PUBLIC CONSTRUCTION LIENS IN IOWA: A HISTORY AND ANALYSIS OF IOWA CODE CHAPTER 573

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Like its better known mechanic's lien cousin,[1] the public construction lien has a long history in Iowa. That history can be grouped into the following three time periods: (1) pre-statutory common law up to 1884; (2) passage of Iowa's first public construction lien statute in 1884 to 1924; and (3) passage of Iowa's first comprehensive public construction lien statute in 1924 to the present. The public construction lien, however, is technically not a lien at all because Iowa law does not permit the attachment of liens to public property.[2] Because of this, Iowa's public construction lien statute provides quasi-lien and contractual rights to those who furnish labor, materials, services, and transportation on public construction projects. The principal statute is found in Iowa Code chapter 573, entitled "Labor and Material on Public Improvements."[3] Chapter 573 can be divided into the following four categories:

(1) definitions;[4]

1. Iowa's mechanic's lien statute, which is applicable to private construction projects, is found in Iowa Code chapter 572. IOWA CODE ch. 572 (2011); *see* Roger W. Stone, *Mechanic's Liens in Iowa*, 30 DRAKE L. REV. 39 (1980) (discussing chapter 572 of the Iowa Code); Roger W. Stone, *Mechanic's Liens in Iowa—Revisited*, 49 DRAKE L. REV. 1 (2000) (discussing chapter 572 of the Iowa Code).

2. Cmty. Sch. Dist. v. Emp'rs Mut. Cas. Co. of Des Moines, 194 F. Supp. 733, 742 (N.D. Iowa 1961) (citing Cities Serv. Oil Co. v. Longerbone, 6 N.W.2d 325, 327 (Iowa 1942)); Iowa Supply Co. v. Grooms & Co. Constr., Inc., 428 N.W.2d 662, 665 (Iowa 1988); Econ. Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259, 263 (Iowa 1983) (citing Lennox Indus., Inc. v. City of Davenport, 320 N.W.2d 575, 577 (Iowa 1982)); Md. Cas. Co. v. Des Moines City Evangelistical Union, 167 N.W. 695, 698–99 (Iowa 1918); Indep. Sch. Dist. v. Hall, 140 N.W. 855, 857 (Iowa 1913); Thompson & Peterson v. Stephens, 107 N.W. 1095, 1096 (Iowa 1906) (citing Whitehouse v. Am. Sur. Co., 90 N.W. 727, 728 (Iowa 1902)); Green Bay Lumber Co. v. Indep. Sch. Dist., 97 N.W. 72, 73 (Iowa 1903); Breneman v. Harvey, 30 N.W. 846, 846 (Iowa 1886) (citing Loring & Co. v. Small, 50 Iowa 271, 273–75 (1878)); Whiting & Keenan v. Story Cnty., 6 N.W. 137, 137 (Iowa 1880); Charnock v. Dist. Twp., 50 N.W. 286, 286 (Iowa 1879).

3. IOWA CODE ch. 573 (2011). Chapter 573 is not the exclusive source of Iowa statutory law governing public construction projects. For example, chapter 26 is Iowa's general competitive bidding statute. *Id.* ch. 26. Chapter 262 governs public construction projects owned by the Board of Regents. *Id.* ch. 262. Chapter 384 applies to public construction projects owned by municipalities. *Id.* ch. 384. This Article, however, is limited to a discussion of chapter 573.

4. *Id.* § 573.1.

(2) retention and progress payments;[5]

(3) claims and lawsuits;[6] and

(4) bonds.[7]

This Article provides a historical analysis of chapter 573[8] and concludes with a discussion of some current issues surrounding the chapter.[9]

I. PRE-STATUTORY COMMON LAW

Prior to the passage of Iowa's first public construction lien statute, the common law of contracts governed the rights of those who furnished labor and materials on public construction projects. For an unpaid subcontractor, this meant if the prime contractor with whom it contracted went bankrupt or was otherwise unable to pay, its only hope for payment from the public owner or prime contractor's surety was that the prime contract or bond expressly permitted such recovery.[10] In an attempt to

5. *Id.* §§ 573.12, .14, .15, .27. Iowa Code chapter 26 also contains retainage provisions applicable to chapter 573, which will be discussed later in this Article. *See id.* § 26.13.

6. *Id.* §§ 573.7–.11, .15, .15A, .16–.26.

7. *Id.* §§ 573.2–.6.

8. *See infra* Parts I–III.

9. *See infra* Part IV.

10. *See, e.g.*, Hipwell v. Nat'l Sur. Co., 105 N.W. 318, 319–20 (Iowa 1905) (holding the surety was liable for nonpayment to suppliers under the bond language that required payment "'for all labor and materials used in and about the building'"); Hunt v. King, 66 N.W. 71, 72–73 (Iowa 1896) (holding bond language that required the protection of public owner against all liens and claims "'chargeable to it'" did not require payment to subcontractor (citing Baker v. Bryan, 21 N.W. 83 (Iowa 1884))); Bellamy v. Cathcart, 33 N.W. 636, 638 (Iowa 1887) (holding surety of a public project for a defaulted general contractor had priority over a claim subsequently brought by unpaid suppliers to a retainage fund held by the public owner); *Baker*, 21 N.W. at 84–85 (holding the surety was liable for nonpayment to suppliers under the bond language that required payment of "'all claims for labor and material, etc., used in the construction of said building'" and reasoning that securing such payment benefitted the public owner because "subcontractors, knowing that they were secured, would do better work and furnish better material than if they felt uncertain about their pay"); Tuttle v. Ind. Sch. Dist., 17 N.W. 603, 604 (Iowa 1883) (holding surety who took over a public project for a defaulted general contractor had priority over unpaid suppliers to a retainage fund held by the public owner); Noyes v. Granger, 1 N.W. 519, 521–22 (Iowa 1879) (holding a surety's liability under the language—"fulfillment and completion of [the] contract"—was limited to securing faithful performance of the contract for the public owner and did not extend to securing payments to unpaid subcontractors).

address the sometimes harsh results borne by unpaid claimants, the legislature passed Iowa's first public construction lien statute.

II. PASSAGE OF IOWA'S FIRST PUBLIC CONSTRUCTION LIEN STATUTE: 1884 TO 1924

A. *Chapter 179: Passed in 1884*

Iowa's first public construction lien statute was passed in 1884 by the twentieth general assembly and was designated as chapter 179.[11] Chapter 179 was inapplicable to state-owned projects,[12] had no definitional provisions, and consisted of four sections—three sections about claims and lawsuits and one section about bonds.[13]

Section 1 limited claimants to subcontractors,[14] provided them with claim rights against public owners,[15] and capped public owners' liability to the difference between the original contract price and the amount they already paid prime contractors,[16] but it conditioned recovery by the claimant on whether the prime contract permitted such recovery.[17] In

11. 1884 Iowa Acts 185. Chapter 179 did not appear in the Iowa Code. *See* Iowa Brick Co. v. City of Des Moines, 82 N.W. 922, 923–24 (Iowa 1900) (referring to chapter 179 as "chapter 179, Acts 20th Gen. Assem.").

12. 1884 Iowa Acts 185 (stating liens may apply only to "the construction of any public building or bridge or other improvement not belonging to the state").

13. *Id.*

14. *Id.* (stating those who may have liens included only "[e]very mechanic, laborer or other person who [acts] as subcontractor"). The Iowa Supreme Court did not address the definition of "subcontractor" under this statute. In the case of *Forsberg v. Koss Construction Co.*, the court addressed the definition of subcontractor under a later version of the statute. Forsberg v. Koss Constr. Co., 252 N.W. 258, 261–62 (Iowa 1934). Applying the *Forsberg* definition of subcontractor to chapter 179, section 1 would have permitted claims only by those having contracts directly with the prime contractor, and it would have excluded claims by those who held contracts directly with the prime contractor who furnished only materials. *See id.* at 262. Put another way, only those holding contracts directly with the prime contractor for something more than furnishing materials would have been entitled to assert claims. *See id.*

15. 1884 Iowa Acts 185 (providing subcontractors "shall have a valid claim against the public corporation").

16. *Id.* (providing subcontractors "shall have a valid claim . . . in an amount not in excess of the contract price to be paid for the building"); *see* Swearingen Lumber Co. v. Wash. Sch. Twp., 99 N.W. 730, 732 (Iowa 1904) (applying this provision in affirming the district court's ruling that limited claimant's recovery from public owner "to the remainder unpaid on the building contract").

17. 1884 Iowa Acts 185 ("[N]or shall any such corporation be required to pay

effect, chapter 179 did not change the pre-statutory primacy of prime contracts and bonds in determining the rights, if any, of claimants' recovery against public owners and sureties. In fact, at least one court decision, *Epeneter v. Montgomery County*, was expressly antagonistic to legislative attempts to interfere with the private right to contract.[18]

Section 2 of chapter 179 provided the venue for filing claims,[19] the

any such claim, at any time before, or in any manner different from that provided in the principal contract."); *see, e.g.*, Iowa Brick Co. v. City of Des Moines, 82 N.W. 922, 924 (Iowa 1900) (holding retainage terms in the general contract were for the benefit of subcontractors, meaning the public owner was obligated to pay claims according to the priority rules in chapter 179); Indep. Sch. Dist. v. Mardis, 76 N.W. 794, 795 (Iowa 1898) (finding under the terms of the prime contract that the public owner had the right to pay all subcontractor claims and demands, and thus the subcontractors had priority over the prime contractor to the retainage held by the public owner); Epeneter v. Montgomery Cnty., 67 N.W. 93, 97–98 (Iowa 1896) (holding that even though subcontractor filed a timely and proper claim under chapter 179, the owner "had the right to pay the contractors in accordance with the terms of the contract, regardless of subcontractors or their claims" because "the owner may make such a contract as he sees fit, so long as it is legal, and may make any provisions as to the time and manner of payment he chooses, and such contract he has the absolute right to comply with, in all respects, regardless of his knowledge of subcontractors"); Hunt v. King, 66 N.W. 71, 72–73 (Iowa 1896) (citing to chapter 179 but deciding the case on interpretation of the general contract and bond, and holding that language requiring the protection of the public owner against all liens and any claims "'chargeable to it'" did not require payment to subcontractor).

18. *Epeneter*, 67 N.W. at 97 ("[T]he legislature has no such power of interference with the right of private contract; and it cannot thus create obligations against one party, and in favor of another, in plain violation of the contract."). The *Epeneter* decision's hostility to legislative interference with private contract law was tempered, if not effectively overruled *sub silentio*, by subsequent decisions. *See* Wykoff v. Stewart, 164 N.W. 122, 125 (Iowa 1917) (interpreting the issue in *Epeneter* as "whether the payments by the owner made in good faith, without notice, and in strict accord with the contract, would protect the owner from again paying to the subcontractors the amounts of their respective liens"); *Swearingen Lumber Co.*, 99 N.W. at 731 (interpreting *Epeneter* as holding "that a public corporation which has let a contract for a public improvement may pay the contractor according to the terms of the agreement, without incurring any liability to subcontractors whose claims are not filed as provided by law before such payment is made"); Simonson Bros. Mfg. Co. v. Citizens' State Bank, 74 N.W. 905, 906 (Iowa 1898) (noting "the holding [in *Epeneter*] is that the owner may pay at such times [as authorized by the general contract], regardless of his knowledge of subcontractors and their claims, so long as a lien is not filed, and he served with notice thereof").

19. 1884 Iowa Acts 185 ("Such claim shall be made by filing with the public officer through whose order the payment is to be made . . . ."); *see* Green Bay Lumber Co. v. Thomas, 76 N.W. 749, 750 (Iowa 1898) (dismissing claims because of the failure to file them with the proper party and holding the filing of claims with a member of the

required form for claims,[20] a thirty-day limitations period for filing claims,[21] and priority rules among claimants.[22] These filing requirements were strictly enforced[23] under the then-applied court rule that those asserting statutory rights in derogation of the common law must strictly comply with the statutory requirements.[24]

Section 3 identified the parties permitted to bring lawsuits on claims,[25] provided the venue for lawsuits,[26] described the permissible scope of a

board of supervisors was improper because "the law nowhere authorizes him, by virtue of that office, to issue an order for the payment of money").

20. 1884 Iowa Acts 185 ("Such claim shall be made by filing . . . an itemized and sworn statement of the demand . . . .").

21. *Id.* ("Such claim shall be made by filing . . . the demand within thirty days after the performance of the last labor, or the furnishing of the last portion of the material . . . .").

22. *Id.* ("[C]laims shall have priority in the order in which they shall be filed."); *see Iowa Brick Co.*, 82 N.W. at 924 (holding retainage terms in the general contract were for the benefit of subcontractors, and thus the public owner was obligated to pay claims according to the priority rules in chapter 179).

23. *See, e.g.*, *Thomas*, 76 N.W. at 750 (dismissing a chapter 179 claim because it was improperly filed with the board of supervisors, while the county auditor was the "only officer 'through whose order payment [could] be made'"); McGillivray v. Dist. Twp., 65 N.W. 974, 975 (Iowa 1896) (holding full and strict compliance with the requirements of chapter 179 was required: (1) failure to attach the jurat to the statement was fatal to the claim because the statute required the itemized statement to show on its face that it was a sworn statement for the protection of public officers or boards against whom these claims were filed, and (2) amendment to the claim which contained the jurat was barred because it was filed beyond the thirty-day time limit); Breneman v. Harvey, 30 N.W. 846, 846–47 (Iowa 1886) (holding the claimant's chapter 179 claim was barred because it was filed more than thirty days after the claimant last furnished materials or labor).

24. *See McGillivray*, 65 N.W. at 975 ("The right to make a claim against such a corporation as the defendant is given by statute, and the one to be benefited thereby must clearly bring himself within its provisions." (citations omitted)); Whiting & Keenan v. Story Cnty., 6 N.W. 137, 138 (Iowa 1880) ("But the lien of the mechanic is purely a creature of the statute. It has been uniformly held by this court that it can be enforced only in the manner prescribed by the statute."). *But see* McCready v. Sexton & Son, 29 Iowa 356, 380 (1870) ("And in this connection, it should be remembered that the rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application, and is expressly repealed; and instead thereof it is enacted that our statutes 'shall be liberally construed, with a view to promote their objects and assist the parties in obtaining justice.'" (citations omitted)).

25. 1884 Iowa Acts 185 ("Any party in interest may cause the adjudication . . . .").

26. *Id.* ("Any party in interest may cause the adjudication . . . by equitable proceedings in any court having jurisdiction.").

lawsuit,[27] and permitted public owners to recover attorney fees.[28]

Section 4 permitted prime contractors to file bonds with public owners to obtain the release of retainage held by public owners for the benefit of claimants,[29] provided a one-year limitations period for lawsuits against bonds,[30] and permitted judgments to be entered against prime contractors and sureties for valid claims.[31]

The paramount changes to the common law made by chapter 179 were providing unpaid claimants, for the first time, with quasi-lien rights against retainage funds held by public owners and providing contract rights against prime contractors' sureties.[32]

B. *Chapter 8, Sections 3102 to 3104: Passed in 1897*

In 1897, the twenty-sixth general assembly made amendments to and renumbered chapter 179, and placed the statute for the first time in the Iowa Code—chapter 179 was placed in chapter 8 of mechanic's liens and

27. *Id.* ("Any party in interest may cause the adjudication as to the amount, validity, priority and mode and time of payment, of such claim . . . .").

28. *Id.* ("In such case the court may assess a reasonable sum to be taxed as attorney's fees against the party failing in such action in favor of such corporation.").

29. *Id.* ("The contractor may at any time release such claim by filing with the treasurer of such corporation a bond, to such corporation, for the benefit of such claimants in sufficient penalty with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant. And such contractor may prevent the filing of such claim by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims.").

30. *Id.* ("Suit may be brought on said bond by any claimant within one year after the cause of action accrues . . . .").

31. *Id.* ("[J]udgment shall be rendered against the principal and sureties for any amount due said claimant.").

32. These rights constitute the fundamental difference between Iowa's mechanic's lien statute and Iowa's public construction lien statute. A judgment on a mechanic's lien is one against property and not against a person. *See* W.P. Barber Lumber Co. v. Celania, 674 N.W.2d 62, 64–65 (Iowa 2003) ("The mechanic's lien only attaches to the real property on which the benefit was conferred, even though the action is not pleaded against the property . . . ."). A judgment on a public construction lien is one personally against a public owner, to the extent of the retainage held, or personally against a surety on the bond. 1884 Iowa Acts 185 ("[J]udgment shall be rendered against the principal and sureties for any amount due said claimant."). In the former, a judgment holder can force the sale of real property to obtain payment, while in the latter it cannot—in the latter a judgment holder can only obtain payment of money from the public owner or surety. *Compare Calenia*, 674 N.W.2d at 64–65, *with* 1884 Iowa Acts 185.

numbered as sections 3102 through 3104.[33] The new sections were renumbered and given titles:[34] former chapter 179, sections 1 and 2 were combined into section 3102;[35] former chapter 179, section 3 was renumbered as section 3103;[36] and former chapter 179, section 4 was renumbered as section 3104.[37]

Amendments to what became section 3102 were mostly stylistic. Court decisions were generally consistent with decisions interpreting former chapter 179, sections 1 and 2,[38] including the requirement that claimants strictly comply with the statutory requirements.[39] However, the Iowa Supreme Court did address some new statutory issues, such as the scope of recovery for "materials" used on a project[40] and whether public

33. IOWA CODE §§ 3102–04 (1897).

34. *See id.*

35. *Id.* § 3102 ("Public buildings or bridges-claim of subcontractor.").

36. *Id.* § 3103 ("Adjudication of claims.").

37. *Id.* § 3104 ("Release of claim.").

38. *See, e.g.*, Wackerbarth & Blamer Co. v. Indep. Sch. Dist., 138 N.W. 470, 472 (Iowa 1912) ("[Section 3102] purports to create a personal liability against the public corporation. It is limited, however, to the amount due under the contract at the time such liability is created. The corporation is not bound to assume that the subcontractor will avail himself of the provisions of this statute. It is not bound to suspend operations while waiting for the expiration of 30 days in favor of any subcontractor. But, when the subcontractor does avail himself of the provisions of this section and does comply with its formal requirements, then a personal liability is created against the public corporation, to the extent of the amount of money then in its hands, preference being given to subcontractors in the order of their filing in pursuance of this statute.").

39. *See, e.g.*, Indep. Sch. Dist. v. Hall, 140 N.W. 855, 857–58 (Iowa 1913) (citing *Empire State*, *Whitehouse*, and *McGillvray* for the proposition that a subcontractor must strictly follow the statutory requirements, and holding the subcontractors' failure to file their claims within thirty days "waived all rights which they otherwise might have had to this fund," meaning "[t]hey stood simply as general creditors." (citing Empire State Sur. Co. v. City of Des Moines, 131 N.W. 870, 871 (Iowa 1911); Whitehouse v. Am. Sur. Co., 90 N.W. 727 (Iowa 1902); McGillivray v. Dist. Twp., 65 N.W. 974 (Iowa 1896))).

40. *See Empire State Sur. Co.*, 131 N.W. at 877–78 (holding that subcontractors could not make a claim under statute for materials or tools "including lanterns, sledges, handles, chisels, axels, bolts, washers, etc., used by the bridge company in carrying on its work, but not actually used in the completed bridge or in the falsework thereunto pertaining" because such materials and tools were not "materials for the construction" of the improvement as used in section 3102 (citations omitted)); Empire State Sur. Co. v. City of Des Moines, 132 N.W. 837, 837 (Iowa 1911) [hereinafter *Empire II*] (drawing "a distinction between material which went into the completed bridge or into the falsework which was erected in the construction of such

owners could ever be liable for amounts above the retainage they held.[41] The only substantive change made by section 3102 was to the venue provision for filing claims found in the former chapter 179, section 2. The former provision, chapter 179, section 2, required claims be filed "with the public officer through whose order the payment [was] to be made,"[42] while section 3102 required claims be filed "with the public officer through whom the payment [was] to be made."[43] The Iowa Supreme Court interpreted this as a substantive change.[44] The amendments to what became sections

bridge and destroyed on its completion and the material and supplies which became a part of the machinery and equipment used by the bridge company in the construction of the bridge," and explaining that "material furnished and consumed in prosecuting the work is included, such as powder for blasting and lumber employed in constructing falsework or scaffolding" but "machinery, tools and equipment, constituting the plant, and material furnished for additions to and repair thereof, are not included" (citations omitted)).

41. *See* Wykoff v. Stewart, 164 N.W. 122, 126 (Iowa 1917) (stating that "had the drainage district paid the contractor after the laborers and materialmen had filed their liens there would have been at least the question arising whether the drainage district would be liable to the laborers and materialmen had the contractor failed to satisfy their claims"); Swearingen Lumber Co. v. Wash. Sch. Twp., 99 N.W. 730, 732 (Iowa 1904) (suggesting absence of good faith conduct by a public owner may not eliminate public owner's "second" payment liability (citing Iowa Stone Co. v. Crissman, 83 N.W. 794, 794 (Iowa 1900))). *But see* Wackerbarth & Blamer Co., 138 N.W. at 472 ("[If the public owner] had paid to [the prime contractor] the full amount due under the contract before the subcontractor had availed himself of the provisions of section 3102, it would have been protected against a second liability under the holding in the Swearingen Case . . . . If it had made such payment to the assignee under the same circumstances, it might perhaps have been protected in like manner. The provisions of the statute guard the public corporation against double liability. But there is no valid reason why it needs any protection to the extent of the amount due from it, and while such amount remains unpaid."); Modern Steel Structural Co. v. Van Buren Cnty., 102 N.W. 536, 540–41 (Iowa 1905) (suggesting public owners could be liable for double payment liability under certain circumstances but noting that chapter 179 caps a public owner's liability to a subcontractor to the amount of the general contract price).

42. 1884 Iowa Acts 185.

43. IOWA CODE § 3102 (1897).

44. *See Wackerbarth & Blamer Co.*, 138 N.W. at 471 (acknowledging: (1) the statutory change; (2) discussing the confusion concerning whether the school district's president, secretary, or treasurer was the proper party with whom to file claims; (3) stating "the treasurer is the officer through whom payment is made in the literal sense,"; and (4) holding claimant filed its claims with the proper party when they were filed with the treasurer and notice was given to the president and secretary, thus satisfying the purpose of the statute—to "bring the claim definitely and formally to the attention of the governing officers of the corporation before its liability thereon can attach").

3103 and 3104 were mostly stylistic.[45] In respect to section 3103, the Iowa Supreme Court relied on the mechanic's lien statute's venue provision in interpreting the vague venue provision of section 3103, holding section 3103 permitted claims, including bond claims, to be brought in the county in which the project was located.[46] Former chapter 179, section 4 provided "judgment shall be rendered against the principal and sureties for any amount due said claimant,"[47] while section 3104 stated "judgment shall be rendered on said bond for the amount due such claimant."[48]

During this time, there was an increase in overall litigation in respect to the statute, which resulted in various court decisions interpreting the statute's nature and purpose. The Iowa Supreme Court held the statute provided claimants with a limited personal claim against the public owner and not a lien upon property,[49] and statutory claimants had priority over

45. IOWA CODE §§ 3103–04 (1897).

46. *See* Thompson & Peterson v. Stephens, 107 N.W. 1095, 1096 (Iowa 1906).

47. 1884 Iowa Acts 185.

48. IOWA CODE § 3104.

49. *See, e.g.*, Md. Cas. Co. v. Des Moines City Evangelistical Union, 167 N.W. 695, 699 (Iowa 1918) ("[T]here is a statute (Code, § 3102) by which a subcontractor who files his claim in due time may become entitled to have the money due the principal contractor applied by the [public owner] to the payment of his claim."); Empire State Sur. Co. v. City of Des Moines, 131 N.W. 870, 876 (Iowa 1911) ("[The statute] merely provides a method by which the subcontractor or materialman may acquire a right to be paid by the public corporation out of such portion of the contract price as has not been paid to the contractor in accordance with the terms of the contract. The public corporation is under no obligation to protect the subcontractor or materialman in such cases until such a statement as is required by the statute is filed within the time specified." (citations omitted)); *Thompson & Peterson*, 107 N.W. at 1096 ("[Claimant] acquires no lien upon the building or upon the moneys which become due from the county to the contractor. But he does have a right to acquire a priority as to the distribution of such fund by following the statutory provision and to this extent his claim and the prior right which he thus acquires as against any other claimant to the money is in the nature of a lien." (citation omitted)); Modern Steel Structural Co. v. Van Buren Cnty., 102 N.W. 536, 540 (Iowa 1905) ("The statute (Code, § 3102) is intended to provide for one who furnishes labor or materials to a contractor upon a public work a remedy having some analogy to a mechanic's lien. But it does not create any lien. It provides that by taking the proper steps within due time, the claimant may, in effect, be substituted for the contractor, and recover from the municipal corporation to the extent of his just demand, if there be found in the hands of the corporation any moneys due to such contractor. The law is carefully framed to protect the municipality from onerous burdens and undue annoyance in litigation of this kind . . . ."); Swearingen Lumber Co. v. Wash. Sch. Twp., 99 N.W. 730, 731–32 (Iowa 1904) (discussing that under the statute, "the idea of a lien either upon the building or on the fund is expressly excluded, and the demand is of a direct or personal

non-statutory claimants to retainage held by public owners.[50] The Iowa Supreme Court also addressed some of the rights and obligations of sureties on the bonds they furnished under the statute,[51] including the important principle that surety liability on public construction statutory bonds are limited to the terms of the statute, even if the actual bond language provided greater protection to claimants than the statute.[52]

Despite the Iowa Supreme Court's increased attention to the statutory language, it remained steadfast in its insistence that the primary source of determining claimants' rights, if any, lay with the language of the

nature against the corporation, which has been made liable by the compliance of the contractor with the provisions of the statute, before such corporation has paid the principal contractor according to the terms of the contract" (citation omitted)).

50. *See* Whitehouse v. Am. Sur. Co., 90 N.W. 727, 728–29 (Iowa 1902) (explaining the statute gives the claimant a preference over subsequently filed claims or those who do not file statutory claims to the fund being held by the public owner).

51. *See, e.g.*, Ottumwa Boiler Works v. O'Meara & Son, 218 N.W. 920, 921 (Iowa 1928) (holding surety who paid claims was subrogated to the paid claimants and thus had priority to the retainage over the contractor's bank as assignee); Des Moines Bridge & Iron Works v. Plane, 143 N.W. 866, 867–68 (Iowa 1913) (holding that surety who paid statutory claims stood in the shoes of such claimants and had priority to the retainage fund over general creditors).

52. *See, e.g.*, Schisel v. Marvill, 197 N.W. 662, 662–64 (Iowa 1924) ("[A] statutory bond is a creature of the statute, and that common-law obligations cannot be added to it. . . . [T]he liability of a surety, under a statutory bond, is measured and defined by the statute; and that a construction of the statute is a construction of the bond. In such a case, the statute becomes a guide to the surety as to the extent of the obligation assumed. Manifestly, if a bond required by statute for purposes defined by statute and in an amount fixed by the statute may be extended voluntarily to cover other obligations than those required by the statute, such extraneous obligations might of themselves absorb the full penalty of the bond and defeat the statutory purpose for which the bond was required. If it be found, therefore, that the purported obligation of the bond by its terms extends beyond the limits fixed by the statute, such excess provisions will be deemed as surplusage, and the bond will be enforced in accord with the statute. . . . To add to the bond other liability to other persons is necessarily to diminish the protection afforded by the bond to those enumerated persons for whose use and benefit the bond is required."); U.S. Fid. & Guar. Co. v. Iowa Tel. Co., 156 N.W. 727, 733 (Iowa 1916) (holding (1) a statutory bond's "validity or enforceable quality does not extend beyond the conditions which the ordinance prescribed"; (2) "the court will construe [the statutory bond], so far as it properly may, to sustain the statutory purpose, and . . . it will be so treated and enforced"; and (3) "if the added or nonstatutory conditions are separable from those required by the statute they will be treated as surplusage and of no effect"). The genesis of this principle is found in the case of *Field v. Schricher*, in which the court adopted the same rule for statutory appeal bonds. *See* Field v. Schricher, 14 Iowa 119, 123–24 (1862).

prime contract and bond.[53] One consequence of this was the right of claimants to pursue actions directly against public owners and sureties, independent of the statute, based on contract[54] and equitable theories.[55]

53. *See, e.g.*, Carr & Baal Co. v. Consol. Indep. Dist., 174 N.W. 780, 783–84 (Iowa 1919) (following the rule that "there must be a promise to pay for materials furnished in such language or form that the failure of the contractor to pay for materials will constitute a breach of the condition of the bond," and holding the contract and bond were for the benefit of the public owner only and not subcontractors); Ludowici-Celadon Co. v. Netcott, 172 N.W. 943, 943 (Iowa 1919) (following prior cases holding "where the contract in terms contains a promise on the part of the principal contractor to pay for all labor and material, and where the bond is conditioned upon the full performance of such contract, or when the bond in terms is conditioned upon the payment for all labor and materials, then the bond will be deemed to operate to the benefit of subcontractors; such being its manifest intent"—but, "in the absence of an express undertaking of such kind, either in the bond or in the contract, the bond will not operate to the benefit of subcontractors" (citations omitted)); Haakinson & Beaty Co. v. McPherson, 166 N.W. 60, 62 (Iowa 1918) (enumerating the rule as "where the specifications and the bond conflict, the bond controls because it contains the last expression of the parties as to their rights and liabilities, and that specifications do not control as to provisions in the contract which are not covered by the specifications" (citation omitted)); *Md. Cas. Co.*, 167 N.W. at 700 (concluding the prime contract language was equivalent to precedent cases, permitting the public owner "to withhold payments from the contractor sufficient to satisfy the claims of subcontractors" (citations omitted)); Hipwell v. Nat'l Sur. Co., 105 N.W. 318, 321–22 (Iowa 1905) (holding the bond language was for the benefit of subcontractors, but the surety had no claim to retainage because the general contract only reserved that fund up to completion and acceptance, after which time it was to be paid to the general contractor); *Modern Steel Structural Co.*, 102 N.W. at 541 (holding recovery is limited to the contract, and "if . . . the contract is without legal vitality in the company's hands, it cannot be imbued with life for the benefit of the subcontractor"); Green Bay Lumber Co. v. Indep. Sch. Dist., 97 N.W. 72, 73 (Iowa 1903) (holding the bond language, which stated that the building must be delivered free from liens or claims of any kind, did not constitute a "direct promise" to pay subcontractors and suppliers but rather was for the sole benefit of the public owner); *Whitehouse*, 90 N.W. at 729 (holding that even under the statute, payments to the general contractor "in accord with the terms of the contract defeat the [statutory] claim").

54. *See, e.g.*, Reynolds v. City of Onawa, 184 N.W. 729, 730 (Iowa 1921) (allowing recovery by subcontractor of retainage held by public owner under the language of the prime contract because the subcontractor substantially complied with the prime contract's notice provision); *McPherson*, 166 N.W. at 62 ("Whenever it is settled what the parties named in the contract agreed to do, it is settled what the sureties undertook to indemnify against."); Hay v. Hassett, 156 N.W. 734, 736 (Iowa 1916) (stating that "subcontractors and laborers are entitled to the benefit of contracts . . . and may maintain action thereon in their own names" (citations omitted)); Streator Clay Mfg. Co. v. Henning-Vineyard Co., 155 N.W. 1001, 1006 (Iowa 1916) (finding the provision in the prime contract, which required the prime contractor to file a bond to pay any claims, relieved the subcontractors from proceeding under the statute and

C. *Amendments to Chapter 8, Sections 3102 & 3104, and Passage of Chapter 347: All Passed in 1919*[56]

In 1919, the thirty-eighth general assembly amended sections 3102 and 3104. Section 3102 was amended to require claims to be filed "[w]ithin sixty days after the completion of said public building, bridge or other improvement."[57] Section 3104 was amended to extend the time to bring actions on bonds from one year to two years, and the legislature added the language that "[n]o provisions of any bond or contract to the contrary shall affect any of the provisions of this and the two preceding sections."[58]

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instead allowed them to proceed directly against the bond); City of Boone v. Gary, 144 N.W. 709, 709–10 (Iowa 1913) (holding that the contract permitted a public owner to withhold payment from a contractor in order to address nonstatutory claims and to determine the priority of the claims, and noting "it was the right of the city in letting the contract to insure, so far as practicable, that the money which became due to the contractor should be applied to the payment of its own citizens and others who furnished the labor and materials necessary to make the improvement"); Empire State Sur. Co. v. City of Des Moines, 131 N.W. 870, 875 (Iowa 1911) (rejecting surety's argument that public owner's premature payment to the general contractor discharged surety from liability because surety was contractually bound to pay the subcontractors and "no action of the city taken after the accruing of claims by subcontractors or materialmen or without their knowledge would release the surety company from its liability to them" (citations omitted)); *Hipwell*, 105 N.W. at 323 ("[T]he subcontractors were not bound to perfect their claims against the fund in the hands of the treasurer of the committee, but might rely, as several of them did, on the security afforded by the bond." (citing *Whitehouse*, 90 N.W. at 728)); Read v. Am. Sur. Co. of N.Y., 90 N.W. 590, 590–91 (Iowa 1902) (holding subcontractors owed no duty to pursue statutory claims prior to seeking recovery from the surety under the bond provisions).

55. *See, e.g.*, Humboldt Cnty. v. Ward Bros., 145 N.W. 49, 55 (Iowa 1914) (holding that claimants had equitable priority over general contractor to retainage being held by the public owner, even though claimants failed to file timely statutory claims, because "[t]he fund primarily belongs to the contractor [and] is a fund created and held by the county for the purpose of discharging the obligation which the county assumed to the contractor, and for the purpose of paying for the work contracted to be done by the defendant"). *But see* Iowa Pipe & Tile Co. v. Parks & Gerber, 151 N.W. 438, 440 (Iowa 1915) (distinguishing *Humboldt County* because there the evidence showed the contractor earned the money to which the claimants had equitable priority, while there was no such evidence in *Iowa Pipe & Tile Co.*).

56. In the 1913 supplement to the Iowa Code, three new sections appeared, numbered 1989-a57 to 1989-a59. IOWA CODE §§ 1989-a57 to -a59 (Supp. 1913). These were enacted by the thirty-fifth general assembly and applied to securing claims of subcontractors who provide labor or materials for the construction of drainage ditches. 1913 Iowa Acts 179–80. In that same supplement, section 1527-s18 also appeared that applied to county highway projects. IOWA CODE § 1527-s18.

57. 1919 Iowa Acts 492.

58. 1919 Iowa Acts 69.

The thirty-eighth general assembly also passed chapter 347, sections 1 to 4, all of which related to bonds on public construction projects.[59] Section 1 required prime contractors to furnish bonds in the sum of not less than the contract price whenever the contract price exceeded $1,000,[60] required the bonds to run to the benefit of the public owners and all who furnished any labor or materials,[61] and mandated that bond provisions include (1) discharge of surety obligations under the bonds if the prime contractors complied with all of their contractual obligations, (2) indemnification of public owners for prime contractors' failure to comply with their contractual obligations, and (3) payment to subcontractors.[62] Section 1 also made its bond requirements supplementary to any other statutory bond requirements[63] and prohibited contracts and bonds from modifying or eliminating the requirements of chapter 347.[64]

59. 1919 Iowa Acts 448–49 (codified as amended at IOWA CODE §§ 8427–30 (Supp. 1919)).

60. 1919 Iowa Acts 448 ("[W]henever the contract price is in excess of one thousand ($1,000) dollars, [a public body, board committee, officer or other public representative] shall require as a condition precedent to the making of such contract that the person, firm or corporation to whom the contract is awarded furnish and file a bond, as hereinafter provided, in a sum of not less than the contract price, the amount to be determined by those representing the public, signed by the contractor and a responsible surety company authorized to do business in Iowa . . . .").

61. 1919 Iowa Acts 448–49 ("[The] bond shall run to said body, board, committee, or other public representative, for its use and benefit and for the use and benefit of all persons, firms and corporations who shall perform any labor or furnish any material, including fuel, in the carrying out of such public contract . . . .").

62. 1919 Iowa Acts 449 ("[A]nd [the bond] shall have as one of its conditions, the following paragraph: . . . if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for sub-contractors for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect.").

63. 1919 Iowa Acts 448 ("The foregoing condition shall at all times be additional to those conditions and requirements now or hereafter required by statute to be a part of such bonds.").

64. *Id.* ("The provisions and requirements of this act shall not be modified or annulled by contrary provisions in any such bond or contract."). Even after these changes in 1919, the Iowa Supreme Court reaffirmed the rule that surety liability on statutory bonds was set by the terms of the statute, even if the bond language provided greater or lesser protection to claimants than the statute. *See, e.g.*, Cities Serv. Oil Co. v. Longerbone, 6 N.W.2d 325, 327 (Iowa 1942) ("By Chapter 347, Acts of the 38th G.

A., it was enacted that those contracting for a public improvement, to cost more than $1,000, should require a bond of the contractor, 'which bond shall run for the use and benefit of all persons, firms and corporations who shall perform any labor or furnish any material.' The penalty for the bond was specifically prescribed and the act further provided that its requirements 'shall not be modified or annulled by contrary provisions in any such bond or contract.' Accordingly, a bond given subsequent to such legislation was interpreted as inuring to the protection of those furnishing labor or material for a public improvement, even though the bond, by its express terms, inured only to the benefit of the public body." (citation omitted)); Philip Carey Co. v. Md. Cas. Co., 206 N.W. 808, 809–10 (Iowa 1926) ("Prior to the enactment of chapter 347 . . . we had held that where a contractor's bond was not conditioned for the payment of those who furnished labor and material, or where it was conditioned for the faithful performance of the contract, but the contract contained no promise on the part of the contractor to pay subcontractors, or those furnishing labor or material, the latter had no right of action on the bond. The statute was manifestly designed to meet this situation . . . . If we must say that, because of this omission, or because the bond limits the right to recover on it to the obligee, it is not a statutory bond, the same thing must be said of every such bond that fails to contain any provision required by the statute, and the mandate of the statute that its provisions and requirements shall not be modified or annulled by contrary provisions in the bond is wholly ineffectual, and those furnishing labor and material to the contractor are precisely where they were before the statute was enacted, although it is expressly declared to be for the purpose of affording them additional security. If a bond that does not in all its terms conform to the statute is not a statutory bond, and if any material and substantial deviation in the bond from the requirement of the statute must result in its being held not to be a statutory bond, then, since the requirement that contrary provisions in the bond shall not modify or annul the statute applies only to a statutory bond, the purpose of the act is defeated, and it accomplishes nothing, so far as the additional security of subcontractors is concerned, for their rights must still rest on the expressed terms of the bond."); *id.* at 810–11 ("[P]rovisions in a statutory bond in addition to those required by statute will be rejected as mere surplusage. . . . 'The corollary to this rule is that where the bond is a statutory one the statutory conditions which are not expressed in the bond will be inserted therein.' Where a statutory bond is given, the provisions of the statute will be read into the bond." (citations omitted)); Standard Oil Co. v. Marvill, 206 N.W. 37, 39 (Iowa 1925) ("It is true that the obligation of the contractor was not enhanced by the giving of the statutory bond. The liability of the contractor is fixed by statute . . . ."); Neb. Culvert & Mfg. Co. v. Freeman, 198 N.W. 7, 11 (Iowa 1924) ("[T]his court is committed to the rule that liability may not be predicated upon provisions of a statutory bond which are broader and beyond the requirements of the statute providing for the bond and under which the bond is given."); Schisel v. Marvill, 197 N.W. 662, 662–64 (Iowa 1924) ("[A] statutory bond is a creature of the statute, and that common-law obligations cannot be added to it. . . . [T]he liability of a surety, under a statutory bond, is measured and defined by the statute; and that a construction of the statute is a construction of the bond. In such a case, the statute becomes a guide to the surety as to the extent of the obligation assumed. Manifestly, if a bond required by statute for purposes defined by statute and in an amount fixed by the statute may be extended voluntarily to cover other obligations than those required by the statute, such extraneous obligations might of themselves absorb the full penalty of the bond and

Section 1 effected a sea change in public construction lien law. Not only did it reverse the primacy that contract and bond language held over the statutory language, but, for the first time, it mandated that prime contractors furnish bonds and required such bonds pay claimants for any valid claims.[65] Unpaid claimants were no longer subject to the whims of contract and bond language drafted by public owners, prime contractors, and sureties in their attempt to obtain payment for their work.[66]

Section 2 provided the location for the filing of bonds,[67] required the filing of claims on bonds as a prerequisite to filing lawsuits on bonds,[68] and included limitation periods for the filing of claims and lawsuits, with the former beginning to run after the last date of furnishing labor or materials, and the latter beginning to run on completion of the project.[69] Section 2, therefore, tempered the rights given claimants under section 1 by imposing

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defeat the statutory purpose for which the bond was required. If it be found, therefore, that the purported obligation of the bond by its terms extends beyond the limits fixed by statute, such excess provisions will be deemed as surplusage, and the bond will be enforced in accord with the statute . . . . To add to the bond other liability to other persons is necessarily to diminish the protection afforded by the bond to those enumerated persons for whose use and benefit the bond is required.").

65. *See* 1919 Iowa Acts 448–49.

66. *See* 1919 Iowa Acts 449.

67. *Id.* ("Such bond . . . shall be filed in the office of the clerk of the district court of the county in which such public work is to be performed . . . .").

68. *Id.* ("[A]ny person for whose benefit the bond is given, or his assigns, may bring an action on such bond . . . provided that a verified, itemized statement of the claim shall be filed with the city clerk, county auditor or secretary of the school board, as the case may be . . . .").

69. *Id.* ("[A]ny person for whose benefit the bond is given, or his assigns, may bring any action on such bond for the recovery of such indebtedness; provided, that no such action shall be brought on said bond after six (6) months of the completion of any public improvement or building, and provided that a verified, itemized statement of the claim shall be filed with the city clerk, county auditor or secretary of the school board, as the case may be, within sixty days after the last item of material is furnished or labor performed."); *see* Queal Lumber Co. v. Anderson, 229 N.W. 707, 709–10 (Iowa 1930) (discussing how the start time of the claim-filing period applies, and holding that the last date of furnishing materials was the date the last lumber was delivered even if contractor could return some lumber later); Francesconi v. Indep. Sch. Dist. of Wall Lake, 214 N.W. 882, 885 (Iowa 1927) (holding that chapter 347's amended requirement of "[i]temized and verified claims to be filed within four months were conditions precedent to be complied with, to entitle such claimant to recover in an action on the bond" and "[s]ection 2, [chapter] 347, [was] not merely procedural in character, but compliance therewith [was] mandatory and essential to the right of the claimant to an action against the surety on its bond.").

various filing obligations upon them. It also made compliance with those obligations a condition precedent to any recovery against the public owner for retainage in its possession and against the surety on the bond.[70]

Section 3 nullified any public construction contract unless the requirements of chapter 347 were met and the contract contained a written endorsement from the clerk of the district court that a bond was on file with the clerk.[71]

Section 4 clarified that chapter 347 was additional security for claimants, and it did not displace any other statutes that permitted the filing of claims.[72]

D. *Amendments to Chapter 347, Sections 1 and 2: Passed in 1921*

In 1921, the thirty-ninth general assembly amended chapter 347, sections 1 and 2, which had been codified at sections 8427 and 8428, respectively, in the Iowa Code.[73] The 1921 amendment to chapter 347, section 1 added maintenance work to the type of work for which bonds were required, reduced the required bond amount from not less than the contract price to not less than seventy-five percent of the contract price, imposed additional qualifications for sureties, and made selection of the surety subject to a public owner's approval.[74]

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70. *See, e.g.*, *Francesconi*, 214 N.W. at 885 ("Itemized and verified claims to be filed within four months were conditions precedent to be complied with, to entitle such claimant to recover in an action on the bond. The provisions of this enactment are mandatory and must be complied with." (citations omitted)).

71. 1919 Iowa Acts 449 ("No public contract coming within the provisions of this chapter shall be of any validity until the bond mentioned herein has been executed and filed in the form and bearing the conditions as provided in this chapter, and until there is endorsed on said contract the written endorsement of the clerk of the district court of the county in which such public work is to be performed that such a bond, properly executed, is now on file in his office.").

72. *Id.* ("This act shall be construed as affording additional security to that now provided such claimants under existing statutes and not so as to affect existing mechanic's lien laws or other statutes providing for the filing of similar claims, and so as not to apply to bonds furnished under the requirements of chapter 2-A title X, supplement to the code, 1913.").

73. *See* IOWA CODE §§ 8427–28 (1919).

74. *See* 1921 Iowa Acts 22. *Compare* IOWA CODE § 8427 (Supp. 1921) ("[W]henever the contract price is in excess of one thousand dollars, . . . the person, firm or corporation to whom the contract is awarded [shall] furnish and file a bond, as hereinafter provided, in a sum of not less than seventy-five per cent of the contract price, the amount of said bond and the nature of the surety to be determined by those representing the public. In the event the surety upon said bond is other than a surety

The 1921 amendment to chapter 347, section 2 increased the limitations period to file claims on bonds from sixty days to four months after the last date of furnishing labor or materials.[75]

III. PASSAGE OF IOWA'S FIRST COMPREHENSIVE PUBLIC CONSTRUCTION LIEN STATUTE: 1924 TO THE PRESENT

A. *Chapter 452: Passed in 1924*

In 1924, the fortieth general assembly passed Iowa's first comprehensive public construction lien statute, codified as chapter 452.[76] It consisted of twenty-five sections, numbered from section 10299 to section 10323, and brought together various provisions previously located in different chapters of the Iowa Code.[77] Like the current chapter 573,[78]

company authorized to do business in Iowa, such surety must be a resident of the state, worth double the sum to be secured beyond the amount of his debts and must have property liable to execution in this state equal to double the sum to be secured. When there are two or more sureties other than corporate signing the same bond, they must in the aggregate have the qualifications provided in this section. The bond shall be subject to the approval of . . . said body, board, committee, or other public representative . . . ."), *with* IOWA CODE § 8427 (1919) ("[W]henever the contract price is in excess of one thousand dollars, . . . the person, firm or corporation to whom the contract is awarded [shall] furnish and file a bond, as hereinafter provided, in a sum of not less than the contract price, the amount to be determined by those representing the public, signed by the contractor and a responsible surety company authorized to do business in Iowa . . . .").

75. 1921 Iowa Acts 140.

76. *See* IOWA CODE ch. 452 (1924).

77. *See* Teget v. Polk Cnty. Drainage Ditch, 210 N.W. 954, 955–56 (Iowa 1926) (discussing how different parts of the Code were brought together here).

> Section 1, chapter 347, Laws of the Thirty-Eighth General Assembly, construed in Standard Oil Co. v. Marvill (Iowa) 206 N.W. 37, relates to contracts for certain public works not including drainage. Section 10299 of the Code was enacted at the extra session of the Fortieth General Assembly, and was known as House File No. 254. Paragraph 4 of this section defines material 'in addition to its ordinary meaning' as 'feed, provisions, and fuel.' This bill became a part of chapter 452 of the Code, which was enacted and went into effect subsequent to the completion of the present improvement, and is not cited or relied upon by counsel. All of the pertinent and relevant provisions of chapter 347, Laws of the Thirty-Eighth General Assembly, section 1989a57 of the Supplement, and the other statutory provisions here referred to, were enacted and codified as parts of chapter 452 of the Code.

Id.

78. *See supra* text accompanying notes 4–7.

chapter 452 can be divided into the following four general categories:

(1) definitions;[79]

(2) retention and progress payments;[80]

(3) claims and lawsuits for labor and materials;[81] and

(4) bonds and sureties.[82]

Initially, the Iowa Supreme Court continued to follow the policy of requiring strict compliance with the statute's requirements.[83] However, it eventually began to adhere to a legislative mandate that a statute creating rights must "be liberally construed" to "promote its objects" and to "assist the parties in obtaining justice."[84]

1. *Definitions: Section 10299*

Section 10299 of chapter 452 provided definitions for the terms "public corporation,"[85] "public improvement,"[86] "construction,"[87] and

79. IOWA CODE § 10299 (1924).

80. *Id.* §§ 10310–12, 10321.

81. *Id.* §§ 10306–09, 10313–23.

82. *Id.* §§ 10300–04.

83. *See, e.g.*, Melcher Lumber Co. v. Robertson Co., 250 N.W. 594, 594 (Iowa 1933) (citations omitted); Coon River Coop. Sand Ass'n v. McDougall Constr. Co. of Sioux City, 244 N.W. 847, 849 (Iowa 1932) (citation omitted); Mo. Gravel Co. v. Fed. Sur. Co., 237 N.W. 635, 638 (Iowa 1931) (citing Aetna Cas. & Sur. Co. v. Kimball, 222 N.W. 31, 33 (Iowa 1928)).

84. IOWA CODE § 64 (1931) ("The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."). This statutory provision is still in existence at Iowa Code section 4.2. IOWA CODE § 4.2 (2011); *see In re* Van Vechten's Estate, 251 N.W. 729, 731 (Iowa 1933) (noting the statute at issue is assumed to be in abrogation of the common law and therefore liberally construed).

It is unclear why, in the late 1800s and early 1900s, the Iowa Supreme Court ever followed the strict compliance policy when Iowa's liberal construction statute was on the books as early as 1870. *See* McCready v. Sexton & Son, 29 Iowa 356, 380 (1870) (reiterating the express repeal of the common law's strict construction rule and subsequent enactment of the liberal construction statute). The Iowa Supreme Court surmised the failure of the judiciary to follow the liberal construction statute may have been because of forgetfulness. Chiesa & Co. v. City of Des Moines, 138 N.W. 922, 923–24 (Iowa 1912) ("The old rule has at times been quoted by our courts with apparent forgetfulness of this wholesome provision, and a statute so clearly in accord with essential justice and fairness ought not to be ignored or allowed to fall into disuse.").

85. IOWA CODE § 10299(1) (1924) ("'Public corporation' shall embrace the

"material."[88] The definitions of "public corporation" and "construction" were loosely based on prior statutory definitions of those terms, while the definitions of "public improvement" and "material" were new.[89]

2. *Retention and Progress Payments: Sections 10310, 10311, 10312, and 10321*

a. *Section 10310: Payments under public contracts*. Section 10310 was a new provision that required public owners to make monthly progress payments to prime contractors for work completed,[90] but it also required public owners, notwithstanding any contrary contract provisions, to retain at least ten percent of each monthly progress payment.[91]

b. *Section 10311: Inviolability and disposition of fund*. Section 10311 was a new provision that barred public owners from asserting noncompliance with the retainage requirements of section 10310 as a defense.[92] Section 10311 also required public owners to hold and dispose of

state, and all counties, cities, towns, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements."). Iowa Code section 10299 specifically defined the word to include state-owned projects, which were previously excluded. *Compare id.* § 10299(1), *with* IOWA CODE § 8427 (Supp. 1921).

86. *Id.* § 10299(2) ("'Public improvement' is one, the costs of which is payable from taxes or other funds under the control of the public corporation, except in cases of public improvement for drainage or levee purposes the provisions of the drainage law in cases of conflict shall govern.").

87. *Id.* § 10299(3) ("'Construction' shall, in addition to its ordinary meaning, embrace repair and alteration.").

88. *Id.* § 10299(4) ("'Material' shall, in addition to its ordinary meaning, embrace feed, provisions, and fuel.").

89. *Compare* IOWA CODE § 8427 (Supp. 1921), *with* IOWA CODE § 10299(2), (4) (1924).

90. IOWA CODE § 10310 (1924) ("Payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered . . . .").

91. *See id.* ("[S]aid payments [are] to be made for not more than ninety per cent of said estimates and to be so made that at least ten per cent of the contract price will remain unpaid at the date of the completion of the contract, anything in the contract to the contrary notwithstanding."). The ten percent figure in section 10310 was ten percent less than the amount public owners were required to hold on drainage ditch projects. *See* IOWA CODE § 1989-a57 (1913) (noting at least twenty percent of the contract price is required to be held on drainage ditch projects).

92. IOWA CODE § 10311 (1924) ("No public corporation shall be permitted to

the retainage as described in the statute.[93] It designated the use of the retainage as a fund to pay claims for labor and materials furnished.[94]

c. *Section 10312: Retention of unpaid funds.* Section 10312 required public owners to hold the retainage for a period of thirty days after completion and final acceptance of the project.[95] If claims were on file at the end of that period, it required public owners to continue to hold at least double the amount of all claims on file.[96] This provision arguably imposed double-payment liability upon public owners for failure to withhold the required retainage lest the provision would have no practical effect.[97]

d. *Section 10321: Retention of funds in case of highway improvement.* Section 10321 was a new provision that required the county auditor to immediately notify the state highway commission of any claims filed on a project where payment was made in whole or in part from the primary road fund.[98]

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plead noncompliance with the preceding section . . . .").

93. *Id.* ("[T]he retained percentage of the contract price . . . shall be held and disposed of by the public corporation as hereinafter provided.").

94. *Id.* ("[T]he retained percentage of the contract price, which in no case shall be less than ten per cent, shall constitute a fund for the payment of claims for materials furnished and labor performed on said improvement . . . .").

95. *Id.* § 10312 ("Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement.").

96. *Id.* ("If at the end of said thirty-day period claims are on file as herein provided the public corporation shall continue to retain from said unpaid funds a sum not less than double the total amount of all claims on file."). *But see* IOWA CODE § 1989-a57 (1913) (requiring public owners on drainage ditch projects to delay in paying any more than eighty percent of the contract price until thirty days after completion of the contract).

97. Language in at least one court case arguably suggests that public owners could be held personally liable for damages caused by their failure to comply with retainage requirements. *See, e.g.*, Perkins Builders Supply & Fuel Co. v. Indep. Sch. Dist., 221 N.W. 793, 795 (Iowa 1928) (recognizing "[t]he appellants contend[ed] that it was the duty of the school district, under section 10312 of the Code, not to pay the amount of the final estimate forthwith, but to retain it for a period of 30 days after the completion and final acceptance of the improvement," but holding this "did not relieve the appellants from filing their claims as provided" and thus refusing to provide relief in this case).

98. IOWA CODE § 10321 (1924) ("If payment for such improvement is to be made in whole or in part from the primary road fund, the county auditor shall immediately notify the state highway commission of the filing of all claims.").

3. *Claims and Lawsuits for Labor and Materials: Sections 10305 to 10309, 10313 to 10320, 10322, and 10323*

a. *Section 10305: Claims for material or labor.* Section 10305 enlarged the scope of permissible claimants to include materialmen who contracted directly with prime contractors or subcontractors.[99] It also changed the location for filing claims to "the officer authorized by law to issue warrants in payment of such improvement."[100] Section 10305 also described the required contents of claims,[101] including an express statement that claims must be in writing.[102]

Section 10305 changed the former statute's language from "for the

99. *Id.* § 10305 ("Any person, firm, or corporation who has, under a contract with the principal contractor or with subcontractors, performed labor, or furnished material, service, or transportation, in the construction of a public improvement, may file . . . the claim . . . ."). The claims were previously limited to subcontractors. *Compare id.*, *with* IOWA CODE § 1989-a57 (1913) ("Every mechanic, laborer, or other person who [acts] as subcontractor . . . shall have a claim . . . ."), *and* IOWA CODE § 3102 (1897) ("Every mechanic, laborer, or other person who [acts] as subcontractor . . . shall have a claim . . . .").

100. IOWA CODE § 10305 (1924). *Compare id.*, *with* 1884 Iowa Acts 185 (requiring claims to be filed "with the public officer through whose order the payment is to be made"), *and* IOWA CODE § 3102 (1897) (requiring claims to be filed "with the public officer through whom the payment is to be made"). *See also* Mo. Gravel Co. v. Fed. Sur. Co., 237 N.W. 635, 637–39 (Iowa 1931) (explaining the filing method for highway improvement claims); S. Sur. Co. v. Jenner Bros., 237 N.W. 500, 504 (Iowa 1931) (addressing the issue of proper location to file claims); Francesconi v. Indep. Sch. Dist., 214 N.W. 882, 885 (Iowa 1927) (determining whether a claim was "filed in the office of the proper officer of the school district"); Fuller & Hiller Hardware Co. v. Shannon & Willfong, 215 N.W. 611, 612 (Iowa 1927) (discussing whether a subcontractor should file a claim "with the state highway commission or with the county auditor").

101. *See* IOWA CODE § 10305 (1924) (requiring "an itemized, sworn, written statement of the claim for such labor, or material, service, or transportation"); *see also Francesconi*, 214 N.W. at 884 (holding (1) "[a] verified claim is one supported by oath"; (2) that although section 3102 of the 1897 Iowa Code used the term "sworn," the difference between "verified" and "sworn" was "immaterial" because the two terms were "frequently used interchangeably"; and that (3) the "affidavit attached to the claim . . . state[d] the dates between which the labor was performed, and the itemized statement itself . . . meaning the statute, . . . was sufficiently complied with." (citations omitted)).

102. IOWA CODE § 10305 (1924). *Compare* 1884 Iowa Acts 185 (stating "itemized and sworn statement"), *and* IOWA CODE § 3102 (1897) (stating "itemized sworn statement"), *with* IOWA CODE § 8428 (Supp. 1921) (stating "verified, itemized statement").

purpose of constructing . . . any public improvement"[103] to "in the construction of a public improvement"[104]—a change the courts interpreted as substantive and as requiring the materials for which the claim was made to have actually been "used in any proper way in connection with the work of constructing the improvement" and not just delivered for use in the improvement.[105] As a result of this statutory change, the Iowa Supreme Court imposed upon claimants the burden to prove the "definite portion" of the material that went into the public improvement, lest they be barred from any recovery.[106] Finally, statutory language controlled a claimant's statutory claim rather than the terms of the claimant's contract[107]—a fundamental shift from prior statutes that made contract language paramount in determining the rights, if any, of claimants.[108]

b. *Section 10306: Filing claims in case of highway improvements.* Section 10306 was a new provision that provided the following: "In case of highway improvements by the county, claims shall be filed with the county auditor of the county letting the contract."[109]

103. IOWA CODE § 8427 (Supp. 1921).

104. IOWA CODE § 10305 (1924).

105. Rainbo Oil Co. v. McCarthy Improvement Co., 236 N.W. 46, 49 (Iowa 1931); *see also* Melcher Lumber Co. v. Robertson Co., 250 N.W. 594, 594–95 (Iowa 1933) (holding use of wooden concrete forms was not used "in the construction of a public improvement" and that "[t]hey were useful, and even necessary, in a practical sense to the construction of the improvement," but determining "they were such, not as a part of the improvement, but as a necessary tool or equipment for the construction thereof [and] were capable of use in successive improvements as other equipment might be"); Byers Mach. Co. v. Iowa State Highway Comm'n, 242 N.W. 22, 25 (Iowa 1932) ("[A]ppellant is not entitled to relief in the case at bar because it has not shown the amount or extent of the assumed service furnished by it in the construction of the public improvement." (citation omitted)).

106. *See Byers Mach. Co.*, 242 N.W. at 24 ("[T]here can be no recovery unless it appears that a 'definite portion' of the material there under consideration, and likewise a definite portion of the service in the case at bar, went into the public improvement." (citation omitted)); *Rainbo Oil Co.*, 236 N.W. at 49 ("The plaintiff having failed to prove what portion of the same was so used, the court is powerless to aid the plaintiff, because of lack of proof.").

107. *See, e.g.*, *Byers Mach. Co.*, 242 N.W. at 25 ("The relief sought by appellant is to be granted, if at all, not because rentals have accrued under the rental contracts . . . , but rather because compensation is due for service furnished in the construction of the public improvement."); *see also supra* note 72 and accompanying text.

108. *See supra* note 53 and accompanying text.

109. IOWA CODE § 10306 (1924).

c. *Section 10307: Officer to indorse time of filing.* Section 10307 was a new provision that provided the following: "The officer shall indorse over his official signature upon every claim filed with him, the date and hour of filing."[110]

d. *Section 10308: Time of filing claims.* Section 10308 provided two different deadlines for filing claims. The first required claims to be filed within thirty days after completion and final acceptance of the improvement.[111] This thirty-day limitations period was the same as previous provisions,[112] but was shortened from those amendments that allowed sixty-days[113] and four-month[114] limitations periods, respectively.[115] Using "completion and final acceptance" of the project as the start date of the limitations period[116] was a change from prior statutes that triggered the

110. *Id.* § 10307.

111. *Id.* § 10308(1). Section 10308(1) also required claims to be filed with "said officer." *Id.* "Said officer" referred to the officer described in section 10305 or 10306, depending on which section was applicable. *See id.* §§ 10305–06; *see also* S. Sur. Co. v. Jenner Bros., 237 N.W. 500, 504 (Iowa 1931) (analyzing the appropriate party with whom to file claim with under this provision to comply with section 10308).

112. IOWA CODE § 1989-a57 (1913); IOWA CODE § 3102 (1897); 1884 Iowa Acts 185 (Chapter 179, Section 2).

113. 1919 Iowa Acts 29 (allowing sixty days).

114. 1921 Iowa Acts 140 (increasing the period to four months).

115. *See* Francesconi v. Indep. Sch. Dist., 214 N.W. 882, 884 (Iowa 1927) (providing a detailed discussion of the statutory history of this provision and noting (1) "that Section 3102, Code 1897, required claims to be filed 'with the public officer thru [sic] whom the payment is to be made . . . within thirty days after the performance of the last labor or the furnishing of the last of the material'"; (2) that "Section 2 of chapter 347, Acts of the Thirty-Eighth General Assembly, as amended by chapter 147, Acts of the Thirty-Ninth General Assembly, provides for the filing of claims for labor or material furnished or performed upon a public building within four months after the date of the last item of labor or material"; (3) that "Chapter 347, Acts of the Thirty-Eighth General Assembly, was amended, revised, and codified by the Fortieth Extra General Assembly" as chapter 452, Code of 1924; and (4) that Section 10308 and 10309 of the Code of 1924 required filing of claims "'before the expiration of thirty days immediately following the completion and final acceptance of the improvement'" or "'at any time after said thirty-day period, if the public corporation has not paid the full contract price as herein authorized, and no action is pending to adjudicate rights in and to the unpaid portion of the contract price,'" or "'[t]he court [could] permit claims to be filed with it during the pendency of the action hereinafter authorized, if it be made to appear that such belated filing will not materially delay the action.'" (quoting IOWA CODE §§ 10308–09 (1924))).

116. IOWA CODE § 10308(1) (1924).

limitations period upon "completion" of the project,[117] or upon the last date the claimant furnished labor or materials.[118] The section also expressly provided that if no claims were filed within the thirty-day period, the public owner and surety were released from potential liability and the public owner was free to pay the retainage to the prime contractor.[119]

The second deadline was a new provision that allowed claims to be filed after expiration of the thirty-day period contained in section 10308(1), but only if the public owner had not yet paid the full contract price and no action was pending to resolve rights to the unpaid part of the contract price.[120] However, a claimant proceeding under the second deadline was limited to a maximum recovery of the amount held by the owner at that time.[121]

e. *Section 10309: Claims filed after action brought.* Section 10309 was a new provision that provided a third deadline for filing claims—a court, during the pendency of a case, could authorize the filing of claims with it.[122] The Iowa Supreme Court discussed the interaction of sections

117. IOWA CODE § 1989-a57 (1913).

118. *See* IOWA CODE § 3102 (1897); 1884 Iowa Acts 185. Although it is unclear whether these statutory limitations start dates were based on the last labor or material furnished on the overall project by anyone or by the claimant, the structure and wording of the statutes suggests the latter.

119. IOWA CODE §§ 10308, 10312 (1924); *see, e.g.*, Perkins Builders' Supply & Fuel Co. v. Indep. Sch. Dist., 221 N.W. 793, 795 (Iowa 1928) ("After the expiration of the 30-day period, the school district could have paid the entire amount, and neither said district nor the surety company would be liable.").

120. IOWA CODE § 10308(2) ("Claims may be filed with said officer as follows: At any time after said thirty-day period, if the public corporation has not paid the full contract price as herein authorized, and no action is pending to adjudicate rights in and to the unpaid portion of the contract price.").

121. *See, e.g.*, S. Sur. Co. v. Jenner Bros., 237 N.W. 500, 505 (Iowa 1931) (following *Perkins* and only providing entitlement to the remaining balance); *Perkins Builders' Supply & Fuel Co.*, 221 N.W. at 795 ("[A]ppellants claim that since the school district withheld $1 from the payment on the final estimate, they have brought themselves within the provisions of the second sentence of the aforesaid section. It is clear, however, that under said provision the appellants would have no right, except as to the unpaid portion of the contract price, to wit: $1. After the expiration of the 30-day period, the school district could have paid the entire amount, and neither said district nor the surety company would be liable. Therefore, in no event could the appellants prevail, except as to the amount of the $1 withheld.").

122. IOWA CODE § 10309 (1924) ("The court may permit claims to be filed with it during the pendency of the action hereinafter authorized, if it be made to appear that such belated filing will not materially delay the action."); *see, e.g.*,

10308(1), 10308(2), and 10309, and held that if at least one claim was timely filed within the thirty-day period under section 10308(1), then any claims filed after that period pursuant to sections 10308(2) or 10309 were also timely.[123] If the retainage held by the public owner was insufficient to fully satisfy all valid claims, then the surety was liable on the bond to fully satisfy any deficiencies.[124] The surety's liability for valid claims filed under any of the three deadlines was based on the fact that such claims were "'established as provided by law; within the contemplation of section 10304.'"[125] Conversely, if no claims were filed within the thirty-day period in section 10308(1), then retainage ceased to exist after that thirty-day period and the surety's liability was extinguished.[126]

Francesconi v. Indep. Sch. Dist., 214 N.W. 882, 884 (Iowa 1927) (noting that if section 10308 is not met "'[t]he court may permit claims to be filed with it during the pendency of the action hereinafter authorized, if it be made to appear that such belated filing will not materially delay the action'" under section 10309 (quoting IOWA CODE § 10309)).

123. *See* Cities Serv. Oil Co. v. Longerbone, 6 N.W.2d 325, 329 (Iowa 1942) (permitting subsequent claims under section 10308 if action had not yet been brought, or permitting claims under section 10309 with leave of court if the action had been brought).

124. *See id.* at 329.

125. *See id.* ("When claims were filed herein within the 30 day period, the Highway Commission was required to retain 'not less than double the total amount of all claims filed.' To that extent there was clearly a statutory retained percentage. If, before these actions were brought, further claims had been filed after such 30 day period, they would be timely under paragraph 2 of Section 10308. After the action was brought, claims could not be filed under paragraph 2 of Section 10308 but could be filed with leave of court under Section 10309. We agree with the trial court that the funds retained by the Highway Commission constituted statutory retained percentages herein which, subject to the priorities fixed by Section 10315, were available for the payment of claims filed with the court pursuant to Section 10309, and, if such funds were insufficient, recovery might be had upon the bond. The action herein was timely. The provisions of Section 10309 were complied with. The merits of the claims are conceded. The claims were 'established as provided by law', within the contemplation of Section 10304."). This rule is referred to as the "piggybacking" rule. *See infra* Part III.J.

126. *See id.* at 328 ("'So, under the statute, the so-called ten per cent. portion of the contract price no longer exists, as such, if claims are not filed within the thirty-day period. Appellees' rights in the premises are determined by the statute. Likewise, the obligation being a statutory bond, appellant's liabilities also are fixed and controlled by statute. In fact, the statutory language only is expressly and in terms written into the obligatory provision of the bond executed by appellant. That being true, appellees did not secure for themselves the ten per cent. portion of the contract price because they failed to file their claims with the state auditor within the thirty-day period. After that period elapsed and no claims were filed by appellees, the ten per cent. portion of the contract price, referred to in the statute, lost its identity as such,

f. *Section 10313: Action to determine right to fund.* Section 10313 permitted public owners, prime contractors, claimants for labor or material, and sureties to file lawsuits in the county where the project was located to adjudicate rights to the retainage or liability on the bond.[127] This section created one set of rules applicable to disputes involving both retainage and bonds,[128] whereas the prior statutes contained different rules for each.[129]

The section also created a reverse limitations period, which prohibited the filing of lawsuits prior to the expiration of thirty days after completion and final acceptance of the project, and created a standard limitations period of six months following completion and final acceptance of the project.[130] Previously, there had been no reverse limitations period

and became mingled with general portions of that contract price without statutory identity. Because appellees failed to properly and timely file their claims, the ten per cent. designated in the statute, lost its status as such, and became merely a general balance due the contractor. Such is true, regardless of section 10309 permitting claims to be filed under certain circumstances with the district court. Permission to file claims with the district court does not change the time of filing provided in section 10308 of the Code. Consequently, under the facts and circumstances here presented, when appellees filed their claims with the district court there was not then in existence the ten per cent. statutory retained balance. Without fixing their statutory rights to such ten per cent. retained balance, appellees cannot insist upon the surety's liability.'" (quoting *S. Surety Co.*, 237 N.W. at 504 (citations omitted))).

127. IOWA CODE § 10313 ("The public corporation, the principal contractor, any claimant for labor or material who has filed his claim, or the surety on any bond given for the performance of the contract, may . . . bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.").

128. *See id.*

129. *Compare* IOWA CODE § 1989-a58 (1913) (containing rules for lawsuits against the retainage), IOWA CODE § 3103 (1897) (same), *and* 1884 Iowa Acts 185 (containing rules for lawsuits against the retainage), *with* IOWA CODE § 8428 (1919) (dealing instead with bonds), IOWA CODE § 1989-a59 (1913) (same), IOWA CODE § 3104 (1897) (same), *and* 1884 Iowa Acts 185 (same).

130. IOWA CODE § 10313 (1924) (stating action may be brought "at any time after the expiration of thirty days, and not later than six months, following the completion and final acceptance of said improvement"). Previously, the events triggering the start of the limitations period were either the general accrual rules for lawsuits or "completion of the improvement," not "completion and acceptance" of the improvement. IOWA CODE § 8428 (Supp. 1921) (suit on bond may be brought "after six months of the completion" of a project); IOWA CODE § 8428 (1919) (suit on bond may be brought "after six months of the completion" of a project); IOWA CODE § 1989-a59 (Supp. 1913) (suit on a bond may be brought for one year after the "cause of action accrues"); IOWA CODE § 3104 (1897) (suit on bond may be brought "within one year after his cause of action accrues"); 1884 Iowa Acts 185 (suit on bond may be brought

nor had there been any specific limitations period for lawsuits seeking recovery against the retainage; the only specific limitations period was on lawsuits to recover against bonds.[131] The six-month limitations period was the same as one prior bond statute[132] but was less than other previous bond statutes that contained one-year[133] and two-year periods.[134]

The Iowa Supreme Court interpreted section 10313 as a special statute of limitations and made clear claimants who filed lawsuits after that period were barred from recovery against retainage and bonds.[135]

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within one year "after the cause of action accrues"); *see also* Daniels Lumber Co. v. Ottumwa Supply & Constr. Co., 214 N.W. 481, 482–83 (Iowa 1927) (analyzing how this change should apply; noting "the action must be brought within six months 'of the completion of the improvement'"; observing "that the statute has since been amended by the insertion of words 'final acceptance,' in what is now Code, § 10313[, b]ut no such provision was in the statute at the time this action accrued"; construing the term "completed" to mean "when the contractor had done all that it undertook to do" even if some of the work was defective; and rejecting the argument that "completed" meant doing all that was required under the contract, including removing leftover material, and replacing fences). The court in *Daniels Lumber Co.* held "completed" to mean only "when the contractor had done all that it undertook to do" because

> [t]he statute [did] not make the right of recovery of this appellee against the appellant depend upon the completion of the contract in regard to incidental matters of this kind. By the terms of the statute, this action [could not] be brought on the bond 'after six months of the completion of any public *improvement or building*.' As between the appellant and the appellee the statute began to run when the improvement was completed, even though some other incidental matter which the contractor agreed to do had not been performed. The removal of loose boards, etc., that had been used in the construction, and that had been left upon the side of the highway, although it may have been provided for in the contract, had nothing whatever to do with the '*completion of the improvement or building*.' In other words, 'completion of the *improvement*' under the statute in question might be a very different thing than completion of the *contract*. The contract might have bound the contractor to do many things, as restore fences, remove lumber, cut weeds, etc., and yet under this statute, 'the *improvement*' would have been 'completed,' although the *contract* had not.

Daniels Lumber Co., 214 N.W. at 482–83 (emphasis added).

131. IOWA CODE § 1989a-59 (1913); IOWA CODE § 3104 (1897); 1884 Iowa Acts 185.

132. IOWA CODE § 8428 (1919).

133. IOWA CODE § 3104 (1897); 1884 Iowa Acts 185.

134. 1919 Iowa Acts 69.

135. *See* Perkins Builders Supply & Fuel Co. v. Indep. Sch. Dist., 221 N.W. 793, 795 (Iowa 1928).

g. *Section 10314: Parties.* Section 10314 was a new provision that required the public officer or official board that was party to the contract, the prime contractor, all claimants for labor and material, and the surety to be parties to any lawsuit under section 10313.[136]

h. *Section 10315: Adjudication—payment of claims.* Section 10315 was a new provision that provided the order of payments from the retainage.[137] Under this section, claimants were only entitled to interest payments on their claims if the retainage was sufficient to fully pay the principal amounts of all valid claims.[138] If the retainage were insufficient to fully pay the principal and interest amounts of all valid claims, then no claimant was entitled to interest.[139] Leading from this rule, one could argue

136. IOWA CODE § 10314 (1924) ("The official board or officer letting the contract, the principal contractor, all claimants for labor and material who have filed their claim, and the surety on any bond given for the performance of the contract shall be joined as plaintiffs or defendants.").

137. *Id.* § 10315 ("The court shall adjudicate all claims. Payments from said retained percentage, if still in the hands of the public corporation, shall be made in the following order: 1. Costs of the action. 2. Claims for labor. 3. Claims for materials. 4. Claims of the public corporation."); *see* S. Sur. Co. v. Jenner Bros., 237 N.W. 500, 505 (Iowa 1931) ("Distribution . . . according to . . . 1927 Code, should be made as follows: First, for the court costs, including the attorneys fees named in the judgment of the district court; second, for the labor claims in the order filed with the district court; and, third, after paying the aforesaid labor claims, then for the material demands in the order filed with the district court."). The fact that public owners are listed as potential payees of retainage strongly suggests that they could use retainage to recover their damages from prime contractors—a right subordinate to the payment rights of claimants who furnished labor and materials for the project.

138. *See S. Sur. Co.*, 237 N.W. at 506 (citation omitted).

139. *See id.* ("So far as chapter 452 of the 1927 Code is concerned, however, there is no provision made for interest on claims of laborers or materialmen. In view of the fact that the Code provision contemplates interest on contracts, appellees assert that *Foley Brothers v. St. Louis County*, 158 Minn. 320, 197 N. W. 763, is authority for the proposition that the fund in question may be used to pay interest on claims allowed. That decision was partly, at least, based upon statute, and there was no discussion concerning the justice and equity of permitting a preferred creditor to draw interest on his claim from a fund of this kind, and thereby prejudice other preferred creditors, because the fund is insufficient. Undoubtedly the appellees are entitled to interest from the contractor, Jenner Brothers. But the state highway commission, or the public fund, are not obligated to pay interest. Liability on the part of the public officers and commissions is simply to pay to Jenner Bros., the contractors, the contract price under the terms of the statute. Under certain circumstances, such duty to pay the principal sum is not to the contractor, but to laborers and materialmen within the statutory provision. However, as before seen, interest is not to be paid by the public

sureties should never be liable to pay interest because their payment liability only arises if the retainage is insufficient to fully pay all valid claims.[140]

officers or commissions under the statute either to the contractor or to the fund retained for laborers and materialmen. No doubt interest could be obtained if the fund were sufficient to pay in full all the original claims entitled to participate therein. Here, however, in the matter before us, the fund is not sufficient to pay the principal sums . . . . Prejudice would arise to the other claimants, in the case at bar, if one of them were permitted to take interest out of a fund not sufficient to pay the principal to each. Interest is not authorized by the public improvement statute itself. Funds accumulated by retaining portions of the contract price, however, are provided to protect laborers and materialmen. It is contemplated by statute that each laborer and materialman shall partake of the principal of that fund according to the amount and time of filing his claim. Such participation contemplates the principal of the fund without any deduction because of interest. Of course, if, as aforesaid, the fund were sufficient to pay both principal and interest, there then would be no objection to the payment of interest. Therefore, because the fund here is insufficient, the district court properly denied the interest. In bank receivership cases, we have adopted the rule that interest is not applicable unless the principal is sufficient to pay all preferred creditors." (citations omitted)).

140. Although *Southern Surety Co.* does not expressly state this proposition, it seems implied in the decision. The district court entered judgment against the surety because the retainage was insufficient to satisfy all valid claims, but the district court denied interest to all claimants. *Id.* at 503. The Iowa Supreme Court reversed the judgment against the surety because the claims had not been filed within the thirty-day period following completion and final acceptance. *Id.* at 505 (noting the plaintiffs could only be entitled to the remainder of the contract price). The court explained interest could not be awarded to any claimant because the retainage was insufficient to satisfy all valid claims. *Id.* at 506.

One could argue that interest should be allowed against a surety because *Southern Surety Co.*'s discussion of the issue was limited to the retainage—the surety was relieved of liability when the claimant failed to file a claim within the thirty-day period following completion and final acceptance of the project. *See id.* at 505. Therefore, the court could minimize prejudice to claimants if a surety were required to pay interest to all claimants. *See id.* at 506 (noting prejudice would arise if one was allowed interest over another). However, *Southern Surety Co.*'s discussion of the issue should apply to sureties because of section 10319 of the 1924 Iowa Code, which states:

> If, after the said retained percentage had been applied to the payment of duly filed and established claims, there remain any such claims unpaid in whole or in part, judgment shall be entered for the amount thereof against the principal and sureties on the bond. In case the said percentage has been paid over as herein provided, judgment shall be entered against the principal and sureties on all such claims.

IOWA CODE § 10319 (1924). Because *Southern Surety Co.* held that any judgment against the public owner for payment from the retainage cannot include interest if the retainage is insufficient to pay the principal and interest on all valid claims, and

i. *Section 10316: Insufficiency of funds.* Section 10316 was consistent with prior statutes[141] in providing a priority rule for claimants if the retainage was insufficient to pay all valid claims.[142]

j. *Section 10317: Converting property into money.* Section 10317 was a new provision that gave courts jurisdiction over deposits and property that were utilized in lieu of bonds and retainage.[143]

k. *Section 10318: Attorney fees.* Section 10318 was a provision that permitted courts to award attorney fees as costs to a prevailing "claimant for labor or materials."[144] This was a change from prior statutes that only permitted attorney fees in favor of public owners[145] and against unsuccessful claimants.[146]

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because section 10319 makes a surety liable only for the deficiency amount not satisfied by the judgment against the public owner for payment from the retainage, it necessarily follows that a surety should never be liable to pay interest on any claims.

141. *See, e.g.*, IOWA CODE § 1989-a57 (Supp. 1913) ("[C]laims . . . shall have priority in the order in which they are filed."); IOWA CODE § 3102 (1897) ("[C]laims shall have priority in the order in which they are filed."); 1884 Iowa Acts 185 ("[C]laims shall have priority in the order in which they shall be filed.").

142. IOWA CODE § 10316 (1924) ("When the retained percentage aforesaid is insufficient to pay all claims for labor or materials, the court shall, in making distribution under the preceding section, order the claims in each class paid in the order of filing the same.").

143. *Id.* § 10317 ("When it appears that the unpaid portion of the contract price for the public improvement, or a part thereof, is represented, in whole or in part, by property other than money, or if a deposit has been made in lieu of a surety, the court shall have jurisdiction thereover, and may cause the same to be sold, under such procedure as it may deem just and proper, and disburse the proceeds as in other cases.").

144. *Id.* § 10318 ("The court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole or in part, established his claim.").

145. *See, e.g.*, Teget v. Polk Cnty. Drainage Ditch, 210 N.W. 954, 956 (Iowa 1926) (denying attorney fees under section 1989a-58 because that provision only permitted attorney fees in favor of the drainage ditch or county, and the attorney representing the interveners did not represent the drainage district).

146. *See, e.g.*, IOWA CODE § 1989-a58 (Supp. 1913) ("[T]he court may assess a reasonable attorney's fee against the party failing, in favor of said drainage district or county."); IOWA CODE § 3103 (1897) ("[T]he court may assess a reasonable attorney's fee against the party failing, in favor of such corporation."); 1884 Iowa Acts 185 ("[T]he court may assess a reasonable sum to be taxed as attorney's fees against the party failing in such action in favor of such corporation.").

l. *Section 10319: Unpaid claimants—judgment on bond.* Section 10319 imposed liability on prime contractors and sureties for the amount of valid claims not satisfied out of the retainage.[147] This was consistent with one prior statute,[148] but was a change from others that provided for deficiency judgments only against sureties, not prime contractors.[149]

m. *Section 10320: Abandonment of public work effect.* Section 10320 was a new provision that provided a different limitations period for the filing of claims than what was provided in sections 10308 and 10309, but it applied only to situations where a prime contractor abandoned a project or was terminated by the owner; the limitations period started on the official date the prime contract was cancelled.[150] Furthermore, the only funds available to satisfy any claims filed under these situations were amounts due to the prime contractor from the public owner, if any existed, with the surety liable for any deficiencies.[151]

147. IOWA CODE § 10319 (1924) ("If, after the said retained percentage had been applied to the payment of duly filed and established claims, there remain any such claims unpaid in whole or in part, judgment shall be entered for the amount thereof against the principal and sureties on the bond. In case the said percentage has been paid over as herein provided, judgment shall be entered against the principal and sureties on all such claims.").

148. 1884 Iowa Acts 185 ("[J]udgment shall be rendered against the principal and sureties for any amount due said claimant.").

149. *See* IOWA CODE § 1989a-59 (Supp. 1913) ("[J]udgment shall be rendered on said bond for the amount due such claimant."); IOWA CODE § 3104 (1897) ("[J]udgment shall be rendered on said bond for the amount due such claimant."). Practically speaking, because retainage consists of money withheld from monthly payments to prime contractors, judgment against a public owner for the retainage is a judgment against the prime contractor. Likewise, a judgment against a surety is practically a judgment against the prime contractor because sureties and prime contractors typically enter into general indemnity agreements that permit sureties to recover from the prime contractors and their individual owners all of the sureties' outlays including but not limited to attorney fees. *See, e.g.*, Emp'rs Ins. v. Able Green, Inc., 749 F. Supp. 1100, 1103 (S.D. Fla. 1990) ("[T]he surety is entitled to reimbursement pursuant to an indemnity contract . . . ."); Spirtas Co. v. Ins. Co., No. 4:05-CV-100-DDN, 2006 WL 1300669, at *5–6 (E.D. Mo. May 9, 2006) (interpreting an indemnification provision).

150. IOWA CODE § 10320 (1924) ("When a contractor abandons the work on a public improvement or is legally excluded therefrom, the improvement shall be deemed completed for the purpose of filing claims as herein provided, from the date of the official cancellation of the contract.").

151. *Id.* ("The only fund available for the payment of the claims of persons for labor performed or material furnished shall be the amount then due the contractor, if any, and if said amount be insufficient to satisfy said claims, the claimants shall have a

n. *Section 10322: Filing of claim—effect.* Section 10322 was a new provision that limited the financial effect of the filing of claims on prime contractors. If claims were filed, it expressly permitted public owners to withhold retainage only as permitted under chapter 452.[152] The Iowa Supreme Court interpreted this provision as limiting a claimant's interest only to the retainage being held by the public owner and not to any other progress payments or accounts payable to a prime contractor.[153]

o. *Section 10323: Public corporation—action on bond.* Section 10323 was a new provision that preserved the right of a public owner to pursue remedies against a surety's performance bond notwithstanding anything in chapter 452.[154]

4. *Bonds and Sureties: Sections 10300 to 10304*

After passage of chapter 452, the Iowa Supreme Court reaffirmed the rule that a surety's liability under statutory bonds, like those provided under chapter 452, was governed by the language of the applicable statute and not the actual language in the bond; if a bond contained language beyond that required by the statute, such language was null and void.[155]

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right of action on the bond given for the performance of the contract.").

152. *Id.* § 10322 ("The filing of any claim shall not work the withholding of any funds from the contractor except the retained percentage, as provided in this chapter.").

153. *See* Fed. Sur. Co. v. Des Moines Morris Plan Co., 239 N.W. 99, 100 (Iowa 1931) (reasoning that section 10322 established a policy "not to incumber these installments [and thus t]here was . . . no lien upon the installments, which were assigned to the Morris Company, and which passed through its hands.").

154. IOWA CODE § 10323 ("Nothing in this chapter shall be construed as limiting in any manner the right of the public corporation to pursue any remedy on the bond given for the performance of the contract.").

155. *See, e.g.*, Monona Cnty. v. O'Connor, 215 N.W. 803, 805–06 (Iowa 1927) (reaffirming that "the liability of a surety on a statutory bond does not extend beyond the statutory obligations"; "[a] statutory bond is one conditioned upon the statute, which is a part thereof, and is given to secure performance of a contract executed in pursuance of and in compliance with such statute"; "[t]he penalty of the bond, if not fixed by statute, is prescribed by the officer or body authorized to accept the same, and the liability thereunder is limited by statute"; and "the statute is a part of the bond, and the liability of the surety is strictly limited thereby"). The court explained the policy behind this rule as follows:

> The applicable rule of law does not depend upon the mere favorable condition of the account as it affects one of the parties. The law must apply to both parties alike, and the contract be interpreted under all circumstances in

a. *Section 10300: Public improvements—bond and conditions.* Section 10300 of the Iowa Code required contractors to execute bonds when the contract price equaled or exceeded $1,000, or when public owners required them even if the contract price was below $1,000.[156] This was a change from some of the previous statutes that left it to the discretion of contractors whether to furnish bonds.[157] Section 10300 also mandated that bonds guarantee contractors' contract performance and the fulfillment of their other legal obligations.[158] Finally, this section eliminated the prior statutes' differing requirements for sureties depending on whether they were authorized to do business in Iowa.[159]

> harmony with the statute in compliance with which it was entered into. . . . Contracts for highway and many other public improvements are let by competitive bids. To secure a proper basis for bidding, it is necessary that the propositions of all bidders be rendered upon the same basis; otherwise, secret favorable terms of the bidders might, in a measure, destroy the theory upon which competitive bidding rests, and result in favoritism and dishonesty in letting contracts. It is our conclusion that the bond must be given effect as a statutory obligation, and that, in so far as the same purports to secure the performance of terms and provisions of the contract nonstatutory in character, it is violative of the statute under which it was given, and void.

Id. at 806; *see also* Queal Lumber Co. v. Anderson, 229 N.W. 707, 709 (Iowa 1930) ("The action is upon a statutory bond. It is the statute that grants, measures, and limits the remedy of the plaintiff upon the bond. Such a bond is not elastic." (citations omitted)); Ottumwa Boiler Works v. O'Meara & Son, 218 N.W. 920, 924 (Iowa 1928) ("It follows that the liability of the appellant under the bond in the instant case is limited to the statutory limitations of the bond.").

156. IOWA CODE § 10300 ("Contracts for the construction of a public improvement shall, when the contract price equals or exceeds one thousand dollars, be accompanied by a bond, with surety. . . . Such bond may also be required when the contract price does not equal said amount.").

157. *See, e.g.*, IOWA CODE § 1989-a59 (Supp. 1919) ("The contractor may at any time release such claim by filing . . . a bond . . . ."); IOWA CODE § 3104 (1897) ("The contractor may at any time release such claim by filing . . . a bond . . . ."); 1884 Iowa Acts 185 ("The contractor may at any time release such claim by filing . . . a bond. . . . And such contractor may prevent the filing of such claim by filing in like manner a bond . . . .).

158. IOWA CODE § 10300 (1924) (stating a bond must be "conditioned for the faithful performance of the contract, and for the fulfillment of such other requirements as may be provided by law").

159. *Compare id.*, *with* IOWA CODE § 8427 (Supp. 1921) (including additional requirements for a surety company not authorized to do business in Iowa), *and* IOWA CODE § 8427 (1919) (requiring a signature by "a responsible surety company authorized to do business in Iowa").

b. *Section 10301: Bond mandatory.* Section 10301 provided that the bond requirements of chapter 452 were mandatory and could not be avoided by contract.[160] This was a change from some previous statutes that left it to the discretion of contractors whether to furnish bonds[161] and was similar to, but not as Draconian as, another statute that rendered invalid any contract in which the bond requirements had not been followed.[162]

c. *Section 10302: Deposit in lieu of bond.* Section 10302 permitted contractors to deposit money, certified checks, or municipal bonds as security in lieu of surety on bonds.[163]

d. *Section 10303: Amount of bond.* Section 10303 required bonds to run to the benefit of the public owners,[164] to guarantee prime contractors' compliance with all contract requirements and ensure fulfillment of all bond conditions,[165] and to be for an amount of not less than seventy-five percent of the contract price or not less than twenty-five percent of the contract price if the contract did not permit any payment to

160. IOWA CODE § 10301 (1924) ("The obligation of the public corporation to require, and the contractor to execute and deliver said bond, shall not be limited or avoided by contract.").

161. *See, e.g.*, IOWA CODE § 1989-a59 (Supp. 1919) ("The contractor may at any time release such claim by filing . . . a bond . . . ."); IOWA CODE § 3104 (1897) ("The contractor may at any time release such claim by filing . . . a bond . . . ."); 1884 Iowa Acts 185 ("The contractor may at any time release such claim by filing . . . a bond. . . . And such contractor may prevent the filing of such claim by filing in like manner a bond . . . .").

162. *See, e.g.*, IOWA CODE § 8429 (1919) ("No public contract coming within the provisions of this chapter shall be of any validity until the bond mentioned herein has been executed and filed in the form and bearing the conditions as provided by this chapter, and until there is indorsed on said contract the written endorsement of the clerk of the district court of the county in which such public work is to be performed that such a bond, properly executed, is now on file in his office.").

163. IOWA CODE § 10302 (1924) ("A deposit of money, or a certified check on a solvent bank of the county in which the improvement is to be located, or state or federal bonds, or bonds issued by any city, town, school corporation, or county of this state, or bonds issued on behalf of any drainage or highway paving district of this state, may be received in an amount equal to the amount of the bond and held in lieu of a surety on such bond, and when so received such securities shall be held on the terms and conditions applicable to a surety.").

164. *Id.* § 10303 ("Said bond shall run to the public corporation.").

165. *Id.* ("The amount thereof shall be . . . approved . . . sufficient to comply with all requirements of said contract and to insure the fulfillment of every condition, expressly or impliedly embraced in sad bond . . . .").

the prime contractor until after completion of the project.[166] The contract-compliance guarantee was consistent with a prior statute,[167] but the bond-amount provision varied from earlier statutes that left the bond amount to the discretion of the public owners[168] or required the amount to be based on the contract price.[169]

e. *Section 10304: Subcontractors on public improvements.* Section 10304 statutorily inserted the following provisions and requirements into every bond, notwithstanding the actual bond language.[170] Subsection 1 imposed liability on prime contractors and sureties to pay all just claims of those claimants who had contracts with prime contractors or subcontractors if the retainage was insufficient to pay such claims provided by law.[171] This was an extension of an earlier statute that contained a similar obligation.[172]

166. *Id.* ("The amount thereof shall be fixed, and the bond approved, by the official board or officer empowered to let the contract, in an amount not less than seventy-five per cent of the contract price . . . except that in contracts where no part of the contract price is paid until after the completion of the public improvement the amount of said bond may be fixed at not less than twenty-five per cent of the contract price.").

167. *Compare id.*, *with* IOWA CODE § 8427 (Supp. 1919).

168. *See, e.g.*, IOWA CODE § 1527-s18 (Supp. 1913) (requiring a bond "in such sum as the board of supervisors may deem necessary").

169. *See, e.g.*, IOWA CODE § 8427 (Supp. 1921) (requiring an amount not less than seventy-five percent of the contract price); IOWA CODE § 8427 (1919) (requiring a bond "in a sum of not less than the contract price").

170. IOWA CODE § 10304 (1924) ("The following provisions shall be held to be a part of every bond given for the performance of a contract for the construction of a public improvement, whether said provisions be inserted in such bond or not . . . .").

171. *Id.* § 10304(1) ("'The principal and sureties on this bond hereby agree to pay to all persons, firms, or corporations having contracts directly with the principal or with subcontractors, all just claims due them for labor performed or materials furnished, in the performance of the contract on account of which this bond is given, when the same are not satisfied out of the portion of the contract price which the public corporation is required to retain until completion of the public improvement . . . .'").

172. *See* IOWA CODE § 8427 (1919) ("[The bond] shall have as one of its conditions, the following paragraph: . . . '[I]f the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for subcontractors for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect.'").

Subsection 1 also required claimants to establish their claims against the retainage as a condition of their right to recover against the retainage and bond.[173] This was a major shift from determining surety liability entirely on the language of the prime contract and bond[174] and from imposing only minor requirements on the claimants' ability to recover on the bond.[175] Although a claimant's right of recovery vel non against a bond was no longer tethered to the actual language of the prime contract and bond, it was conditioned upon compliance with all of the statutory requirements for recovery against the retainage.[176] Therefore, if a claimant's recovery against the retainage was denied for any reason, such as failure to file a claim with the correct person, a claimant also lost the right to recover against the bond.[177]

Subsection 2 required sureties to consent to any extension of time provided to prime contractors to complete the contract.[178] This eliminated a sixty-day limit for such increases that existed in an earlier statute.[179]

Subsection 2 also required sureties to consent to any change in the contract documents when such change did not increase the total contract price by more than twenty percent, but it eliminated surety liability for any increase above twenty percent.[180] This was identical to an earlier statute.[181]

173. IOWA CODE § 10304(1) (1924) ("[T]he principal and sureties shall not be liable to said persons, firms, or corporations unless the claims of said claimants against said portion of the contract price shall have been established as provided by law.").

174. *See, e.g.*, 1884 Iowa Acts 185; *see also supra* notes 15–17 and accompanying text.

175. *See, e.g.*, IOWA CODE § 8428 (1919).

176. *See* IOWA CODE § 10304(1) (1924).

177. *See, e.g.*, Mo. Gravel Co. v. Fed. Sur. Co., 237 N.W. 635, 640 (Iowa 1931) (barring these claims under the statute because they were not properly filed); Queal Lumber Co. v. Anderson, 229 N.W. 707, 708 (Iowa 1930); Zeidler Concrete Pipe Co. v. Ryan & Fuller, 215 N.W. 801, 802 (Iowa 1927) (noting prerequisites became part of bond in denying claim for failure to file as provided by law).

178. IOWA CODE § 10304(2)(a) ("'Every surety on this bond shall be deemed and held . . . to consent without notice: To any extension of time to the contractor in which to perform the contract.'").

179. *Compare id.*, *with* IOWA CODE § 1527-s18(1) (Supp. 1913) ("The surety on any bond . . . shall be deemed and held . . . without notice: To any extension of time to the contractor in which to perform the contract when each particular extension does not exceed sixty days.").

180. IOWA CODE §10304(2)(b) (1924) ("'Every surety on this bond shall be deemed and held . . . to consent without notice: To any change in the plans, specifications, or contract, when such change does not involve an increase of more than twenty per cent of the total contract price, and shall then be released only as to such

Lastly, subsection 2 prohibited any contract or bond from providing a limitations period of less than one year from the time of acceptance of the work for public owners to sue on the bond for any defective workmanship or materials not discovered or known at the time of acceptance of the work.[182] This changed a prior statute by limiting the prohibition to those defects that the owner did not have knowledge of at the time of acceptance of the work, and by eliminating a mandatory five-year limitations period for defective concrete work.[183]

B. *Changes Reflected in the Code of 1931*[184]

In a case subsequent to these amendments, the Iowa Supreme Court held that prime contracts for public construction projects were "statutory contracts" whereby any contractual provision in conflict with a statutory provision was null and void.[185]

1. *Definitions*

The definition of "material" in section 10299 was enlarged to include "gasoline," "kerosene," "lubricating oils," and "greases," and to expressly exclude "personal expenses or personal purchases of employees for their individual use."[186] Also, the definition of the term "service" was added.[187]

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excess increase.'").

181. *Compare id.*, *with* IOWA CODE § 1527-s18(2) (Supp. 1913).

182. IOWA CODE § 10304(2)(c) (1924) ("'Every surety on this bond shall be deemed and held . . . to consent without notice: That no provision of this bond or of any other contract shall be valid which limits to less than one year from the time of the acceptance of the work the right to sue on this bond for defects in workmanship or material not discovered or known to the obligee at the time such work was accepted.'").

183. *Compare id.*, *with* IOWA CODE § 1527-s18 (Supp. 1913) ("No contract shall be valid which seeks to limit the time to less than five years in which an action may be brought upon the bond covering concrete work nor to less than one year upon the bond covering other work.").

184. *See generally* 1931 Iowa Acts 157–59.

185. Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 356 (Iowa 1944) ("Aside from the above, however, we think the rights of the parties are governed by the provisions of statute which are, in effect, written into the contract. Appellant says in its brief, 'The contract . . . is a statutory contract and the terms of the statutes are written into, and become a part of, the contract.' If there were a conflict between the terms of the contract and the statutes, the latter should prevail. The highway commission was powerless to enter into a contract except in accordance with the statutory provisions which we have analyzed." (citations omitted)).

186. IOWA CODE § 10299(4) (1931).

2. *Retention and Progress Payments*

A new section numbered 10312-d1 and entitled "Exception" was added, which imposed a notice requirement upon claimants who made claims for materials if such materials were not ordered by the prime contractor.[188]

The title of section 10321 was changed from "Retention of funds in case of highway improvement"[189] to "Retention of funds—road improvement."[190]

3. *Claims and Lawsuits for Labor or Materials*

Section 10305 was amended[191] by changing the venue for filing claims from "the officer authorized by law to issue warrants in payment of such improvement"[192] to "the officer, board or commission authorized by law to let contracts for such improvement."[193] The Iowa Supreme Court also interpreted the term "subcontractor" in this section[194] to mean "'[o]ne who

187. *Id.* § 10299(5) ("'Service' shall, in addition to its ordinary meaning, include the furnishing to the contractor of workmen's compensation insurance, and premiums and charges for such insurance shall be considered a claim for service.").

188. *Id.* § 10312-d1 ("No part of the unpaid fund due the contractor shall be retained as provided in this chapter on claims for material furnished, other than materials ordered by the general contractor or his authorized agent, unless such claims are supported by a certified statement that the general contractor had been notified within thirty days after the materials are furnished or by itemized invoices rendered to contractor during the progress of the work, of the amount, kind and value of the material furnished for use upon the said public improvement.").

189. IOWA CODE § 10321 (1924).

190. IOWA CODE § 10321 (1931).

191. The Iowa Supreme Court has commented on this amendment. Mo. Gravel Co. v. Fed. Sur. Co., 237 N.W. 635, 639 (Iowa 1931) ("It may be noted that the Forty-Fourth General Assembly (chapter 209) has now amended section 10305 by striking therefrom the words 'authorized by law to issue warrants in payment of such improvement' and inserting in lieu thereof the words 'board or commission authorized by law to let contracts for such improvement.' Manifestly, this is not only a wholesome, but a very intelligent, bit of legislation, because it enables all interested parties to readily determine where the claim shall be filed. All that needs be done is to ascertain who, on behalf of the commonwealth, let the contract, and all claims are to be filed with that person or organization." (citations omitted)).

192. IOWA CODE § 10305 (1924).

193. IOWA CODE § 10305 (1931).

194. *Id.* ("Any person, firm, or corporation who has, under a contract with the principal contractor or with subcontractors, performed labor, or furnished material . . . may file . . . [a] claim . . . .").

contracts with a contractor to perform part or all of the latter's contract'"[195] and held that this definition excluded materialmen.[196]

Section 10306 was changed to the following paragraph: "But no claims filed for credit extended for the personal expenses or personal purchases of employees for their individual use shall cause any part of the unpaid funds of the contractor to be withheld."[197] Its title was also changed from "Filing claims in case of highway improvements"[198] to "Highway improvements."[199]

Section 10313 reduced the statute of limitations for lawsuits from six months[200] to sixty days,[201] included a requirement that claimants file lawsuits within thirty days of the prime contractor's written demand,[202] and included a requirement that public owners release retainage to prime contractors notwithstanding the filing of claims and lawsuits if the prime contractor furnished a surety bond, conditioned to pay any final judgment, in double the amount of claims filed.[203] The section's title was also changed from "Action to determine rights to fund"[204] to "Optional and mandatory action—bond to release."[205]

Although sections 10320 and 10322 were not amended, the Iowa Supreme Court held that nondefaulting contractors and assignees of defaulting contractors had priority over claimants to any contract amounts

195. Forsberg v. Koss Constr. Co., 252 N.W. 258, 261 (Iowa 1934) (quoting Webster's Dictionary).

196. *See id.* at 261–62.

197. IOWA CODE § 10306 (1931).

198. IOWA CODE § 10306 (1924).

199. IOWA CODE § 10306 (1931).

200. *See* IOWA CODE § 10313 (1924).

201. IOWA CODE § 10313 (1931).

202. *Id.* ("Provided that upon written demand of the contractor served on the person or persons filing said claims requiring him to commence action in court to enforce his claim in the manner as prescribed for original notices, such action shall be commenced within thirty days thereafter, otherwise such retained and unpaid funds due the contractor shall be released . . . .").

203. *Id.* ("[I]t is further provided that, after such action is commenced, upon the general contractor filing with the public corporation or person withholding such funds, a surety bond in double the amount of the claims in controversy, conditioned to pay any final judgment rendered for such claims so filed, said public corporation or person shall pay to the contractor the amount of such funds so withheld.").

204. IOWA CODE § 10313 (1924).

205. IOWA CODE § 10313 (1931).

above the ten percent retainage being held by public owners.[206] These cases reaffirmed the rule that a claimant's right of recovery was limited to the retainage and bond, and did not extend to any other progress payments or accounts payable owed to a prime contractor.[207]

4. *Bonds and Sureties*

No changes were made.

C. *Changes Reflected in the Code of 1945*

Chapter 452[208] was reclassified as chapter 573[209] and renumbered as follows:

(1) definitions:

1931[210]	**1946**[211]
10299	573.1

206. *See, e.g.*, Sinclair Ref. Co. v. Burch, 16 N.W.2d 359, 360–63 (Iowa 1944) (defaulting contractor); Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 351–56 (Iowa 1945) (nondefaulting contractors).

207. *See, e.g.*, Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 354–56 (Iowa 1944) (reaffirming *S. Sur. Co. v. Jenner Bros.,* 237 N.W. 500 (Iowa 1931) and *Fed. Sur. Co. v. Des Moines Morris Plan Co.,* 239 N.W. 99 (Iowa 1931), and distinguishing *Cities Serv. Oil Co. v. Longerbone,* 6 N.W.2d 325 (Iowa 1942) in holding that references to "'said fund,' 'retained percentage,' and similar expressions throughout this chapter refer[red] to the 'retained percentage of the contract price, which in no case shall be less than ten percent' and which 'shall constitute a fund for the payment of claims'").

208. IOWA CODE ch. 452 (1931).

209. IOWA CODE ch. 573 (1946).

210. IOWA CODE § 10299 (1931).

211. IOWA CODE § 573.1 (1946).

(2) retention and progress payments:

1931[212]	**1946**[213]
10310	573.12
10311	573.13
10312	573.14
10312.1	573.15
10321	573.24

(3) claims and lawsuits for labor and materials:

1931[214]	**1946**[215]
10305	573.7
10306	573.8
10307	573.9
10308	573.10
10309	573.11
10313	573.16
10314	573.17
10315	573.18
10316	573.19
10317	573.20
10318	573.21
10319	573.22
10320	573.23
10322	573.25
10323	573.26

212. IOWA CODE §§ 10310–12.1, 10321 (1931).
213. IOWA CODE §§ 573.12–.15, .24 (1946).
214. IOWA CODE §§ 10305–09, 10313–23 (1931).
215. IOWA CODE §§ 573.7–.11, 573.16–.26 (1946).

(4) bonds and sureties:

1931[216]	**1946**[217]
10300	573.2
10301	573.3
10302	573.4
10303	573.5
10304	573.6

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

The title of section 573.12 was changed from "Payments under public contracts"[218] to "Retention from payments on contracts."[219] The title of section 573.24 was changed from "Retention of funds—road improvement"[220] to "Notice of claims to highway commission."[221]

3. *Claims and Lawsuits for Labor or Materials*

No changes were made.

4. *Bonds and Sureties*

No changes were made.

D. *Changes Reflected in the Code of 1950*

After these amendments were passed, the Iowa Supreme Court described the elements of a chapter 573 cause of action as follows: (1) claimant had a valid contract with a required party under the statute, (2) claimant furnished labor or material as required by the statute, (3) the amount of labor or material the claimant furnished, (4) the amount owed

216. IOWA CODE §§ 10300–04 (1931).
217. IOWA CODE §§ 573.2–.6 (1946).
218. IOWA CODE § 10310 (1931).
219. IOWA CODE § 573.12 (1946).
220. IOWA CODE § 10321 (1931).
221. IOWA CODE § 573.24 (1946).

to the claimant, and (5) the filing of a claim.[222] The Iowa Supreme Court also suggested equitable principles could apply to excuse a claimant's failure to satisfy a statutory requirement.[223]

1. *Definitions*

Section 573.1(4)'s definition of "material" was enlarged to include "the use of forms, accessories, and equipment."[224]

2. *Retention and Progress Payments*

Although there were no amendments to any sections in this category, a federal court confirmed that claimants had superior interests over prime contractors to retainage held by public owners.[225] That same federal court

222. *See, e.g.*, Bingham v. Blunk, 116 N.W.2d 447, 449–50 (Iowa 1962) (interpreting the Code of 1954, which reads the same as it did in 1950).

> Under the statutes plaintiff was required to prove his contract with Seddon, who was a subcontractor, the furnishing of equipment for a public improvement, the filing of his claim and the amount and nonpayment thereof. These things he did by his own testimony, the testimony of Seddon, his 'boss,' and by written records. It was necessary for plaintiff to prove his account against Seddon.

Id.; *see also* IOWA CODE §§ 573.1(4), 573.7 (1950).

The Author has not found caselaw addressing whether all of the statutory requirements are elements of a chapter 573 claimant's cause of action that it has the burden to prove, or whether some of them are affirmative defenses that a defendant has the burden to plead and prove. In addressing an issue under Iowa's mechanic's lien statute, the Iowa Court of Appeals held that whether a lien claimant released its lien was an affirmative defense that must be pleaded and proved by the defendants. Booth v. Pilot Corp., No. 99-0925, 2001 WL 726364, at *10 (Iowa Ct. App. June 29, 2001) ("Accordingly, in order for the defense of release to be at issue in a case, it must be pled as an affirmative defense." (citation omitted)); *see also* Preston Refrigeration Co. v. Omaha Cold Storage Terminals, Inc., 742 N.W.2d 782, 789 (Neb. Ct. App. 2007) ("While we have found no specific authority holding that noncompliance with the 120-day requirement for the filing of a construction lien is an affirmative defense which is waived if not specifically pled, we so hold . . . .").

223. L&W Constr. Co. v. Kinser, 99 N.W.2d 276, 282–83 (Iowa 1959) (holding equitable estoppel could be applied against sureties, but concluding that claimant failed to prove the elements of equitable estoppel against surety to excuse its failure to timely file claims and lawsuit).

224. IOWA CODE § 573.1(4).

225. *See* Cmty. Sch. Dist. v. Emp'rs Mut. Cas. Co., 194 F. Supp. 733, 740 (N.D. Iowa 1961) ("There was never a time when the Contractor herein had an enforceable claim to that ten percent. The Contractor never had any property in the retained ten percent to which the Government's tax lien could attach. It seems clear that under the

also held that prime contractors had superior rights over claimants to the nonretainage contract amount held by public owners[226] and that after exhaustion of the retainage to pay claimants, public owners then had the right to satisfy any of their claims against prime contractors out of any funds they held in excess of the retainage.[227]

3. *Claims and Lawsuits for Labor or Materials*

Although there were no amendments to any sections in this category, the Iowa Supreme Court clarified that although public owners were required to be named as parties in claim-related lawsuits pursuant to section 573.17, they were, for the most part, required parties only because they held retainage as required by chapter 573.[228]

The Iowa Supreme Court also held that, despite the existence of subcontractual conditional-payment clauses,[229] a subcontractor's cause of action for nonpayment against a prime contractor accrued within a reasonable amount of time if the reason for nonpayment by the owner to

decisions in the two cases referred to, the claim of the unpaid claimants here involved as to the retained ten percent, or $ 5,350, is prior and superior to the Government's tax lien.").

226. *See id.* at 744–45 ("[W]here an owner retains an amount in excess of the ten percent required to be retained under Chapter 573, the contractor, upon completion of the improvement, is entitled to such excess even though there are unpaid claims on file for labor and materials furnished for the improvement and if the contractor has made an assignment which includes that excess the assignee is entitled to such excess ahead of the unpaid claimants.").

227. *See id.* at 742.

228. *See* Petit v. Ervin Clark Constr., 49 N.W.2d 508, 513 (Iowa 1951) ("Defendant County has also appealed but appears to be merely a stakeholder. No serious contention is made that it did not hold funds owing its co-defendant in the amount mentioned in the judgment as limiting the amount it could be required to pay on plaintiff's judgment against Clark. Nor is any contention made that it is not liable for any amount adjudged against defendant Clark, up to the amount withheld by it due Clark.").

229. Conditional-payment clauses encompass two similar yet distinct clauses better known as "pay-if-paid clauses" and "pay-when-paid clauses." They are typically used by prime contractors to condition their payment obligations to subcontractors upon their receipt of payment from owners. *See* Glencoe Educ. Found., Inc. v. Clerk of Court & Recorder of Mortgs., 65 So. 3d 225, 231–32 (La. Ct. App. 2011) (addressing "the issue of whether a surety . . . can assert a conditional payment provision contained in the principal's contract with subcontractors as a defense to payment"); Wellington Power Corp. v. CNA Sur. Corp., 614 S.E.2d 680, 686–87 (W. Va. 2005) (analyzing pay-if-paid clauses and holding they are not void as violating public policy).

the prime contractor was not caused by the subcontractor.[230]

In respect to the attorney-fee provision under section 573.21,[231] a federal court reaffirmed the rule that public owners are not entitled to attorney fees under chapter 573.[232] The Iowa Supreme Court also held that the attorney-fee provision is permissive, and a district court does not abuse its discretion in denying attorney fees to a successful claimant;[233] the court also held it was not an abuse of discretion for a district court to award attorney fees to a claimant even if the claimant only established its claim in part.[234]

4. *Bonds and Sureties*

No changes were made.

E. *Changes Reflected in the Code of 1962*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

A new section numbered 573.27 was added that permitted public owners to fully pay contractors for satisfactory completion of at least ninety-five percent of the contract if conditions beyond the control of the contractors existed for at least sixty days and prohibited full completion of

230. *See* Grady v. S.E. Gustafson Constr. Co., 103 N.W.2d 737, 738–39 (Iowa 1960). In *Grady*, it is unclear whether the owner finally accepted the project even though the court noted the prime contractor did not "urge[] [that] the Commission ha[d] not accepted the project." *Id.* at 739. Although the *Grady* court did not expressly rely upon chapter 573 in addressing this issue, its holding could logically and reasonably be extended to chapter 573 cases because section 573.16's prohibition against claimants filing lawsuits prior to the expiration of thirty days after completion and final acceptance of the improvement is substantively similar to a conditional-payment clause—both serve as an obstacle to a subcontractor obtaining payment. *See* IOWA CODE § 573.16 (1950). In fact, as discussed later in this Article, subsequent legislative amendments to chapter 573 support this conclusion. *See, e.g., infra* Part III.J, N, P.

231. IOWA CODE § 573.21 (1950).

232. *See Cmty. Sch. Dist.*, 194 F. Supp. at 741 (holding section 573.21 does not provide a basis for awarding attorney fees to a public corporation).

233. *Petit*, 49 N.W.2d at 513.

234. *Grady*, 103 N.W.2d at 743.

the contract.[235] It also permitted public owners in such situations to enter into supplemental contracts with contractors for the remainder of the work on the same terms and conditions as the prior contracts if sureties agreed to leave the existing bonds in place.[236]

3. *Claims and Lawsuits for Labor or Materials*

Section 573.8 was amended to require claims in respect to farm-to-market highway system contracts to be filed with the auditor of the state highway commission.[237]

The Iowa Supreme Court also concluded that section 573.16 permitted parties to utilize the interpleader process in chapter 573 cases.[238]

4. *Bonds and Sureties*

No changes were made.

F. *Changes Reflected in the Code of 1966*

1. *Definitions*

No changes were made.

235. IOWA CODE § 573.27 (1962) ("Notwithstanding anything in this Code to the contrary, when at least ninety-five percent of any contract for the construction of public improvements has been completed to the satisfaction of the public contracting authority and owing to conditions beyond the control of the construction contractor the remaining work on the contract cannot proceed for a period of more than sixty days, such public contracting authority may make full payment for the completed work . . . .").

236. *Id.* ("[S]uch public contracting authority may make full payment for the completed work and enter into a supplemental contract with the construction contractor involved on the same terms and conditions so far as applicable thereto for the construction of the work remaining to be done, provided however, that the contractor's bondsman consents thereto and agrees that the bond shall remain in full force and effect.").

237. *Id.* § 573.8 ("In case of contracts for improvements on the farm-to-market highway system paid from farm-to-market funds, claims shall be filed with the auditor of the state highway commission.").

238. Spahn & Rose Lumber Co. v. Iowa Steel & Constr. Co., 131 N.W.2d 791, 794 (Iowa 1964) (citation omitted) (noting in this mechanic's lien case under chapter 572 that chapter 572 did not permit interpleader while chapter 573 expressly did).

2. *Retention and Progress Payments*

Section 573.15 was amended by adding a provision which prohibited a public owner from retaining any funds owed to a prime contractor because of the prime contractor's commencement of an action against the Iowa State Highway Commission.[239]

3. *Claims and Lawsuits for Labor or Materials*

No changes were made.

4. *Bonds and Sureties*

No changes were made.

G. *Changes Reflected in the Code of 1971*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

Section 573.12 was changed so that public owners were required to withhold ten percent retainage from each monthly progress payment,[240] which was a change from the prior version that made the ten percent figure a floor below which a public owner could not go. This section also permitted public owners to cease holding retainage from monthly progress payments after completion of fifty percent of the improvement if the contract was for more than $50,000 and public owners found satisfactory progress was being made.[241]

Section 573.13 lowered the required retainage to five percent of the contract price.[242] This created tension between section 573.12—requiring

239. IOWA CODE § 573.15 (1966) ("[N]o part of such unpaid fund due the contractor shall be retained as provided in this chapter because of the commencement of any action by the contractor against the Iowa state highway commission under authority granted in section 613.11.").

240. IOWA CODE § 573.12 (1971) ("In making said payments, there shall be retained ten percent of each said monthly estimate by the public corporation . . . .").

241. *Id.* ("[I]f the contract is for more than fifty thousand dollars, and if the public corporation at any time after fifty percent of the improvement has been completed finds that satisfactory progress is being made, the public corporation may authorize any of such remaining payments to be made in full.").

242. *Id.* § 573.13 ("[T]he retained percentage of the contract price, which in no

ten percent retainage be withheld from monthly payments—and section 573.13—containing a retainage floor of five percent. Read together, ten percent retainage was required because of section 573.12's mandate of ten percent retainage.[243]

3. *Claims and Lawsuits for Labor or Materials*

No changes were made.

4. *Bonds and Sureties*

No changes were made.

H. *Changes Reflected in the Code of 1975*

1. *Definitions*

Section 573.1(1) was amended to remove "towns" from the definition of "public corporation."[244]

2. *Retention and Progress Payments*

Section 573.15 was changed to prohibit public owners from withholding retainage from prime contractors because of the commencement of an action by prime contractors against the State Department of Transportation.[245] Previously the prohibition applied to lawsuits against the Iowa State Highway Commission.[246] This change was made only to reflect the fact that the Highway Commission and other state agencies were combined into the State Department of Transportation.[247]

3. *Claims and Lawsuits for Labor or Materials*

Section 573.8 was changed so that claims regarding farm-to-market highway system projects that were paid from farm-to-market funds were

case shall be less than five percent. . . .").

243. *See id.* § 573.12.

244. *Compare id.* § 573.1(1), *with* IOWA CODE § 573.1(1) (1975).

245. IOWA CODE § 573.15 (1975) ("[N]o part of such unpaid fund due the contractor shall be retained as provided in this chapter because of the commencement of any action by the contractor against the state department of transportation under authority granted in section 613.11.").

246. *See* IOWA CODE § 573.15 (1971).

247. *See* Pundt Agric., Inc. v. Iowa Dep't of Transp., 291 N.W.2d 340, 344 (Iowa 1980).

required to be filed with the auditor of the state department of transportation[248] instead of the auditor of the state highway commission.[249]

The title of section 573.24 was changed from "Notice of claims to highway commission"[250] to "Notice of claims to state department of transportation."[251] The section also required the county auditor to notify the state department of transportation, instead of the state highway commission,[252] of the filing of any claims if payment for the improvement came in whole or in part from the primary road fund.[253]

4. *Bonds and Sureties*

Section 573.4 was changed to eliminate municipal bonds issued by towns from the list of acceptable alternatives to a surety bond.[254]

I. *Changes Reflected in the Code of 1977*

During the time period after these amendments, the Iowa Supreme Court reaffirmed the statutory obligation to construe chapter 573 liberally to promote its objectives and assist the parties in obtaining justice.[255] It also indicated the three different roles sureties can play in respect to payment disputes, depending on their involvement in the projects.[256]

248. IOWA CODE § 573.8 (1975).

249. *See id.*

250. *Id.* § 573.24.

251. *Id.*

252. IOWA CODE § 573.24 (1971).

253. IOWA CODE § 573.24 (1975) ("[T]he county auditor shall immediately notify the state department of transportation of the filing of all claims.").

254. *Compare* IOWA CODE § 573.4 (1971), *with* IOWA CODE § 573.4 (1975).

255. *See, e.g.*, Econ. Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259, 264 (Iowa 1983); Lennox Indus., Inc. v. City of Davenport, 320 N.W.2d 575, 578 (Iowa 1982); Dobbs v. Knudson, Inc., 292 N.W.2d 692, 694 (Iowa 1980) (citations omitted).

256. *See* First Fed. State Bank v. Town of Malvern, 270 N.W.2d 818, 820 (Iowa 1978) ("'When, on default of the contractor, it pays all the bills of the job to date and completes the job, it stands in the shoes of the contractor insofar as there are receivables due it; in the shoes of the laborers and material men who have been paid by the surety—who may have had liens; and, not least, in the shoes of the government, for whom the job was completed.'" (quoting Nat'l Shawmut Bank v. New Amsterdam Cas. Co., 411 F.2d 843, 845 (1st Cir. 1969))). The *Malvern* court also held that Article 9 of the UCC was not applicable when the surety asserted subrogation rights, but the rule of Article 9 that assignees acquire no greater rights than the assignor still applied. *See id.* at 820–21.

1. *Definitions*

A stylistic change was made to section 573.1(5)'s definition of service by changing "workmen's compensation insurance"[257] to "workers' compensation insurance."[258]

The Iowa Supreme Court also addressed the definition of "subcontractor" in the chapter 573 context.[259] Although chapter 573 did not define "subcontractor," the court refused to adopt chapter 572's statutory definition of the term, and instead looked to Federal Miller Act cases for guidance.[260] The court adopted "not a technical, but a functional definition."[261] In effect, the court overruled, *sub silentio*, the *Forsberg* case[262] and adopted a vague definition of "subcontractor" that essentially

257. IOWA CODE § 573.1(5) (1975).

258. IOWA CODE § 573.1(5) (1977).

259. *See, e.g.*, *Lennox*, 320 N.W.2d at 577–78.

260. *Id.* at 577 (noting the Federal Miller Act "is the federal counterpart of chapter 573"). The Federal Miller Act is now found at 40 U.S.C. §§ 3131–34 (2006).

261. *Id.* ("A subcontractor is an entity that performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. . . . The substantiality of the relationship will usually determine whether the prime contractor can protect itself, since it easily can require bond security or other protections from those few 'subcontractors' with whom a substantial relationship exists. It is apparent under the language of the Miller Act and section 573.7, The Code, that ordinarily a contract with a prime contractor is a prerequisite to being a subcontractor." (citations omitted)).

In *Lennox*, the contractual relationships were as follows: the City of Davenport was the public owner, Shir-Jim, Inc., was the prime contractor, ABC Supply Co. was a supplier, and Lennox Industries, Inc., was a supplier to ABC. Based on its functional test, the court determined ABC was a subcontractor. *See id.*

> It had a contract with the prime mechanical contractor to furnish cooling and heating units that were an integral part of the project plans and specifications. The cost of these units comprised about fifteen percent of Shir-Jim's total compensation under its contract with Davenport. Applying the above functional test, ABC therefore undertook to furnish a specific part of the materials required under the original contract. Contrary to inferences in Shir-Jim's brief, ABC, under the functional test we adopt, was not required to furnish labor or install the material in order to be a section 573.7 "subcontractor." "Material," as defined in subsection 573.1(4), may even include gasoline and fuel, items not ordinarily requiring labor or installation. Nor is Lennox prohibited from recovering because it did not install the units it manufactured. Other requirements being met, section 573.7 permits recovery by a sub-subcontractor furnishing "labor, *or* material" to a subcontractor.

Id. at 577–78.

262. *See* Forsberg v. Koss Constr. Co., 252 N.W. 258, 261–62 (Iowa 1934)

required case-by-case, fact-intensive analysis into the details of the project and relationships among the prime contractor, subcontractors, sub-subcontractors, and suppliers.[263]

2. *Retention and Progress Payments*

Although no amendments were made to sections under this category, the Iowa Supreme Court held that upon a prime contractor's default, it had no right to unearned progress payments, and thus a public owner could retain them.[264] It also held that chapter 573 had no application to priority disputes between a prime contractor and a public owner over earned but unpaid progress payments.[265]

In respect to section 573.15's notice provision, the Iowa Supreme Court noted it applied "only to claims of materialmen."[266] That comment, however, did not address the issue of whether the notice provision applied only to claims of suppliers (who furnish only materials) or if it also applied to material portion of claims of those furnishing both labor and materials.

The Iowa Supreme Court also rejected due process and equal protection challenges to chapter 573's retainage provisions and its requirement that public owners must retain double the amount of claims filed.[267] The court also refused to apply equitable principles to eliminate or lessen a prime contractor's potential double-payment liability under chapter 573 because a prime contractor facing such a situation could have "protect[ed] itself from the present eventuality in its contract with [the defaulted subcontractor] by requiring either bond security or other assurances that [the defaulted subcontractor] would meet its obligations to those who would furnish it with labor or materials."[268]

(defining "subcontractor" as those having contracts directly with the prime contractor but excluding those who furnished only materials).

263. It is curious that the *Lennox* court did not address the applicability vel non of *Forsberg* to the issue before it considering it was aware of and cited to the *Forsberg* case for support of its refusal to adopt chapter 572's statutory definition of "subcontractor." *See Lennox*, 320 N.W.2d at 577.

264. First Fed. State Bank v. Town of Malvern, 270 N.W.2d 818, 821 (Iowa 1978).

265. *See id.* at 822.

266. *Id.*

267. *See* Econ. Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259, 262–63 (Iowa 1983).

268. *Id.* at 264–65 (citing *Lennox*, 320 N.W.2d at 577).

3. *Claims and Lawsuits for Labor or Materials*

Although no amendments were made to sections in this category, the Iowa Supreme Court explained a claimant must substantially perform its obligations under its contract to recover in full on a claim,[269] and a claimant must "substantially comply with statutory provisions governing filing of claims."[270] In respect to section 573.15's notice provision, the Iowa

269. *See* Sheer Constr., Inc. v. W. Hodgman & Sons, Inc., 326 N.W.2d 328, 332 (Iowa 1982).

270. *Econ. Forms Corp.*, 340 N.W.2d at 264. In *Economy Forms*, the court concluded that although the claimant filed its claim and notice certification with the improper party, substantial compliance was achieved because evidence showed the proper party actually received the claim and notice certification within the statutory limitations period. *Id.* The court explained that it was "obliged to construe the statute liberally with a view to promoting its objects and assisting the parties in obtaining justice" and "[t]o that end [the court found] that a claimant must substantially comply with statutory provisions governing filing of claims." *Id.* (citing Dobbs v. Knudson, Inc., 292 N.W.2d 692, 694 (Iowa 1980)). The *Dobbs* court relied on Iowa Code section 4.2. *Dobbs*, 292 N.W.2d at 694 (citing IOWA CODE § 4.2 (1979)). The statute states: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." IOWA CODE § 4.2. The Author contends the problem with wholesale reliance on section 4.2 in this context is that it does not resolve what it means to substantially comply with a statute.

Iowa's definition of "substantial compliance" in the statutory context means "'compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" Sims v. NCI Holding Corp., 759 N.W.2d 333, 338 (Iowa 2009) (citation omitted). This definition of "substantial compliance" in the statutory context first appeared in *Superior/Ideal, Inc. v. Bd. of Review of the City of Oskaloosa*. Superior/Ideal, Inc. v. Bd. of Review of the City of Oskaloosa, 419 N.W.2d 405, 407 (Iowa 1988). That case borrowed the definition from decisions of the state courts of Oregon, Kansas, New Mexico, and Washington. *Id.* A review of those cases reveals the definition originated from the California Supreme Court in the case of *Stasher v. Harger-Haldeman*. Stasher v. Harger-Haldeman, 372 P.2d 649, 652 (Cal. 1962). The *Stasher* case, in turn, principally relied on the case of *Carter v. Seaboard Fin. Co.*, which stated, "Whether the statute was meant to be mandatory or directory may not be determined merely from the fact that it provided that certain formalities 'shall' be followed. The word 'shall' in a statute may sometimes be directory only, whereas the word 'may,' seemingly much less forceful, may be mandatory. The entire statute may be resorted to in order to ascertain its proper meaning. If to construe it as directory would render it ineffective and meaningless it should not receive that construction. To construe it would indicate that the prescribed form and requisites are merely desirable matter which the seller could include or would not be bound to include, at his option." Carter v. Seaboard Fin. Co., 203 P.2d 758, 764 (Cal. 1949) (citation omitted).

These statements from the *Stasher* court are directly contrary to Iowa law, where

Supreme Court stated the "progress of the work" notice option was "not

the word "may" normally implies permissive rather than mandatory action or conduct. *See* IOWA CODE § 4.1(30)(a), (c) (2011). However, the word has been and is to be construed as mandatory, or the equivalent of "shall" where logic and context so require. State v. Berry, 247 N.W.2d 263, 265 (Iowa 1976 (citations omitted). However, while the rule may work one way, it does not work the other—the word "may" can mean "shall," but the word "shall" does not mean "may." The legislature made this clear in drafting the Iowa Code when it stated use of "'shall' imposes a duty" and "'may' confers a power." *See* IOWA CODE § 4.1(30)(a), (c). "Additionally, we have interpreted the term 'shall' in a statute to create a mandatory duty, not discretion." State v. Klawonn, 609 N.W.2d 515, 522 (Iowa 2000) (citations omitted); *see also In re* Det. of Fowler, 784 N.W.2d 184, 187 (Iowa 2010) (citation omitted); Olver v. Tandem HCM, Inc., No. 10-0225, 2010 WL 4885252, at *4 (Iowa Ct. App. Nov. 24, 2010). Therefore, the Iowa Supreme Court's definition of "substantial compliance" in the statutory context appears to be built on a very tenuous foundation that is contrary to Iowa Code section 4.1(30)(a) and (c) and Iowa Supreme Court precedent. Furthermore, wholesale reliance on the general provision contained at Iowa Code section 4.2 is misplaced because its express purpose was to repeal the common law rule that statutes passed in derogation of the common law are to be strictly construed. *See* Gollehon, Schemmer & Assocs., Inc. v. Fairway-Bettendorf Assocs., 268 N.W.2d 200, 201 (Iowa 1978). Section 4.2 was not intended to create a working definition for substantial compliance, and to wholesale rely on it for this issue ignores the important role that Iowa Code sections 4.1(30)(a) and (c) play in addressing the substantial compliance issue in the statutory context.

Economy Forms addressed the issue of substantial compliance with the requirement of Iowa Code section 573.7 that claims be filed with the public owner. *See Econ. Forms Corp.*, 340 N.W.2d at 264. Although Iowa Code section 573.7 says that claims "may" be filed with the public owner, the use of "may" in the statute appears to be mandatory because there is no other location provided where claims "may" be filed. *See Klawonn*, 609 N.W.2d at 52 ("The word 'may' can be interpreted to mean 'shall' where the context evidences such an intent."). The *Economy Forms* court's application of the "substantial compliance" definition, which is based solely upon Iowa Code section 4.2, excused the claimant's complete failure to comply with the statute's mandatory requirement concerning where claims must be filed. *See Econ. Forms Corp.*, 340 N.W.2d at 264. Because the proper party ended up receiving the claim (but apparently not from the claimant) within the claim-filing deadline, the court found substantial compliance was satisfied. *See id.* It could be claimed that this violated Iowa Code sections 573.7 and 4.1(30)(a) and (c). The better and more sound substantial compliance rule should be: "Substantial compliance allows for a minor deficiency in a required element . . . but does not allow for the complete omission of a required element." Gordon v. W. Houston Trees, Ltd., No. 01-09-00269-CV, 2011 WL 1598790, at *4 (Tex. Ct. App. Apr. 28, 2011) (citation omitted); *see also* Sparks v. Kern Cnty. Bd. of Supervisors, 173 Cal. App. 4th 794, 800, (Cal. Ct. App. 2009); Niziolek v. Chi. Transit Auth., 620 N.E.2d 1097, 1101 (Ill. App. Ct. 2009). This rule would give meaning to both Iowa Code sections 4.1(30)(a) and (c) and 4.2 by excusing minor deficiencies per section 4.2 but not excusing the complete omission of a statutory requirement per section 4.1(30)(a) and (c).

limited by the 30 day provision" in the other notice option.[271]

The Iowa Supreme Court also made clear that whether a claim is for labor or services is to be "determined not by the nature of what the claimant receives but rather by the nature of what is done to be entitled to receive it."[272]

The Iowa Supreme Court also reaffirmed that the attorney-fee provision in section 573.21 was discretionary and permitted a district court to deny attorney fees to a successful claimant.[273]

4. *Bonds and Sureties*

Section 573.2 was changed to require a bond if the contract amount was $5,000, [274] an increase from the $1,000 amount in the prior version.[275]

J. *Changes Reflected in the Code of 1983*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

Section 573.12 placed the responsibility of determining the amount of

271. *Econ. Forms Corp.*, 340 N.W.2d at 264.

272. *Dobbs*, 292 N.W.2d at 694. In *Dobbs*, the court held that "payments to the trusts are for labor" under chapter 573 when the right to have such payment made was based on labor performed by laborers, carpenters, and bricklayers on a project. *See id.* The court also held that the trusts themselves had the right to bring chapter 573 claims despite section 573.7's requirement that the person furnishing the labor must bring the claim. *Id.* at 695. The court reasoned that "the trusts have the contractual right to make the claim for those persons. Any other result would frustrate the legislative purpose in allowing such claims to be made and would unjustly enrich the party with the obligation to make the payments." *Id.* at 696. This result seems consistent with Iowa's real party in interest rule. IOWA R. CIV. P. 1.201.

273. *Sheer Constr.*, 326 N.W.2d at 334 (holding claimant could have obtained its recovery without a trial); *Econ. Forms Corp.*, 340 N.W.2d at 265 (finding denial of fees proper because of failure to formally request them in the proceedings).

274. IOWA CODE § 573.2 (1977) ("Contracts for the construction of a public improvement shall, when the contract price equals or exceeds five thousand dollars, be accompanied by a bond . . . .").

275. IOWA CODE § 573.2 (1983) ("Contracts for the construction of a public improvement shall, when the contract price equals or exceeds one thousand dollars, be accompanied by a bond . . . .").

the monthly progress payments with the project architect or project engineer.[276] The section was amended to eliminate the ability of public owners not to retain any money from prime contractors after fifty percent of the improvement was completed,[277] and to require that public owners retain five percent from each monthly progress payment to the contractor.[278] The latter change eliminated the tension between former section 573.12's ten percent retainage provision and section 573.13's five percent retainage provision,[279] and effectively lowered to five percent the retainage amount that the public owner was required to withhold.

Section 573.14 was changed in the following ways:

(1) It required public owners to pay any amounts owed to prime contractors in accordance with the prime contracts;[280]

(2) it provided confusing provisions for accrual of interest on overdue payments to prime contractors;[281]

276. IOWA CODE § 573.12 ("Payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered, as determined by the project architect or engineer. The public corporation shall retain from each monthly payment five percent of that amount which is determined to be due according to the estimate of the architect or engineer.").

277. *See* IOWA CODE § 573.12 (1977).

278. IOWA CODE § 573.12 (1983) ("The public corporation shall retain from each monthly payment five percent of that amount which is determined to be due according to the estimate of the architect or engineer.").

279. *See supra* notes 244–45 and accompanying text.

280. IOWA CODE § 573.14 ("The public corporation shall order payment of any amount due the contractor to be made in accordance with the terms of the contract.").

281. *See id.* ("Failure to make payment within seventy days after the work under the contract has been completed and if the work has been accepted and all required materials, certifications, and other documentations required to be submitted by the contractor and specified by the contract have been furnished the awarding public corporation by the contractor, shall cause interest to accrue on the amount unpaid to the benefit of the unpaid party. Interest shall accrue during the period commencing the thirty-first day following the completion of work and satisfaction of the other requirements of this subsection and ending on the date of payment."). These two seemingly inconsistent sentences could reasonably be read in one of the two following ways: (1) the first sentence applies to progress payments and not final payments, while the second sentence applies only to final payments; or (2) both sentences apply only to final payments. The first reading is logical because it resolves the seventy-day and thirty-first-day inconsistency. Yet, it is problematic because (1) section 573.14 otherwise seems to apply only to final payments and placing progress-payment-interest provisions in this section seems illogical, and (2) section 573.12

(3) it provided the rate of interest on late payments;[282]

(4) it clarified that the section did not impair any rights created by section 573.16,[283] which addresses the right to file lawsuits under chapter 573 and the ability of prime contractors to obtain retainage notwithstanding the filing of claims and lawsuits by the posting of bonds;[284]

(5) it prohibited the accrual of interest on properly held retainage;[285] and

(6) it rendered chapter 573 inapplicable to projects under certain circumstances where the federal government, federal law, or federal grants are involved.[286]

3. *Claims and Lawsuits for Labor or Materials*

Although no amendments were made to sections in this category, the Iowa Supreme Court adopted the joint-payee check rule for chapter 573

specifically addresses progress payments which strongly suggests that any interest rules applying to them would logically be included there. The second reading is logical because the actual language of the two sentences is best read as applying to final payments only. This is because section 573.14 otherwise applies to final payments, and because section 573.12 specifically addresses progress payments so any interest rules applying to them would logically be included there. It is illogical, though, because it creates the seventy-day and thirty-first-day inconsistency. Under either reading, the Author concludes this is a poorly drafted provision.

282. *Id.* ("The rate of interest shall be determined by the period of time during which interest accrues, and shall be the same as the rate of interest that is in effect under section 453.6, as of the day interest begins to accrue, for a deposit of public funds for a comparable period of time.").

283. *Id.* ("Nothing contained in this paragraph shall abridge any of the rights set forth in section 573.16.").

284. *See id.* § 573.16.

285. *Id.* § 573.14 ("Interest shall not accrue on funds retained by the public corporation to satisfy the provisions of this section regarding claims on file.").

286. *Id.* ("The provisions of this chapter shall not apply if the public corporation has entered into a contract with the federal government or accepted a federal grant which is governed by federal law or rules that are contrary to the provisions of this chapter."). It is doubtful this language should be read to invalidate chapter 573 in its entirety if any provision in it is inconsistent with an applicable federal law. Rather, it is more reasonable to read this language to invalidate only the specific chapter 573 provision that is inconsistent with an applicable federal law, while leaving unaffected all other provisions of chapter 573. *See, e.g.*, Heaberlin Farms, Inc. v. IGF Ins. Co., 641 N.W.2d 816 (Iowa 2002) (holding that Federal Arbitration Act preempts Iowa Code section 679A to the extent it conflicts with the FAA).

cases.[287] The court also reaffirmed that only retainage and not amounts in excess of retainage were available to satisfy claims.[288] In respect to the "piggybacking" rule announced in *Longerbone* applicable to the limitations periods for filing claims under sections 573.10 and 573.11,[289] the court held the rule was "limited to claims of persons or entities who . . . contracted directly with the general contractor."[290]

In respect to section 573.15's notice provision, the Iowa Supreme Court described it as "not a model of clarity"[291] and held that "the words 'during the progress of the work' refer[red] to progress of that portion of the work in which the materials for which claim [was] made [were] utilized."[292] Based on that definition, the court concluded that notice given after completion of the portion of the project involving the claimant's materials was untimely, even though the overall project was not yet completed.[293]

287. Iowa Supply Co. v. Grooms & Co. Constr., Inc., 428 N.W.2d 662, 664–66 (Iowa 1988) ("'[W]hen a subcontractor and his materialman are joint payees, and no agreement exists with the general contractor as to the allocation of proceeds, the materialman by endorsing the check will be deemed to have received the money due him'. . . . When a general contractor issues a check payable jointly to the materialman and subcontractor, endorsement of that check by the payees will be treated as payment to the materialman by the maker of the check. This is a narrow holding which does not prevent suit by the materialman against the copayee or its surety. This rule only bars claims against the maker of the check for the money due from a subcontractor up to the date of the check and up to the amount of the check." (quoting Post Bros. Constr. Co. v. Yoder, 569 P.2d 133, 135 (1977))). In adopting the joint-payee check rule, the court followed California law and refused to follow Federal Miller Act cases that rejected such a rule; the court clarified that although it relied on Federal Miller Act cases for guidance in interpreting chapter 573, it was not bound by such cases. *See id.*

288. *See, e.g.*, Lumberman's Wholesale Co. v. Ohio Farmers Ins. Co., 402 N.W.2d 413, 415 (Iowa 1987) (citing Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 353–54 (1944); S. Sur. Co. v. Jenner Bros., 237 N.W. 500, 504–05 (Iowa 1931)).

289. *See* Cities Serv. Oil Co. v. Longerbone, 6 N.W.2d 325, 327–28 (Iowa 1942).

290. *Lumberman's*, 402 N.W.2d at 415; *see also Iowa Supply Co.*, 428 N.W.2d at 667 (permitting claimant to proceed under Iowa Code section 573.11 where it had mistakenly filed a mechanic's lien but was joined as a party by another claimant pursuant to section 573.17 because claimant contracted directly with prime contractor; thus, piggybacking in this case was permitted).

291. *Lumberman's*, 402 N.W.2d at 416.

292. *Id.*

293. *See id.*

4. *Bonds and Sureties*

Section 573.2 was changed stylistically, and increased the contract amount that required a bond from $5,000[294] to $25,000.[295]

The Iowa Supreme Court also reaffirmed the rule that a claimant was not entitled to recovery from the retainage or the bond unless it established its claim as provided by law, including compliance with the requirements of chapter 573.[296]

K. *Changes Reflected in the Code of 1985*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

No changes were made.

3. *Claims and Lawsuits for Labor or Materials*

Section 573.7 was amended to add a provision that prohibited a material supplier to a subcontractor who furnished only materials from filing claims under chapter 573 or from recovering against the retainage and bond.[297] This change also passively defined "subcontractor" to include material suppliers.[298]

4. *Bonds and Sureties*

Section 573.4 added a "credit union certified share draft" as a

294. *See* IOWA CODE § 573.2 (1979).

295. IOWA CODE § 573.2 (1983) ("Contracts for the construction of a public improvement shall, when the contract price equals or exceeds twenty-five thousand dollars, be accompanied by a bond . . . .").

296. *See Lumberman's*, 402 N.W.2d at 414–15.

297. IOWA CODE § 573.7 (1985) ("A person furnishing only materials to a subcontractor who is furnishing only materials is not entitled to a claim against the retainage or bond under this chapter and is not an obligee or person protected under the bond pursuant to section 573.6.").

298. *See id.* (including language: "to a subcontractor who is furnishing only materials"). This language legislatively overruled, or at least strongly called into doubt, *Forsberg v. Koss Construction Co.* Forsberg v. Koss Constr. Co., 252 N.W. 258, 261–62 (Iowa 1934) (defining "subcontractor" as those having contracts directly with the prime contractor but excluding those who furnished only materials).

permissible alternative to a surety bond.[299]

L. *Changes Reflected in the Code of 1987*

1. *Definitions*

Section 573.1(3)'s definition of "construction" was changed to include "demolition,"[300] and other stylistic changes were made.[301]

2. *Retention and Progress Payments*

No changes were made.

3. *Claims and Lawsuits for Labor or Materials*

No changes were made.

4. *Bonds and Sureties*

Section 573.2 was amended to permit prime contractors to recover from public owners the cost of purchasing a second surety bond if the original surety became insolvent, with the costs to be drawn from funds allocated for road construction purposes.[302]

M. *Changes Reflected in the Code of 1989*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

Section 573.12 was changed in the following ways:

299. *Compare id.* § 573.4, *with* IOWA CODE § 573.4 (1983).

300. IOWA CODE § 573.1(3) (1987) ("'*Construction*', in addition to its ordinary meaning, includes repair, alteration, and demolition.").

301. *Compare id.*, *with* IOWA CODE § 573.1(3) (1985).

302. IOWA CODE § 573.2 (1987) ("However, if a contractor provides a performance or maintenance bond as required by a public improvement contract governed by this chapter and subsequently the surety company becomes insolvent and the contractor is required to purchase a new bond, the contractor may apply for reimbursement from the governmental agency that required a second bond and the claims shall be reimbursed from funds allocated for road construction purposes.").

(1) The prior version of section 573.12[303] was renumbered as section 573.12(1), and a paragraph was added to permit prime contractors to retain from subcontractors the lesser of five percent of each progress payment or the amount specified in subcontracts;[304]

(2) it required prime contractors to make progress payments and final payments to subcontractors for satisfactory work no later than seven days after the prime contractor received payment for the subcontractors' work or a reasonable time after prime contractors could have received payment for the subcontractors' work, if the reason for nonpayment was not the subcontractors' fault;[305]

(3) it preserved prime contractors' claim rights against subcontractors and others even after acceptance of payments for subcontractors' work;[306] and

(4) it required prime contractors who received interest payments under section 573.14 to pay subcontractors their proportional shares of that interest.[307]

303. *Id.* § 573.12.

304. IOWA CODE § 573.12(1) (1989) ("The contractor may retain from each payment to a subcontractor not more than the lesser of five percent or the amount specified in the contract between the contractor and the subcontractor.").

305. *Id.* § 573.12(2) ("A progress payment or final payment to a subcontractor for satisfactory performance of the subcontractor's work shall be made no later than: (a) [s]even days after the contractor receives payment for that subcontractor's work [or] (b) [a] reasonable time after the contractor could have received payment for the subcontractor's work, if the reason for nonpayment is not the subcontractor's fault."). It could be argued that Iowa Code section 573.12(2)(b) invalidates conditional payment clauses in subcontracts. *See* Miller Insulation, Co. v. Beatrice Biodiesel, LLC., 2009 WL 3786082 (D. Neb. 2009) (addressing mechanic's lien issue under Iowa Code chapter 572, holding that Iowa law did not preclude enforcement of pay-if-paid clauses on private projects, and interpreting Iowa Code section 573.12(b) as creating time frame for payment of subcontractors on public project and not as establishing a policy against pay-if-paid clauses on private projects).

306. IOWA CODE § 573.12(2) ("A contractor's acceptance of payment for one subcontractor's work is not a waiver of claims, and does not prejudice the rights of the contractor, as to any other claim related to the contract or project.").

307. *Id.* § 573.12(3) ("If the contractor receives an interest payment under section 573.14, the contractor shall pay the subcontract a share of the interest payment proportional to the payment for that subcontractor's work."). This change seems to lend support to the interpretation that the second sentence of the second paragraph of section 573.14 applied to interest on progress payments. *See supra* note 282 and accompanying text.

3. *Claims and Lawsuits for Labor or Materials*

No changes were made.

4. *Bonds and Sureties*

Section 573.2 was amended to preserve the remedies under chapter 573 for those who have contracts with targeted small businesses (TSB) or their subcontractors, even if the requirement of a bond is waived under Iowa Code section 12.44,[308] and it made public owners liable to claimants for a targeted small businesses nonpayment if the bond requirements had been waived for the targeted small businesses.[309]

308. IOWA CODE § 573.2 ("If the requirement for a bond is waived pursuant to section 12.44, a person, firm, or corporation, having a contract with the targeted small business or with subcontractors of the targeted small business, for labor performed or materials furnished, in the performance of the contract on account of which the bond was waived, is entitled to any remedy provided under this chapter.").

309. *See id.* ("When a bond has been waived pursuant to section 12.44, the remedies provided for under this paragraph are available in an action against the public corporation.").

One issue surrounding section 573.2's second paragraph is whether it makes public owners liable to claimants for any amounts above the retainage being held by the public owners. The answer seems to clearly be "yes." The first sentence of the second paragraph provides that if the conditions described in that sentence are satisfied then a claimant is entitled to "any remedy provided under this chapter." This refers to any remedy contained in chapter 573, including but not limited to payment from the retainage held by the public owner (Iowa Code section 573.18), judgment against the prime contractor for any amount not satisfied by the retainage (Iowa Code section 573.22), judgment against the surety on the bond for any amount not satisfied by the retainage (Iowa Code Section 573.22), and attorney fees (Iowa Code section 573.21). *See id.* §§ 573.18, .21, .22.

The second sentence of the second paragraph provides that when the bond requirement has been waived for a TSB pursuant to Iowa Code section 12.44, "the remedies provided for under this paragraph are available in an action against the public corporation." This means that a claimant is entitled to "any remedy provided under this chapter," as indicated in the first sentence of the second paragraph, against the public owner as stated in the last sentence of the paragraph. *Id.* § 573.2.

If that statute were interpreted as permitting a claimant to recover only the retainage being held by the public owner, then it would render section 573.2's second paragraph meaningless because, independently of section 573.2, a claimant is already entitled to obtain retainage from the public owner under sections 573.13 and 573.18. Hercules Mfg. Co. v. Burch, 16 N.W.2d 350, 353 (Iowa 1945) ("It is plain that the terms 'Said fund' at the beginning of 10312 [now Section 573.14] and 'said unpaid funds' later on in the same section refer to 'the retained percentage of the contract price' (in this case 10 per cent) found in section 10311 [now Section 573.13], and a similar provision in section 10310 [now Section 573.12]. Section 10311 [now Section 573.13] plainly says,

N. *Changes Reflected in the Code of 1991*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

Section 573.12 was amended in the following ways:

(1) It arguably eliminated the mandatory nature of retainage by making five percent retainage the maximum amount a public owner could withhold;[310]

(2) it permitted the Board of Regents to make full progress payments to prime contractors without holding any retainage until ninety-five percent of the contract price had been paid, with the remaining five percent subject to the retainage rules in section 573.14;[311]

'the retained percentage of the contract price, which in no case shall be less than ten percent, shall constitute a fund for the payment of claims. . . .'"); Cities Serv. Oil Co. v. Longerbone, 6 N.W.2d 325, 329 (Iowa 1942) ("We agree with the trial court that the funds retained by the Highway Commission constituted statutory retained percentages herein which, subject to the priorities fixed by Section 10315 [now Section 573.18], were available for the payment of claims filed with the court pursuant to Section 10309 [now Section 573.11], and, if such funds were insufficient, recovery might be had upon the bond."). Such an interpretation would also violate Iowa's statutory interpretation rules which prohibit the interpretation of a statute in a way that would render parts of it superfluous. State v. Keutla, 798 N.W.2d 731, 734 (Iowa 2011) ("We seek an interpretation that does not render portions of [the statute] redundant or irrelevant."). If section 573.2's second paragraph is to have any purpose at all, it must entitle a claimant to obtain something more than retainage from the public owner; the language of section 573.2's second paragraph provides that the "something more" is a judgment against the public owner for any deficiency amounts not satisfied by the retainage and attorney fees.

The reason the legislature passed this provision may have been to help promote and aid TSBs by encouraging others to do business with them despite the absence of bond security by assuring that they will be fully paid by the public owner if the TSB fails to fully pay them.

310. *See* IOWA CODE § 573.12(1) (1991) ("The public corporation shall retain from each monthly payment not more than five percent of that amount . . . ."). This change made section 573.12(1) consistent with language in section 573.13 that described the retainage amount as no more than five percent. *Id.* § 573.13.

311. *Id.* § 573.12(1) ("However, institutions governed pursuant to chapter 262 may, on contracts where a bond is required under section 573.2, make payments under this section without retention until ninety-five percent of the contract amount has been paid and the remaining five percent of the contract amount shall be paid as provided

(3) it required certain types of public owners to make interest payments on late progress payments at the time of final payment;[312] and

(4) it specified the rate of interest on late progress payments.[313]

Section 573.13 was amended to make some stylistic changes, as well as to change the five percent retainage figure from a minimum amount that public owners were required to withhold[314] to a maximum amount above which a public owner could not retain.[315]

Section 573.14 was changed in the following ways:

(1) It required public owners to hold retainage for thirty days after "completion and final acceptance" of the improvement, compared with the former version that required it to be held for thirty days after "completion" of the improvement;[316]

(2) it changed the interest accrual date for retainage payments to the thirty-first day following completion of work and satisfaction of the other requirements of the *second paragraph* of section 573.14, compared with the prior version, that began accrual on the thirty-first day following completion of work and satisfaction of *all* the other requirements of section 573.14;[317] and

(3) it eliminated the blanket prohibition of interest accrual on retainage held, as required by section 573.14, and changed it to permit

under section 573.14.").

312. *Id.* § 573.12(3)(b) ("If a public corporation other than a school corporation, county, or city retains funds, the interest earned on those funds shall be payable at the time of final payment on the contract in accordance with the schedule and exemptions specified by the public corporation in its administrative rules.").

313. *Id.* ("The rate of interest shall be determined by the period of time during which interest accrues, and shall be the same as the rate of interest that is in effect under section 453.6 as of the day interest begins to accrue.").

314. IOWA CODE § 573.13 (1989).

315. IOWA CODE § 573.13 (1991) ("A public corporation shall not be permitted to plead noncompliance with section 573.12 and the retained percentage of the contract price, which in no case shall be more than five percent, constitutes a fund for the payment of claims for materials furnished and labor performed on the improvement and shall be held and disposed of by the public corporation as provided in this chapter.").

316. *Id*. § 573.14 ("Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement.").

317. *Id*. ("Interest shall accrue during the period commencing the thirty-first day following the completion of work and satisfaction of the other requirements of this paragraph and ending on the date of payment.").

interest accrual on retainage only as allowed by section 573.12.[318]

3. *Claims and Lawsuits for Labor or Materials*

Although there were no amendments to the sections in this category, the Iowa Supreme Court held that failure to file a lawsuit within the sixty-day limitations period in section 573.16 barred a claimant from recovery against the retainage and bond.[319] The court concluded the limitations period in section 573.16 applicable to filing lawsuits was to be strictly enforced, which was unlike the limitations periods for filing claims in sections 573.10(2) and 573.11.[320] It also left open the issue of whether estoppel principles could excuse a claimant's failure to file a lawsuit within the section 573.16 limitation period, but the court refused to apply them in the case before it.[321]

4. *Bonds and Sureties*

No changes were made.

O. *Changes Reflected in the Code of 1993*

After the 1993 amendments, the Iowa Supreme Court explained the purpose of chapter 573, like chapter 572, which governs mechanic's liens, was to "secure or protect the persons performing work or providing materials toward the improvement of property belonging to another. However, [the chapter] also provide[d] some protection to either the owner of private property or governmental entities for public improvements."[322] The court also recognized the similarity between chapters 572 and 573 and explained that those two chapters should be construed similarly, if possible, because

318. *Id.* ("Except as provided in section 573.12, interest shall not accrue on funds retained by the public corporation to satisfy the provisions of this section regarding claims on file.").

319. Nw. Limestone Co. v. Dep't of Transp., 499 N.W.2d 8, 11 (Iowa 1993).

320. *Id.* ("We conclude that cases involving late-filed claims are inapposite to the present statute-of-limitations dispute. The degree of slack afforded to late-filed claims has been posited upon the legislative validation of late-filed claims contained in section 573.10(2) and section 573.11. There is . . . no similar legislative validation of late-filed actions not meeting the time requirements specified in section 573.16.").

321. *See id.* at 12.

322. Farmers Coop. Co. v. DeCoster, 528 N.W.2d 536, 537–38 (Iowa 1995) (citations omitted).

> [w]hen statutes relate to the same subject matter or to closely allied subjects they are said to be in pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation. The pari materia rule applies with peculiar force to statutes passed at the same session of the legislature.[323]

1. *Definitions*

Although no changes were made to sections in this category, the Iowa Supreme Court held the language "ordinary meaning" in the definitions of "material" in chapters 572 and 573 should be interpreted the same.[324] The court also held "gasoline, diesel fuel and petroleum are not included within the 'ordinary meaning' of 'material' under section 572.1(2)."[325] Although the meaning of "material" in chapters 572 and 573 is the same, the interpretation of chapter 572 and chapter 573 may vary due to the use of specific language in chapter 573, including words such as "gasoline," "kerosene," "oils," and "greases," which is not included in chapter 572.[326]

2. *Retention and Progress Payments*

Section 573.12 was amended to (1) create and clarify the interest rules for progress payments,[327] and (2) clarify that the two provisions concerning

323. *Id.* at 538 (citations omitted).

324. *Id.* at 539 ("Identical statutory language in different statutes should be given much the same meaning. . . . If the ordinary meaning of material in section 573.1(2) does not include gasoline, diesel fuel and petroleum, the ordinary meaning of material in section 572.1(2) should be construed to also not include those items. To hold otherwise would be to impermissibly add words to the mechanic's lien statutes." (citations omitted)).

325. *Id.*

326. *Id.* ("[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed." (citing Richerson v. Jones, 551 F.2d 918, 928 (3d Cir. 1977))).

327. IOWA CODE § 573.12(2)(a)(1)–(2) (1993) ("Interest shall be paid to the contractor on any progress payment that is approved as payable by the public corporation's project architect or engineer and remains unpaid for a period of fourteen days after receipt of the payment request at the place, or by the person, designated in the contract, or by the public corporation to first receive the request, or for a time period greater than fourteen days, unless a time period greater than fourteen days is specified in the contract documents, not to exceed thirty days, to afford the public corporation a reasonable opportunity to inspect the work and to determine the adequacy of the contractor's performance under the contract. Interest shall accrue

the deadline by which prime contractors were required to pay subcontractors were alternatives.[328]

In addition to some stylistic changes, section 573.14 was amended to (1) clarify that the term "fund" in the section was retainage as described in section 573.13;[329] (2) change the amount of retainage public owners were required to withhold upon the filing of claims from *not less* than double the amount of claims on file[330] to an amount *equal* to double the amount of claims on file;[331] (3) clarify that the interest provisions were for final payments and not progress payments;[332] (4) provide start dates for interest accrual on final payment;[333] (5) change the rate of interest from the rate provided in Iowa Code section 453.6[334] to the rate provided in Iowa Code section 12C.6;[335] and (6) include section 573.16 as another exception—like section 573.12 for interest on progress payments[336]—to the interest rules

during the period commencing the day after the expiration of the period defined in subparagraph (1) and ending on the date of payment. The rate of interest shall be determined as set forth in section 573.14.").

328. *Id.* § 573.12(2)(b) ("A progress payment or final payment to a subcontractor for satisfactory performance of the subcontractor's work shall be made no later than one of the following, as applicable . . . .").

329. *Id.* § 573.14 ("The fund provided for in section 573.13 shall be retained . . . .").

330. IOWA CODE § 573.14 (1991).

331. IOWA CODE § 573.14 (1993) ("[T]he public corporation shall continue to retain from the unpaid funds a sum equal to double the total amount of all claims on file.").

332. *Id.* ("Except as provided in section 573.12 for progress payments, failure to make payment pursuant to this section, of any amount due the contractor . . . after the work under the contract has been completed and if the work has been accepted . . . shall cause interest to accrue . . . .").

333. *Id.* ("[F]ailure to make payment pursuant to this section, of any amount due the contractor, within forty days, unless a greater time period not to exceed fifty days is specified in the contract documents . . . shall cause interest to accrue on the amount unpaid to the benefit of the unpaid party."). This language eliminated the seventy-day/thirty-first day inconsistency in the prior version of section 573.14. *See* IOWA CODE § 573.14 (1991) ("Failure to make payment within seventy days . . . shall cause interest to accrue . . . during the period commencing the thirty-first day following the completion of work . . . ."). While the revision created a new forty/fifty/thirty-first day inconsistency, this inconsistency could be avoided by reading the thirty-first day reference as applying to nonretainage final payment and reading the forty/fifty day references as applying to retainage payments only. *See* IOWA CODE § 573.14 (1993).

334. IOWA CODE § 573.14 (1993).

335. *Id.* ("The rate of interest . . . shall be the same as the rate of interest that is in effect under section 12C.6 . . . .").

336. *Id.* (stating "except as provided in section 573.12 for progress payments").

that apply upon failure to pay retainage to prime contractors upon their posting of a surety bond.[337]

3. *Claims and Lawsuits for Labor or Materials*

In addition to some stylistic changes, section 573.16 was amended to clarify that demands to file suit from prime contractors against claimants must be served in the same manner as that required for service of an original notice.[338] It also created payment deadlines and interest rules for retainage held by a public owner with respect to situations where a claimant failed to file suit within the thirty-day limitations period after demand from a prime contractor.[339]

In addition to a stylistic change, section 573.18 was also amended to (1) clarify that a court is required to adjudicate all claims when a lawsuit is filed under section 573.16[340] and (2) create payment deadlines and interest rules when retainage funds remained after satisfaction of claims.[341]

4. *Bonds and Sureties*

No changes were made.

337. *Id.* ("Except as provided in sections 573.12 and 573.16, interest shall not accrue on funds retained by the public corporation to satisfy the provisions of this section regarding claims on file.").

338. *Id.* § 573.16 ("Upon written demand of the contractor served, in the manner prescribed for original notices . . . .").

339. *Id.* ("Unpaid funds shall be paid to the contractor within twenty days of the receipt by the public corporation of the release as determined pursuant to this section. Failure to make payment by that date shall cause interest to accrue on the unpaid amount. Interest shall accrue during the period commencing the twenty-first day after the date of release and ending on the date of the payment. The rate of interest shall be determined pursuant to section 573.14.").

340. *Id.* § 573.18 ("The court shall adjudicate all claims for which an action is filed under section 573.16.").

341. *Id.* ("Upon settlement or adjudication of a claim and after judgment is entered, unpaid funds retained with respect to the claim which are not necessary to satisfy the judgment shall be released and paid to the contractor within twenty days of receipt by the public corporation of evidence of entry of judgment or settlement of the claim. Failure to make payment by that date shall cause interest to accrue on the unpaid amount. Interest shall accrue during the period commencing on the twenty-first day after receipt by the public corporation of evidence of entry of judgment and ending on the date of payment. The rate of interest shall be determined as set forth in section 573.14.").

P. *Changes Reflected in the Code of 1997*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

The legislature created a new section numbered 573.15A that permitted public owners to release retainage upon ninety-five percent completion of the contract, and for such situations it created claim-filing and lawsuit-filing limitations periods and other new rules relating to such situations.[342] All such limitation periods and rules were essentially identical to those contained in sections 573.7, 573.10, 573.14, 573.16, and 573.18, except that section 573.15A claims were based on ninety-five percent completion of the contract[343] instead of completion and final acceptance of the improvement.[344] The only exception is that the rule excuses public owners from holding additional retainage if they complied with this new section and released retainage upon ninety-five percent completion of the contract.[345]

3. *Claims and Lawsuits for Labor or Materials*

Although no changes were made to the sections in this category, the Iowa Supreme Court reaffirmed section 573.16 mandated that a claimant "must file suit no sooner than thirty days and no later than sixty days following completion and final acceptance of the improvement."[346] In addition, the court reconfirmed *Longerbone*'s piggybacking rule:

> [I]f any claimant has filed a claim within the thirty day period, other claimants may file claims after the thirty-day period as long as the conditions in section 573.10(2) are met. The conditions are that (1) the public corporation has not paid the full contract price and (2) no action is pending to adjudicate rights to the contract price.[347]

342. IOWA CODE § 573.15A (1997).

343. *Id.*

344. *See id.* §§ 573.7, .10, .14, .16, .18.

345. *Id.* § 573.15A(4) ("A public corporation that releases funds at the completion of ninety-five percent of the contract, in accordance with this section, shall not be required to retain additional funds.").

346. Emp'rs Mut. Cas. Co. v. City of Marion, 577 N.W.2d 657, 659 (Iowa 1998).

347. *Id.* at 661 (citations omitted). "Some of the unearned portion of the

Therefore, the *Longerbone* piggybacking rule continued to be available to claimants who held contracts directly with prime contractors,[348] and was only available to such claimants "'if [1] the public corporation ha[d] not paid the full contract price . . . and [2] no action [was] pending to adjudicate rights in and to the unpaid contract price.'"[349] Logically, if the second claim-filing deadline under section 573.10(2) is limited to claimants who hold contracts directly with prime contractors, then the third claim-filing deadline in section 573.11 should also be so limited. Otherwise, it would effectively render section 573.10(2) meaningless or it would give a later-filing claimant under section 573.11 greater rights than an earlier-filing claimant under section 573.10(2).[350]

The Iowa Supreme Court interpreted section 573.23 and explained it "deal[t] not only with who [was] to pay the claims but it also clearly deal[t] with when claims [were] to be filed in the event the contractor default[ed] or [was] legally excluded from the work on the improvement."[351] It construed section 573.23 as an exception to section 573.10(1)'s claim-filing limitations period,[352] but concluded it had no effect on the lawsuit

contract price as well as some of the statutory retained percentage" was still being held and because "[t]he present suit [was] one 'to adjudicate rights in and to the unpaid portion of the contract price' pursuant to section 573.10(2)." *Id.* The late filed claims were "also considered filed in a timely manner *if* they were filed before Employers Mutual filed this suit." *Id.* at 662 (noting even claims filed after the suit were timely if the district court permitted these filings under section 573.11).

348. *See, e.g.*, Iowa Supply Co. v. Grooms & Co. Constr., Inc., 428 N.W.2d 662, 666 (Iowa 1988) (refusing to recognize materialman without a contract as a claimant); Lumberman's Wholesale Co. v. Ohio Farmers Ins. Co., 402 N.W.2d 413, 415 (Iowa 1987) (refusing to extend the rule beyond those contracting with the general contractor).

349. *Emp'rs Mut. Cas. Co.*, 577 N.W.2d at 661 (quoting IOWA CODE § 573.10(2) (1995)).

350. Another issue is the impact of the lawsuit limitations period in section 573.16 on claimants proceeding under section 573.11. Section 573.16's limitations period is strictly enforced. *See* Nw. Limestone Co. v. Iowa Dep't of Transp., 499 N.W.2d 8, 11 (Iowa 1993). The Author believes that claimants proceeding under section 573.11 should be barred from recovery if their request to the district court is filed more than sixty days after completion and final acceptance of the improvement; otherwise, it would create an exception to the strict enforcement of section 573.16's limitations period that would swallow the limitations period itself.

351. *Emp'rs Mut. Cas. Co.*, 577 N.W.2d at 660 (interpreting *Sinclair v. Burch* as only addressing the issue of who must pay claims under section 573.23 and not when claims are to be filed under the section).

352. *Id.* ("[O]nce there has been a cancellation of the contract, as here, the section 573.10 time limitations for filing claims start to run from the cancellation date.

limitations period in section 573.16.[353]

4. *Bonds and Sureties*

Although no amendments were made to sections in this category, the Iowa Court of Appeals reaffirmed the rule that surety liability on statutory bonds, like those furnished under chapter 573, should be measured only by the statutory language and not by the actual language of the bonds.[354]

Q. *Changes Reflected in the Code of 2001*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

No changes were made.

3. *Claims and Lawsuits for Labor or Materials*

Although no amendments were made to sections in this category, the Iowa Court of Appeals suggested prime contractors could file claims under chapter 573[355] and recover attorney fees under section 573.21 if successful.[356] In a subsequent case, the Iowa Court of Appeals backed

(We interpret the words 'legally excluded therefrom' in section 573.23 to include here the city's cancellation of the contract.)").

353. *See id.* at 661.

354. City of Adel v. Emp'rs Mut. Cas. Co., No. 00-0592, 2002 WL 31115242, at *2 (Iowa Ct. App. Sept. 25, 2002) (explaining bonds required under chapter 573 were "designed to ensure a contractor will complete a project as envisioned").

> The surety's liability must be measured by the statute rather than by the form of the bond. Our supreme court has held that a bond cannot be extended to other matters. The language in section 573.2 providing 'other requirements as provided by law' cannot refer to an obligation to make restitution, since restitution was not based on contract. Section 573.2 thus refers to statutory requirements only, not common law or equity remedies.

Id. (citations omitted).

355. Midland Restoration Co. v. Sioux City Cmty. Sch. Dist., No. 02-0625, 2003 WL 21229272, at *2 (Iowa Ct. App. May 29, 2003) (stating "section 573.16 . . . allows a contractor who provided material and labor on a public improvement to seek adjudication of rights to funds the public corporation retained from the contract price").

356. *See id.* at *5 (allowing the award of attorney fees).

away from the suggestion of allowing these claims by prime contractors.[357] With respect to the amount of attorney fees to be awarded to a claimant under section 573.21, the Iowa Court of Appeals concluded that "the total amount of time spent cannot be measured by the amount of recovery, but must be viewed in terms of the complexity of the cases and issues involved. Unfortunately cases are often complex and difficult, even though the amount of recovery sought is not large."[358]

With respect to section 573.15's notice provision, the Iowa Court of Appeals extrapolated on the *Lumberman* court's discussion of the clause "itemized invoices rendered to contractor during the progress of the work" and interpreted it to mean "those invoices that are rendered to the general contractor prior to completion of the particular subproject for which those material [sic] were supplied."[359]

4. *Bonds and Sureties*

Section 573.3 was changed to prohibit public owners from requiring prime contractors to obtain bonds from a specific company, agent, or broker.[360]

R. *Changes Reflected in the Code of 2007*

1. *Definitions*

No changes were made.

357. Saydel Cmty. Sch. Dist. v. Denis Della Vedova, Inc., No. 06-0070, 2007 WL 1201748, at *2 (Iowa Ct. App. Apr. 25, 2007) (concluding "the *Midland* court was not presented with and did not address the question of whether section 573.16 created a private cause of action for a general contractor against a public corporation that withholds payments").

358. Ace Concrete Co. v. Metro Waste Auth., No. 04-1921, 2006 WL 228925, at *2 (Iowa Ct. App. Feb. 1, 2006) (affirming award of attorney fees that exceeded the amount of judgment).

359. Marquart Block Co. v. Denis Della Vedova, Inc., No. 05-1952, 2006 WL 3018227, at *3 (Iowa Ct. App. Oct. 25, 2006) (holding notice was timely because invoices were provided by block supplier claimant while the masonry portion of the project was ongoing).

360. IOWA CODE § 573.3 (2001) ("A public corporation, with respect to a public improvement which is or has been competitively bid or negotiated, shall not require a contractor to procure a bond, as required under section 573.2, from a particular insurance or surety company, agent, or broker.").

2. *Retention and Progress Payments*

Section 573.12 was amended to eliminate the exception for the Board of Regents first included in the 1991 Code.[361] However, section 573.14 was amended to include an exception to the interest rate accrual rules for projects owned by the Board of Regents,[362] and it provided a definition of "prime rate" as used in the second paragraph of the section.

In 2006, the legislature created a new law[363] that governed chapter 573's release of retainage, placing it at Iowa Code section 26.13[364] within the public construction competitive bidding statute.[365] The new law contained the following provisions:

(1) It permitted prime contractors to request early release of "all or part of the" retainage upon substantial completion of "all or any part of the work" on the improvement;[366]

(2) it required any request for early release of retainage to "be accompanied by a sworn statement" that a required notice had been given "to all known subcontractors, sub-subcontractors, and suppliers" at least ten days prior to the request;[367]

(3) it contained the notice language that prime contractors should use;[368]

361. *See* IOWA CODE § 573.12(1) (1991).

362. IOWA CODE § 573.14 (2006) ("However, for institutions governed pursuant to chapter 262, the rate of interest shall be determined by the period of time during which interest accrues, and shall be calculated as the prime rate plus one percent per year as of the day interest begins to accrue.").

363. 2006 Iowa Acts 60–71.

364. IOWA CODE § 26.13 (2007) ("Payments made by a governmental entity or the state department of transportation for the construction of public improvements and highway, bridge, or culvert projects shall be made in accordance with the provisions of chapter 573, except as provided in this section.").

365. *Id.* ch. 26.

366. *Id.* § 26.13(1) ("At any time after all or any part of the work on the public improvement or highway, bridge, or culvert project is substantially completed, the contractor may request the release of all or part of the retained funds owed.").

367. *Id.* ("The request shall be accompanied by a sworn statement of the contractor that, ten calendar days prior to filing the request, notice was given as required by subsection 7 to all known subcontractors, sub-subcontractors, and suppliers.").

368. *Id.* § 26.13(7) ("Prior to applying for release of retained funds, the contractor shall send a notice to all known subcontractors, sub-subcontractors, and suppliers that provided labor or materials for the public improvement project or the

(4) it required public owners to release the retainage pursuant to a proper request for early release;[369]

(5) it provided the deadline by which the retainage must be released when requested;[370]

(6) it prohibited the additional withholding of retainage on any work for which any release of retainage had already occurred;[371]

(7) it provided interest rules for late payment of retainage;[372]

(8) it permitted public owners to withhold up to two hundred percent of the value of the labor or materials yet to be provided, as determined by the public owner's representative, until the labor or materials were provided;[373]

(9) it required public owners to provide prime contractors an itemized explanation of the reasons for not releasing all of the retainage requested

highway, bridge, or culvert project. The notice shall be substantially similar to the following: 'NOTICE OF CONTRACTOR'S REQUEST FOR EARLY RELEASE OF RETAINED FUNDS[:] You are hereby notified that [name of contractor] will be requesting an early release of funds on a public improvement project . . . designated as [name of project] for which you have or may have provided labor or materials. The request will be made pursuant to Iowa Code section 26.13. The request may be filed with the [name of governmental entity or department] after ten calendar days from the date of this notice. The purpose of the request is to have [name of governmental entity or department] release and pay funds for all work that has been performed and charged to [name of governmental entity or department] as of the date of this notice. This notice is provided in accordance with Iowa Code section 26.13.'").

369. *Id.* § 26.13(2) ("Except as provided under subsection 3, upon receipt of the request, the governmental entity or the department shall release all or part of the retained funds.").

370. *Id.* ("Retained funds that are approved as payable shall be paid at the time of the next monthly payment or within thirty days, whichever is sooner.").

371. *Id.* ("If partial retained funds are released pursuant to a contractor's request, no retained funds shall be subsequently held based on that portion of the work.").

372. *Id.* ("If within thirty days of when payment becomes due the governmental entity or the department does not release the retained funds due, interest shall accrue on the amount of retained funds at the rate of interest that is calculated as the prime rate plus one percent per year as of the day interest begins to accrue until the amount is paid.").

373. *Id.* § 26.13(3) ("If at the time of the request for the release of the retained funds labor or materials are yet to be provided, an amount equal to two hundred percent of the value of the labor or materials yet to be provided, as determined by the governmental entity's or the department's authorized contract representative, may be withheld until such labor or materials are provided.").

within thirty days of the contractor's request;[374]

(10) it required prime contractors and subcontractors to release retainage to their respective lower tier subcontractors in the same manner as public owners' early release of retainage to prime contractors;[375] and

(11) it provided definitions of (a) "department,"[376] (b) "authorized contractor representative,"[377] and (c) "substantially completed."[378]

3. *Claims and Lawsuits for Labor or Materials*

No changes were made.

374. *Id.* § 26.13(4) ("An itemization of the labor or materials yet to be provided, or the reason that the request for release of retained funds is denied, shall be provided to the contractor in writing within thirty calendar days of the receipt of the request for release of retained funds.").

375. *Id.* § 26.13(6) ("The contractor shall release retained funds to the subcontractor or subcontractors in the same manner as retained funds are released to the contractor by the governmental entity or department. Each subcontractor shall pass through to each lower tier subcontractor all retained fund payments from the contractor.").

376. *Id.* § 26.13 ("For purposes of this section, *'department'* means the state department of transportation.").

377. *Id.* § 26.13(3) ("For purposes of this section, *'authorized contract representative'* means the person chosen by the governmental entity or the department to represent its interests or the person designated in the contract as the party representing the governmental entity's or the department's interest regarding administration and oversight of the project.").

378. *Id.* § 26.13(5) ("For purposes of this section, *'substantially completed'* means the first date on which any of the following occurs: *a*. Completion of the public improvement project or the highway, bridge, or culvert project or when the work on the public improvement or the highway, bridge, or culvert project has been substantially completed in general accordance with the terms and provisions of the contract. *b*. The work on the public improvement or on the designated portion is substantially completed in general accordance with the terms of the contract so that the governmental entity or the department can occupy or utilize the public improvement or designated portion of the public improvement for its intended purpose. This paragraph shall not apply to highway, bridge, or culvert projects. *c*. The public improvement project or the highway, bridge, or culvert project is certified as having been substantially completed by either of the following: (1) The architect or engineer authorized to make such certification. (2) The authorized contract representative. *d*. The governmental entity or the department is occupying or utilizing the public improvement for its intended purpose. This paragraph shall not apply to highway, bridge, or culvert projects.").

4. *Bonds and Sureties*

No changes were made.

S. *Changes Reflected in the Code of 2009*

1. *Definitions*

No changes were made.

2. *Retention and Progress Payments*

Stylistic changes were made to section 26.13(3) in 2007, and section 26.13 was reorganized in 2008,[379] but no stylistic or substantive changes were made.[380]

3. *Claims and Lawsuits for Labor or Materials*

Although no amendments were made to the categories in this section, a federal district court addressed some important issues. The court held that a public owner who properly releases all retainage to the prime contractor should not be dismissed from a lawsuit brought by a claimant because judgment could still be entered on the bond, which could impact the public owner who has an interest in the bonds because the statute says they "run to" the public owner.[381]

With respect to the venue provision of section 573.16 for filing lawsuits,[382] the court held the provision did not deprive federal courts of subject matter jurisdiction even if the federal court with whom the lawsuit was filed was not located in the county where the improvement is located.[383] Similarly, the federal court also held that a claimant's failure to timely file a lawsuit with a court located in the county in which the improvement was located was not fatal, as long as a lawsuit was timely filed in a federal court whose district included the county in which the

379. IOWA CODE § 26.13 (2009). Section 26.13 is broken into two main subsections numbered 1 and 2; the first subsection contains the definitions of "'authorized contract representative,'" "'department,'" and "'substantially completed,'" and subsection 2 contains the remaining provisions. *See id.*

380. *Compare id.*, *with* IOWA CODE § 26.13 (2007).

381. *See* Accurate Controls, Inc. v. Cerro Gordo Cnty. Bd. of Supervisors, 627 F. Supp. 2d 976, 1008 (N.D. Iowa 2009).

382. *See* IOWA CODE § 573.16 (2009).

383. *See Accurate Controls*, 627 F. Supp. 2d at 988 (noting the contract and statute did not make jurisdiction exclusive).

improvement was located.[384]

The federal court also addressed in detail various issues surrounding the notice provision of section 573.15.[385] The federal court confirmed the ruling in *Economy Forms* that the notice provision contained two options for a claimant.[386] The court noted,

> [I]t seems likely that, in most instances, the '30-day' alternative will expire before the 'progress of the work' alternative will expire, because materials will ordinarily be furnished before the work on the pertinent portion of the work is completed. Thus, the 'progress of the work' alternative ordinarily provides the *last* deadline for providing adequate notice, because that alternative does not expire until completion of the particular 'subproject' or 'that portion of the work in which the materials for which claim is made are utilized,' which may well be much more than thirty days after the materials were 'furnished.'[387]

The federal court held the notice requirements of section 573.15 applied not only to claims made by suppliers (who furnish only material) but also to the material portion of claims made by claimants who provide both labor and material.[388] The court concluded the statute only exempted those material suppliers who furnished materials "by a direct request of the general contractor (or its authorized agent) to the material supplier, for example, pursuant to a contract directly between the general contractor and the material supplier or a purchase order directly from the general contractor to the material supplier."[389] The court also held that the claimant itself was responsible for providing notice to the prime contractor,[390] and that "substantial compliance" was not the proper

384. *See id.* at 989–90.

385. *See generally id.* at 1001–06.

386. *Id.* at 1002 ("[A]dequate notice may be provided *either* 'by [(1)] a certified statement that the general contractor had been notified within thirty days after the materials are furnished *or* [(2)] by itemized invoices rendered to contractor during the progress of the work.'" (alterations in original) (quoting IOWA CODE § 573.15 (2009))).

387. *Id.* at 1003–04 (citations omitted).

388. *See id.* at 995, 998. The court resolved claimed inconsistencies between *Lumberman's* and *Town of Malvern* by concluding that *Town of Malvern* did "not identify any class of entities as 'subcontractors,' or otherwise distinguish any entity that furnished only 'material' from an entity that furnished both 'labor' and 'material.'" *See id.* at 996.

389. *Id.* at 999.

390. *Id.* at 1004 (citing IOWA CODE § 573.15 (2009)).

standard by which to judge compliance with the notice requirements.[391] The court concluded that invoices provided by a claimant to its subcontractor, who in turn provided them to a prime contractor, did not satisfy the notice requirements.[392]

In another case, the Iowa Court of Appeals confirmed that chapter 573 claims could be subject to arbitration.[393]

4. *Bonds and Sureties*

No changes were made.

T. *2011 and 2012 Proposed Amendments*

1. *Definitions*

In 2011, the Iowa House of Representatives passed House File 458, which would have provided definitions of "principal contractor"[394] and "subcontractor."[395] The bill, however, died in the Senate.[396] At the time of publication of this Article, the Iowa House of Representatives has introduced House File 2005 which provides the same definitions.[397]

2. *Retention and Progress Payments*

No proposed amendments were made.

391. *See id.* (noting the party was unable to provide caselaw that required only "substantial compliance" with notice requirements).

392. *See id.* at 1005–06 (citing United States *ex rel.* Am. Radiator & Standard Sanitary Corp. v. Nw. Eng'g Co., 122 F.2d 600 (8th Cir. 1941)).

393. *See, e.g.*, DB Acoustics, Inc. v. Great River Contractors, L.L.C., No. 09-1260, 2010 WL 1375319, at *2–3 (Iowa Ct. App. Apr. 8, 2010) (affirming the lower court's decision to compel arbitration motion).

394. *See* H.F. 458, 83rd Gen. Assemb., Reg. Sess. (Iowa 2011) ("'*Principal contractor'* means those persons, firms, or corporations having contracts directly with the public corporation.").

395. *See id.* ("'*Subcontractor'* shall include every person, firm, or corporation performing labor for or furnishing materials to a public improvement, except those persons, firms, or corporations having contracts directly with the public corporation.").

396. *See Bill History for HF 458,* IOWA LEGISLATURE, http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=hf&key=0505C&GA=84 (last visited Nov. 21, 2011).

397. *See* H.F. 2005, 84th Gen. Assemb., Reg. Sess. (Iowa 2012).

3. *Claims and Lawsuits for Labor or Materials*

House File 458 would have effected a significant overhaul of the notice provision of section 573.15.[398] However, it died in the Senate.[399]

> 1. A person, firm, or corporation performing labor for or furnishing materials to a subcontractor shall not be entitled to a claim against the retainage or bond under this chapter unless the person, firm, or corporation performing the labor or furnishing the materials does all of the following:
>
> *a.* Notifies the principal contractor in writing within forty-five calendar days of first performing the labor or furnishing the materials for the public improvement. The notice shall contain the name, mailing address, and telephone number of the person, firm, or corporation performing the labor or furnishing the materials and the name of the subcontractor for whom the labor was performed or to whom the materials were furnished. Additional labor performed, or materials furnished by the same person, firm, or corporation to the same subcontractor for the public improvement shall be covered by this notice.
>
> *b.* Supports the claim with a certified statement that the principal contractor was notified in writing with a notice containing the name, mailing address, and telephone number of the person, firm, or corporation performing the labor or furnishing the materials and the name of the subcontractor for whom the labor was performed or to whom the materials were furnished, within forty-five calendar days after the labor was performed or the materials were furnished, pursuant to paragraph *"a"*.
>
> 2. Notwithstanding any other provision of this chapter, a principal contractor shall not be prohibited from requesting information from a subcontractor or from a person, firm, or corporation performing labor for or furnishing materials to a subcontractor regarding payments made or payments to be made to a person, firm, or corporation performing labor for or furnishing materials to a subcontractor.
>
> 3. This section does not apply to claims for labor filed by employees of principal contractors or employees of subcontractors.

398. *See* H.F. 458, 83rd Gen. Assemb., Reg. Sess.

399. *See Bill History for HF 458*, *supra* note 396.

> 4. A public corporation shall not retain any part of the unpaid fund due to the contractor as provided in this chapter because of the commencement of any action by the contractor against the state department of transportation under authority granted in section 613.11.[400]

At the time of publication of this Article, the Iowa House of Representatives has introduced House File 2005 which provides the same changes to Iowa Code section 573.15.[401]

The Iowa Court of Appeals also addressed several issues in a very recent case.[402] The court held the plaintiffs satisfied the itemization requirement of Iowa Code section 573.7 by listing only the amount of money owed to each of them followed by a grand total of those amounts,[403]

400. H.F. 458, 83rd Gen. Assemb., Reg. Sess.

401. H.F. 2005, 84th Gen. Assemb., Reg. Sess.

402. Trustees of the Iowa Laborers Dist. Council Health & Welfare Trust v. Ankeny Cmty. Sch. Dist., No. 10-1880, 2011 WL 4378084 (Iowa Ct. App. Sept. 21, 2011).

403. *Id.* at *7. In the case, the plaintiffs were "various union trusts set up by the Laborers' Local Union 177 and national branches of the union for payment of certain fringe benefits and dues owed to laborers and bricklayers under the collective bargaining agreements." *Id.* at *2 n.1. The plaintiffs filed one collective claim under section 573.7 with the public owner, and the claim simply listed the amount of money each plaintiff was owed followed by a grand total of those amounts. *See id.* at *4. The Iowa Court of Appeals noted that "section 573.7 does not specify what should be included in the itemization set forth in the statement or how detailed the list should be," and proceeded to conclude that listing only the respective amounts owed to each claimant satisfied the itemization requirement. *Id.* at *7 (citing IOWA CODE § 8A.514; 455E.11). The Author respectfully disagrees.

Section 573.7 says that a claimant may file "an itemized, sworn, written statement of the claim for such labor, or material, service, or transportation." IOWA CODE § 573.7 (2011). It is clear that the terms "itemized," "sworn," and "written" modify the words "statement of the claim for such labor, or material, service, or transportation" thereby mandating that such claims must be itemized, sworn to, and in writing. This conclusion is supported by *McGillivray v. District Township of Barton*, *Independent School District of Perry v. Hall*, and *Francesconi v. Independent School District of Wall Lake* where this statutory provision was strictly interpreted and its requirements enforced. *See* McGillivray v. District Twp. of Barton, 65 N.W. 974, 975 (Iowa 1896); Indep. Sch. Dist. of Perry v. Hall, 140 N.W. 855, 857 (Iowa 1913); Francesconi v. Indep. Sch. Dist. of Wall Lake, 214 N.W. 882, 884–85 (Iowa 1927). The Court of Appeals is correct that chapter 573 does not define the term "itemized," but, as it noted, *Black's Law Dictionary* defines it as "'[t]o list in detail; to state by items.'" *Trustees*, 2011 WL 4378084, at *7 (citing BLACK'S LAW DICTIONARY 837 (7th ed. 1999)). One court has defined an itemized statement as: "'[A] detailed statement of the various items, and there must be something which will furnish to the person having a right thereto

that the plaintiffs satisfied the section 573.7 requirement of a sworn claim by including a jurat[404] on the claim,[405] that unions have the right to assert chapter 573 claims on behalf of a subcontractor's union employees,[406] and that section 573.15's failure to require labor claimants to provide notice prior to filing a claim does not violate the due process or equal protection clauses of the federal and state constitutions.[407]

4. *Bonds and Sureties*

No proposed amendments were made.

information which will enable him to make some reasonable test of its accuracy and honesty.'" McWater v. Ebone, 350 S.W.2d 905, 906 (Ark. 1961) (citation omitted). This is consistent with Iowa caselaw. *See McGillivray*, 65 N.W. at 975 (holding that failure to attach the jurat to the statement was fatal to the claim because the "statute requires that the itemized statement which must be filed must be one which shows on its face that it is a sworn statement"). Furthermore, Iowa courts frequently deal with attorney fee claims where attorneys must submit itemized fee statements in support of their claims, and simply listing a total amount owed is insufficient. Boyle v. Alum-Line, Inc., 773 N.W.2d 829, 832 (Iowa 2009) ("'[T]o ensure that all necessary data is before the court, attorneys are generally required to submit detailed affidavits which itemize their fee claims.'") (citations omitted). The Iowa Court of Appeals' conclusion appears to be contrary not only to the very definition of "itemized" and to applicable caselaw on the subject, but it effectively reads the itemization requirement out of the statute. The only way the plaintiffs in that case could have provided less information about their claims is if they had omitted the amounts altogether, which would then have raised the question of whether the submissions would have even qualified as claims.

404. BLACK'S LAW DICTIONARY 926 (9th ed. 2009) (defining jurat as "a certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made").

405. *Trustees*, 2011 WL 4378084, at *7. The Court of Appeals correctly noted that Chapter 573 does not define a "sworn" statement. *See id.* However, the Iowa Supreme Court has defined a sworn claim under chapter 573 as one that is "supported by oath." *See Francesconi*, 214 N.W. at 885 (using this definition for a verified claim, yet noting verified and sworn are interchangeable in this instance). It has also concluded that section 573.7 requires the face of the claim show it is a sworn statement through the use of a jurat. *McGillivray*, 65 N.W. at 975.

406. *Trustees*, 2011 WL 4378084, at *7–8. As noted by the court of appeals, this conclusion is dictated by *Dobbs v. Knudson, Inc.*. *Id.* (citing Dobbs v. Knudson, Inc., 292 N.W.2d 692, 693–95 (Iowa 1980)).

407. *Trustees*, 2011 WL 4378084, at *9–11.

IV. ISSUES SURROUNDING CHAPTER 573

A. *Is a Prime Contractor a "Claimant" Under Chapter 573 or a "Claimant for Labor or Materials" Within the Scope of the Attorney Fee Provision of Chapter 573.21?*

First and foremost, various statutory provisions make it clear that a prime contractor was not intended to be a claimant under chapter 573. The best evidence of this is the fact that two sections—in providing a list of persons who may file lawsuits and be named as parties in such lawsuits—reference, among others, "principal contractor" and "claimant for labor or material who has filed a claim."[408] Additionally, seven other sections use language inconsistent with the idea that a prime contractor can be a claimant.[409] Finally, the bond-related sections require the prime contractor to furnish a bond against which claims can be made.[410]

408. IOWA CODE § 573.16 (2011) ("The public corporation, the *principal contractor, any claimant for labor or material who has filed a claim*, or the surety . . . may . . . bring action . . . ." (emphasis added)); *id.* § 573.17 ("The official board . . . , the *principal contractor, all claimants for labor and material who have filed their claim*, and the surety . . . shall be joined as plaintiffs or defendants." (emphasis added)).

409. *See id.* § 573.7 ("Any person . . . who has, under a contract with the *principal contractor* or with subcontractors . . . may file . . . statement of the claim . . . ." (emphasis added)); *id.* § 573.14 ("The remaining balance of the unpaid fund, or if no claims are on file, the entire unpaid fund, shall be released and paid to the *contractor*." (emphasis added)); *id.* § 573.15 ("No part of the unpaid fund due the *contractor* shall be retained as provided in this chapter on claims for material furnished . . . unless such claims are supported by a certified statement that the *general contractor* had been notified . . . ." (emphasis added)); *id.* § 573.18 (providing payment restrictions in the order of "costs of the action[,] claims for labor[,] claims for materials[, and] claims of the public corporation," and requiring any remaining retainage after satisfaction of all such claims to be "paid to the *contractor*" (emphasis added)); *id.* § 573.22 ("If, after the said retained percentage has been applied to the payment of duly filed and established claims, there remain any such claims unpaid in whole or in part, judgment shall be entered . . . against the *principal* and sureties on the bond. In case the said percentage has been paid over as herein provided, judgment shall be entered against the *principal* and sureties *on all such claims*." (emphasis added)); *id.* § 573.23 ("When a contractor abandons the work . . . [t]he only fund available for the payment of the claims of persons for labor performed or material furnished shall be the amount then due the *contractor* . . . ." (emphasis added)); *id.* § 573.25 ("The filing of any claim shall not work the withholding of any funds *from the contractor* except the retained percentage, as provided in this chapter." (emphasis added)).

410. *See id.* § 573.2 (discussing procedure when a *contractor* is required to obtain another bond in the event the surety for the initial bond becomes insolvent); *id.* § 573.3 (regarding "[t]he obligation of . . . the *contractor* to execute and deliver said bond" (emphasis added)); *id.* § 573.6(1) ("The *principal* and sureties on this bond

The conclusion that a prime contractor is not a "claimant" is supported by both caselaw and logic. In *First Federal State Bank v. Town of Malvern*, the Iowa Supreme Court concluded that "[n]othing in chapter 573 would apply to this dispute [between the owner and the prime contractor]."[411] Payment disputes regarding monies owed between public owners and prime contractors are contract disputes governed by the terms of their contracts, not the claim provisions of chapter 573.[412]

Logically, this makes sense. Retainage, by definition, is money earned by a prime contractor that is set aside to be used to pay the claims of those who have not been paid.[413] It would make little sense for a prime contractor to make a "claim" against the retainage it earned because, absent the filing of any claims, the retainage must be paid over to the prime contractor upon expiration of thirty days after completion and final acceptance of the improvement.[414] If a prime contractor was a "claimant" who was entitled to assert claims against and recover from the retainage, the result could be the absurd scenario of a prime contractor having greater rights to the retainage than other claimants who the prime contractor failed to pay.[415] This would directly counter the essential purpose of retainage—

hereby agree to pay all persons . . . having contracts directly with the *principal* or with subcontractors, all just claims due . . . ." (emphasis added)).

411. First Fed. State Bank v. Town of Malvern, 270 N.W.2d 818, 822 (Iowa 1978).

412. Nonetheless, if the dispute between the owner and prime contractor revolved around the timeliness of monthly payments, final payment, retainage, or the amount of interest owed for any late payment "for labor performed and material delivered," then chapter 573 would be relevant to resolve such a dispute. *See* IOWA CODE § 573.12 ("Payments made under contracts for the construction of public improvements . . . shall be made on the basis of monthly estimates of labor performed and material delivered . . . ."). This does not mean the prime contractor is a "claimant."

413. *See id.* § 573.13 ("[T]he retained percentage of the contract price, which in no case shall be more than five percent, constitutes a fund for the payment of claims for materials furnished and labor performed on the improvement and shall be held and disposed of by the public corporation as provided in this chapter.").

414. *See id.* § 573.14 ("If at the end of the thirty-day period claims are on file as provided the public corporation shall continue to retain from the unpaid funds a sum equal to double the total amount of all claims on file. The remaining balance of the unpaid fund, or if no claims are on file, the entire unpaid fund, shall be released and paid to the contractor.").

415. *See id.* §§ 573.18–.19 (setting claim priority according to order of filing when retainage is insufficient to pay all claims). For example, suppose a prime-contractor claimant filed its claim first and was therefore entitled to first payment out of the retainage over all other claimants. If the retainage were insufficient to pay all

to provide those below the prime contractor in the contractual chain with two possible sources of payment for their labor and materials: retainage and the bond.

In respect to bonds, a surety generally will be entitled to recover from the prime contractor any outlay it makes with respect to a project, including, but not limited to attorney fees under the general indemnity agreement.[416] Thus, it would make no sense to allow a prime contractor to obtain a claim payment from its surety because the surety would then be entitled to recover from the prime contractor the amount of that payment, plus attorney fees.[417]

Why then did the Iowa Court of Appeals suggest in *Midland Restoration Co. v. Sioux City Community School District* that prime contractors were "claimants" under chapter 573 and could obtain attorney fees pursuant to section 573.21?[418] The answer may be that the parties to the lawsuit did not dispute that prime contractors were "claimants" who had attorney-fee rights under the statute.[419] A subsequent Iowa Court of

claims, a prime-contractor claimant could obtain retainage payments that would otherwise go to other claimants. *See id.* § 573.19. This would lead to an absurd result because under such a scenario the prime contractor and the surety would be liable to pay the amount of any claims not satisfied out of the retainage. *See id.* § 573.22. In that situation, a court would likely offset any retainage payment to the prime contractor by the amount of the other valid claims that would not be satisfied out of the retainage if the prime contractor's claim was paid. The end result would be the prime contractor not receiving any retainage necessary to pay other valid claims, which is the exact result intended by chapter 573.

416. *See, e.g.*, Emp'rs Ins. v. Able Green, Inc., 749 F. Supp. 1100, 1103 (S.D. Fla. 1990) ("[T]he surety is entitled to reimbursement pursuant to an indemnity contract . . . ."); Amwest Sur. Ins. Co. v. Patriot Homes, Inc., 135 Cal. App. 4th 82, 87 (Cal. Ct. App. 2005) ("[T]he general indemnity agreement covered the appeal bond . . . ."); Home Indem. Co. v. Wachter, 115 A.D.2d 590 (N.Y. App. Div. 1985); Durkin v. Am. Gen. Fire & Cas. Co., 651 S.W.2d 41, 42, 46 (Tex. Ct. App. 1983).

417. If a surety were obligated to pay a prime contractor on a chapter 573 claim, the surety would be entitled to recover that payment, plus attorney fees, from the prime contractor under the general indemnity agreement. In such a scenario, a court would likely offset the surety's payment obligation to the prime contractor by the amount of that same retainage payment, which would result in the surety not paying the prime contractor anything on its claim—the result intended by chapter 573.

418. Midland Restoration Co. v. Sioux City Cmty. Sch. Dist., No. 02-0625, 2003 WL 21229272 , at *2, *5 (Iowa Ct. App. May 29, 2003).

419. *See id.* ("While the District recognizes an award of appellate attorney fees would be authorized under Iowa Code section 573.21, it argues that the amount of fees claimed is excessive." (footnote omitted)).

Appeals case suggests that was the reason.[420] To the extent that *Midland* stands for the proposition that a prime contractor is a "claimant" under chapter 573 and is entitled to attorney-fee rights under the section 573.21,[421] it is incorrect. It appears the *Saydel* court recognized this and correctly took steps to disavow any such holding.[422]

B. *Can a Chapter 573 Claimant Enforce the Terms of Its Contract?*

The underlying reason chapter 573 claimants cannot enforce the terms of their contracts is because chapter 573 does not permit them to do so. If a court were inclined to disagree with this conclusion, then enforcement of a claimant's contract should be limited to those claimants who contract directly with prime contractors.

Iowa Code section 573.7 is the principal section on this issue, and it states, in relevant part:

> [A claimant] who has, under a contract with the principal contractor or with subcontractors, performed labor, or furnished material, service, or transportation, in the construction of a public improvement, may file . . . an itemized, sworn, written statement of the claim for such labor, or material, service, or transportation.[423]

Five Iowa Supreme Court cases directly held or commented that claimants cannot enforce the terms of their contracts and are limited to recovery as provided by the statute.[424]

420. Saydel Cmty. Sch. Dist. v. Denis Della Vedova, Inc., No. 06-0070, 2007 WL 1201748, at *2 (Iowa Ct. App. Apr. 25, 2007) ("As we have already mentioned, the *Midland* court was not presented with and did not address the question of whether section 573.16 created a private cause of action for a general contractor against a public corporation that withholds payments; the *Midland* court only addressed whether Iowa's competitive bidding law had been violated and whether the defendant's agent in that case had authority to order the work at issue.").

421. *Midland*, 2003 WL 21229272, at *2, *5.

422. *Saydel*, 2007 WL 1201748, at *2.

423. IOWA CODE § 573.7 (2011).

424. *See* Melcher Lumber Co. v. Robertson, 250 N.W. 594, 595 (Iowa 1933) ("[T]he forms which were constructed from the lumber furnished by the plaintiffs were not intended to become a part of the finished improvement; nor did they become a part thereof. They were useful, and even necessary, in a practical sense to the construction of the improvement. But they were such, not as a part of the improvement, but as a necessary tool or equipment for the construction thereof. They were capable of use in successive improvements as other equipment might be. True the lumber contained therein lost its marketable value for other purposes; but the same thing is true as to other equipment of the contractor. It wears out by use; some of it sooner and the rest

of it later. It is to be conceded that the relation of this material to the construction of the improvement is close. For that reason it presents an appeal to the legislative judgment for its inclusion within the terms of the statute. Such inclusion is a legislative function and not a judicial one."); Byers Mach. Co. v. Iowa State Highway Comm'n, 242 N.W. 22, 24–25 (Iowa 1932) ("Perhaps it is true that [the subcontractor] owes [the claimant] the $1,200 rental on the machinery. This fact . . . does not mean that said liability on [the subcontractor's] part must be transferred over onto the funds due [the general contractor], unless the service was furnished 'in' the construction of the public improvement. Obviously, the rental under the lease contracts between [the claimant] and [the subcontractor] would continue to run whether or not the machinery was used in the construction of the public improvement. But the only portion of such rental that can be imposed as a lien upon the funds belonging to [the general contractor] is such portion, if any, that accrued for service in the construction of a public improvement. *The relief sought by [the claimant] is to be granted, if at all, not because rental have accrued under the rental contracts with [the subcontractor], but rather because compensation is due for service furnished in the construction of the public improvement. Consequently [the claimant] is not entitled to relief in the case at bar because it has not shown the amount or extent of the assumed service furnished by it in the construction of the public improvement.*" (emphasis added)); Rainbo Oil Co. v. McCarthy Improvement Co., 236 N.W. 46, 49 (Iowa 1931) ("It is significant that the Legislature changed the language of the statute so as to require the furnishing of material '*in* the construction of a public improvement' instead of furnishing material '*for* the construction of any public building, bridge or other improvement.' It is also significant that the change was made at the same session of the Legislature which enlarged the ordinary meaning of the word 'material.' In taking the two sections together, it is apparent that it was the legislative intent that a recovery could be had for those things denominated in section 10299, Code 1927, as material which, under section 10305, Code 1927, were furnished and used '*in the construction of a public improvement*,' that is, used in any proper way in connection with the work of constructing the improvement. While gasoline, oils and greases consumed or used by haulers in hauling other material, which actually go into the physical improvement, constitute material 'furnished in the construction of a public improvement,' the plaintiff has not shown that any definite portion of the gasoline, oils, and greases for which claim is made was so used. The relief given to one as against the unpaid portion due to a contractor for public improvements is *purely statutory in its character* and there can be no claim established against the unpaid portion of the fund, *except as stated in the statute*.").

In *Bingham v. Blunk*, the prime contractor, Blunk, subcontracted with Seddon, who hired Bingham as an employee and rented Bingham's backhoe for work on a public project. Bingham v. Blunk, 116 N.W.2d 447, 448 (Iowa 1962). At trial, Bingham presented daily time records, notes, and other evidence to prove the *actual* number of hours the backhoe was used. *Id.* The district court held the "'three exhibits taken together with the testimony of plaintiff and Mr. Seddon satisfactorily establishe[d] *the number of hours the backhoe was in use* and the agreed price per hour. The *price per hour does not appear to be unreasonable*.'" *Id.* (emphasis added). The district court did not simply adopt the contractual rate between Seddon and Bingham. *See id.* Rather, it used the contractual rate as evidence relating to the value of the labor furnished and then concluded the value claimed was reasonable. *See id.* It should be noted that there would have been no reason for the district court to have

engaged in such analysis and discussion if the contractual rate were, as a matter of law, the measure of recovery.

On appeal in *Bingham*, the defendant's arguments were focused on alleged errors in admitting the above-described evidence, which concerned the number of hours the backhoe was actually used. *Id.* at 448–49. The supreme court described the relevant statutory provisions and evidence presented by the claimant to prove his chapter 573 claim as follows:

> Plaintiff's claim is for use of equipment in 1955 on a public improvement. The statutes then in force are found in the Code of 1954. Then, and now, chapter 573 of the Code, I.C.A. related to "Labor and Material on Public Improvements." Section 573.1(4) provides that the word "material" includes equipment. Section 573.7 provides that "Any person . . . who has, under a contract . . . with subcontractors, . . . furnished material, . . . in the construction of a public improvement, may file, with the officer, board, or commission authorized by law to let contracts for such improvement, an itemized, sworn, written statement of the claim for . . . material . . . . The statutes provide for an action in equity to adjudicate all claims.
>
> Under the statutes plaintiff was required *to prove his contract with Seddon, who was a subcontractor, the furnishing of equipment for a public improvement, the filing of his claim and the amount and nonpayment thereof. These things he did by his own testimony, the testimony of Seddon, his "boss", and by written records*.

Id. at 449–50 (alterations in original) (emphasis added). Nowhere does the court state that Bingham only had to prove the terms of his contract with Seddon or the amount of his contract price that was unpaid. If the evidence that the court so painstakingly analyzed was completely irrelevant, then there would certainly have been no reason for the court to engage in the lengthy discussion about it. It could have simply said there was no dispute that Seddon and Bingham had a contract for the agreed upon rate, and thus Bingham was entitled to recover the remaining amount on that contract.

In *Dobbs v. Knudson, Inc.*, the court framed the issue as follows: "The question here is whether health, welfare and pension trusts may make public improvement lien claims for unpaid sums which subcontractors on the public improvement were obligated to pay for their employees." Dobbs v. Knudson, Inc., 292 N.W.2d 692, 693 (Iowa 1980). The district court granted the defendant's motion for summary judgment against the trusts, and it was this ruling that the Iowa Supreme Court was reviewing. *See id.* at 694. The defendant's argument on summary judgment "was based on its allegation that 'the items for which claim [was] made by said trusts [were] not claims for "labor or service" within the meaning of section 573.7, Code of Iowa,' and the trial court sustained the motion on that ground. The [district] court reasoned that the claims did not come within the section because they were for 'fringe benefits' rather than wages." *Id.*

The supreme court began its analysis by stating "[s]ection 573.7 requires that the *claim* be for 'labor' or 'service.'" *Id.* (emphasis added). In the very next sentence the *Dobbs* court stated, "Whether a claim is for labor or service *is determined not by the nature of what the claimant receives* but rather by the nature of what is done to be

If the legislature wanted to permit claimants to enforce the terms of their contracts, it could easily have done so with words such as "under the terms of their contracts." The legislature used phrases referring to the contract in other parts of chapter 573,[425] so its failure to do so in section 573.7—while describing the scope of claims—is strong evidence it did not intend for claimants to enforce their contracts.[426] It is also strong evidence

entitled to receive it." *Id.* (emphasis added). The italicized language makes clear that the terms of a claimant's contract—what the defendant in this case was relying on as the source of what the claimants were entitled to receive for the labor or service—is *not* relevant to the question of whether a claim is for labor or service. What is relevant is "what is *done* to be entitled to receive it," which is determinable without reference to a claimant's contract. *Id.* (emphasis added).

Thus, *Dobbs* reinforces the position that the terms of a claimant's contract are irrelevant to determining relief under chapter 573. *Dobbs* simply states the obvious: labor is labor under section 573.7, regardless of what one is contractually entitled to receive for it—be it wages, fringe benefits, merchandise, lodging, meals, or anything else. *See id.*

The United States District Court for the Northern District of Iowa reached a contrary conclusion. *See* Accurate Controls, Inc. v. Cerro Gordo Cnty. Bd. of Supervisors, 2009 WL 427374 (N.D. Iowa Feb. 23, 2009). However, the context of that finding was different; it was a discovery dispute in which the district court judge affirmed the decision on appeal but did not expressly address or decide the issue at hand. Accurate Controls, Inc. v. Cerro Gordo Cnty. Bd. of Supervisors, Nos. C08-3021-MWB (N.D. Iowa May 12, 2009). The district court judge later declined to address the issue in the parties' summary judgment motions because it was mooted by other rulings. Accurate Controls, Inc. v. Cerro Gordo Cnty. Bd. of Supervisors, 627 F. Supp. 2d 976, 1006-07 N.D. Iowa 2009).

425. *See* IOWA CODE § 573.2 (2011) (stating "when the contract price equals or exceeds . . . [or] does not equal that amount"); *id.* § 573.5 (stating "in an amount not less than seventy-five percent of the contract price"); *id.* § 573.7 (stating "under a contract with the principal contractor, or with subcontractors"); *id.* § 573.10(2) (stating "has not paid the full contract price"); *id.* (stating "adjudicate rights in and to the unpaid portion of the contract price . . . ."); *id.* § 573.12(1) (stating "lesser of five percent or the amount specified in the contract between the contractor and the subcontractor"); *id.* § 573.13 (stating "the retained percentage of the contract price").

426. *See* Econ. Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259 (Iowa 1983) (failing to exactly refute this position); Joseph T. Ryerson & Son, Inc. v. Schraag, 229 N.W. 733 (Iowa 1930) (failing to exactly refute this position). In *Schraag*, the court stated that the claimant "duly filed its claim for the balance due it upon its said contract." *See Schraag*, 229 N.W. at 734. This was simply meant as a factual recitation of the case, not a pronouncement on a legal issue. Second, the defendant prime contractor argued (1) that Ryerson could not legally maintain the case because it was a foreign corporation, (2) that the claim was barred because the prime contractor settled the matter with its subcontractor, with whom Ryerson had its contract, and (3) that the claim was barred under an estoppel theory because Ryerson took an assignment for amounts the prime contractor owed the subcontractor. *Id.* at 734–36. Thus, the court

that the legislature intended chapter 573—like chapter 572[427]—to compensate claimants only for work that actually adds value to the property, not to make contracts enforceable. Finally, the rule that a claimant's contract is irrelevant to the scope of its recovery is consistent with the related rule that the actual language of a statutory bond, like those provided under chapter 573, is irrelevant because its terms are based solely on the statutory language.[428]

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was not presented with and did not decide the issue of whether the contracts can be enforced. Finally, the only language in the case relevant to the issue is where the court stated that "the principal contractor and the surety on his bond, *under the terms of the statute* (Code 1927, §10304) are liable to pay 'subcontractors, all just claims due them *for labor performed or materials furnished*, in the performance of the contract on account of which this bond is given.'" *Id.* at 735 (emphasis added). This quote was not made in the context of addressing the issue, so it really is not helpful at all. At least the court showed it understood that the liability of the prime contractor and surety is defined by the statute, not by the contract. *See id.*

In *Economy Forms*, the defendants never raised the issue. As stated by the *Economy Forms* court, the defendants argued "that certain 'equitable considerations' demonstrate that judgment should have been entered for a lesser amount." *Econ. Forms Corp.*, 340 N.W.2d at 264. Additionally, in the section of the opinion entitled "Amount of judgment," the court never cited chapter 573—rather, it only cited one Iowa case that had nothing to do with the issue. *Id.* at 264–65 (citing Lennox Indus. Inc. v. City of Davenport, 320 N.W.2d 575, 577 (Iowa 1982)). It would certainly be strange for the *Economy Forms* court to render a holding on this issue without even citing to chapter 573 or any relevant case.

Finally, Iowa Code section 573.6(1) is also not to the contrary. IOWA CODE § 573.6(1) (2011). It states in relevant part that one of the terms in all chapter 573 bonds is that a surety agrees to pay to all claimants "all just claims due them for labor performed or materials furnished." *Id.* Importantly, the statute does not use the language "all just claims due them under their contract" or similar wording. Instead, it uses the words "for labor performed or materials furnished," which is consistent with the language of section 573.7. *Compare id.*, *with id.* § 573.7.

427. *See, e.g.*, Gollenhon, Schemmer & Assocs., Inc. v. Fairway-Bettendorf Assocs., 268 N.W.2d 200, 201–02 (Iowa 1978) (holding architect was not entitled to mechanic's lien because the work performed, although necessary and valuable to the project, did not improve the property).

428. *See, e.g.*, Cities Serv. Oil Co. v. Longerbone, 6 N.W.2d 325, 327 (Iowa 1942); Queal Lumber Co. v. Anderson, 229 N.W. 707, 709 (Iowa 1930); Monona Cnty. v. O'Connor, 215 N.W. 803, 805–06 (Iowa 1927); Philip Carey Co. v. Md. Cas. Co., 206 N.W. 808, 809–10 (Iowa 1926); Standard Oil Co. v. Marvill, 206 N.W. 37, 39 (Iowa 1925); Neb. Culvert & Mfg. Co. v. Freeman, 198 N.W. 7, 11 (Iowa 1924); Schisel v. Marvill, 197 N.W. 662, 663 (Iowa 1924); United States Fid. & Guar. Co. v. Iowa Tel. Co., 156 N.W. 727, 733 (Iowa 1916); City of Adel v. Emp'rs Mut. Cas. Co., No. 00-0592, 2002 WL 31115242, at *2 (Iowa Ct. App. Sept. 25, 2002); *see also* Field v. Schricher, 14 Iowa 119, 124 (1862).

Despite the above statutory provisions and caselaw, there are federal cases interpreting the Federal Miller Act,[429] as well as Iowa cases interpreting chapter 572,[430] that seem at odds with the above conclusion. However, on closer examination, they are not necessarily inconsistent.

In respect to the Federal Miller Act, its past[431] and current[432] statutory language is different from the pertinent language in chapter 573.[433] In *Taylor Construction, Inc. v. ABT Service Corp.*, the Ninth Circuit explained that,

> What is disputed here is not who can recover but rather *what* Taylor Construction can recover. Clearly, the 'who' is limited to those supplying 'labor or material.' The 'what' is not so limited and is described simply as 'sums justly due.' 'Sums justly due' refers back to the term 'paid in full' contained in the earlier part of that same

429. *See, e.g.*, Taylor Constr. Inc. v. ABT Serv. Corp. Inc., 163 F.3d 1119, 1122–23 (9th Cir. 1998) (allowing recovery according to terms of contract).

430. *See, e.g.*, Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 193–94 (Iowa 1987) (agreeing with district court's computation of damages based on terms of contract).

431. In the late 1990s, the relevant Miller Act statute stated:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d–1 of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him . . . .

40 U.S.C. § 270b(a) (Supp. 1999).

432. The current version of the statute states:

> Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

40 U.S.C. § 3133(b)(1) (2006).

433. *See* IOWA CODE § 573.7 (2011).

sentence.[434]

Based on this discussion, the court held that a claimant under the Federal Miller Act could enforce the terms of its contract even if such recovery included items that were not labor or materials.[435] The same cannot be said of Iowa Code chapter 573.

In contrast to the Federal Miller Act,[436] Iowa Code section 573.7 limits both the "who" and the "what" to the furnishing of labor or material, and it further limits furnishing of labor and material to those "in the construction of a public improvement."[437] Section 573.6 also limits the "what" to labor or materials.[438] Therefore, the Federal Miller Act's statutory language is qualitatively different from the language of chapter 573, which supports the conclusion that Federal Miller Act decisions on the issue should not be followed in interpreting this issue under chapter 573.[439]

Iowa's mechanic's lien decisions on the issue are more difficult to distinguish. Various Iowa cases have held a lienholder is entitled to recover an unpaid contract price;[440] however, in every one of those cases,

434. *Taylor Constr.*, 163 F.3d at 1122.

435. *Id.* at 1123.

436. 40 U.S.C. § 270b(a) (1994 & Supp. 1999) ("Every person who has furnished labor or material . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the *sum or sums justly due him* . . . ." (emphasis added)).

437. IOWA CODE § 573.7 ("Any person . . . who has . . . performed labor, or furnished material, service, or transportation . . . may file . . . claim *for such labor, or material, service, or transportation*." (emphasis added)).

438. *Id.* § 573.6 ("The principal and sureties . . . agree to pay . . . all just claims due them *for labor performed or materials furnished* . . . ." (emphasis added)).

439. The Iowa Supreme Court has refused to follow Miller Act cases in deciding chapter 573 issues. *See, e.g.*, Iowa Supply Co. v. Grooms & Co. Constr., Inc., 428 N.W.2d 662, 666 (Iowa 1988) (following California law in adopting the joint-payee-check rule under chapter 573 and refusing to follow Federal Miller Act cases to the contrary).

440. *See, e.g.*, Rohlin Constr. Co. v. Lakes, Inc., 252 N.W.2d 403, 406 (Iowa 1977) (allowing recovery of the entire contract price, not just reasonable value of services). Although it is beyond the scope of this Article, the Author respectfully disagrees with those Iowa cases that permit a lienholder to enforce the terms of its contract in a chapter 572 lawsuit. *See* IOWA CODE § 572.2(1) ("Every person who shall furnish any material or labor for, or perform any labor upon . . . or repair thereof . . . shall have a lien upon such building or improvement . . . *for the material or labor furnished or labor performed*." (emphasis added)); *see also* Farmers Coop. Co. v. DeCoster, 528 N.W.2d 536, 537, 539 (holding plaintiff was not entitled to recover for

the referenced contracts were between the lienholder and the owner.[441] Thus, if there is a rule in mechanic's lien cases that a lienholder is entitled to enforce the terms of its contract, it is arguably limited to those lienholders who have contracts directly with the property owners. Because it is the property owners, through their property, who are ultimately responsible to pay a lienholder's claim if it is successful,[442] enforcing the terms of a lienholder's contract against the property owner with whom it contracted would be similar to enforcing the contract in a breach of contract action between the same parties.[443]

With respect to chapter 573, prime contractors are ultimately liable to pay any valid chapter 573 claims, either from their retainage or from the surety bond for which they must indemnify the surety.[444] Thus, allowing a

certain items furnished under a contract because they did not fall within the definition of "material" and, thus, were not lienable); Stone, *Mechanic's Liens in Iowa—Revisited*, *supra* note 1, at 9–23 (discussing a variety of statutory limitations on a lienholders' measure of recovery, including, but not limited to, the definition of "labor" and "materials").

441. *See, e.g.*, *Rohlin Constr.*, 252 N.W.2d at 404–05 (noting the contract was between the plaintiff–contractor who held the lien and defendant–owner); Olberding Constr. Co. v. Ruden, 243 N.W.2d 872, 874 (Iowa 1976) (noting the contract was between plaintiff–contractor and defendant–owner); Denniston & Partridge Co. v. Mingus, 179 N.W.2d 748, 749 (Iowa 1970) (noting contract was between plaintiff–builder and defendant–owner); Welter v. Heer, 181 N.W.2d 134, 135–36 (Iowa 1970) (describing the contract between plaintiff–remodeler and defendant–owner); S. Hanson Lumber Co. v. De Moss, 111 N.W.2d 681, 683 (Iowa 1961) (noting contract was between codefendant–owner and codefendant–builder who asserted cross-claims against one another in the suit); Farrington v. Freeman, 99 N.W.2d 388, 389 (Iowa 1959) (stating the contract was between plaintiff–builder and defendant–homeowner); Stratmeyer v. Hoyt, 174 N.W. 243, 243 (Iowa 1919) (involving contract between plaintiff–builder and defendant–estate of cemetery plot); Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 193 (Iowa Ct. App. 1987) (describing contract between plaintiff–remodeler and defendant–owner).

442. *See* W.P. Barber Lumber Co. v. Celania, 674 N.W.2d 62, 64–65 (Iowa 2003) (delineating and applying this rule in assessing the judgment).

443. It is only similar, not the same. The difference between a breach of contract case and a mechanic's lien case is in enforcement of the judgments. In a breach of contract action, the successful plaintiff would be an unsecured judgment creditor subject to all applicable rules and limits for collecting judgments. In a mechanic's lien action, however, a successful plaintiff is akin to a secured creditor with respect to the property improved and is in a better position than an unsecured creditor. *See In re* Carney, 396 B.R. 22, 25–27 (Bankr. N.D. Iowa 2008) (discussing the classification and subsequent prioritizing of a mechanic's lien).

444. IOWA CODE § 573.22 ("[J]udgment shall be entered for the amount thereof against the principal and sureties on the bond.").

claimant to enforce a contract against a prime contractor would be similar to[445] enforcing the contract in a breach of contract action between the same parties.[446]

Notwithstanding, a claimant should not be able to enforce the terms of its contract in a chapter 573 action. Neither the statutory language nor caselaw supports such a result. If the mechanic's lien rule was adopted for chapter 573 cases, it should be limited to those claimants who contract directly with prime contractors;[447] such a limitation would guard against the

445. Again, it is only similar, not the same. In a chapter 573 action, a successful claimant has priority to the retainage over nonclaimants and the prime contractor and its mortgagees and assignees, such as banks. First Fed. State Bank v. Town of Malvern, 270 N.W.2d 818, 820 (Iowa 1978) ("Article 9 of the UCC is not entirely irrelevant, however, for the bank's assignment is a perfected security interest. The bank's position is thus defined by § 554.9318(1)(a), The Code. Its rights are essentially the same as what existed under prior law. That is to say that the assignee acquired only such rights as the contractor had in the fund. 'The claims of the assignee are no higher or greater than those of the contractor.'" (citations omitted)). A successful plaintiff in a breach of contract action would be an unsecured creditor with inferior priority to the prime contractor's mortgagees and assignees.

446. From the surety's standpoint, however, the difference between a breach of contract action and a chapter 573 action is significant. In a breach of contract action untethered to chapter 573, the surety has no liability. In a chapter 573 action, the surety is liable for any amounts due claimants that are not satisfied out of the retainage. IOWA CODE § 573.22. If the claimant did not contract with the prime contractor, then, from the prime contractor's perspective, the difference between a chapter 573 claim and a breach of contract claim would be significant for qualitatively the same reasons.

447. *See, e.g.*, Lumberman's Wholesale Co. v. Ohio Farmers Ins. Co., 402 N.W.2d 413, 415 (Iowa 1987) (drawing the line between claimants who have contracts with prime contractors and those who do not).

> Our review of the *Longerbone* decision suggests that the type of "piggybacking" which was permitted *should be limited to claims of persons or entities who have contracted directly with the general contractor*. As to such claims, it does not extend the general contractor's liability to permit claims against funds owed the general contractor which have been retained by the public corporation as a result of claims filed by other parties. *The general contractor is liable for such claims in any event under general principles of contract law*. The timely filing claimants are not prejudiced because they will receive any deficiency from the general contractor's surety.
>
> *A different situation prevails, however, with respect to claims on behalf of subcontractors or material suppliers who do not have contracts with the general contractor.* Failure to require the latter type of claimant to file timely claims or *to comply with the notice requirement of section 573.15 would serve to extend the liability of the general contractor beyond* that established by either the statutory scheme or *the contractor's contractual liability*. We conclude the

potential unfairness in enforcing claimants' contracts against parties with whom they did not contract.[448]

C. *Does a Prime Contractor Have to Furnish a Second Bond to Obtain Release of Retainage Under Section 573.16*

Iowa Code section 573.16 states that a prime contractor can obtain release of retainage despite the filing of claims by "filing with the public corporation or person withholding funds, a surety bond in double the amount of the claim in controversy, conditioned to pay any final judgment rendered for the claims so filed."[449] If a prime contractor wants to obtain all of the retainage being held because of the filing of claims, this language clearly requires the posting of a bond in double the amount of all claims as a condition to the prime contractor obtaining the retainage.[450] The question becomes whether the bond provided by the prime contractor at the beginning of the project, as required by chapter 573,[451] suffices under section 573.16, or whether the prime contractor has to purchase and post another bond.[452]

If the initial bond furnished by the prime contractor at the beginning of the project is sufficient to cover the required amounts under section 573.16, then another bond should not be required.[453] After all, sections 573.6(1) and 573.22 state that a surety is liable, under the initial bond, to pay all valid claims that are not satisfied[454] out of the retainage.[455] Thus, the

> court of appeals was correct in holding that Lumberman's should not be permitted to join in a claim against the retainage generated by claims filed by Riverview Products, Inc. or Parkview Company.

Id. (emphasis added).

448. For example, suppose a subcontractor entered into an objectively unreasonable contract with a claimant, whereby the subcontractor was obligated to pay the claimant an amount that was double the reasonable value of the labor or materials being furnished by the claimant. If the subcontractor fails to pay the claimant and the claimant files a chapter 573 claim, it seems patently unfair for the prime contractor and surety to be liable for the contract amount because (1) they did not enter into or agree to the contract terms, and (2) the reasonable value they received from the claimant is half of the claim amount. Conversely, it does not seem unfair to limit the claimant's recovery to the reasonable value of the labor or materials it furnished.

449. IOWA CODE § 573.16.

450. *Id.*

451. *Id.* §§ 573.2–.5.

452. *See id.* § 573.16.

453. *See id.*

454. *See id.* § 573.22.

primary, if not sole, purpose of section 573.16's bond requirement—security for payment of valid claims—is already satisfied by the initial bond.[456] Requiring the prime contractor to purchase and furnish another bond is redundant and imposes needless expense upon the prime contractor.

If, however, the initial bond requirement has been waived for a prime contractor who is a TSB pursuant to section 573.2,[457] the TSB should be required to purchase and furnish a bond to cover the required amount. Similarly, if a prime contractor furnished an initial bond, but its amount is insufficient to cover the required amounts under section 573.16, it should be required to purchase and furnish another bond to cover the deficiency amount.

455. *See id.* § 573.6.

456. *See id.* § 573.16.

457. *See id.* § 573.2 (noting "a bond [may be] waived pursuant to section 12.44").