Mechanic's Liens in Iowa – Revisited

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The Iowa Mechanic's Lien Statute started 150 years ago with the premise that improvements to land stand as security for the workers who built the improvement. The statutes's evolving set of rules reflects that construction remains a risky business and costs often cannot be accurately known when a job starts. The legislative changes during the last 20 years shift risk away from owners of property to contractors, subcontractors, and suppliers, presumably because construction companies are more familiar with and better able to protect themselves from the financial risks of construction.[2] The legislative changes since 1980 substantially curtail the mechanic's lien remedy for almost all contractors. During the same 20 years, the Iowa appellate courts have considered about sixty mechanic's lien cases. The purpose of this article is to review the legislative and judicial developments during the past twenty years and supplement the article entitled *Mechanic's Liens In Iowa* published in 1980.[3]

I. THE ELEMENTS OF A MECHANIC'S LIEN CLAIM

II. *"By Virtue of Any Contract"* Every mechanic's lien claimant must have a contract.[4] The Iowa Supreme Court has stated:

> Fundamental to establishment of a mechanic's lien on property is proof of such an express or implied contractual arrangement binding the person possessing an ownership interest.[5]

Where a contractor without any contract with the owner removed an old driveway and replaced it with one accessible to a newly paved city street, the mechanic's lien could not be enforced because there was no contract with the owner or its agent.[6]

The mechanic's lien statute is liberally construed to promote restitution, the prevention of unjust enrichment, and to assist parties in obtaining justice.[7] These equitable principles, however, do not supplant the need for a contract with an owner to recover on a mechanic's lien.[8]

An action on a mechanic's lien is an action on a contract.[9] The enforcement of a mechanic's lien is not an action *in rem*, but must be commenced against a named defendant. The reason is that an action for foreclosure of a mechanic's lien must be referable to a contract with some person with a beneficial interest in the property. A claim against the property in the absence of such contract could not be maintained.[10]

The contract may be express or implied.[11] The contract is implied in fact when the parties show their assent by their acts.[12] An express contract and an implied contract cannot coexist with respect to the same subject matter, and the law will not imply a contract where there is an express contract.[13] One who pleads an express contract cannot ordinarily recover on an implied contract or *quantum meruit*.[14] An implied contract may exist where there is an express contract if the implied contract covers points not covered by an express contract.[15] An implied contract on a point not covered by an express contract is not superseded by the express contract.[16] Mere knowledge by an owner that a supplier is delivering materials to the property is not sufficient for a contract to be implied in fact.[17] Providing benefit to or enrichment of an owner by mistakenly performing labor on the property is not sufficient to imply a contract.[18]

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

The contract required by Section 572.2 must be with an owner, the owner's agents, trustee, contractor or subcontractor to establish a lien.[19] The Supreme Court has refused to enforce a mechanic's lien when a contractor has performed pursuant to an express contract with someone other than the person who has a present and beneficial interest in the property.[20] A contract with a prior owner is insufficient, even if the workers were not told of the change in the ownership.[21] Even if the prior owner is contractually required by the sales documents to improve the property as a condition of the sale, the prior owner had no beneficial interest in the property at the time the contracts were made and the liens could not be enforced.[22] The person with whom the contractor has a contract must have a present beneficial interest in the property to subject the property to a lien.[23] A prior owner might be deemed the owner's contractor within the meaning of Section 572.2 and the mechanic's lien's claimants could claim as subcontractors.

A person who has an ownership interest in the property is not able to enforce a mechanic's lien claims against the property for work performed.[24] Even though there were other co-owners, the person with an interest in the property was not entitled to a mechanic's lien.

The result in *Clemens* appears inconsistent with the result in *A & W Electrical Contractors, Inc. v. Petry.*[25] In the later case, a clause requiring a tenant to obtain all licenses and permits necessary to operate a tavern impliedly required the tenant to improve the property because the license and permit could only be obtained after the wiring was improved. Since the lessor had a contractual arrangement requiring the lessee to improve the property, the mechanic's lien claimant who had contracted with the lessee could charge its lien against the lessor's interest.[26] In *Clemens*, the party that purchased the property required the seller to improve the property as a condition of the sale, but the lien claims by parties who had contracted with the

previous owner were denied because the previous owner had no beneficial interest in the property.

1. Owner's Agent The statute permits enforcement of a mechanic's lien against an owner whose "agent" has made a contract with a contractor.[27] For an agency relationship to exist, the agent must have the principal's express or apparent authority to act as agent for the owner in negotiations for labor and material.[28] Agency requires that the principal manifest to the agent that it may act on the principal's behalf and the agent must consent so to act.[29] For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority.[30]

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

Iowa law provides that a contractor is entitled to a mechanic's lien on the lessor's property where the "lessor has by express or implied agreement with his lessor contracted for improvement of his real estate by the lessor."[31] The Iowa Supreme Court has held that where the lease is drafted so that the improvements may become the property of the lessor after a comparatively short time, where the improvement creates an additional value included in the sums to be paid as rental, and where the lease agreement requires the lessor to improve the property, a mechanic's lien will attach to the lessor's interest.[32] In such circumstance a mechanic's lien will attach to both the lessee's and the lessor's interest.

In one recent case, however, the test appears to be whether the lessor has contracted for the improvement. In that case, a lease clause requiring the tenant to obtain all the licenses and permits necessary to operate a tavern impliedly required the tenant to improve the property because the license and permit required to operate the restaurant could only be obtained after the wiring was improved.[33] However, in an earlier Court of Appeals case, a lease requiring the

lessee to leave the property in the same condition as it was received was not sufficient to allow enforcement of a lien by a contractor that had furnished 10 overhead doors for the repair of the property.[34] These two holdings appear inconsistent. In both cases, lease clauses impliedly required the tenant to improve or repair the property. In the *Overhead Door* case, the Iowa Court of Appeals actually said that by replacing the damaged doors, the lessee was acting under the required terms of the lease, but not "as agent, trustee, contractor, or subcontractor" for the owner. In *Overhead Door*, the owner even told the lessee the replacement doors had to have windows, just as the original ones had windows. The owner saw the claimant's truck on the property, but the knowledge of the improvement by the owner is not sufficient standing alone to subject the owner's interest to the lien. The Court of Appeals held that the supplier did not show by a preponderance of evidence that an express or implied agreement existed whereby the lessor was contractually bound to improve the lessor's property.[35]

3. The Contractor as Agent A contractor may be recognized as an agent of the owner for purposes of a mechanic's lien.[36] However, naming the general contractor as the owner did not perfect a mechanic's lien against the true owner. If the contractor is the agent of the owner, arguably, persons who do business with that agent are in fact doing business with the owner and would be contractors rather than subcontractors. There are several advantages to being a contractor rather than a subcontractor, including timely filing requirements, attorney's fees, and notice requirements.

4. Vendee as Agent For a vendor's interest to be subject to a mechanic's lien claim arising from a contract with the vendee, the vendor must have had some active involvement in requiring or ordering the work.[37] Mere knowledge that the work is being performed is not enough to charge the vendor's interests.[38] If the contract vendors did not

impliedly contract for the improvements, then the vendor's interests are not subject to the mechanic's lien, and only the vendee's interest is subject to the lien.[39] Also where the vendee has completed the purchase price and received title to the property, persons who subsequently make a contract for improvement of the property with the prior owner do not have rights against the new owner who has paid in full for the property.[40] A contract vendee has sufficient interest in the property so that a contract with the vendee subjects the vendee's interest to the mechanic's lien.[41]

Where an agency relationship is implied, the court may nevertheless find that the agent has exceeded the scope of its implied authority. The Iowa Court of Appeals found that making a contract for improvement was not an ordinary and necessary expense for operation and maintenance of the land by the implied agent, and lacking such proof, the mechanic's lien would not apply to the land.[42]

D. *"Furnishing Any Material or Labor"*

1. *The Meaning of "Furnished"*

The statute requires that labor or material be "furnished" for improvement, alteration, or repair.[43] Work off the project site that never becomes part of the improvement of the project site is not a lienable item.[44]

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

The legislature amended Section 572.1(2) by adding the word "tools" in the definition of material.[45] This change was done at the same time as the creation of a lien for renting material (including tools) to persons at the site.[46] Accordingly, the furnishing of tools for repair or

improvement of real property or the renting of tools entitles the person to a mechanic's lien. The questions left unanswered by the legislative amendment are many:

(1) How are the tools used to be valued?

(2) Is the "reasonable value" of hand tools and other tools lienable?

(3) Is the appropriate charge the "normal wear and tear" on tools if the tools are not rented to the owner?

(4) Are these charges duplicative of overhead charges normally included in the contract price?

The legislature added a new section regarding rental of material to an owner which makes rented items lienable.[47] The purpose of the new section is to give persons who rent material to the owner or certain others a lien to secure the rent payment. The chargeable amount is the reasonable rental value for periods of actual use and reasonable periods of nonuse taken into account in the rental agreement. A presumption is created that the delivery of material to a site means the material was used for alteration, construction, or repair of the site. The language is uncertain whether this presumption applies only to rented material or to all material. There is no limitation in this sentence for only rented material, although the first two sentences appear to be limited to rental situations. An exception to the presumption is for recoveries under a surety bond. The logic for including this exception is not clear. A claim on a surety bond is not a mechanic's lien claim and would not be covered by this chapter, unless a surety bond were a mechanic's lien discharge bond. In the case of a mechanic's lien discharge bond, the reason for eliminating the presumption is still not clear. A party could potentially obtain an advantage of eliminating the presumption by filing a discharge bond, and thereby requiring the person furnishing the material to prove facts its otherwise would not have to prove if no discharge bond

had been filed. The origin of this exception for surety bonds is not clear and the reason for the exception is also a mystery.

4. *Non Lienable Items*

Gasoline, diesel fuel, and petroleum are not lienable materials under the mechanic's lien statute.[48] The Iowa Court of Appeals, *in dicta*, questioned whether ten new replacement doors valued at over $17,000 were not "substantial improvements or alterations," but were merely repairs. The case suggests that items of repair may not be lienable while improvements or alterations would be lienable. The decision in this case, fortunately, was not made on this basis.[49] Under the terms of the statute, there is no distinction between "improvements, alterations, or repairs," and all three are equally lienable.

6. *The Requirement of a Visible Improvement*

The Supreme Court requires that the furnished material or labor constitute visible notice of an improvement; and absent actual, visible improvement, there is no lien.[50] A landsurveryor's markers placed on the premises assisted in surveying the property and were visible evidence of the architect's work, but they did not "improve" the land within the meaning of the statute and no lien was available.[51] This work was preliminary to, rather than part of the contemplated improvement.[52] Similarly, a construction sign providing notice to the public that an improvement was to be built was not lienable, because it was not part of the improvement, but was "strictly collateral to it and would always remain so."[53] A construction fence around the project was not part of the improvement, but was rather a necessitated by the demolition process, not by the actual construction.[54] Excavation for piling tests was similar to the architect's staking in the Court's view and was preliminary to construction to allow finalizing of the plans and therefore was not part of the construction.[55] In contrast, moving overlying concrete pads above a

steamline was necessary as part of the construction of the project and was an "actual, visible" activity entitling the claimant to a mechanic's lien.[56] The 1998 amendment also creates a presumption that delivery of material means the material was used in the course of "alteration, construction, or repair." Under this presumption, the question could arise whether the mere delivery, even without any visible improvement being accomplished, was sufficient to allow a lien. If the material were removed without any visible improvement remaining, it would seem that the owner could easily rebut the presumption that was created by the new amendment.

E. The Requirement of Substantial Performance To enforce a mechanic's lien, the claimant must show that it has substantially performed the requirements of its contract.[57] The Iowa Court of Appeals has described "substantial performance" as follows:

> Substantial performance allows only the omission or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to other portions of the building, and may be compensated for or through deductions from the contract price.[58]

In one case, the Iowa Court of Appeals held that the failure to construct a four season porch that was usable in the winter was a failure to substantially perform and held that the contractor was entitled to its contract price on the mechanic's lien claim, less the owner's damages.[59] In another case, the Iowa Court of Appeals held that the general contractor did not substantially perform its duties even though the house was approximately 95% done, because the general contractor lost interest in the project and the subcontractors worked directly for the owner.[60] The Court said that upon substantial compliance with the contract, the contractor is entitled to receive the contract price with deduction for defects or incompletions.[61]

Although the burden of proof regarding the showing of substantial performance rests with the contractor,[62] the owner has the burden of showing any defects or incompletions.[63] The

owner is required to show "legally defective" work to obtain an offset or damage.[64] Even if the owner has some complaints about the work and although the work may not have met the owner's satisfaction, the work is not necessarily "legally defective."[65]

The Iowa Court of Appeals has stated the following regarding substantial performance:

> [T]he doctrine of substantial performance is merely an equitable doctrine that was adopted to allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit. The doctrine does not, however, permit the contractor to recover the full consideration provided for in the contract. By definition, this doctrine recognizes that the contractor has not totally fulfilled his bargain under the contract – he is in breach. Nonetheless, he is allowed to due on the contract, but his recovery is decreased by the cost of remedying those defects for which he is responsible.[66]

Where a general contractor commits such a substantial breach that it is not entitled to payment, the subcontractor's right to enforce their liens is also lost.[67]

F. The Owner's Damages Damages in a defective construction case may include diminution in value, cost of construction or completion as required under the contract, and loss of rentals or some combination of these three elements.[68] The general rule is that the cost of correcting defects or completing the omissions is the proper measure of damages.[69] If defects can be corrected only at a cost grossly disproportionate to the result or benefit obtained by the owner, or if correcting the defect would involve unreasonable destruction of the builder's work, the proper measure of damage is the reduced value of the building.[70] The diminution in value is the difference between the value of the building if the contract has been fully performed and the value of the performance actually received.[71] Iowa law follows Restatement of Contracts Section 364(1) as the appropriate measure of damages in an owner's breach of contract

claim.[72] The amount of money needed to finish the work is the deducted from the balance due the contractor on the contract.[73]

G. *Calculation of the "Balance Due*" A subcontractor which fails to perfect its mechanic's lien within ninety days of its last day of work under Section 572.9 can recover only to the extent of the balance due from the owner to the contractor at the time it perfects its lien under Section 572.10.[74] Accordingly, late filing subcontractors can only recover the balance due from the owner to the contractor. The computation of the balance due to the subcontractor who files late requires deducting payments made by the owner from the contract price, adding extras provided by the contractor to the project, then deducting the owner's damages from omissions and deficiencies in the contractor's work.[75] The determination of the balance due includes deductions for finishing the work.[76] The owner, however, is not allowed to "nit pick" until the balance due is depleted, and the deduction is allowed where there is a substantial breach of contract.[77] Subcontractors on owner-occupied dwellings have special rules with respect to amounts they may recover, and the calculation of the balance due described in this section relates only to projects other than owner-occupied dwellings.

*H. Owner's Other Claims*In addition to claims based on breach of contract, the owner's claims include breach of express warranty and implied warranty of fitness.[78] In a construction contract it is implied that the building will be erected in a reasonably good and workmanlike manner and it will be reasonably fit for the intended purpose.[79] Where owners do not rely on the contractor to ensure that a project's plans were fit for a particular purpose and the owner undertakes to provide certain responsibilities themselves, the implied warranty does not apply.[80] An owner can make claims for offsets against the subcontractor, even though the owner is not a party to the subcontract.[81] An owner does not have any defense or claim against the

subcontractor for failure of the subcontractor to warn or provide information it has about the financial condition of the contractor.[82] There is no duty to warn the owner, instead the owner has to protect itself from a financially shaky contractor. The owner may have a claim against a creditor for negligent misrepresentation if the creditor states that it will obtain the lien waivers or words to a similar effect and subsequently fails to get mechanic lien waivers.[83] A terminated contractor can recover its actual cost, limited by the contract price, and the owner is entitled to offsets for the cost of completing the work and other damages.[84] The court may require the claimant to prove that any discharge of the claimant from the improvement project was without fault on its part.[85]

I. The Taking of Collateral Security Defeats the Lien Any person who takes collateral security at the time of making the contract or during the process of the work shall not be entitled to a mechanic's lien.[86] The taking of personal guarantees from individual owners of the corporation that own the building is collateral security that will defeat a mechanic's lien.[87] A note or promise from a third person who is not otherwise liable for the indebtedness on the contract giving rise to the lien claim will also constitute collateral security.[88] The taking of shares in a limited partnership from the building owner is collateral security and will defeat the mechanic's lien.[89] No intent to waive the mechanic's lien is required to defeat the lien under Section 572.3.

The taking of a promissory note from the contractor debtor is not collateral security and will not defeat the lien.[90] If the only security is an additional promise to pay from the party already obligated to pay, then there is no collateral security. The Court said if the contractor would have furnished a security interest to the subcontractor the security interest would have constituted collateral security. The retention of title to the materials and equipment under

the original contract was the taking of collateral security in one old Iowa Supreme Court case.[91] This decision should be overruled. A mechanic's lien is unnecessary on any materials on which the contractor retains title. Since title has not passed, the owner has no claim to those items, and the contractor can simply remove them if unpaid. But the retention of title by a contractor on some materials should not defeat the contractor's right to a mechanic's lien for nonpayment on other materials where title has passed to the owner. If the owner has not paid the contractor for material on which title has passed to the owner, a lien should attach to those items. By definition, a lien would not attach to items in which the contractor has an interest or title.[92] The lien attaches to another person's property. Under the most popular of form contracts, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1987 Edition), title to the work passes to the owner at the time of payment.[93] The owner retains title under these general conditions for material for which it has not been paid. This retention of title should not defeat the mechanic's lien claim, which is otherwise permitted by both the general conditions and Iowa law.

In a later case, the Iowa Supreme Court effectively overruled the earlier case on title retention, but did not discuss it or say so. In the later case, the removal of two circuit boards by a contractor was done in an attempt to force payment and was not the taking of collateral security that would void a mechanic's lien.[94] The exercise of self-help or repossession of the collateral by the mechanic's lien claimant would appear to be squarely in conflict with the earlier case that held the retention of title to materials and equipment was the taking of collateral security. The latter case reflects the better view, because a lien does not attach to items for which the contractor holds title and attaches only to items of the owner's property. The contractor retaining

title to items for which it has not been paid by the owner is not inconsistent with the exercise of a mechanic's lien on property on which the contractor has given up title.

The collateral security section is an anachronism, serves no continuing useful purpose, and should be legislatively deleted from the statute. That equity abhors a forfeiture is a well established principle of law,[95] but the collateral security provision works as a forfeiture to many mechanic's lien claimants who are unaware of its effect until a court denies their mechanic's lien claim. The collateral security section is a strict prohibition, and there is no required proof of an intent to waive a mechanic's lien for a claimant to lose its rights. This principle should be contrasted with the very generous protection given to contractors and subcontractors who actually sign a mechanic's lien waiver during the course of a job.[96] The Iowa Supreme Court will not favor a forfeiture of mechanic's lien rights when the claimant signs a mechanic's lien waiver, unless the evidence shows that the claimant intended to waive more than the payment it received. The reasons for protecting contractors and subcontractors who sign mechanic's lien waivers are no different from the reasons for protecting contractors and subcontractors who take collateral security.

Although repeal of the collateral security section would be the best option, the legislature could limit the effect of a claimant's taking collateral security and state that the amount of the lien is waived to the extent of the value of the collateral security taken. Under this suggestion, an otherwise valuable and substantial mechanic's lien would not be forfeited because the claimant took collateral security that subsequently proved to be worthless or of little value. The primary drawback of this suggestion is that it adds an unnecessary complication to a mechanic's lien trial by requiring the court to determine the value of the collateral security taken. Repeal of this section would be preferable to this alternative because of the requirement to have the court

determine the value of the collateral security taken. Alternatively, the legislature could state that the mechanic's lien is waived by one who takes collateral security if the intent was that the collateral security would substitute for the lien. This alternative has the advantage of imposing a forfeiture only where the party intended that the collateral security substitute for the lien, but has the disadvantage of adding to a trial the need to determine the claimant's intent when it took the collateral security. Regardless whether the legislature repeals this section, adds a valuation requirement, or adds an intent requirement, the current section is an anachronism dating from two centuries ago that the law has outgrown in most other areas of business transactions. The collateral section is one of the very few areas of Iowa law where a debtor forfeits what may be its only effective method of recovery without intending to do so or without receiving any significant value. For this reason, Iowa Code Section 572.3 should be repealed or modified as indicated.

J. Partial and Final Lien Waivers The following are examples of partial and final lien waivers that balance the interest of owners and contractors and comply with current Iowa law:

> *1. Partial Lien Waivers*Subcontractor hereby acknowledges receipt of payment of $____ as a partial payment for its furnishing of labor and material for the above-referenced project and hereby waives, releases, and discharges any lien claim or lien right it has or could have to the extent of the partial payment made in exchange for this partial lien release. Subcontractor states that this partial lien release is not intended to and does not release any lien claims or rights for work, labor, or materials for which payment has not yet been received by the subcontractor.
>
> *2. Final Lien Waivers*The undersigned does hereby waive and release any and all lien or claim of, or rights to, lien under statutes relating to mechanic’s and other liens on account of labor, services, materials, fixtures, apparatus or machinery for the above-referenced project or for improvement of real estate.
>
> This full and final lien waiver is intended as a full and complete waiver of any and all lien rights on said project or real estate, as a

> complete relinquishment of lien rights rather than as a receipt for partial payment, as an acknowledgment of final and full payment of the contract price and all allowable additions or extras, and an affirmation that the undersigned fully releases and discharges the owner (or contractor) of any further claim or obligation for payment of any kind.
>
> The undersigned acknowledges and affirms that it has paid all employees, contractors, subcontractors, suppliers, materialmen, and laborers all payments, claims, and obligations due or that may be due and owing for all work, labor, or materials furnished for work on or improvement of the project.
>
> The undersigned agrees to defend, indemnify, and hold harmless the payor and owner, its agents, employees, representatives, architects, engineers, and consultants from any and all costs, expenses, fees including attorneys fees, claims, demands, lawsuits, actions, liens, foreclosures, judgments, or executions that arise or may arise from claims, demands, or liens of persons with whom the undersigned contracted for the performing of labor or services for the above referenced project or any person or persons claiming by or through such a person.

The Iowa Supreme Court described the general principles that control the interpretation of mechanic's lien waivers in *Metropolitan Federal Bank v. A.J. Allen.*[97] The Iowa Supreme Court identified the general principles for interpretation of mechanic's lien waivers.

First, the Iowa Supreme Court stated:

> In interpreting the meaning of written instruments such as these lien waiver documents, we seek to give effect to the intention of the parties in conformity with the reasonable application of the circumstances under which the instrument was executed.[98]

The Court added that the:

> Scope and effect of lien waiver is to be determined from language of document, sequence of events, and surrounding circumstances.[99]

The Court also stated:

> Although there may be a waiver of such a lien, in order for it to be effective it must be clear, satisfactory, unambiguous, and free from doubt.[100]

The final general principle stated by the Court was:

> All doubts about the waiver must be resolved in favor of the lien.[101]

The Iowa Supreme Court in *Metropolitan Federal Bank* applied these principles of interpretation to the language and circumstances of the mechanic's lien waivers given by the contractors in that case. The lien waivers in the *Metropolitan Federal Bank* case contained broad and all-encompassing language. The lien waivers of one contractor purported to release any and all liens:

> The undersigned hereby waives and releases any lien upon or against the premises. . . and the improvements thereon, on account of any labor, materials, and services rendered or furnished. . . .[102]

The lien waiver by another contractor purported to release any and all liens up to and including the date of payment:

> The undersigned . . . does hereby waive and release any and all lien or claim of, or rights to lien under statutes relating to mechanic's and other liens . . . on account of labor, services, material, fixtures, apparatus, or machinery furnished up to and including . . . upon payment.[103]

The Court considered the effect of the broad, all-encompassing waiver language in view of the circumstances that the contractors merely intended the lien waivers as receipts for partial payments. None of the contractors testified that they intended to waive anything other than the right to claim liens for the amounts actually paid to them.[104]

The Court considered the evidence that the contractors had not received full payments at the time of the waiver because there was always a retainage of 10% withheld from each monthly

progress payment. The Court did not believe the contractors intended to waive their rights to mechanic's liens for amounts earned but not yet paid.[105]

The Iowa Supreme Court concluded:

> That the lien waivers periodically submitted to ABAS by Allen and Baker were intended, as between ABAS and the contractors, as a waiver of the contractors' rights to assert mechanic's liens only for that work for which the contractors had been paid from Metropolitan's construction loan proceeds.[106]

Notwithstanding the broad, all-encompassing language of the lien waivers, the Court held expressly that the lien waivers given in recognition of periodic progress payments waived mechanic's lien rights only to the extent of the payment received.[107] For that reason, the lien waivers had the effect of waiving the contractor's mechanic's lien rights only to the extent of the payments received. The contractors had a contract that provided for monthly progress payments, provided lien releases to obtain additional progress payments, and did not intend to release their lien rights for amounts not yet paid.

In another similar case, the Court held that a broad, all-encompassing release of any mechanic's lien was, in fact, only a release of a mechanic's lien to the extent of the payment that had already been made.[108] In that case, the contractor testified that the document was only intended to waive any claim to a mechanic's lien to the extent of such payment.

The Court stated:

> In interpreting the meaning of written instruments we seek to give effect to the intention of the parties in conformity with the reasonable application of the circumstances under which the instrument was executed. . . . Upon our *de novo* review of the transaction at issue, we agree with the trial court's finding that the so-called "waiver of mechanic's lien" was intended, as between the defendant-contractor and the owners, as a waiver of the contractor's right to assert a lien for work which had been paid for from the construction loan proceeds.[109]

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

> However, given the circumstances of its execution, not as part of a single document referring to the entire construction contract but as part of each progress payment the more reasonable interpretation is that the discharge released plaintiff's lien rights only as to materials for which payment was made by a particular check.[110]

In an Illinois case, the court considered the effect of a lien waiver given in recognition of partial payments.[111] The Illinois Supreme Court held:

> The execution of lien waivers does not bar any claim for additional payments because the evidence supports the circuit court's findings that these waivers were necessarily executed by Wolfe in order to receive partial payment and were intended to be partial lien waivers as to particular work.[112]

The contractor intended that the lien waivers given were payments for particular work. In view of the circumstances for which the lien waivers were given, the effect of the waivers was limited to the extent of the payment received. The contractor was found to not have waived its lien with respect to other payments due the contractor.

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

A. Mechanic's Liens on Residential Construction In 1981, the Iowa legislature shifted the risk of doing business with financially shaky contractors from homeowners to subcontractors and suppliers. The method of shifting this risk was to prescribe a pre-lien notification requirement for subcontractors and suppliers who provided material or labor for residential construction.[113] The direct lien liability that was previously available to

subcontractors and suppliers who timely filed mechanic's liens was eliminated, except for those who followed the strict pre-lien notification requirements. For those who did not follow the pre-lien notification requirements, only derivative lien liability was available. These statutory changes put the burden on the suppliers and subcontractors rather than on the home buyers and owners. In *Louie's Floor Covering v. De Phillips Interests,*[114] the Court stated that the purpose of the "notice" provision is to protect an innocent homeowner. The Court added: "If an innocent party must be hurt, the materialman is less favored than a homeowner, because the materialman is far more sophisticated and familiar with the construction industry and better able to protect himself than is the homeowner."[115]

A question that often arises is whether a home is being built for a developer-contractor or for an owner-occupier. In *Louie's Floor Covering*, the Court found that a supplier of materials was required to give notice where a house was under construction and was being built for the buyer. The buyer intended to occupy the dwelling as a homestead, and the statute required notice be given for the supplier to have a lien.[116]

In *Schaffer v. Frank Moyer Construction,*[117] the Court held that a carpentry contractor could have a claim against the property, if it were shown that the lien was perfected against the record owner of the property (the developer) who had contracted for the contractor's services and who did not intend to occupy the property as a homestead. So long as the contractor perfected its lien before the prospective owner-occupier had any ownership in the property, the lien would attach to the property. In that case, the contractor's lien was recorded before payment to the primary builder by the owner-occupiers had been made. The Court stated that Section 572.14(2) only protects an owner-occupier from potential subcontractor liens that might be timely perfected after payment has been made to the primary contractor by the owner-occupier.

The presentation of the notice to the owner required under Section 572.14 is not sufficient to establish the lien. In *Griess & Ginder Drywall, Inc. v. Moran,*[118] the furnishing of the required notice under mechanic's lien statute did not relieve the supplier from the duty to perfect its lien. Since the supplier did not perfect its lien within 90 days of the last date of its work, the lien claim was not timely perfected. Because the homeowners did not owe the general contractor any money when the lien was perfected, there was no balance due from which the subcontractor could obtain a mechanic's lien recovery. The lien could only be enforced against the Morans' property to the extent of the balance the Morans owed the principal contractor at the time when the subcontractor gave the Morans notice of the lien, and the failure to perfect the lien within the required 90 days meant no lien could be enforced because no money was owed the contractor. The pre-lien notice under Section 572.14(2) simply informed the owners of the possibility of a mechanic's lien, it did not perfect the lien.

In *Henning v. Security Bank,*[119] the homeowners paid twice for same work, once to contractor who abandoned the job and once to subcontractors. The homeowners then sued their bank which was to obtain lien waivers from subcontractors before payment to contractor. The homeowner had no legal obligation to pay the subcontractors because they had failed to comply with the notice requirements of Section 572.14(2). The subcontractors had no statutory or common law right to recover from the homeowners and so the homeowners' payments to subcontractor were voluntary. The homeowners could not recover the duplicate payment from the bank because indemnity does not cover voluntary payments.

B. Legislative Amendment of the Amount Due for Owner-occupied Dwellings In 1998, the legislature amended the provision regarding how much can be collected on a mechanic's lien on an owner-occupied dwelling. Section 572.14(2) now provides:

> In the case of an owner-occupied dwelling, a mechanic's lien perfected under this chapter is enforceable only to the extent of the amount due the principal contractor by the owner-occupant under the contract, less any payments made by the owner-occupant to the principal contractor prior to the owner-occupant being served with a notice specified in subsection 3. This notice may be served by delivering it to the owner or the owner's spouse personally, or by mailing it to the owner by certified mail with restricted delivery and return receipt to the person mailing the notice, or by personal service as provided in the rules of civil procedure.[120]

The meaning of this provision is not clear and will require judicial interpretation. The legislature substituted a new term "amount due ... under the contract" for the customary term "balance due." The reason for the substitution of the term is not clear from the statute. The original term "balance due" included all remaining monies to be paid under a contract, less payments already made and cost to finish or repair.[121] Perhaps the term "amount due ... under the contract" means the same as the previous language, but a more customary meaning would be the amount that was required to be paid at a particular time under the terms of the contract, such as a progress payment less retainage.

More importantly, the 1998 amendment appears not to specify a time when the "amount due" is to be calculated. Under the old language, the "balance due" was to be calculated at the time when written notice was given to the owner-occupant. In the amended section, it is unclear whether the calculation of the "amount due ... under the contract" is to be made at the time of the service of the notice or when the trial occurs on the mechanic's lien. The new section states redundantly that the "amount due under the contract" is to be reduced by the payments made by the owner-occupant prior to the service of the notice. Presumably, the phrase "less any payments made by the owner-occupant to the principal contractor prior to the owner-occupant being serviced with the notice ..." was inserted to imply that payments made after the service of the notice would not be deducted from the amount due. But even that suggestion is not mandated by

the new section. The prior language specifying that the balance due was at the time the written notice was served was much clearer than the new language as to when the calculation was to be made. An example illustrates the problem:

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

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

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

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

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

Under the old language before the amendment, the "balance due from the owner to the principal contractor at the time the written notice was served" was $70,000. This amount was determined by subtracting from the contract price ($270,000) the payments made ($100,000), balance to finish ($80,000), and costs of repair ($20,000). Under the new language, the "amount due under the contract" is either $270,000 (total contract price) or $170,000 (payment due plus balance to finish) or $90,000 (amount of payment currently due). Because the payments already made are to be deducted, it would seem that the phrase "amount due under the contract" actually means contract price. Since the new amendment specifies that previous payments are to be deducted, but is silent as to the cost to finish and the offsets for damages, it is unclear whether the legislature intended the owner-occupant to get credit for these items.

The Supreme Court will have to determine these issues. This section is simply not clear since the original language was abandoned and replaced by the ambiguity that was created by the amendment.

C. Requirement of Contractor's Giving Notice Regarding Subcontractors As a further protection for owner-occupants, the legislature in 1987 required contractors to give owner-occupants notice of its subcontractors.[122] The penalty for a contractor's failure to give notice to an owner-occupant of its subcontractors is that the contractor is not entitled to a mechanic's lien for labor performed or material furnished by the subcontractor not included in the notice. This amendment is nonsense. The result of this amendment is that the person contracting directly with the owner-occupant cannot have a full recovery on its mechanic's lien for the agreed contract price, which would include the amounts to be paid the subcontractors, because the general contractor did not give notice of the subcontractors it was using. It should make no difference to the owner-occupant who has not paid the general contractor the contract price that the owner-occupant did not know that the general contractor was going to use subcontractors. Every homeowner should assume a general contractor is going to use some subcontractors, and the failure to specify the names should not prevent recovery of the agreed contract price in a lien action.

The general contractor will have a contract claim and other common law claims against the owner for the amounts of the subcontractor's work,[123] and it is a waste of judicial resources and everyone's time that these claims cannot be brought in a single mechanic's lien action simply because the contractor did not give the owner-occupant notice that it was using subcontractors. Since the contract and common law claims of the contractor cannot be joined with the mechanic's lien foreclosure action,[124] the contractor may have to bring two actions: (1) a

mechanic's lien foreclosure for the value of the work done by the general contractor, and (2) a contract or other common law claim for the value of the subcontractor's work performed on the job for which the contractor has not been paid. In the mechanic's lien action, the general contractor may be entitled to its attorney's fees,[125] but in the common law action, unless the contract provides for attorneys' fees, the contractor would not get attorney's fees for its efforts to recover the subcontractor's money. The contractor does not get a jury on the mechanic's lien case, but does on the common law case.

The notice requirement of Section 572.13 is unnecessary to protect homeowners from subcontractors' liens. Any subcontractors who want to establish liens for their nonpayment must do so by giving the notice required in subsection 3 of Section 572.14. If the subcontractors give the notice, then they can preserve their own lien rights and if they fail to give the notice, they have no lien rights. Where the subcontractors have no lien rights, the general contractor ought to be able to recover the amounts from the owner-occupant that the general contractor owes the subcontractors, even if the owner-occupant was not told of the identity of the subcontractors. Where the subcontractors have protected their lien rights, the owner-occupant still only has to pay once either to the general contractor or to the subcontractors. The protection given owner-occupants by Section 572.13 seems unnecessary and elevates irrelevant notice requirements above the reality of the arrangement between a homeowner and a general contractor. The general contractor who has not been paid by the owner-occupant should be able to recover the full amount of its contract price from the owner-occupant in one action, including the amounts that the general contractor owes to its subcontractors who performed labor on the owner-occupied dwelling, but have not been paid for their services or material.

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

On owner-occupied dwellings, the principal contractor must pay its subcontractors within 30 days after receiving full payment from the owner.[126] If the principal contractor fails to do so after receiving full payment, exemplary damages in the amount of 1% to 15% of the amount not paid shall be charged against the principal contractor.[127]

E. Notification Requirement for Suppliers to Subcontractors The legislature adopted a notification requirement for suppliers of subcontractors in 1998[128] and revised the language a year later.[129] The notification requirement for suppliers to subcontractors does not apply to single-family or two-family dwellings occupied or intended to be used for residential purposes.[130] The notification requirement by suppliers to subcontractors, however, would apply to condominium projects, commercial real estate or apartment houses.

The notification requirement requires the supplier to a subcontractor to notify the principal contractor in writing with a one-time notice providing specific information within thirty days of first furnishing labor and materials for which a lien claim may be made. Additional labor and materials furnished by the same person may be covered by the earlier notice.[131]

The notification requirement also requires the supplier to a subcontractor to include a special notice in its lien claim. The lien claim must be supported by a certified statement that the principal contractor was notified in writing with a one-time notice containing specified information within 30 days after labor and materials were first furnished.[132]

The 1999 amendment eliminated the requirement of giving the pre-lien notice by a supplier to the owner. The pre-lien notice needs to be given only to the principal contractor. The supplier's notice to the principal contractor could help assure that the principal contractor pays the suppliers when the subcontractor is in a difficult financial position. However, in the event

the principal contractor does not take steps to see that the supplier is paid by the subcontractor, the supplier still has a lien on the owner's property and the owner may have no notice of the existence or arrangement of the supplier until it receives the lien claim. For this reason, the supplier's notice does not seem well designed to ensure that the owner is protected from supplier's liens. The contractor receiving the supplier's notice is not the owner who is most directly interested in seeing that the supplier gets paid. To protect themselves, owners should include in their contracts with the principal contractor an indemnity obligation or mechanic's lien discharge bond obligation for the principal contractors to assume responsibility for the liens of its subcontractors or subcontractor's suppliers. An example of the type of language that may be suitable for an owner's protection is contained in General Condition 9.10.2 of AIA Document A201, General Conditions of the Contract for Construction (1987 Edition).

F. Attorney's Fees From the period of 1983 through 1999, a successful contractor in a mechanic's lien action was assured of recovering its attorney's fees. This provision made mechanic's liens the preferred method of recovery in construction cases, unless the contract also provided for attorney's fees. Additionally, the requirement that an owner had to pay a successful contractor its attorney's fees was settlement leverage and actually helped assure that most mechanic's lien claims were settled rather than litigated. The requirement that a losing owner pay the amount of the mechanic's lien, interest on the judgment, its own attorney's fees, and the contractor's attorney's fees created significant transaction costs for owners and gave them incentives to settle meritorious claims.

The Court of Appeals rulings established that a party had to actually foreclose the lien to get attorney's fees,[133] a contractor's failure to substantially perform meant it could get no

attorney's fees,[134] and where the owner's damages exceeded the balance due the contractor, attorney's fees could not be awarded because the contractor was not the successful party.[135]

In 1999, the legislature amended the attorney's fees section to make it discretionary rather than mandatory. Now, a prevailing plaintiff "may" be awarded reasonable attorney's fees but the award is no longer mandatory.[136] The legislature provided no guidance to the courts as to when attorney's fees should be granted on a mechanic's liens, so further clarification by the courts is needed. Additionally, the legislature added a new section which allows a challenge to a mechanic's lien filed on an owner-occupied dwelling, if the person challenging the lien prevails, the court may award reasonable attorney's fees and actual damages.[137]

The elimination of the mandatory attorney's fees provision took away the only real legislative improvement of the mechanic's lien statute for contractors during the past twenty years. Making the award of attorney's fees to successful contractors discretionary will likely create more litigation for the courts, rather than less, discourage settlements, and further delay payments for work performed. There is some risk that contractors and subcontractors will rely less on mechanic's liens and more on common law remedies. Resolution of construction disputes will take longer because mechanic's lien actions are trials to the court and the parties can request a jury on common law actions. Also, the determination of construction disputes will likely become more complicated as parties add claims, including fraud, to create pressure to settle cases, since the incentive of a losing owner having to pay the other party's fees has been lessened. Owners have few, if any, incentives to pay their contractors promptly in Iowa, and the taking away of the attorney's fee mandatory provision takes away the only statutory incentive for prompt payment. The 5% interest rate available under Iowa Code § 535.2 for money due on a

contract when the contract does to state an interest rate makes it unlikely that owners will try to resolve disputes promptly or make payments quickly.

G. Priority of Mechanic's Liens vs. Other Liens Iowa law provides that the mechanic's lien arises on the day work commences under the contract and attaches for all services and materials furnished thereafter.[138] A mechanic's lien predates the filing of the lien and relates back to the date when work commenced.[139] Partial payment does not restart the priority and priority of a mechanic's lien dates from the start of work and not merely from the beginning of the period for which payment has not been made.[140]

1. Mechanic's Lien vs. Mechanic's Lien There have been no recent legislative or judicial changes to Iowa Code § 572.17. Priority between competing mechanic's liens is based on the time of filing. Iowa does not follow a pro-rata allocation of available proceeds between mechanic's lienors, but rather accords priority to the first filed mechanic's lien.[141] Section 572.17 leads to the first filed mechanic's lien claims having priority over subsequently filed mechanic's liens, even when the earlier filed are limited to the balance due and the late filed are timely perfected and provide for recovery.

2. Mechanic's Lien vs. Construction Mortgage A construction mortgage covers only money provided for financing the work and improvements and does not include land acquisition costs.[142] The legislature amended the mechanic's lien statute to give construction mortgagees additional protection against mechanic's lienors.[143] This amendment followed the Supreme Court's decision in *Barker's Inc. v. B.D.J. Development Co.*[144] Construction mortgage liens are now preferred to all mechanic's liens of claimants who commence their particular work or improvement subsequent to the date of the recording of the construction mortgage lien.[145] The phrase "particular work or improvement" does not refer to only unpaid work, but includes

any work of the particular mechanic's lien claimant, whether or not the payment has been made.[146] If a mechanic's lienor commences its particular work prior to the recording of the construction mortgage, then the mechanic's liens ordinarily would take priority over the construction mortgage.[147] If the mechanic's lien claimant starts its particular work after the recording of the construction mortgage, then the construction mortgage takes priority.[148]

3. Mechanic's Lien vs. Purchase Money Mortgages Purchase money mortgages cover money provided for purchasing the real estate or acquiring the land, regardless whether the funds are provided to a third party or the owner.[149] Purchase money mortgage lien has priority over a mechanic's lien, although the mortgage was not executed and recorded until after the material and labor were provided.[150]

4. Priority of Mechanic's Liens as to Building or Land Mechanic's liens have priority as to the building or improvement in preference to any mortgage upon the land upon which such building or improvement was erected or situated.[151] The court may determine under Section 572.21 that a building or improvement may be sold separately and the proceeds applied to the mechanic's lien. If the building or improvement cannot be sold separately, the court shall value the land and the building separately, order the whole sold, and distribute the proceeds so as to secure the mortgage priority upon the land and the mechanic's lien priority upon the building.[152] Where the mechanic's lienor provided repairs or additions to an existing building, the court shall value the land and buildings before the improvement separately from the additions, repairs or betterments and distribute the proceeds so as to give the mechanic's lienholder priority upon the value of the enhancements.[153]

A bank's mortgage may secure future advances that have priority over a mechanic's lien that arises before the future advance of money if the loan documentation contains the notice prescribed by Iowa Code §654.12A,[154] which notice states:

> NOTICE: This mortgage secures credit in the amount of _____. Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens.

IV. PROCEDURAL REQUIREMENTS AND ISSUES *Mechanic's Liens and Arbitration* Under Iowa law, a party may waive it's right to submit issues to binding arbitration through delay or action in court inconsistent with the right to arbitration.[155] The filing of a mechanic's lien does not constitute sufficient court action to establish a waiver of the right to arbitration.[156] The issue whether one has waived its right to arbitrate depends on the significance of the action taken in the judicial form.[157] There remains an open question under Iowa law whether foreclosing a mechanic's lien is sufficient court action to waive the right to arbitrate.[158]

B. Service of a Late Filed Lien A lien filed after the lapse of ninety days following the claimant's last day of work must be served in the same manner as an original notice is served, which generally requires service by the sheriff or a process server.[159] A timely filed mechanic's lien, however, merely requires the claimant to file the lien with the clerk of the district court, and the clerk then mails a copy of the lien to the proper person.[160] It is important that the late filed lien be personally served to comply with the statute and necessary because the balance due from the owner to the contractor at the time of service of the notice governs the amount of recovery of a late filed subcontractor.[161]

The filing of the pre-lien notification to an owner-occupant does not relieve the subcontractor of its obligation to file the lien and perfect it in accordance with the statute.[162] The

complying with the pre-lien notification for owner-occupied dwellings is only one of the steps needed to perfect the lien, and the lien must be perfected in accordance with Sections 572.8 or 572.9-.10.

C. Amendment of a Mechanic's Lien An action to enforce a mechanic's lien may be amended by leave of court.[163] The allowance of an amendment to a mechanic's lien statement are to a pleading referring to such a statement is a matter of discretion, and will be reversed only upon finding an abuse of discretion.[164] The statute states that the amount of the lien claim may not be amended, which presumably means increased, as there would appear to be no valid reason for refusing reductions in the lien demand.[165]

D. Acknowledgment of Satisfaction of the Lien In 1999, the legislature amended Section 572.23 to provide a method for acknowledgment of satisfaction of a lien claim. The claimant is required to acknowledge satisfaction of the mechanic's lien, and if it neglected to do so, a demand in writing may be personally served. There is a $25 penalty on the claimant and it is also liable for damages that result from failure to satisfy the lien claim.[166] If the acknowledgment of satisfaction is not filed within 30 days after personal service, the party may file proof of service and an affidavit with the clerk of the district court and obtain constructive notice to all parties of the forfeiture and cancellation of the lien.[167]

E. Action to Challenge Mechanic's Lien In 1999, the legislature also added a procedure to challenge a mechanic's lien in the district court or small claims court.[168] The action may be either in district court or small claims if within the $4,000 jurisdictional limit of small claims. Any permissible claim or counterclaim may be joined with the action and the court is required to make written findings regarding both the lawful amount and validity of the mechanic's lien. In an action challenging a mechanic's lien on an owner-occupied dwelling, the

person challenging the lien may be awarded attorney's fees and actual damages if it prevails.[169] Additionally, if the mechanic's lien was filed in bad faith or the supporting affidavit was materially false, a penalty of the lesser of $500 or the amount of the lien shall be awarded.[170]

F. Demand for Bringing Suit In 1999, the legislature also provided for the filing of the proof of service and an affidavit with the clerk of court following a demand for bringing suit.[171] If the party upon whom a written demand for commencing an action within 30 days does not do so, the party serving the demand may file with the clerk of the district court proof of service and a copy of the demand, which filing shall be constructed notice to all parties of forfeiture and cancellation of the lien.

G. Constructive Notice One fiction that survives an Iowa mechanic's lien law is that contractors and subcontractors have constructive notice of all information contained in recorded documents and have a duty of inquiry concerning circumstances disclosed in those records.[172] For example, a contract of release that is recorded may give notice to all contractors and subcontractors that no mechanic's liens were attached to the property, and this provision is an effective bar to the attachment of the lien.[173] Also, contractors have constructive notice of the change in ownership and recorded documents and they are on inquiry of satisfying themselves that the person with whom they are contracting was an owner at the time of the contract.[174]

The opportunity to file an action following a 30 day demand by the owner is extended by a day if the last day falls on a holiday or a day when the courthouse is closed because of a holiday.[175]

H. Time of Filing In 1987, the legislature set the period of timely filing for mechanic's liens for contractors and subcontractors at 90 days.[176] Previously, subcontractors had 60 days from their last date of work to timely file their mechanic's lien. The period of time

runs from the last date of the subcontractor's work.[177] Where work is done merely to extend the time of filing and is not performed for completion of the original contract, the extra work will not extend the time for filing the lien.[178] Subcontractor may not extend the time for filing by performing some trivial amount of work, remedying small defects, or making trifling changes.[179]

Separate contracts cannot be joined for purposed of extending the time period for filing or obtaining an earlier priority date.[180] Work performed under separate contracts - one as contractor and one as subcontractor - cannot be joined together to extend the time for filing mechanic's liens.[181]

V. CONCLUSION The legislature has substantially undermined the value of a contractor's mechanic's liens by making attorney's fees discretionary. Reinstating mandatory awards to prevailing contractors will promote settlement, encourage mechanic's lien actions rather than common law actions, reduce the number of jury trials on construction cases, and expedite payments for work performed. The legislature should repeal its1999 amendment to Section 572.32(1) and restore the mandatory award of attorney fees to a prevailing contractor.

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

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

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2. *See, e.g.*, Iowa Code §572.13(2) (amended 1987); §572.14 (amended 1987 and 1988); §572.16 (amended 1987); §572.30 (amended 1987); §572.31 (amended 1983); §572.32(2) (amended 1999); §572.33 (amended 1998 and 1999).

3. R. Stone, *Mechanic's Liens in Iowa*, 30 Drake L. Rev. 39 (1980).

4. Iowa Code §572.2 (1999); *Giese Construction Co. v. Randa*, 524 N.W.2d 427, 430-31 (Iowa App. 1994).

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

6. *Giese Construction Co. v. Randa*, 524 N.W.2d 427, 430-31 (Iowa App. 1994).

7. *Carson v. Roediger*, 513 N.W.2d 713, 716 (Iowa 1994).

8. *Giese Construction Co. v. Randa*, 524, N.W.2d 427, 431 (Iowa App. 1994).

9. *Northwestern National Bank v. Metro Center*, 303 N.W.2d 395, 401 (Iowa 1981).

10. *Id.*

11. *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 709 (Iowa 1985); *Sulzberg Excavating, Inc. v. Glass*, 351 N.W.2d 188, 191 (Iowa App. 1984).

12. *Goldberg v. Greenfield*, 259 Iowa 873, 146 N.W.2d 298 (1966).

13. *See, Clemens Graf Droste Zu Vischering*, 368 N.W.2d at 712.

14. *Goldberg*, 146 N.W.2d at 301; *Carlson v. Maughmer*, 168 N.W.2d 802, 803 (Iowa 1969).

15. *Sulzberg Excavating, Inc. v. Glass*, 351 N.W.2d 188, 194 (Iowa App. 1984).

16. *Id*.

17. *Overhead Door Co. v. Sharkey*, 395 N.W.2d 186, 188 (Iowa App. 1986).

18. *Giese Construction Co. v. Randa*, 524 N.W.2d 427, 432 (Iowa App. 1994).

19. Iowa Code §572.2.

20. *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d at 712.

21. *Id.* at 709.

22. *Id.* at 709-10.

23. *Id.* at 710.

24. *Thomas Electric Co. v. Severson Enterprises*, 376 N.W.2d 631, 633 (Iowa App. 1985).

25. 576 N.W.2d 112 (Iowa 1998).

26. *Id.* at 114.

27. Iowa Code §572.2.

28. *Clemens*, 368 N.W.2d at 711.

29. *Id.* at 710-11.

30. *Id.* at 711.

31. *A & W Electrical Contractors, Inc. v. Petry,* 576 N.W.2d 112 (Iowa 1998); *Stroh Corp. v. K & S Development Corp.,* 247 N.W.2d 750, 752 (Iowa 1976); *Ringland-Johnson-Crowley Co. v. First Central Service Corp.,* 255 N.W.2d 149, 151-52 (Iowa 1977); *Overhead Door Co. v. Sharkey*, 395 N.W.2d 186, 187 (Iowa App. 1986).

32. *Ringland-Johnson-Crowley Co,* 255 N.W.2d at 152.

33. *A & W Electrical Contractors, Inc. v. Petry,* 576 N.W.2d 112 (Iowa 1998).

34. *Overhead Door Co. v. Sharkey*, 395 N.W.2d 186 (Iowa App. 1986).

35. *Id.* at 188.

36. *See, e.g., Love Bros., Inc. v. Mardis,* 189 Iowa 350, 176 N.W. 616 (1920). *See also, Schumacher Electric, Inc. v. DeBruyn,* 604 N.W.2d 39 (Iowa 1999).

37. *Sheder v. Lemke,* 564 N.W.2d 1 (Iowa 1997).

38. *Id.*

39. *Thomas Electric Co. v. Severson Enterprises, Inc.* 376 N.W.2d 631 (Iowa App. 1985).

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

41. *Northwestern National Bank v. Metro Center, Inc.*, 303 N.W.2d 395, 400 (Iowa 1981).

42. *King v. Gustafson,* 459 N.W.2d 651 (Iowa App. 1990).

43. Iowa Code §572.2.

44. *Northwestern National Bank v. Metro Center,* 303 N.W.2d 395, 400 (Iowa 1981) (parapet wall on an adjoining building to prevent water damage was not a lienable item).

45. 98 Iowa Acts, Ch. 1142, §1.

46. 98 Iowa Acts, Ch. 1142 §2 discussed *infra*.

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

98 Iowa Acts, Ch. 1142, §2 (codified at Iowa Code §572.2(2).

48. *Farmers Coop Co. v. DeCoster*, 528 N.W.2d 536 (Iowa 1995).

49. *Overhead Door Co. v. Sharkey*, 395 N.W.2d 186, 188 (Iowa App. 1986).

50. *Northwestern National Bank v. Metro Center*, 303 N.W.2d 395, 399 (Iowa 1981).

51. *Gollehon, Schemmer & Assoc., v. Fareway-Bettendorf Assoc.,* 268 N.W.2d 200, 201 (Iowa 1978).

52. *Id.* at 201-202.

53. *Northwestern National Bank v. Metro Center,* 303 N.W.2d at 400.

54. *Id.* at 400.

55. *Id.* at 400.

56. *Id.* at 400.

57. *Moore's Builder and Contractor, Inc. v. Hoffman,* 409 N.W.2d 191, 193 (Iowa App. 1987).

58. *Id*. at 193.

59. *Bidwell v. Midwest Seleriums, Inc.,* 543 N.W.2d 293 (Iowa App. 1995).

60. *Nepstad Custom Homes Co. v. Krull,* 527 N.W.2d 402 (Iowa App. 1994)

61. *Id.*

62. *Farrington v. Freeman,* 251 Iowa 18, 23, 99 N.W.2d 191, 194 (Iowa App. 1987).

63. *Moore's Builder and Contractor, Inc. v. Hoffman,* 409 N.W.2d 191, 194 (Iowa App. 1987).

64. *Id.* at 194.

65. *Id.* at 194.

66. *Vance v. My Apartment Steak House, Inc.,* 667 S.W.2d 480, 482 (Tex. 1984).

67. *Central Iowa Grading, Inc. v. Ude Corp.,* 392 N.W.2d 857, 859 (Iowa App. 1986).

68. *RET Corp. v. Frank Paxton Co.,* 329 N.W.2d 416, 421 (Iowa 1983).

69. *Busker v. Sokolowski,* 203 N.W. 2d at 304.

70. *Service Unlimited, Inc. v. Elder,* 542 N.W.2d 855, 858 (Iowa App. 1995).

71. *F.E. Marsh & Co., v. Light & Power Co. of St. Ansgar,* 196 Iowa 926, 195 N.W. 754 (1923).

72. *Conrad v. Dorweiler,* 198 N.W. 2d 537 (Iowa 1971); *Bidwell v. Midwest Seleriums, Inc.* 543 N.W.2d 293, 296 (Iowa App. 1995).

73. *Carson v. Roediger,* 513 N.W.2d 713 (Iowa 1994).

74. Iowa Code § 572.11.

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

76. *Diecke v. Lumber Supply,* 260 Iowa 470, 149 N.W.2d 822 (1967).

77. *Ude Corp.,* 392 N.W.2d at 859.

78. *Moore's Builder and Contractor, Inc. v. Hoffman,* 409 N.W.2d 191, 195 (Iowa App. 1987).

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

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

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

82. *Conrad American v. Cooperative Grain & Product Co.,* 488 N.W.2d 450 (Iowa 1992).

83. *Cedar Falls Building Center, Inc. v. Vietor,* 365 N.W.2d 635 (Iowa App. 1985).

84. *Williams v. Hair Stadium, Inc.,* 334 N.W.2d 354 (Iowa App. 1983).

85. *McDonald v. Welch,* 176 N.W.2d 846, 847 (Iowa 1970) (a prerequisite to holding the claimant entitled to a mechanic's lien is that the claimant proved his discharge from the work site was without fault on its part).

86. Iowa Code § 572.3.

87. *Builder's Kitchen and Supply Co. v. Pautvein,* 601 N.W.2d 72 (Iowa 1999).

88. *Id.*

89. *Clemens Graf Droste Zu Vischering v. Kading,* 368 N.W.2d 702, 705 (Iowa 1985).

90. *Central Ready Mix Co. v. J.G. Ruhlin Construction Co.,* 258 Iowa 500, 139 N.W.2d 444 (1966).

91. *Perfection Tire & Rubber Co. v. Kellogg-Mackey Equipment Co.,* 194 Iowa 523, 526, 187 N.W.2d 32, 33 (1922).

92. *Thomas Electric Co. v. Severson Enterprises,* 376 N.W.2d 631, 633 (Iowa App. 1985).

93. *American Institute of Architects, Document A201, General Conditions of the Contract for Construction* (1987 Edition), GC ¶ 9.3.3.

94. *First Central Bank v. White,* 400 N.W.2d 534 (Iowa 1987).

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

96. *Metropolitan Federal Bank v. A.J. Allen Mechanical Contractors,* 477 N.W. 668, 673-74 (Iowa 1991).

97. *Id*. at 673.

98. *Id.*

99. *Id.* at 672 citing *Portland Elec. & Plumbing Co. v. Simpson*, 59 Or. App. 486, 651 P. 2d 172 (1982). Aff'd 61 Or. App. 266, 656 P. 2d 394 (1983).

100. *Id.* at 673.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 674.

105. *Id.* at 675.

106. *Id.*

107. *Id.*

108. *First National Bank v. Smith*, 331 N.W.2d 120, 122 (Iowa 1983).

109. *Id.* at 122.

110. *Portland Elec. & Plumbing Co. v. Simpson*, 59 Or. App. 486, 490, 651 P. 2d 172 (1982)

111. *Lyons Federal Trust and Savings Bank v. Moline National Bank*, 549 N.E. 2d 933 (Ill. App. 3 Dist. 1990).

112. *Id.* at 936.

113. The legislature amended Section 572.1 to include the term "owner-occupied dwelling," which means the homestead of an owner actually occupied by the owner and it includes a newly-constructed dwelling to be occupied by the owner as a homestead or dwelling that is under construction and being built by or for an owner who will occupy the dwelling of the homestead.

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

> In the case of an owner-occupied dwelling, a mechanic's lien perfected under this chapter is enforceable only to the extent of the balance due from the owner to the principal

> contractor at the time written notice, in the form specified in Subsection 3, is served on the owner. This notice may be served by delivering it to the owner or the owner's spouse personally, or by mailing it to the owner by certified mail with restricted delivery and return receipt to the person mailing the notice, or by personal service as provided in the Rules of Civil Procedure.

The notice was required to include the following information:

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

Iowa Code § 572.14(3).

Section 572.16 was also amended to underscore the new protections given to owner-occupiers:

> Nothing in this chapter shall be construed to require the owner to pay a greater amount or at an earlier date than is provided in the owner's contract with the principal contractor, unless said owner pays a part or all of the contract price to the original contractor before the expiration of the 90 days allowed by law for the filing of a mechanic's lien by subcontractor; provided that in the case of an owner-occupied dwelling, nothing in this chapter shall be construed to require the owner to pay a greater amount or at an earlier date than is provided in the owner's contract with the principal contractor, unless the owner pays a part or all of the contract to the principal contractor

after receipt of the notice under Section 572.14, Subsection 2.

114. 378 N.W.2d 923, 927 (Iowa 1985).

115. *Id.* at 927.

116. *Id.* at 926.

117. 563 N.W.2d 605 (Iowa 1997).

118. 561 N.W.2d 815 (Iowa 1997).

119. 564 N.W.2d 398 (Iowa 1987).

120. 98 Iowa Acts, Ch. 1142, § 3 (codified at Iowa Code § 572.14(2)).

121. *Carson v. Roediger*, 513 N.W.2d 713, 716 (Iowa 1994).

122. 1987 Iowa Acts, Ch. 79, § 5 (codified at Iowa Code § 572.13(2)).

123. *Frontier Properties Corp. v. Swanberg*, 488 N.W.2d 146, 149 (Iowa 1992) (contractors must give notice to have a lien for subcontractor's labor and material; contractor, however, had common law remedies for the subs claims against the owner-occupant).

124. Iowa Code § 572.26.

125. Iowa Code § 572.32.

126. Section 572.30.

127. *Frontier Properties*, 488 N.W.2d 146, 150 (Iowa 1992) (full payment is a condition precedent to the imposition of the penalty).

128. 98 Iowa Acts, Ch. 1142, § 4.

129. 99 Iowa Acts, Ch. 104, § 1.

130. Iowa Code § 572.33(2).

131. Iowa Code § 572.33(1)(a).

132. Iowa Code § 572.33(b).

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

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

135. *Bidwell v. Midwest Solariums, Inc.*, 543 N.W.2d 293 (Iowa App. 1995).

136. 99 Iowa Acts, Ch. 79, § 4 (codified at Iowa Code § 572.32(1)).

137. In 1999, the legislature added another protection for owner-occupants when it stated:

> If the court determines that the mechanic's lien was filed in bad faith or that the supporting affidavit was materially false, the court shall award the owner reasonable attorney fees plus an amount not less than $500 or the amount of the lien, whichever is less.

99 Iowa Acts, Ch. 79, § 4 (codified at Iowa Code § 572.32(2)).

138. *Northwestern National Bank v. Metro Center, Inc.*, 303 N.W.2d 395, 398 (Iowa 1981); *Metropolitan Federal Bank v. A.J. Allen Mechanical Contractors, Inc.*, 477 N.W.2d 668, 671 (Iowa 1991).

139. *Metropolitan Federal Bank,* 477 N.W.2d at 671; *Society Linnea v. Wilbois*, 253 Iowa 953, 959, 113 N.W.2d 603, 606 (1962).

140. *Metropolitan Federal Bank*, 477 N.W.2d at 671.

141. *Lindsay & Phelps Co. v. Zoeckler*, 128 Iowa 558, 104 N.W. 802 (1905).

142. *Midland Savings Bank FSB v. Stewart Group, L.C.*, 533 N.W.2d 191, 195 (Iowa 1995).

143. 1984 Iowa Acts, Ch. 1215, § 1. 572.18 Priority over other liens -- priority of certain construction mortgage liens. Mechanics' liens shall be preferred to all other liens which may attach to or upon a building or improvement and to the land upon which it is situated, except liens of record prior to the time of the original commencement of the work or improvements. However, construction mortgage liens shall be preferred to all mechanics' liens of claimants who commenced their particular work or improvement subsequent to the date of the recording of the construction mortgage lien. For purposes of this section, a lien is a "construction mortgage lien" to the extent that it secures loans or advancements made to directly finance work or improvements upon the real estate which secures the lien. The rights of purchasers, encumbrancers, and other persons who acquire interests in good faith and for a valuable consideration, and without notice, after the expiration of the time for filing claims for mechanics' liens, are prior to the claims of

all contractors or subcontractors who have not, at the dates such rights and interests were acquired, filed their claims for such liens.

144. 308 N.W.2d 78, 81 (Iowa 1981) (mechanic's lien has priority over mortgage if any work or improvement by any one contractor, not limited to the mechanic's lienor's claim, had been started before the mortgage was recorded).

145. 1984 Iowa Acts, Ch. 1215, § 1 (codified at Iowa Code § 572.18).

146. *Metropolitan Federal Bank,* 477 N.W.2d at 672.

147. *Id.* at 672.

148. *Id.*

149. *Midland Savings Bank FSB v. Stewart Group, L.C.*, 533 N.W.2d 191 (Iowa 1995).

150. *Id.* at 195.

151. Iowa Code § 572.20. Priority as to buildings over prior liens upon land. Mechanics' liens, including those for additions, repairs, and betterments, shall attach to the building or improvement for which the material or labor was furnished or done, in preference to any prior lien, encumbrance, or mortgage upon the land upon which such building or improvement was erected or situated.

152. Iowa Code § 572.21. Foreclosure of mechanic's lien when lien on land. In the foreclosure of a mechanic's lien when there is a prior lien, encumbrance, or mortgage upon the land the following regulations shall govern:

> Lien on original and independent building or improvement. If such material was furnished or labor performed in the construction of an original and independent building or improvement commenced after the attaching or execution of such prior lien, encumbrance, or mortgage, the court may, in its discretion, order such building or improvement to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix. If the court shall find that such building or improvement should not be sold separately, it shall take an account of and ascertain the separate values of the land, and the building or improvement, and order the whole sold, and distribute the proceeds of such sale so as to secure to the prior lien, encumbrance, or mortgage priority upon the

land, and to the mechanic's lien priority upon the building or improvement.

Lien on existing building or improvement for repairs or additions. If the material furnished or labor performed was for additions, repairs, or betterments upon any building or improvement, the court shall take an accounting of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs, or betterments; and upon the sale of the premises, distribute the proceeds of such sale so as to secure to the prior mortgagee or lienholder priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lienholder priority upon the enhanced value caused by such additions, repairs, or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens.

153. Iowa Code § 572.21(2).

154. *DeWitt Bank & Trust v. Monarch Development CO.*, 2000 WL 328040 (Iowa App. March 29, 2000).

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

156. *Clinton National Bank v. Kirk Gross Co.*, 559 N.W.2d 282 (Iowa 1997).

157. *Modern Piping*, 581 N.W.2d at 620; *Des Moines Asphalt & Paving Co. v. Colcon Industries Corp.*, 500 N.W.2d 70 (Iowa 1993).

158. *Clinton National Bank*, 559 N.W.2d at 283.

159. Iowa Code § 572.10.

160. Iowa Code § 572.8.

161. Iowa Code § 572.11.

162. *Griess & Ginder Drywall, Inc. v. Moran*, 561 N.W.2d 815 (Iowa 1997).

163. *First Central Bank v. White*, 400 N.W.2d 534 (Iowa 1987).

164. *Atlantic Veneer Corp. v. Sears*, 232 N.W.2d 499, 503 (Iowa 1975).

165. Iowa Code § 572.26.

166. 99 Iowa Acts, Ch. 79, § 2 (codified at Iowa Code §572.23).

167. Iowa Code § 572.23(2).

168. 99 Acts, Ch. 79, § 2 (codified at Iowa Code § 572.24(2)).

169. 99 Iowa Act, Ch. 79, § 4 (codified at Iowa Code § 572.32(2)).

170. 99 Iowa Acts, Ch. 79, § 4 (codified at Iowa Code § 572.32(2)).

171. 99 Iowa Acts, Ch. 79, § 3 (codified at Iowa Code § 572.28(2)).

172. *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 709 (Iowa 1985); *Queal Lumber Co. v. Lipman*, 200 Iowa 1376, 206 N.W.2d 627 (1925).

173. *Queal*, 200 Iowa at 1380, 206 N.W.2d at 629.

174. *Clemens*, 368 NW.2d at 709.

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

176. 1987 Iowa Acts, Ch. 79, § 1 (codified at Iowa Code § 572.9).

177. *Pater Painter, Inc. v. William R. Higgins, Jr. Foundation, Inc.*, 295 N.W.2d 451 (Iowa 1980).

178. *Id.* at 452.

179. *Casler Electric Co. v. Carlson*, 249 Iowa 289, 295, 86 N.W.2d 682, 686 (1957); *Skemp v. Olansky*, 249 Iowa 1, 8-9, 85 N.W.2d 580, 584 (1957); *Nielson v. Buser*, 207 Iowa 288, 291-92, 222 N.W. 856, 858 (1929).

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

181. *Id.* at 713.