Mechanic's Liens in Iowa

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I. INTRODUCTION

The Iowa Mechanic's Lien Statute started 150 years ago with the premise that improvements to land stand as security for the workers who built the improvement. The theory and purpose of a mechanic's lien statute is to protect persons who have supplied labor or material for the construction, improvement, or repair of a building or other structure by giving the lienholders security independent of their contractual remedies against the owner of the property, if any.[2] The mechanic's lien claimant's rights are designed to prevent the owner of land from retaining the benefit of services of goods of other persons without paying for them. The statute is based on the principle that the mechanic's lien claimant has materially increased the value of an owner's real property and is entitled to look to the property as security for his efforts.

The mechanic's lien is a statutory lien and is not recognized in equity absent statutory authorization.[3] Mechanic's liens and equitable liens, nevertheless, share several common characteristics.[4] Both types of liens are essentially remedial interests rather than ownership interests in property. In other words, these liens are characterized by the holder's right to collect a debt by forcing a judicial sale of the property subject to the lien rather than by any right of the holder to possess and use the property. The right to foreclose and the lack of a right to possess the property distinguish these liens from other types of property interests. Additionally, the enforcement of mechanic's liens is subject to equitable principles, as is the enforcement of equitable liens. One provision of chapter 572 explicitly recognizes the authority of judges to exercise their discretion in determining available remedies.[5] The Iowa Supreme Court has mandated that the mechanic's lien statute be interpreted to effect its equitable purposes.[6] Furthermore, the standard of review of district court decisions involving chapter 572 is de novo, as is the standard of review for other entity cases.[7]

The statute'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.[8] The legislative changes since 1980 substantially curtail the mechanic's lien remedy for almost all contractors.

II. BRIEF OVERVIEW OF THE OPERATION OF CHAPTER 572

Although discussion of the complexities of the Iowa mechanic's lien statute will be reserved until later, this Article will better enable the reader to understand the operation of the statute if an overview is given first. Chapter 572 allows only those persons who have furnished labor and material *by virtue of any contract* to recover on a mechanic's lien.[9] Consequently, only contractors and subcontractors are entitled to mechanic's liens. The legal consequences that inhere to the distinction between contractors and subcontractors will be discussed in full.[10]

In addition to proving a contract for supply, a mechanic's lien claimant's cause of action requires proof of three additional elements. The claimant must prove that it has *furnished* material or labor for an improvement. Generally, the claimant has furnished material when the item is delivered to the owner's property, but there are exceptions. A claimant has furnished labor when the claimant actually works to improve the owner's property and some actual, visible improvement results.[11] Also, the claimant must prove that the goods and services provided the owner amount to *material* or *labor* within the meaning of the statute.[12] Although these terms include almost all types of goods and services that can be supplied or performed for the construction of a building, there are some exceptions. The last element in the claimant's cause of action is to show that the claimant has furnished labor or material for an *improvement, alteration, or repair* of the owner's real property. These terms have connotations that serve to limit the recovery of persons who have worked for or supplied goods to an owner.[13]

The mechanic's lien arises at the point in time when a subcontractor or contractor furnishes labor or material for an improvement of real property.[14] As a general rule, the lien attaches only to the property interest of the person for whose benefit the material was furnished or labor performed.[15] Because a number of persons can simultaneously have property interests in a parcel of land or an improvement, it is an important question under chapter 572 to identify the person for whose benefit the labor or material was supplied. The statute subjects the property interest of that person to judicial sale for the price or value of labor and materials furnished by a claimant.[16] The computation of the price or value of the supplier's goods or services is a complex process that relies heavily on principles of computation of contract damages.[17] The statute does not impose personal liability on the owner for the amount of the lien, but rather limits the remedy of the lienholder to foreclosure of the lien and sale of the owner's property interest.[18]

In addition to the requirements of the claimant's cause of action, chapter 572 has several provisions which bar or limit the amount of the claimant's recovery. Section 572.27 imposes a statute of limitations on contractors of two years and ninety days after completion of the entire project and on subcontractors of two years and ninety days after

the subcontractor's last date of furnishing materials or labor for the project. The property owner can shorten the statute of limitations to thirty days demanding that the claimant foreclose the lien.[19] The subcontractor's right to recover to the full extent of its lien may also be lost unless the subcontractor files a lien statement with the clerk of the district court within ninety days after the subcontractor last furnished labor or material.[20] Additionally, mechanic's liens will be defeated if the claimant obtains collateral security before the completion of its contract.[21]

Even if a mechanic's lien claimant proves its right to a lien and avoids the pitfalls that may defeat or limit the lien, the claimant is not assured of recovering the full value of the mechanic's lien claim. Chapter 572 recognizes that certain other holders of interests in the real property for which the claimant furnished labor and material may have rights to the owner's property superior to the rights of the mechanic's lien claimant. The statute provides a means for determining the relative priority of claims among conflicting interests in the owner's property.[22] The priority of the mechanic's lien claimant's rights over the claims of others depends upon the claimant's compliance with the lien perfection requirements of sections 572.8-.10.

III. PERSONS ENTITLED TO MECHANIC'S LIENS: SUBCONTRACTORS AND CONTRACTORS

The right of materialmen and laborers to a mechanic's lien is created by Iowa Code section 572.2. As stated above, only contractors and subcontractors are entitled to mechanic's liens, inasmuch as chapter 572 allows only those persons who have furnished labor and material by virtue of any contract to recover on such a lien.

A. *Distinguishing between Subcontractors and Contractors*

A primary purpose of a mechanic's lien is to assure a subcontractor payment for his material and labor. The designation "subcontractor" includes "every person furnishing material or performing labor upon any building, erection, or other improvement, except those having contracts therefore directly with the owner …."[23] The crucial characteristic of a subcontractor is that it has no contact with an "owner, his agent or trustee …."[24] On the other hand, a supplier who has a contract with an owner is a contractor under chapter 572.[25] Significant legal consequences inhere in the distinction between a subcontractor and contractor. A contractor, by definition, has contractual remedies available against the owner to recover the value of its labor and materials,[26] in addition to the remedy provided by chapter 572. A subcontractor, however, has no contractual remedies against the owner, unless the subcontractor can establish that it was an intended third party beneficiary of the principal construction contract.[27] Although the Supreme Court has not addressed the issue, a subcontractor who could establish that it was a third party beneficiary would have

a strong argument that it was not a subcontractor at all, but was a contractor, since it would in effect have a contractual relationship with an owner. In most cases, however, the subcontractor's contractual remedies are only against its contractor. Thus, chapter 572 is generally the only means of recovery by a subcontractor against an owner's property.[28]

Additionally, chapter 572 has different requirements for recovery by contractors and subcontractors. Subcontractors have less time within which to perfect their liens than do contractors.[29] Also, subcontractors who fail to perfect their liens within the prescribed time period for filing are limited as to the amount of the lien claim on which they can recover.[30] Late-filing contractors, on the other hand, can recover to the full extent of their lien claims irrespective of when they file.[31] Moreover, late-filing subcontractors are required to serve written notices of the claim for the lien on owners;[32] late-filing contractors are not.[33] These distinctions will be analyzed more fully when filing requirements are discussed later in this Article.

The case of *Beane Plumbing & Heating Co. v. D-X Sunray Oil Co.*[34] illustrates the distinction between a subcontractor and contractor. In that decision, a mechanic's lien claimant installed gasoline pumps at a service station pursuant to a contract with the general contractor for the service station.[35] At the time of the installation of the pumps, the claimant had a contract with the general contractor but had no contract with the owner of the station. Consequently, the claimant was a subcontractor at the time of installation. On the date of completion of the installation, a flood floated the gas tanks out of the ground and ruined the piping.[36] An agent of the service station owner requested the claimant to repair the damage. In a later action to recover for the cost of repairs, the court held that although the claimant had been a subcontractor for the original installation, the claimant had become a principal contractor for purposes of repairing the damage because the acceptance of the offer to repair created a separate contract with the owner.[37]

IV. THE ELEMENTS OF A MECHANIC'S LIEN CLAIM

A. *"By Virtue of Any Contract"* Every mechanic's lien claimant must have a contract.[38] 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.[39]

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.[40]

The mechanic's lien statute is liberally construed to promote restitution, the prevention of unjust enrichment, and to assist parties in obtaining justice.[41] These equitable principles, however, do not supplant the need for a contract with an owner to recover on a mechanic's lien.[42]

An action on a mechanic's lien is an action on a contract.[43] 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.[44]

The contract may be express or implied.[45] The contract is implied in fact when the parties show their assent by their acts.[46] 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.[47] One who pleads an express contract cannot ordinarily recover on an implied contract or *quantum meruit*.[48] An implied contract may exist where there is an express contract if the implied contract covers points not covered by an express contract.[49] An implied contract on a point not covered by an express contract is not superseded by the express contract.[50] 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.[51] Providing benefit to or enrichment of an owner by mistakenly performing labor on the property is not sufficient to imply a contract.[52]

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.[53] 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.[54] A contract with a prior owner is insufficient, even if the workers were not told of the change in the ownership.[55] 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.[56] 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.[57] 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.[58] 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.*[59] 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.[60] 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.

An owner is defined in section 572.1(1) as follows: "*'Owner'* shall include every person for whose use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians."[61] An "owner" must have a present legal or beneficial interest in the property or its use.[62] The list of persons who could have a present legal or beneficial interest in property includes the following: legal titleholders, mortgagees, vendors, vendees, landlords, tenants, lessors, lessees and so on. Determining whether these interests qualify a person as an owner under section 572.1(1) is an important issue for the operation of chapter 572. Consideration of several of these interests follows.

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.[63] 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.[64] 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.[65] 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.[66]

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."[67] 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.[68] 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.[69] 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.[70] 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.[71]

3. The Contractor as Agent. A contractor may be recognized as an agent of the owner for purposes of a mechanic's lien.[72] 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.

Pay-N-Taket, Inc. v. Crooks[73] illustrates one approach to this situation. In that case, a builder purchased several lots for the construction of houses. The defendant was a subsequent purchaser of one lot and house against which the mechanic's lien claimant sought to foreclose for material furnished on a contract with the builder. The claimant's recovery depended on his being regarded as a contractor and not a subcontractor. The court held that the mechanic's lien claimant had no contract with the owner — the defendant — so that the claimant was a subcontractor.[74] Consequently, the court limited the amount of the claimant's recovery because of his failure to comply with the filing requirements for subcontractors.[75] The court's analysis is not satisfactory because the court did not address the question whether the general contractor was also an owner under section 572.1(1). The builder held legal title to the lots and houses at the time it contracted with the claimant for material.[76] The legal title holder is an owner because it has a present interest. Hence, it would seem that the claimant should have been determined to be a contractor since the claimant contracted with an "owner." The claimant could not have been a subcontractor for the same reason. The rights of the defendant purchaser should have been measured under section 572.18, which defines the priority of subsequent purchasers against earlier mechanic's liens.[77] A result quite different from the one in *Pay-N-Taket* would have been reached if the court had recognized that the builder was an owner.

Section 572.1(2) provides that subcontractors are suppliers who furnish material or labor except for those having contracts directly with the owner.[78] This provision should not be taken to mean that there is only one owner; a number of persons may hold claims to the same property simultaneously.[79] A supplier who transacts business with any holder of a present beneficial or legal interest (other than a lien) in the property should be deemed a contractor for the purposes of chapter 572. This interpretation of section 572.1(2) should not work any disservice to other holders of interests in the property since their interests are not subject to attachment by a mechanic's lien arising from an improvement for which the holder did not contract,[80] unless the court deems that equity requires these other interests to be subject to the lien.[81]

The court has recognized that in certain circumstances a contractor is by implication an agent of an owner.[82] Factors which might warrant the recognition of a contractor as a agent include: (1) the owner reserves the right in the construction contract to approve the contractor's choice of supplies;[83] (2) the contractor executes supply contracts in the owner's name;[84] (3) the contractor has authority to purchase supplies on the owner's account[85] and (4) the owner is obligated under the construction contract to check the price, quantity and quality of the materials.[86] In addition to a

finding of agency by implication, there is no obstacle to declaring that an express agency relationship exists between the owner and the contractor where their contract so provides.

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.[87] Mere knowledge that the work is being performed is not enough to charge the vendor's interests.[88] 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.[89] 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.[90] 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.[91]

In *Knudson v. Bland,*[92] a developer of real estate was also the purchaser under an executory contract for sale of land, the undeveloped value of which was $2,000. The contract price, however, was $25,000. This disparity in price was the primary reason why the court deemed the vendee the agent of the vender for purposes of attachment to the vendor's interest of a mechanic's lien arising out of contracts for material and labor between the vendee and claimant.[93] The fact that the vendor stood to profit greatly by the vendee's improvement justified the court's assigning some of the risk of the development plans to the vendor. The legal conclusion used to allocate that risk in such an equitable fashion was that the vendee was the vendor's agent.[94] The court has also found it equitable to recognize agency relationships where one spouse contracts for improvement of property belonging to the other spouse.[95]

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.[96]

5. Vendor's and Vendee's Interests

The interests of vendors and vendees in property subject to a contract for sale are derived from the principles of equitable conversion.[97] The doctrine of equitable conversion regards the purchaser as owner of the land and as debtor for the purchase money.[98] The purchaser's equitable interest in the land means that the purchaser has a present

beneficial interest for the purposes of determining his status as an owner under section 572.1(1), even though this interest is subject to the vendor's lien.[99] The vendor may often hold legal title as security for payment of the purchase price. Thus, the title-retentive vendor also has a present legal interest in the land for purposes of determining his status under section 572.1(1).[100]

The most important in the vendor-vendee situation is whose interest is subject to attachment for the value of the lien. The general rule of chapter 572 is that a holder of an interest in property who contracts for the improvement of property can subject only its own interest to attachment by a lien.[101] Thus, for the most part, if only the title-retentive vendor enters a contract for the improvement, then only the vendor's interest is subject to the lien. Similarly, if only the vendee contracts for improvement of the property, only his interest is subject to the lien.[102] There are situations, however, where the vendor is so closely connected with the vendee's contract for improvement of the property that both interests will be subject to attachment by a mechanic's lien.[103] The question of when a mechanic's lien arising from a contract with the vendee attaches to the vendor's interest will be discussed more fully later.[104]

6. Lessor's and Lessee's Interests

Both the lessor and lessee hold legal interests in property and, for this reason, can be owners under section 571.1(1).[105] Generally, the lessor holds a fee interest subject to a lease for a term of years or other period. The lessee's interest is a leasehold that entitles him to possession and use of the property for a specified period. The rule that an owner can subject only its own interest in property to attachment by a mechanic's lien also applies to lease arrangements.[106] But, as with the vendor-vendee situation, the Iowa Supreme Court has determined some lessors may be so closely connected with their lessee's contracts for improvement of the property that it is equitable to allow attachment of the lien to both the lessors' and lessees' interests.[107]

7. Lienholders as Owners under Section 572.1(1)

Mortgages, judgment liens and mechanic's liens are interests in property. These interests, however, are not the kind of present legal or beneficial interests that would generally accord the holder of such an interest the status of an owner under section 572.1(1). The common law does not recognize that liens—for example, mechanic's liens—attach to other liens.[108]

C. *"Furnishing Any Material or Labor"*

1. *The Meaning of "Furnished"*

The statute requires that labor or material be "furnished" for improvement, alteration, or repair.[109] Work off the project site that never becomes part of the improvement of the project site is not a lienable item.[110]

The lien created by section 572.2 is in favor of "every person who shall *furnish any material or labor* …."[111] The term "furnish" in section 572.2 appears synonymous with delivery, supply or provide.[112] A mechanic's lien cannot be defeated by evidence that the material supplies was not actually used for that purpose.[113] A materialman has been allowed to recover where the evidence showed that supplies were delivered to the site of an improvement and that similar material was installed on the improvement.[114] If a claimant cannot show that its materials were *actually* used for construction, the owner may defend by pleading that the materials similar to the kind the claimant allegedly delivered were actually purchased elsewhere.[115] It is not yet clear, however, who has the burden of proof on the issue.[116]

A mechanic's lien will not arise if a supplier refuses to deliver material.[117] The court has not decided whether a mechanic's lien will arise against an owner for an order of material by a contractor where the supplier is willing to fill the order but the contractor refuses to accept delivery or cancels the order.[118] Comparison with seller's remedies under Iowa's version of Article 2 of the Uniform Commercial Code[119] might suggest an equitable resolution to the problem if and when it arises. In such a contest resale value and unique characteristics of the material orders would be important considerations.

"Furnish" has an additional connotation for a person whose contract requires both the supply of materials and their installation into the improvement or repair. Common examples of such persons are cabinetmakers, carpet layers, electricians, plumbers and tile layers. These persons will have "furnished" materials only when the materials are incorporated into the structure. In *Kern v. Maytag*,[120] a floor tile subcontractor could not recover on a mechanic's lien claim for tiles delivered to the job, but allegedly stolen before being laid, since it was determined that the requirement of "furnish" under section 572.2 required incorporation into the building and not merely delivery to the job site.[121] From *Kern* a general rule can apparently be stated: a supplier has furnished materials when the materials are no longer under the control of the supplier or within its responsibility under the contract.[122] Basically, the court's recognition of a mechanic's lien in these cases appears to involve a determination of an equitable allocation of a risk of loss between the contractor or owner and supplier for materials brought to or stored at the jobsite.

The term "furnish" in the context of supplying labor, may well require that the labor or service be of some value to the owner before the claimant can recover. Such a requirement would explain why an architect whose plans are used may obtain a mechanic's lien,[123] but an architect whose plans are not used cannot.[124] Also, a laborer whose work is so defective that the owner receives no benefit cannot obtain a lien.[125] The test has recently been stated to be whether there has been an actual or visible improvement in the real estate.[126]

It is unlikely that the supplier of materials would have to show an actual or visible improvement in the property to obtain a mechanic's lien for materials supplied. The quantity, quality and value of materials delivered to a jobsite can be readily measured without resorting to an evaluation of the finished product. On the other hand, in contests over the reasonable value of labor supplied, *e.g.*, where there is no express contract term covering labor costs or where the owner counterclaims for damages for defective workmanship, the finished project may be the only measure of value available to the court. Moreover, the mechanic's lien for materials arises upon delivery to the jobsite, even if the materials are not used in construction.[127] A rule allowing the laborer to recover merely because the laborer was present or available for hire at a jobsite without actual proof of benefit to the owner would work an injustice upon the owner. The actual benefit test is unnecessary for the provision of materials because the unused materials are ordinarily valuable upon resale for future use by the owner. Yet labor expended without benefit to an owner has no potential value.

Another apparent reason for requiring the "actual benefit" test with regard to the supply of labor but not for materials is the element of notice to third parties. The provision of labor without actual or visible benefit would not give potential third party creditors notice of the improvement. The delivery of materials, however, would give such notice even if there was no benefit to the owner. One old Iowa case may be interpreted to suggest that the test for a mechanic's lien for materials involves no element of conferring an actual benefit or improvement on the owner. In *Harris v. Schultz*,[128] the court held that lightning rods were lienable items regardless of whether the rods were of any benefit or utility to the owner.[129]

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

a. Material. The statutory definition of material[130] includes a nonexclusive list of lienable items and also covers the "ordinary meaning" of the term. Consequently, "material" embraces a wide range of items. Lienable items include lumber,[131] bricks, concrete, stone,[132] appliances, fixtures, gasoline, oil, grease, fertilizer,[133]

decorations, window screens,[134] locks,[135] lightning rods,[136] siding, paint,[137] and almost any other substance which can be used in the construction of a building or improvement. The only question which seems to have presented any difficulty with respect to the definition of material is whether tools and equipment used in the construction are lienable items. In *Melcher Lumber Co. v. Robertson Co.*,[138] the court held that lumber used for concrete forms was not lienable because it was not intended as part of the permanent improvement and was reusable as forms on subsequent projects, notwithstanding that the lumber lost its value for other purposes. The court likened the lumber to a "necessary tool or equipment for the construction [of the improvement that was] capable of use in successive improvements …."[139] The court invited the legislature to amend the statute to provide for liens for equipment.[140] Such an amendment was passed in 1947.

The legislature amended Section 572.1(2) by adding the word "tools" in the definition of material.[141] This change was done at the same time as the creation of a lien for renting material (including tools) to persons at the site.[142] 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.[143] 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.

b. *Labor*. There is no statutory definition of "labor" as there is for "material." Section 572.2, however, does allow a lien "for improvement, alteration or repair … including … the construction or repair of any work of internal or external improvement and … grading, sodding, installing nursery stock, landscaping, sidewalk building, and fencing on any land or lot …."[144] The court has recognized that nearly any service contracted for by the parties that improves real property can be the basis for a mechanic's lien. One exception, established in the case of *Brown v. Wyman*,[145] is that the initial breaking of prairie with a plow is not lienable because it is not an improvement upon land.[146] While the likelihood of these century-old facts recurring in Iowa is slim, dicta in *Brown v. Wyman* suggests that a mechanic's lien would not attach for annual plowing.[147] Whether the Iowa Supreme Court would refuse to recognize a mechanic's lien for annual plowing because of this unfortunate language is not clear. Liens are allowed on interests in farms for capital improvements such as hogsties, barns and corn cribs.[148] Hence, there does not appear to be an immunity from mechanic's liens for farms. Additionally, the statute recognizes that the term material includes "sod, soil, dirt, mulch, peat and fertilizer."[149] Since the application of fertilizer could give rise to a mechanic's lien for the value of the labor and material, it is difficult to see why annual plowing would not give rise to a lien.

A more important question for the mechanic's lien statute regarding the provision of labor is what expenses associated with the laborer are compensable. The general rule is that any item which was a basis for compensation under the contract for supply of labor is lienable.[150] Board, lodging, and mileage are also lienable.[151] The court previously indicated that premiums on workmen's compensation, insurance and social security tax payments were not lienable.[152] Recently, however, the court has recognized that these costs may be the subject of a lien.[153]

As noted previously, the provision of labor without an actual or visible improvement of the owner's property creates no lien. This rule bars creation of a lien for unusually defective labor[154] and for labor, which, regardless of quality, results in no improvement because the product of the labor is not adapted to the property.[155]

c. *The Award*. The amount of the mechanic's lien award can include sums for the reasonable value of extra work not contemplated by the original contract. These sums are recoverable under implied contract theories.[156] The claimant can also request and receive an award of a reasonable profit.[157] Statutory interest is also available, but the date from which such statutory interest accrues is unclear.[158]

4. *Non Lienable Items*

Gasoline, diesel fuel, and petroleum are not lienable materials under the mechanic's lien statute.[159] 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.[160] 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.[161] A land surveyor'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.[162] This work was preliminary to, rather than part of the contemplated improvement.[163] 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."[164] 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.[165] 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.[166] 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.[167] 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.

D. 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.[168] 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.[169]

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.[170] 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.[171] 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.[172]

Although the burden of proof regarding the showing of substantial performance rests with the contractor,[173] the owner has the burden of showing any defects or incompletions.[174] The owner is required to show "legally defective" work to obtain an offset or damage.[175] 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."[176]

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.[177]

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.[178]

The court may also require the claimant to prove that any discharge of the claimant from the improvement project was without fault on his part.[179] The court, however, was not willing to defeat the claimant's recovery in *Kaltoft v. Nielsen*,[180] where there was a question as to substantial compliance with a contract term proscribing the date of completion. The court in *Kaltoft* displayed a willingness to allow the claimant recovery for fair value of the materials or labor furnished, while allowing the owner offsets for damages resulting from the delay in completing the contract. This balancing of benefits conferred by and damages resulting from the claimant's conduct seems more consonant with the equitable purposes of the mechanic's lien statute than the approach suggested by the cases that require the claimant to prove substantial compliance and faultless discharge as prerequisites to establishing a mechanic's lien. Nevertheless, an argument can be made that the claimant's failure to comply with the contract is grounds for dismissal of the foreclosure action.[181]

Supplies of materials may obtain a mechanic's lien only when they have in some way indicated that the materials are furnished for use on a particular real estate improvement project. A supplier who delivers materials to a contractor without knowing the specific project on which the materials are going to be used cannot later claim a lien on the real estate for the value of the materials.[182] Consequently, supplies should keep records which clearly indicate the materials supplied to each contractor according to the separate jobs of each contractor. If a supplier does not maintain such records and details with a contractor on open account, relying solely on the contractor's credit, the supplier probably will not be entitled to a mechanic's lien.[183]

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.[184] The general rule is that the cost of correcting defects or completing the omissions is the proper measure of damages.[185] 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.[186] 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.[187] Iowa law follows Restatement of Contracts Section 364(1) as the appropriate measure of damages in an owner's breach of contract claim.[188] The amount of money needed to finish the work is the deducted from the balance due the contractor on the contract.[189]

V. FILING REQUIREMENTS FOR MECHANIC'S LIEN CLAIMANTS.

Section 572.8 provides that a mechanic's lien claimant shall file with the clerk of the district court of the county where the real property subject to the claim is located a statement or account of the mechanic's lien claim.[190] The filing of a mechanic's lien statement serves three purposes. First, the filing of the lien gives constructive notice to the owners of the existence and amount of a claim for a lien. Second, the mechanic's lien filing gives constructive notice to holders of security interests and to holders of liens on the property who recorded their interests before the mechanic's lienor. The respective dates of filing between mechanic's lienors and other lienors will, in some cases, be relevant for establishing priority of claims among these parties. Finally, the mechanic's lien filing gives constructive notice to potential subsequent purchasers and encumbrancers, thereby protecting the mechanic's lien claim against such creditors.

As will be shown, the timing of a subcontractor's filing can be very important with respect to the subcontractor's rights against owners and prior and subsequent creditors. In many situations, the failure to file a timely lien statement will bar or limit the subcontractor's recovery. In contrast, the contractor's failure to file a timely statement is almost unrelated to its ability to recover on its lien.[191] The only class of persons who benefit from a contractor's failure to file a timely statement are good faith purchasers who acquire their interest later than ninety days after the completion of the improvement and before the contractor files.[192] As to other parties, the contractor's time of filing is not relevant, provided that the contractor files the statement within the appropriate statute of limitations for the foreclosure action, and before a disposition of the merits of the mechanic's lien claim is made.

A. The Mechanic's Lien Claimant's Filing Duties Vis-à-vis an Owner

The Iowa Supreme Court has often stated that the failure to file a mechanic's lien statement does not preclude foreclosure of a mechanic's lien by a claimant against the owner's property.[193] While it is an exaggeration to state that filing a statement relates only to priority,[194] it is clear that filing is not a prerequisite to foreclosure. Nor is filing a statement a prerequisite to a mechanic's lien claimant's intervention in a foreclosure action instituted by another mechanic's lienor.[195]

Since the claimant need not file to establish a mechanic's lien claim against an owner, the filing of an insufficient statement will not defeat the right to a mechanic's lien.[196] Unintentional errors in the amount, parties or

dates involved are excused.[197] The perpetration of fraud by the filing of an incorrect statement, however, may defeat all recovery, including any amounts actually owed the claimant.[198]

The filing of a mechanic's lien statement does have independent significance for a subcontractor who claims against an owner, however. Generally, a subcontractor is entitled to the contract price or reasonable value of the materials and labor performed.[199] If the subcontractor does not file a mechanic's lien statement within ninety days "from the date on which the last of the material was furnished or the last of the labor performed,"[200] the extent of the recovery for the subcontractor's lien under section 572.11 will be limited to the balance due from the owner to the contractor at the time of the service of notice of the untimely filed lien on the owner.[201] The following example will illustrate the application of section 572.11.

> *O* contracts with *K* to build a garage for $6,000.
> *K* contracts with *S* to supply $4,000 worth of lumber.
> *S* has no contract with *O*, and thus *S* is a subcontractor.
> Day 1: *S* delivers the entire $4,000 worth of lumber.
> Day 31: *O* pays *K* $4,000.
> Day 91: The ninety day period after completion of *S's* furnishing of material expires. Thus, the period for a timely filing has expired.
> Day 100: *S* files late.
> Day 105: *O* pays *K* another $1,000.
> Day 110: *S* gives *O* notice of the late-filed mechanic's lien claim under section 572.10.

It is apparent that *S* has a claim against *K* for $4,000 for lumber furnished, but because *S* perfected late, *S's* recovery on its claim for a mechanic's lien against the property of *O* is limited to the balance due on the principal contract at the time of the service of notice of the late-filed mechanic's lien. At the time of the service of notice of the late-filed mechanic's lien, *O* had paid *K* $5,000 of the $6,000 contract price on the principal construction contract. The balance due on Day 110 was $1,000. Therefore, *S* can collect only this balance—$1,000—on its lien claim for furnishing $4,000 worth of materials.

1. Direct and Derivative Lien Liability

Section 572.11 reflects a legislative compromise among the subcontractor's interest in obtaining full recovery for materials and labor furnished, the contractor's interest in obtaining payment on the principal construction contract as soon as possible and the owner's interest in not being required to pay more than the agreed contract price for the improvement, including all materials and labor furnished under the contract. This legislative compromise established a relationship of direct lien liability of the owner to the subcontractor. Direct lien liability means that the owner's

property is liable for payment to the subcontractor for the full value of materials and labor furnished, even if the owner has paid the contractor, who in turn promised to pay the subcontractor. The relationship of direct lien liability of the owner to the subcontractor continues for ninety days after the completion of the subcontract,[202] and can be preserved beyond this period if the subcontractor files a mechanic's lien statement before the expiration of the ninety day period. The effect of this direct lien liability scheme is that the owner will or should avoid paying the contractor before ninety days after completion of the project, except to the extent that the owner can assure itself that mechanic's liens of subcontractors are fully satisfied. If the owner pays the contractor, the owner will not automatically receive credit against the subcontractor who has preserved the direct lien liability relationship by filing within the prescribed time period.[203]

Under the perfection and filing provisions of the Iowa statute, however, if the subcontractor fails to file a timely mechanic's lien statement, the relationship of direct lien liability is suspended and a relationship of derivative lien liability takes its place. Under a derivative lien relationship, the subcontractor's lien rights are derived from the contractor's rights against the owner. Consequently, the subcontractor's lien recovery is subject to any counterclaims and offsets that would diminish the contractor's recovery on the principal contract. The primary offset from the contract price would, in most cases, be the payments made on the contract. Consequently, the subcontractor's derivative lien rights are limited by payments made by the owner to the contractor. Thus, section 572.11 limits the late filing subcontractor's lien recovery to the balance due on the principal construction contract.

The expiration of ninety days after completion of the subcontract without the subcontractor's filing a mechanic's lien statement merely suspends the direct lien liability relationship. The subcontractor can re-establish direct lien liability by filing a statement and serving written notice on the owner under Iowa Code section 572.10. Re-establishment of direct liability means that the owner will not be allowed to offset against the subcontractor's lien claim any amounts paid the contractor after notice was served on the owner in accordance with section 572.10. The owner, however, may offset against the subcontractor's lien claim any amounts paid before notice was served. The earlier conditional direct lien liability period, which under the statute expires ninety days after completion by the particular subcontractor, is not restored by the late-filing of a mechanic's lien. Consequently, payments made by the owner during the earlier ninety day filing period will be offset against a late-filing subcontractor's lien claim, even though such payments would not have been offsets had the subcontractor timely filed.[204]

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.[205] 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.[206] The determination of the balance due includes deductions for finishing the work.[207] 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.[208] 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.

In *Carlson v. Maughman*,[209] however, where a contractor replied affirmatively to the specific question of whether the submitted plans for a house could be built for $24,000, the claimant was not allowed to prove that the reasonable value of the improvement was greater than the $24,000 bid. The owners in *Carlson* had insisted that they were not willing to pay more than $24,000, a prior to which the builder agreed. Subsequently, the builder attempted to recover for hidden costs of which the owner was not informed at the time of the construction. The court allowed no recover for these additional costs.[210] It is not clear whether the court was proceeding on a theory of agreed cost, warranty or estoppel as to the excess.

Where there is no agreement as to price, the law implies a duty to pay reasonable value for the labor or materials.[211] Even if cost estimates are not conclusive as to contract price, the estimates constitute evidence as to the fair and reasonable value of the improvement.[212] Estimates are accorded less weight, however, when there is evidence that the performance of additional work or extras were not explicitly contemplated by the original estimate.[213] In proving the reasonable value of an improvement, a subcontractor or contractor is not limited to proving the value of comparable improvements in the same area and limiting its recovery to that value. Rather, the claimant can, in such a case, prove the separate costs of materials and labor, including a reasonable profit.[214] Thus, the claimant can prove the value of the parts rather than value of the whole improvement as a basis for recovery on a lien.

2. "The Date on Which the Last of the Material was Furnished or the Last of the Labor Was Performed"

A subcontractor's recovery on a mechanic's lien claim is limited to the balance due the principal contractor from the owner *only* if the subcontractor fails to file within ninety days from the date on which the last of the material or labor was furnished.[215] Thus, a crucial issue becomes the identification of the date on which the last material or labor was furnished.[216] The date material or labor was last furnished is particular to each subcontractor;[217] there is no final date of completion of the improvement from which all mechanic's lien claimants may measure the time for filing. Since each claimant has a particular period for timely filing, it is necessary to determine the date of the subcontractor's completion of its contract for labor or materials.

The court has recognized that claimants who have allowed the period for timely filing to expire may attempt to return to the project or furnish additional material or labor so as to renew or extend the period for timely filing. In *Skemp v. Olansky*,[218] the court held that a subcontractor who had not filed his claim for a mechanic's lien within the ninety day period after completion of his work would not be allowed to extend the period for timely filing merely by returning to the job for a short period of work.[219] The court found that this return to the jobsite was merely a sham for purposes of avoiding the recovery limitation contained in section 572.11, which limits the late-filing subcontractor to the balance due on the principal construction contract. Since the sham return to work could not be tacked onto earlier work for filing purposes, the subcontractor was deemed to have filed late and could recover only the balance due the owner, which in the particular case was nothing. Similarly, the court held in *Nielsen v. Buser*[220] that a return to the project for two and one-half hours to remedy a slight defect in workmanship did not extend the period for timely filing of a subcontractor's lien statement.[221] The court was convinced that the claimant's return to the improvement site three months after substantial completion of the subcontract was "either for the purpose of remedying a slight defect in the work previously performed and considered as completed, or that the work was performed in this trivial amount for the purpose of attempting to revive a lien which he knew had previously expired."[222] The fact that the claimant had served notice of the filing of the lien statement on the owner was interpreted as an indication of the claimant's original belief that he was filing his claim for a lien after the expiration of the filing period.[223] If the claimant had believed he was filing a timely statement for a lien, there would have been no reason to give notice of

the filing to the owner. Because of the lapse of time between the two work periods, the triviality of the second work period and the service of the notice of a lien, the court ruled that the lien was not timely filed.[224]

The general rule emerging from these cases is that a significant lapse of time between two dates of furnishing material or labor on a single contract creates a presumption that the subcontract was completed on the earlier date.[225] Unless the presumption is rebutted, the date of the last material or labor furnished, for filing purposes, will be the earlier date. The presumption may be rebutted, however, by evidence that the subcontract was not completed as of the earlier date.[226] In addition, the presumption may be overcome by a showing that additional labor or repairs were furnished in good faith and not for purposes of extending the period for timely filing.[227] One qualification to the good faith rebuttal is that a subcontractor who has substantially failed to comply with the terms of the subcontract may not extend the period for timely filing by returning to rectify the unusually defective work.[228]

Similar principles have led the court to refuse to recognize, for filing purposes, different times at which materials were furnished if the additional material "was not part of the material contemplated by the parties under the original contract …."[229] In *Mulligan v. Zeller*,[230] the court held that a purchase of a small amount of material from a supplier several months after completion of the supplier's earlier contract for supply of materials for a house did not extend the period for timely filing of a contractor's mechanic's lien.[231] The lapse of time between the completion of the house and the purchase of the small amount of material, combined with the fact that the additional material was not contemplated by the original contract on which the lien was claimed, supported the court's conclusion that the subsequent purchase did not extend the filing period for a lien claim arising from the original contract. The court did not consider, however, the availability of a lien claim for the additional material—which claim amounted to $5.78—but it appears that a lien should have been available for this amount.

Furthermore, separate contracts for improvements on the same piece of property cannot be joined to extend the period for filing mechanic's liens claims, even if the owner directs the supplier to charge both contracts to the same account. *Denniston & Partridge Co. v. Luther*,[232] raised the issue of whether a contractor could extend its period for filing a lien arising from one construction contract by joining to that period the period for filing a lien arising from a second construction contract to be performed on the same piece of property for the same owner. The court stated:

> The two structures were different and independent improvements. The materials therefore were furnished under separate and independent contract, and while plaintiffs were entitled to assert a mechanic's lien upon either or both, they could not … prolong the period for filing their claim under

> the first contract by the expedient of charging therein the items furnished under the other and later contract for another building.[233]

Finally, the court addressed the question of the period for timely filing of a person who was both a subcontractor and a contractor in the case of *Casler Electric Co. v. Carlsen*.[234] The *Casler* court held that a supplier who furnished labor and materials under a subcontract for rough wiring of a house and who subsequently furnished labor and materials under a contract directly with the owner for finish wiring and electrical fixtures could not use the last date of work on the contract as the last date of work for filing a statement for a lien arising from the subcontract. The two contracts were "independent" and thus the second contract did not extend the period for filing of mechanic's lien on the subcontract.[235] The flexibility of the term "independent" should allow the court to avoid inequitable results in any future situations where tacking of contractual periods would be appropriate.

3. Estoppel of the Owner to Assert a Subcontractor's Failure to File as an Offset to Lien Recovery

Although the question has been presented on several occasions, the Iowa Supreme Court has never decided whether an owner may be estopped from urging the subcontractor's failure to file a timely lien statement where the owner has induced the subcontractor not to file. The most recent Iowa Supreme Court case suggests that grounds for estoppel in this circumstance cannot, as a matter of law, serve to excuse a subcontractor's failure to file.[236] In an early decision, *Cedar Rapids Sash & Door v. Heinbaugh*,[237] the court considered the claimant's argument that the owner should be equitably estopped from insisting that the claimant's recovery was limited by his failure to file. The Supreme Court affirmed the trial court's decision that the facts, as presented, did not amount to an estoppel.[238] The willingness of the court to consider whether the facts amounted to an estoppel of the owner does not necessarily mean, however, that such an excuse for late filing exists under chapter 572.[239] The *Heinbaugh* court did indicate, however, that the owner might be estopped if the facts were different.[240]

The Supreme Court appears to have repudiated such an approach, however. In *Skemp v. Olansky,*[241] a subcontractor argued that his failure to file a timely mechanic's lien statement should not limit his right to recover to the full extent of his claim for a lien since the owner induced the subcontractor's failure to file. The court observed:

> It is not asking too much to require him [the subcontractor] to comply with the statutes in asserting his claim. There is a considerable amount of evidence from the plaintiff and other witnesses that many of the potential claimants, including the plaintiff, did not file promptly because Olansky [the owner] asked them not to do so until the house was completed, when it would be sold and they would be paid. They relied on this, to their cost.[242]

This case suggests that, as a matter of law, the owner cannot be estopped from using the subcontractor's failure to file a timely lien statement.

To round out the development of this issue, the United States District Court for the Northern District of Iowa, in *Randall v. Colby,*[243] held that under Iowa law an owner was estopped from raising as a limitation to a subcontractor's recovery the fact that the subcontractor failed to file a timely lien statement because the owner requested the subcontractor not to file the lien.[244] In *Randall*, the owner promised the subcontractor that it would be paid in full if it would not cloud the owner's title by filing a mechanic's lien. The district court relied on the *Heinbaugh* decision[245] as establishing the Iowa Supreme Court's recognition that an owner could be estopped under certain circumstances from raising the subcontractor's failure to file.[246]

Thus, *Skemp* and *Randall* appear to posit contradictory rules. One possible way to resolve these conflicting cases is to argue that the most recent decision of the Iowa Supreme Court, *Skemp*, undercuts any inference that might be drawn from *Heinbaugh* that an estoppel theory will be accepted in certain cases. This, the rule in *Skemp* would govern—and, as a matter of law, an owner could not be estopped from urging as a limitation on the subcontractor's recovery, the failure of the subcontractor to file a timely lien statement.

The rule set forth in *Skemp*, however, could impose an unjust result upon a subcontractor. For example, a subcontractor might agree not to file a mechanic's lien after completion of its contract in exchange for the owner's promise to pay for materials and labor. Yet, if the subcontractor allows the filing period to expire in reliance on the owner's promise to pay, the subcontractor can be denied any recovery on its lien if the owner pays the contractor on the principal construction contract before the subcontractor files its lien. This result would seem harsh in light of the equitable principles which underlie the provisions of chapter 572 and the duty of courts to construe the statute liberally to effect its equitable purposes.

The choice between the *Randall* and *Skemp* rules should be made only after a consideration of the reasons for the filing requirements for subcontractors. One major purpose of requiring subcontractors to file is to give notice of liens on the owner's land to potential creditors of the owner. If the subcontractor fails to file a timely statement, these creditors may well rely on the absence of any liens and the full payment to the principal contractor as justifying the extension of credit to the owner. In a later dispute between the subcontractor and these subsequent creditors over the value of the subcontractor's lien, the subcontractor should not be able to excuse its failure to file a timely lien by

reason of the owner's promises to pay the subcontractor. In other words, third parties can assert the subcontractor's failure to file a timely statement as a limitation to the subcontractor's right to recover for its lien, regardless of the owner's promises to pay the subcontractor. A contrary rule would significantly increase the cost of credit to the owner because potential creditors of the owner would be reluctant to risk becoming subject to unfiled liens of which they were not aware, and could not have been aware, at the time they extended credit.

However, where the dispute over the amount due the subcontractor on its lien is between only the owner and subcontractor, and the owner has in some way induced the subcontractor to delay filing the lien until after the filing period has expired, there is less reason to require strict compliance with the filing requirements for subcontractors. There are no third parties involved in this situation; thus, the policy of protecting them from hidden liens is not relevant. In fact, the only person who benefits from application of the *Skemp* rule is the owner who induced the subcontractor not to file a lien claim. Unless some good reason can be discerned for protecting an owner who induces the subcontractor not to file a lien with promises that he will pay in full, the *Randall* rule should be adopted.[247] Applying the *Randall* rule to these situations would also be consistent with the many cases holding that the owner who pays the contractor before the expiration of the subcontractor's filing period assumes the risk that the contractor will not pay the subcontractor.

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.[248] 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.[249] 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.[250] An owner can make claims for offsets against the subcontractor, even though the owner is not a party to the subcontract.[251] 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.[252] 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.[253] 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.[254] The court may require the claimant to prove that any discharge of the claimant from the improvement project was without fault on its part.[255]

B. Counterclaims and Offsets

Section 572.26 provides: "An action to enforce a mechanic's lien shall be by equitable proceedings, and no other causes of action shall be joined therewith."[256] This section does not prohibit counterclaims by the owner, and compulsory counterclaims will be lost if not pressed.[257] If the owner does press a counterclaim, the claimant can join any other cause of action to the mechanic's lien claim.[258] In effect, therefore, section 572.26 is of little or no consequence and, in practice, Rule 22 of the Iowa Rules of Civil Procedure governs joinder of claims in mechanic's lien foreclosure actions.[259] The determination of the types of counterclaims available to the owner is dependent upon whether the claimant is a contractor, timely-filing subcontractor or late-filing subcontractor.[260]

1. *Foreclosure by a Contractor.*

As will be shown, in a foreclosure action by a contractor, the owner is entitled to offset from the claim for the contract price the following:

1. any payments made to the contractor;
2. any costs of completion of the contract;
3. other consequential damages arising from the contract;
4. the value of subcontractor's mechanic's liens filed under chapter 572; and
5. Any other claim or debt enforceable against the contractor from related or unrelated transactions.

In this regard the Iowa Supreme Court has adopted the Restatement of Contracts, section 346(1),[261] as the standard for determining the damages available to an owner against a mechanic's lien claimant.[262] In addition to payments already made on the contract, "compensatory damages for all unavoidable harm that the builder has reason to foresee"[263] constitute offsets to a mechanic's lien claim.[264] A common item of compensatory damages is lost rental value due to the contractor's failure to complete the project on time.[265] Another item of compensatory damages arises from the breach of the contractor's promise to pay suppliers and subcontractors. Consequently, the mechanic's lien claims that have been filed can be urged as offsets.[266] Section 346(1)(a) allows offsets for the costs of completion of the project if feasible, or, as an alternative recovery, the difference in value between the project at its present stage and as contemplated by the original contract. Both alternatives have been used in appropriate circumstances.[267]

Lastly, the owner can raise permissible counterclaims arising out of unrelated transactions as offsets to the mechanic's lienor's recovery.[268]

2. *Foreclosure by a Late-Filing Subcontractor*

As described above,[269] the late-filing subcontractor's lien rights are derivative of the contractor's rights. As such, the late filing subcontractor's rights are subject to essentially the same offsets and counterclaims as are the contractor's rights, except that permissive counterclaims against the contractor cannot be asserted as offsets to the late-filing subcontractor's recovery.[270] Service of notice of a late-filed mechanic's lien on the owner reinstates direct lien liability as to all payments of the owner to the contractor which occur after service of notice of the late-filed lien on the owner. Consequently, the adjudication of the late filing subcontractor's lien rights involves identification of two periods. One such period runs from the original commencement of work until the service of notice of the late-filed lien on the owner; the subcontractor's lien rights are derivative for this period. The second period runs from the date of late perfection until disposition of the foreclosure action; for this period, the late-filing subcontractor's lien rights are direct.[271]

The owner may urge as an offset to the late-filing subcontractor's lien claim all counterclaims which could be urged against the owner, so long as such counterclaims arose before the service of notice of the late-filing of the mechanic's lien. The owner can press as offsets all payments to the contractor on the contract, the cost of completion claims, the value of all mechanic's liens filed before the lien of the late-filing subcontractor who forecloses, and all other consequential damages, so long as such payments occurred or damages arose before the service of notice of late-filing of the lien.[272] The owner may not, however, assert against the lien of the subcontractor the permissive counterclaims it could urge against the contractor. In other words, in determining the balance due under section 572.11, the term "balance due" refers only to the debt owed on the particular project.[273] The owner is then limited to asserting as offsets to the late-filing subcontractor's lien recovery only those counterclaims which would be compulsory against the contractor. However, there does not appear to be any bar against the owner asserting permissive counterclaims arising from transactions between the owner and subcontractor that are unrelated to the improvement.

With regard to damages arising after the subcontractor's service of notice on the owner of the late-filing of the lien, the rules for direct lien liability in the following section apply.

3. Foreclosure by a Timely-Filing Subcontractor.

Section 572.14 implies by negative inference that an owner's interest in the land will remain subject to the timely-filing subcontractor's lien regardless of the payments made by the owner to the contractor on the principal construction contract.[274] Nor is the lien of the time-filed subcontractor subject to offsets for other counterclaims which might have been urged against the contractor. Under direct lien liability principles, the subcontractor is entitled to assert its lien for payment for material or labor furnished, regardless of the contractor's defaults or breaches. Nevertheless, the lien of the timely-filed subcontractor would be subject to offset for counterclaims for defects or damages arising from its own furnishing of material or labor. Additionally, permissive counterclaims of the owner arising from other transactions with the subcontractor could be urged as a reduction of the lien recovery.

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.[275] 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.[276] 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.[277] The taking of shares in a limited partnership from the building owner is collateral security and will defeat the mechanic's lien.[278] 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.[279] 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.[280] 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.[281] 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.[282] 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.[283] 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,[284] 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.[285] 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.

B. *The Mechanic's Lien Claimants Filing Duties Vis-A-Vis Other Creditors*

The filing of a mechanic's lien statement has its greatest significance with regard to establishing priorities among mechanic's lienholders and third parties who have liens on or security interests in the owner's property. This section discusses only the filing requirements for perfection of a mechanic's lien. The determination of priorities among various creditors will be considered subsequently.

The mechanic's lien statement has three aspects which are important in the perfection of a mechanic's lien: the content and form of the statement, time of filing and place of filing. The function of the statutory requirement of content, form, time and place acquire additional importance when parties other than owners, contractors and subcontractors are involved. These third parties may relay on the absence of a filed statement or on the contents of filed statements, in making decisions to extend credit to an owner or to purchase the owner's interest. Consequently, claimants who file the statements are held to a higher degree of compliance with the statute when third parties are involved in a foreclosure action than the degree required when the dispute involves only an owner and the claimant.

1. *Content and Form*

Section 572.8 governs the content and form of the mechanic's lien statement. First, the claimant must state the time when such material was furnished. Stating the date of completion of the contract is sufficient.[286] The statement must also describe the property to be charged with the lien.[287] The property description should reasonably identify the property in question , but need not be precise in all details.[288]

The statement must also indicate the amount due. A good faith mistake as to the amount due,[289] or the inclusion of nonlienable items in the statement does not vitiate the lien.[290] However, bad faith or fraudulent inclusion of nonlienable items may bar recovery,[291] and the statement of the amount due must allow all credits available to the owner.[292] The failure to recognize credits will be excused if the disallowance is in good faith,[293] but not if it is in bad faith.[294] The statement of the amount due limits the recovery of the mechanic's lien claimant as to third parties but not as to owners.[295] Also, the requirement of allowing all credits against the amount due governs the size of a release bond, which may be provided to release the lien under section 572.15. Lastly, the allowance requirement bears directly on the owner's use of the property as collateral and upon his ability to sell the property.

Section 572.22 requires inclusion of the owner's name for purposes of indexing the statement in the county records.[296] Section 572.8 does not require the inclusion of the owner's name to a perfect a lien.[297] In the event that a statement is timely but improperly filed due to a failure to state or a misstatement of the owner's name, the question of the effect of such mistake on perfection would arise. In resolving this issue, the statutory provisions and the cases dealing with proper identification of the debtor in filings under Iowa's version of section 9-402 of the Uniform Commercial Code could provide useful analogies.[298]

Finally, section 572.8 requires that the statement be verified.[299] The court has found sufficient compliance with the verification requirement despite the fact that the affidavit and jurat contained technical mistakes.[300] For example, omission of the name of the county[301] or the title of the notary public[302] does not vitiate the verification. It should also be noted that the requirement of verification makes fraudulent statements perjurous.

2. *Time and Place of Filing*

A subcontractor's mechanic's lien statement may be filed at any time after completion of the supplier's deliveries and laborer's efforts and before two years and ninety days after completion of the subcontract.[303] The contractor may file at all times available to the subcontractor and has an additional thirty days longer to perfect than the subcontractor. Section 572.9 directs that the subcontractor and contractor have ninety days from the date on

which the last material or labor was furnished in which to perfect. But the failure to file within these time periods defeats the lien only as otherwise provided.[304] The good faith purchaser clause of section 572.18 "otherwise provides" for defeat of the lien of a late filing contractor as against such purchasers. Consequently, someone who purchases, encumbers, or acquires an interest in the owner's property after the expiration of the ninety-day filing period, and before the late-filing contractor files, can defeat the contractor's lien. Also, section 572.17 is an "otherwise provides" section that can defeat the recovery on a contractor's mechanic's lien as against other mechanic's lien claimants filing first.

As contrasted with the contractor, a subcontractor's right to full recovery is subject to three "otherwise provides" sections, two of which are the same limitations applicable to contractors – the good purchasers clause of section 572.18 and the other mechanic's lienors provision of section 572.17. The third "otherwise provides" section for subcontractors is section 572.11, which limits the lien of late filing subcontractors to the balance due on the principal construction contract at the time notice of late filing of the mechanic's lien is served on the owner.[305]

The subcontractor's ninety-day period in section 572.9 runs from his own last delivery of materials or labor on an improvement.[306] The contractor's ninety day period for filing, on the other hand, runs from either its own last work, or the last work or materials furnished by its subcontractor. The contractor may add the subcontractor's work onto its own for purposes of filing because the subcontractor is performing work for the subcontractor and the principal contract is not completed until the subcontracts are performed.

The place of filing under section 572.8 is the office of the clerk of the district court of the judicial district in which the land or the improvement which is to be charged with the lien is situated. Possibly, errors in place of filing could be handled by analogy to Iowa's version of section 9-401 of the Uniform Commercial Code.[307]

3. *The Owner's Right Under Section 572.13 to Withhold Payment After Completion of the Project.*

Sections 572.11, .13 and .14 establish the owner's right to withhold payment from the principal contractor until the expiration of ninety days from the completion of the improvement.[308] If the owner pays the contractor before ninety days after completion, he then risks exposure to lien liability in favor of timely-filing subcontractors, who may recover in full for their liens due to the direct lien liability principles of chapter 572.[309] Thus, the early paying owner risks exposure to having to pay twice for the same labor or materials – once to the contractor on the principal. Construction contract, and again in satisfying mechanic's liens of those subcontractors which the contractor

failed to pay. The owner would, of course, have a contractual right over against the contractor for those amounts which the owners was compelled to pay in order to satisfy the subcontractors' liens, assuming that the contract provided or assured the contractor would pay the subcontractors. Additionally, the owner who discharged the subcontractors' liens would be subrogated to the contractual rights of those subcontractors against the contractor.[310] Yet such rights would involve litigation expenses to recover the payment in many cases; moreover, the contractor's reason for not paying a subcontractor is often linked to the contractor's insolvency or bankruptcy. Consequently, contractual or subrogation rights against the contractor may not provide truly effective protection to the owner.

C. *Mechanic's Lien Discharge Bond*

A mechanic's lien may be discharged at any time by an owner, principal contractor or intermediate subcontractor filing a bond twice the amount of the claim for the lien under section 572.15. The owner may file a discharge bond to clear title to the property of such liens; if such a bond is filed, the mechanic's lien claimant may only sue on the bond, and not on the lien, since the lien has been discharged. The bond is available to the claimant for payment of any sum for which the claimant may obtain payment of a lien claim.[311] Recovery on the bond would be subject to the limitations on the claimant's recovery under chapter 572.[312] Accordingly, if an owner files a section 572.15 discharge bond, the recovery by a late-filing subcontractor on the bond is limited to the balance due the contractor from the owner at the time of the subcontractor's service of notice of the late-filing of the lien notice.[313]

The contractor or intermediate subcontractor may also post a discharge bond.[314] The contractor may be inclined to post a section 572.15 bond if the owner has conditioned payment on the principal contract upon the contractor's posting of such a bond for all mechanic's liens filed with the clerk of court. When the contractor or intermediate subcontractor files the discharge bond, the bond is available to the timely-filed subcontractors to the full extent of their provable claims for materials and labor. Apparently, late-filing subcontractors can also recover to the full extent of their claims against a discharge bond filed by a contractor, even though such a subcontractor would have its recovery on a mechanic's lien limited to the extent of the balance due.

VI. THE OWNER'S ABILITY TO MITIGATE MECHANIC'S LIEN LIABILITY.

The Iowa mechanic's lien statute was not written for the protection of owners. The assertion is supported by the fact that the direct liability principles of section 572.14 create substantial risks of double liability for owners. The

owner's improvement and, to a lesser extent, its land are subject to foreclosure, execution and sale, irrespective of whether the owner meets all contractual obligations.[315] The statute does not provide for personal liability of an owner, but this benefit is seldom of much consequence to the owner who wants to keep its property or improvement. In addition to the lien liability of an owner who has contracted for an improvement under chapter 572, as an owner may encounter personal liability to the contractor for breaches of the construction contract.

A. *Owner's Self-Protection from the Statute by Contract*

The best self-protection for owners is selection of a trustworthy and solvent contractor with whom to do business. Recognizing, however, that there is a risk that any construction project or contractor may encounter financial difficulties, an owner may wish to mitigate possible mechanic's lien difficulties by including protective provisions in the principal construction contract. The following provisions may be more or less applicable to any particular owner, contractor or construction project.[316]

1. Retention of Funds: The owner may provide for retaining funds for a period of time certain to encompass the ninety days allowed for payment under section 572.13. This provision would avoid some of the problems associated with determining the precise day of completion for purposes of the subcontractor's filing on time. This retention provision would also avoid the risk of double liability. Because a contractor may be unwilling to undertake a project unless the principal construction contract provides for progress payments, the owner may not be able to include in the contract a provision allowing retention of all payments for a period longer than the subcontractor's filing periods. In such a case, the owner would do well to draft a provision allowing for the retention of a portion of funds sufficient to cover estimated mechanic's liens ad costs of completion of the project.

2. Impartial Determination of Date of Completion: The construction contract could also provide for the appointment of a third party for purposes of identifying the dates of completion of the entire project and of individual subcontractors. While the decision of this contractual appointee might not be binding on the court or on nonparties to the principal contract, the appointee's determination and testimony could be valuable evidence on the date of completion.

3. Contractor Primarily Responsible for Payment of Subcontractors: The contract should provide that the principal contractor is primarily responsible to pay all persons with whom it contracts for materials and labor. such a provision would allow the owner direct contractual rights against the contractor who fails to pay

subcontractors. These direct rights would be in addition to the owner's subrogation to the rights of any owner-paid subcontractor against the contractor. Moreover, if the principal contract provided for a surety's bond and the surety was to be bound by the terms of the principal construction contract, a contractor payment provision in the principal contract could obligate the surety to pay those subcontractors claiming mechanic's liens, without the subcontractor's first having to proceed against the owner.

4. Free and Clear Clause: The contract should also obligate the contractor to keep the owner's property free of mechanic's liens and to secure the discharge by bond or otherwise of any mechanic's lien that arises from the contractor's dealing with subcontractors. Additionally, a free and clear clause may provide for the owner to tender defense of all mechanic's lien foreclosures to the contractor, and for the contractor to indemnity the owner for any costs the owner may sustain due to the foreclosure or filing of mechanic's liens arising from the contractor's transactions. This provision will not be effective to keep the owner's property free of liens, however, should the contractor fail to pay or prove unable to pay its subcontractors. This provision is only as good as the financial condition of the contractor which it binds; if the contractor cannot pay the subcontractors, the owner's contract rights under this provision may be valueless.

5. Verification of Payment: The owner may condition payment of the construction contract upon the contractor's verification of payment to suppliers and subcontractors and submission of mechanic's lien waivers to the extent of such payments. Verification of payment could be required before each progress payment, or merely before tender of the final contract payment. While this provision may provide some comfort to an owner, it also is not a panacea.

Inasmuch as chapter 572 provides that a timely-filing subcontractor can recover to the full extent of its lien regardless of payments by the owner to the contractor, the owner should be certain that it does not pay more than the value of the lien waivers it receives. Otherwise, the owner will risk double payment in the event that the contractor fails to pay all subcontractors.

6. Direct Payment: The owner may reserve the right to pay all possible mechanic's lien claimants directly and deduct the amount of such payments from the balance due on the principal construction contract. A variation of this provision would allow the owner to make payments directly to the subcontractors who have filed mechanic's liens and then to deduce these payments from the contract price. While this provision may appear only to

make a contract provision of what an owner could already do under chapter 572, this provision may prove helpful to an owner if the contractor refuses to settle with its subcontractor because of a dispute over the subcontract. The owner's rights under this provision could force the contractor to expedite resolution of its dispute with its subcontractor out of fear that the owner would pay the subcontractor and then deduct its payment from the contract price.

7. Owner's Rights on Breach, Default, Insolvency and Bankruptcy of the Principal Contractor: With regard to mechanic's lien claims, the owner should reserve the right to inspect or audit the contractor's books upon breach, default, insolvency or bankruptcy of the contractor. This right would allow the owner to learn of potential mechanic's lien claimants and amounts due them. Without such a right, either under the contract or by virtue of discovery rules, the owner may encounter difficulty in defending against exaggerated mechanic's lien claims.

8. Bonds: The owner may require the contractor to post the payment, payment-acceleration or discharge bonds discussed in section VIII. The requirement of posting such bonds is actually a type of free and clear clause. The obligation to post such bonds may be conditioned upon the occurrence of relevant events; for example, the obligation to post a section 572.13 payment-acceleration bond could be conditioned upon the determination by an impartial appointee of the date of completion of the project. Also, the obligation to post a section 572.15 discharge bond could be conditioned upon the filing of a mechanic's lien.

These bonds are a type of insurance for the owner against its risk of exposure to double liability, and as such, these bonds are not without costs. The contractor who is required to post a bond under a principal construction contract will include the cost of the bond as a cost of doing business with the owner. Consequently, the cost of construction will increase; ultimately, the owner pays for most of, if not all, the cost of the bond. Since the availability and cost of payment and other bonds is related to the "character, credit, and capacity" of the contractor (principal on the bond), usually these bonds are most costly when most needed—that is, when the contractor is an uncertain or poor credit risk.

9. Waiver of Surety's Right to Approve Change Orders: If a bond is provided for, the surety may condition its liability on the bond upon its right to approve of orders that change the nature or scope of the construction project for which it is obligor. The owner may seek a waiver or noninclusion of the surety's approval rights as to certain minor, or even all, changes in construction plans. The owner's interest in omitting such a provision

is that the surety's approval rights diminish the owner's control over the project, complicate the delay changes in construction plans, and ultimately, if breached by the owner, deny the owner indemnity for mechanic's liens arising from the project. The surety, however, may be unwilling to waive or omit from the bond a provision which gives it the right to approve changes in orders, since this is one of the few ways a surety can control its obligation on the bond. Consequently, the cost of such a waiver for the owner in the terms of the price of the bond could be very high.

10. Takeover Clause: The contract may provide the owner with a right to complete the project upon the contractor's default without relieving the contractor of the obligation to pay for damages for breach of contract. Such a provision would have the effect of preserving the owner's counterclaims for costs of completion and damages arising from the contractor's breach against any mechanic's liens claims the contractor might file. A takeover clause would also have some effect upon the rights of subcontractors under chapter 572. The subcontractors who continued to do business with an owner who takes over the project would then become contractors under chapter 572. As contractors, the erstwhile subcontractors would enjoy the greater rights of contractors. However, if these former supplies continued to work, but under new contracts with the owner, the filing periods on the old subcontractors could begin to run and the subcontractor's rights under chapter 572 could be lost if mechanic's liens were not timely filed.[317]

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*.[318] 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.[319]

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.[320]

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.[321]

The final general principle stated by the Court was:

> All doubts about the waiver must be resolved in favor of the lien.[322]

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. . . .[323]

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.[324]

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.[325]

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.[326]

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.[327]

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.[328] 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.[329] 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.[330]

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.[331]

In an Illinois case, the court considered the effect of a lien waiver given in recognition of partial payments.[332] 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.[333]

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.

VII. PRIORITIES

The question of whose claim to the owner's property should be first satisfied from the proceeds of a mechanic's lien foreclosure sale of the owner's property is governed by Iowa Code sections 572.17-.21. The question of priorities should be distinguished from the question of whose interest is subject to attachment by the mechanic's lien. The distinction, however, between the two questions has not always been clearly drawn by the court or commentators.[334] The attachment question must be the focus of initial inquiry. By answering the attachment issue, the court identifies which interest or interests are subject to foreclosure sale. Once the attachment issue is resolved, the court may then determine the priority of claims to the proceeds of the sale of the attached interest. This ranking of

priority of claims to the proceeds will have significance only if the proceeds of the sale are insufficient to satisfy all lien claimants who are joined in the foreclosure action and who seek payment for their claims. If the proceeds of the sale are sufficient to cover all lien claims for which payment is sought, the relative priorities of the claimants is irrelevant.[335]

The proceeds of a mechanic's lien foreclosure sale are particularly likely to be insufficient to satisfy all claims, with the result that ranking of priorities will become an important issue where the court resolves the attachment issue by finding that only the interest of a person holding less than a fee interest is subject to attachment—*e.g.*, where only a lessee's or vendee's interest is subject to the liens. In such a case, the interest subject to judicial sale may only be the improvement severed from the land, and then only if the improvement is severable. The cost of severing the improvement, and its consequential decrease in value, will mean that the foreclosure sale may not generate sufficient proceeds to cover all claims. In such a case, the question of whose interest is first paid is highly relevant. Also, the question of priorities will be important where the completed improvement, for whatever reason, is not worth the funds expended in its construction, where there has been waste or dissipation of assets, or where a person ultimately liable for payment has become insolvent or is otherwise not a source for recovery.

A. *Priority of Mechanic's Liens Among Mechanic's Lien Claimants*

Iowa Code section 572.17 provides: "Mechanic's liens shall have priority over each other in the order of the filing of the statements or accounts as herein provided." The operation of this provision can be seen in the following hypothetical:

Hypothetical I: *O*, as owner, contracts with *K*, the principle contractor, to build a house for a price of $100,000. Pursuant to subcontractors with *K*, subcontractors *S1, S2, S3,* and *S4* begin work on the house.

Day 1: *S1* completes work and timely files a claim for $20,000.

Day 30: *S2* completes work and timely files a claim for $15,000.

Day 39: *S3* completes work but does not file a lien statement within the ninety-day period for timely filing.

Day 50: *O* pays *K* $50,000 on the principal construction contract.

Day 131: *S3* files, late, a claim for $30,000 and serves notice on the owner of the late filing of a mechanic's lien statement under section 571.20.

Day 140: *S4* completes work and timely files a claim for $25,000.

Day 145: *O* pays *K* $20,000.

Because *S1, S2,* and *S4* timely filed, they are entitled to recover to the full extent of their liens from the sale of the owner's interest. S3, who filed late, is only entitled to recover the balance due on the principal construction contract at the date of service of the notice of late filing. The claims may be represented schematically:

Owner's interest in the
property subject to attachment
of the mechanic's lien

mechanic's lien *S1* ($20,000)
mechanic's lien *S2* ($15,000)
mechanic's lien *S3* (balance due, but not more than *S3's* claim for $30,000)
mechanic's lien *S4* ($25,000)

Suppose that $70,000 in proceeds were realized on the sale of *O*'s interest in the property. Section 572.17 directs that the priority between mechanic's liens is determined by the time of filing. Consequently, the order of priorities is *S1, S2, S3,* and *S4*. The fact that *S3* filed late is not relevant to its priority, but is relevant to the amount it may recover. The proceeds should be distributed as follows: The proceeds should first be applied to satisfy in full *S1*'s mechanic's lien, even if this interest were to exhaust the proceeds. *S1*'s claim is $20,000. The claim is fully recognized and allowed. *S1* receives $20,000. The proceeds balance after satisfying *S1* is $50,000.

Second priority is *S2*. *S2*'s claim is $15,000. This claim is fully recognized and allowed. *S2* receives the full $15,000. The proceeds balance after satisfying *S2* is $35,000.

Third priority is *S3*. The value of *S3*'s claim is as a late-filing subcontractor. *S3*'s claim is derivative of the contractor's claim for the contract price at the time of the service of notice of the late-filed lien and, consequently, *S3*'s claim is subject to counterclaims and offsets against the contractor that arose before the service of notice of the late-filed lien on the owner. These counterclaims and offsets might or would include:

1. Consequential Damages: Assume that there are no such damages.

2. Costs of Completion: Assume the construction contract was fully completed.

3. Payments Made to the Contractor:

   (a) The $50,000 payment was made before the service of notice of late filing by S3, so this amount is an offset against the contractor's claim for the contract price that arose before the notice of late filing. Thus, as an offset deduct $50,000 from the contract price to determine the balance due.

   (b) The $20,000 payment was not made before the notice of late filing. Consequently, there is no deduction.

4. Previously Filed Mechanic's Liens:

(a) *S1* and *S2* filed their mechanic's liens within the period before *S3* served notice and late filing on the owner. Both liens are deductible from the contract price owing the principal contractor. These two liens total an offset of $35,000.

(b) *S4* timely filed its mechanic's lien after the notice of late-filing was served on the owner. Thus, its lien is not an offset from the contract at the time of the service of late notice, and, no deduction is available.

5. Permissive Counterclaims of *O* Arising From Other Transactions with *S3*: Assume none.

Thus the formula for the balance due is the following: Balance Due = Contract Price - (consequential damages arising before *S3*'s service of notice of late filing + costs of completion + payments to the contractor before *S3*'s service of notice of late filing + mechanic's liens filed before service of notice of late filing + permissive counterclaims of *O* against *S3* arising at any time). Applying such a formula to the figures assumed for this example, the following figures are obtained: $100,000 - ($0 + $0 + $50,000 + $35,000 + $0) = $15,000. *S3*'s $30,000 claim is realizable from the proceeds of the sale of *O*'s interest only to the extent of $15,000. The proceeds balance after satisfaction of *S3*'s interest to the extent of $15,000 to $20,000.

Fourth priority is *S4*. *S4*'s claim is $25,000. This claim is recognized and allowed in full. However, there are not sufficient proceeds to pay *S4* the full value of its allowable claim; therefore, *S4* receives $20,000, exhausting the proceeds balance. Had any mechanic's lienors filed after *S4* they would have received nothing from the proceeds of the dale of *O*'s property.

The Iowa Supreme Court has recognized that considerations of equity may warrant subordinating the priority of a mechanic's lien claimant to that of another lien claimant who filed later than the first claimant. It is not clear under what circumstances the court will reorder the priorities among mechanic's lien claimants on some basis other than time of filing, but in one decision a supplier who refused to supply material unless partially paid in advance had his entire claim subordinated to subsequently filed mechanic's liens.[336] In *Lindsay & Phelps Co. v. Zoeckler*,[337] the Iowa Supreme Court addressed the question of the priority among mechanic's liens claims under facts similar to those posed by Hypothetical I. In that case, the owner had contracted to build a home. The plaintiff was a subcontractor who had filed his claim late under section 572.10, and as such was entitled to the balance due on the principal construction contract at the time that the notice of the late-filed lien was served on the owner. The plaintiff, although he filed late, filed before a second subcontractor who claimed a mechanic's lien arising from his timely-filed

mechanic's lien. This second subcontractor was held entitled to recover to the full extent of its lien under sections 572.2 and 572.8.[338]

In *Zoeckler*, the plaintiff had priority over the other subcontractor because he filed first. The court determined that the late-filing subcontractor's lien was enforceable to the extent of the balance due at the time of service of notice of late filing.[339] This amount was determined to be $365, and the claim for this amount had priority over the other subcontractor's claim for the price of the materials supplied the owner.[340]

The court, however, did not discuss what amount the other subcontractor recovered or should have recovered. This second subcontractor should have been entitled to satisfy his entire claim, or as much as could be satisfied, from the proceeds of the sale of the owner's interest in the house after $365 of these proceeds were set aside for the plaintiff, who had priority. The *Zoeckler* decision should not be read as stating that the priority of the plaintiff over the second timely-filing subcontractor affected the *right* of the second subcontractor to recover fully. A subcontractor's *right* to recover to the full extent of its lien depends solely on whether it filed a timely statement.[341] In *Zoeckler*, the second subcontractor filed a timely statement and was entitled to recover in full. The *ability* of the second subcontractor to receive full satisfaction may be affected by its being junior in priority to an earlier-filing lienor in cases where the proceeds do not satisfy all liens, but the second subcontractor has no less of a *right* to fully recover. The computation of the balance due the plaintiff in *Zoeckler* had no consequence to the second subcontractor, unless payment to the plaintiff of $365 of the proceeds so depleted the proceeds of the sale of the owner's interest that full satisfaction of the second subcontractor's lien could not have been realized. Any contrary suggestions in *Zoeckler* are not consonant with the necessary reading of chapter 572. An opportunity would be available at this time for the court to adjudicate the contractual rights and liabilities between the contractor and subcontractor. In light of the fact that the subcontractor has cross-claims available to protect its rights, the reversal of the general first-to-file rule of priority seems unnecessary. The subcontractor could cross-claim on the basis of the subcontract for any recovery by the contractor on its mechanic's lien, and, on general equitable principles, seek to establish in the same action a lien or trust on the contractor's recovery out of the proceeds of the sale.

B. *Priority Over Other Liens*

Section 572.18 provides in part: "Mechanic's liens shall be preferred to all other liens which may attach to or upon any 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 …."[342]Determination of priorities under this section requires only a determination of whether the party asserting a lien as prior to a mechanic's lien had recorded the lien before the time of *original commencement* of the work or improvement. The term "original commencement" in section 572.18 raises two questions. First, what acts constitute original commencement of the work or improvement? Second, to obtain priority must a lien be recorded before the original commencement of work by any person on the improvement or be recorded merely before the original commencement of work by the mechanic's lien claimant over which the lienor asserts priority? In other words, can a mechanic's lien claimant assert that its priority as against non-mechanic's lienors relates back to the first acts of any person improving the property or merely to its own first acts improving the property?

1. *Acts Constituting Original Commencement*

The most recent discussion of what acts constitute "original commencement" of an improvement under section 572.18 is Judge Hanson's discussion in *Diversified Mortgage Investors v. Gepada, Inc.*[343] Although this federal court's analysis would not be binding on the Iowa Supreme Court, the case might well be seen as soundly reasoned and be followed by that court and, thus, warrants attention.

In *Diversified Mortgage*, a contractor stripped the weeds and six inches of topsoil from some untilled agricultural land and checked the land for elevations. This preparatory work enabled that contractor to estimate the price of fill required for the job, and the contract was then closed on September 21, 1972. On September 25, 1972, a mortgage was filed. Three days later, the contractor began work on the footings. The court held that the mortgagee had priority over the contractor's mechanic's lien since the mortgage was recorded before the date of "original commencement," which was deemed to be September 28th when the contractor first began work on the building itself.[344] The court stated:

> The commencement of the building or improvement within the meaning of the mechanic's lien statutes is the visible commencement of actual operations on the ground for the erection of the building, the doing of some work or labor on the ground, such as beginning to excavate for the foundation or the basement or cellar, walling the cellar, or work of a like description, which everyone can readily see and recognize as the commencement of a building, and which is done with the intention and purpose then formed to continue the work until the completion of the building.[345]

The purpose of requiring mortgagees to record before the work starts, giving the mortgage priority over mechanic's liens, is that the start of the work gives constructive notice to the mortgagee that other persons may acquire liens on the land. The legislature has deemed it inequitable that a mortgagee could acquire interests superior to

the interests of potential mechanic's lien claimants of which the mortgagee has notice.[346] However, reasonable persons might differ with Judge Hanson over the question of whether the removal of six inches of topsoil from untilled agricultural land gives notice that the construction is underway. There seems to be no reason other than construction for the removal of Iowa topsoil, however, so the removal of topsoil would seem to indicate that construction had begun. Additionally, the court's rule that he work or improvement commences when the footings are begun[347] could make the priority of an excavation subcontractor's lien depend upon the starting of work on the footings by another worker after the excavation subcontractor finished its work. Moreover, the court's recognition that the date of commencement of the building is the date of original commencement appears to deprive the word "work" in section 521.18's phrase "original commencement of the work or improvement" of independent significance.

In defense of the opinion, the rule established would make it easier for an owner to obtain a mortgage. If a subcontractor could establish its priority from the date of preparatory explorations necessary to close the terms of the contract, financing of a construction contract might prove more difficult because a mortgagee would probably not be willing to loan construction funds unless it were assured of first priority. Also, a mortgagee would not be likely to loan funds until the terms of the principal contract were closed. Nevertheless, subordination agreements, rather than a restrictive interpretation of the phrase "original commencement," might prove a better means of establishing priorities of mortgagees who record after excavation has begun.

One Iowa Supreme Court case—*Society Linnea v. Wilbois*[348]—has facts similar to those presented to the district court in *Diversified.* In *Society Linnea*, a plumber inspected some pipes and removed others to permit excavation estimates. Subsequently, a mortgage was filed. The plumber then returned and performed a contract pursuant to the remodeling of the house.[349] Thus, the facts of *Society Linnea* are almost identical with *Diversified*—both cases involve exploratory excavation for purposes of defining the terms of a contract. The court in *Society Linnea* found that the mortgagee had priority because the plumber's exploratory work and remodeling work were pursuant to two different contracts.[350] This holding, however, raises the issue whether, absent the distinct contracts problem and any other obstacles to the plumber's recovery in *Society Linnea*, the Iowa Supreme Court would have found the plumber did not commence work until after the mortgage was filed. Perhaps reference to the visible evidence test[351]—the standard for determining lienable items of labor—could have helped the contractor in

Diversified Mortgage, even though the cases involve different questions, because the policy underlying both standards involves the notice to third parties that potential rights have arisen.

2. *Relation Back to the Original Commencement of Work of Someone Other Than the Claimant.*

A question arises as to whether section 572.18 has one date of original commencement from which all mechanic's lienors measure their priority as against non-mechanic's lien claimants, or whether each mechanic's lienor has its own date of commencement for defining priority against such persons the first date of its own supplying or labor or materials. Another way of phrasing the issue is whether a mortgagee can have priority over some mechanic's liens relating to a contract and yet be subject to others relating to that same construction contract. The following hypothetical illustrates the problem.

O contracts with *K* to build a house.
K contracts with *S1* to supply lumber.
S1 delivers some lumber to the job site.
M loans *O* construction funds and records a mortgage.
K subsequently contracts with *S2* to do the wiring for the house.
S2 completes its contract and timely files a lien.
S1 delivers the remainder of the lumber and timely files.
Schematically, the transactions may be represented like this:

Owner's interest
commences delivery - *S1* (value of lumber)
mortgage recorded - *M* (construction loan)
commences wiring - *S2* (value of wiring)
files wiring lien - *S2*
files lumber lien - *S1*

Important for resolution of priorities in this example is the date of original commencement for *S2*.

Surprisingly, there appears to be no interpretation of the term "original commencement" which controls this situation. The present working of section 572.18 was adopted in 1943[352] and the strained history of its predecessor provisions provides no certain answer. From the years 1850-61, *S2* would have been prior to *M*.[353] From 1861-76, *M* would have been prior to *S2*.[354] After 1876, *S2* would have been prior again. Under the 1924, 1927, 1935 and 1939 codes, *M* would have had priority.[355] The question has apparently not been decided since the revision of the section in 1943.[356]

3. *Foreclosure of a Mechanic's Lien When There Is a Prior Interest in the Property*

Liens of record prior to the time of original commencement of the improvement have priority over mechanic's liens under Iowa Code section 572.18. Consequently, construction mortgages[357] for the improvement of

property, purchase money mortgages for real property,[358] and other interests that are recorded before any supplier furnishes material or labor for an improvement of the property have priority over mechanic's liens. That such mortgages and other interests have priority does not prevent foreclosure of the mechanic's lien, and, apparently, as will be seen under the statutory provisions, the foreclosure of the mechanic's lien will also constitute in effect foreclosure of the prior liens as well, since the statute provides for payment of the prior lien on the foreclosure of the mechanic's lien. The rights of holders of mechanic's liens and prior liens in a mechanic's lien foreclosure action are governed by sections 572.20 and 572.21.[359]

Generally, prior liens such as construction and purchase money mortgages which are of record prior to the original commencement of the work are first satisfied from the proceeds of a foreclosure sale of the property. But section 572.20 provides that mechanic's liens will have priority as to an improvement of the property, as contrasted with the land apart from the improvements, even though there exists on the land on which the improvement is located a lien which has priority over the mechanic's lien as to the land.[360] Section 572.21 establishes regulations that are designed to implement the priority rule of section 572.20.[361] As will be seen, these implementations of the priority rule of section 572.20 so qualify the rule that section 572.20 has only limited significance. In effect, liens and interests which are perfected before the original commencement of the work or improvement will usually be first satisfied in full from the process of a foreclosure sale, regardless of the priority granted by section 572.20.

Section 572.21 distinguishes between mechanic's liens on original independent buildings (newly constructed buildings) and liens on existing buildings or improvement for repairs and additions.[362] A literal reading of the statute would indicate that these two types of mechanic's liens are to be treated quite differently. As will be seen, however, because of judicial interpretations, there are only minor distinctions between the types of liens.

a. *Mechanic's Lien on Original and Independent Building or Improvement.* If a mechanic's lien is on an original or independent building, the court may, in its discretion, order the building to be sold separately. If so ordered, the mechanic's lien is satisfied from the proceeds of the sale of the building. The purchaser at the foreclosure sale may remove the improvement within a reasonable time. Neither the prior lien nor the land is affected by the sale of the improvement, and continues to exist as it did before the improvement was made.

Alternatively, the court may, in its discretion, determine that the newly constructed building should not be sold separately from the land. The court shall then determine the separate values of the land and improvement and

order the whole sold. The statute provides that the proceeds of the foreclosure sale of the land and building shall be distributed to secure the prior interest priority upon the land and the mechanic's lien priority upon the improvement.[363] The Iowa Supreme Court has ruled, however, that the prior interest shall first be paid in full from the proceeds of a foreclosure sale of the whole before any proceeds are distributed to the mechanic's lienor.[364]

(1) *The Proviso*. The interpretation of subsection 572.21(1) to require the prior lien on the land to be satisfied first in full seems to contradict the literal reading of the subsection. The subsection indicates that these conflicting interests should share the proceeds of the foreclosure sale according to the proportionate value of their interest to the value of the whole land and building. The court has rejected the "literal" reading of the statute and has read the last part of subsection 572.21(2), which is in effect a proviso, into subsection 572.21(1).[365] The proviso states "[I]n 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." Consequently, upon the foreclosure sale of the whole of land subject to a prior lien, and an original or independent building subject to a mechanic's lien, the prior lien is first satisfied in full. The court has justified reading the proviso into subsection 572.21(1) by imputing this intent to the legislature,[366] recognizing that the legislature has acquiesced in such an interpretation since 1884,[367] and determining that it is more important to have a settled rule in this area than to be assured of having the most equitable rule.[368] Although these reasons for such an interpretation are conclusory and subject to criticism,[369] the fact remains that the statute has been so interpreted since 1884 and any change is unlikely.

Further justification for reading the proviso into subsection 572.21(1) lies in the fact that such a reading serves an important policy interest. The proviso encourages lenders to provide funds for improvements in exchange for a construction mortgage. Unless the construction mortgagee is assured that it will be allowed to recoup its construction loan or a substantial portion of the loan by foreclosure sale of the land and improvement for which it loaned funds, construction lenders would be reluctant to extend such credit. If the lender were to have priority to the proceeds of a sale only to the extent of the value of the land, then the lenders would be much more cautious about the credit standing of the owner who borrows.

Furthermore, if the construction lender were to have priority as to the land only, it would be more demanding about the posting of payment bonds and more restrictive about the disbursal of funds. In short, reading the proviso

into subsection 572.21(1) facilitates the extension of credit for construction of improvements; a contrary rule would impede such extension of credit and lessen the amount of construction likely to occur in Iowa.

The proviso also appears to protect interests of persons who have loaned funds for construction, and, for that reason, protects persons who may not deserve to have their interests satisfied in full while subsequent mechanic's lienors are protected only to the extent of the proceeds not used to satisfy these prior interests. Where the prior mortgage was not made for construction financing of an improvement, an argument could be made that these prior interests do not deserve the protection afforded them by reading the proviso into Iowa Code subsection 572.21(1).[370] Even if the court were inclined to consider excluding these non-construction interests from the proviso's protection, it would be a mistake to do so. It would not be necessary to exclude non-construction interests from the proviso's protection to avoid unjust enrichment of the prior lien holder, unless the prior interests far exceed the market value of the land alone. The non-construction interest would not normally exceed the approximate value of the land, so the mechanic's lienor stands a good chance of recovering the value of its materials or labor under any interpretation of section 572.21(1). Additionally, affording non-construction interest holders priority to the proceeds in full can be viewed as compensation for the loss of their right to control the timing of the foreclosure of their lien.

In summary, the court has ruled that prior interests in land on which is constructed a new improvement should be satisfied in full from the proceeds of a sale of the whole property, including the land and building, as against the claims of mechanic's lienors. Such a reading is deeply ingrained in the case law, even though a "literal" reading of the statute would not seem to support this rule. A contrary reading would inhibit the availability of capital for construction because construction lenders would be required to assume greater risks. Consequently, mechanic's lienors who face a prior lien and who have to be satisfied from the proceeds of a foreclosure sale not likely to cover both the prior lien and mechanic's lien will do well to argue that the building should be sole separately.

(2) *Separate Sales of Original and Independent Buildings.* In many cases, the sale of the whole property will provide sufficient proceeds to satisfy in full both the mechanic's lienor and the prior interest in land. In those cases, however, where there is an interest in the land which is prior to the mechanic's lien, and the proceeds are not sufficient to satisfy both liens, the mechanic's lien will more likely be satisfied in full only if the court determines that the improvement can be sold separately. This separate sale would more likely the mechanic's lienor than the sale of the whole because under sections 572.20 and 572.21, the mechanic's lienor has priority as to the proceeds of the

separate sale of the improvement. Consequently, the factors which may influence the court to exercise its discretion to order a separate sale, as against a sale of the whole, are crucial.

(a) *Test of Physical Removability.* Important considerations for the court in determining whether to order a separate sale of a building include the practicability[371] and practicality[372] of removal of the building by the foreclosure sale purchaser, the prospective damage to the land and interests in the land, including that of the prior lienor, by removal of the building, and the public interest in avoiding economic waste.[373] That the physical removability of the building is a primary consideration was indicated in *Lincoln National Life Insurance Co. v. McSpadden.*[374]

> It is clear, under the provisions of the foregoing statute, that, if material is furnished for and used in the erection of a new and independent building which may be severed from the realty and removed without substantial injury or damage to either, the court may, in its discretion, order the same to be sold separately, under special execution, with permission to the purchaser to remove the same.[375]

b. *Mechanic's Lien on Existing Building or Improvement for Repairs or Additions.* If the mechanic's lien arises from the furnishing of labor or material for repairs or additions, and there is a prior lien upon the land, the court will order, under section 572.21(2), the sale of the entire premises upon foreclosure of the mechanic's lien. The proceeds will be distributed to first satisfy in full the prior lien or interest and then the excess will be applied to the mechanic's lien until it is satisfied.

3. *Good Faith Purchasers*

The second clause of section 572.18 provides in pertinent part:

> [B]ut 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 such liens, shall be 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.[376]

This provision accords a good faith purchaser of the owner's property priority over a mechanic's lien claimant if the purchase acquired its interest after the claimant's filing period expired and before the claimant actually made a late filing of the lien. A hypothetical will illustrate the operation of this rule.

> *S* begins and completes its work on Day 1.
> On day 30, *M1* records a first mortgage.
> On day 91, *S*'s period for timely filing expires.
> On day 95, *M2* takes a second mortgage and records.
> On day 100, *S* makes a late filing of its mechanic's lien.
> On day 115, *M3* takes a third mortgage and files.
> *O* has not paid *K*.

The determination of the respective priorities can be made by first pairing each lienor against each other lienor. This method is called pairwise determination of priority.

(1) S v. M1: *S*'s mechanic's lien is prior to *M1* even though *S* did not timely file. Section 572.9 provides that a failure to file does not defeat the mechanic's lien except as otherwise provided. The first "otherwise provided" section—Iowa Code section 572.17—does not apply to this problem since *M1* is not a mechanic's lienor. The prior recorded lien clause of section 572.18 does not give *M1* priority because *M1* was not a lien of record before the original commencement of work. The good faith encumbrancers clause of section 572.18 does not give *M1* acquired its interest before the expiration of the time for filing claims. These three clauses are the only relevant "otherwise provided" sections which could apply here, consequently, *S* wins over *M1*.

(2) S v. M2: *M2* has priority under the good faith encumbrancer clause, assuming good faith, valuable consideration and lack of notice of *M2* of the earlier potential liens, inasmuch as *M2* acquired its interest after the time for expiration of the time for filing and before the filing of the mechanic's lien.

(3) S v. M3: *S* wins under Iowa Code section 572.18 because it recorded before *M3* acquired its interest.

(4) M1 v. M2: *M1* wins because it is first in time and has not failed to comply with the Iowa recording act, section 538.41.

(5) M1 v. M3: *M1* wins against *M3* as first in time because *M1* fully complied with the recording act.

(6) M2 v. M3: *M2* wins on a similar basis.

The Iowa mechanic's lien statute again created a circularity of priorities in this hypothetical. *M1* defeats *M2,* who in turn defeats *S*. Yet *S* defeats *M1*.[377] This inconsistency among priority provisions highlights the weakness of Iowa Code section 572.18. The court could possibly interpret section 572.18 to avoid this circularity, but such an interpretation would necessarily distort the plain reading of the section. Legislative revision is a better course.

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

K. 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.[378] 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,*[379] 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."[380]

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.[381]

In *Schaffer v. Frank Moyer Construction,*[382] 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,*[383] 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,*[384] 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.

L. 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.[385]

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.[386] 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.

M. 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.[387] 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,[388] 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,[389] 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,[390] 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.

N. *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.[391] 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.[392]

O. Notification Requirement for Suppliers to Subcontractors The legislature adopted a notification requirement for suppliers of subcontractors in 1998[393] and revised the language a year later.[394] 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.[395] 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.[396]

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.[397]

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).

P. 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,[398] a contractor's failure to substantially perform meant it could get no attorney's fees,[399] 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.[400]

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.[401] 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.[402]

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.

Q. 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.[403] A mechanic's lien predates the filing of the lien and relates back to the date when work commenced.[404] 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.[405]

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.[406] 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.[407] The legislature amended the mechanic's lien statute to give construction mortgagees additional protection against mechanic's lienors.[408] This amendment followed the Supreme Court's decision in *Barker's Inc. v. B.D.J. Development Co.*[409] 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.[410] 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.[411] 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.[412] If the mechanic's lien claimant starts its particular work after the recording of the construction mortgage, then the construction mortgage takes priority.[413]

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.[414] 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.[415]

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.[416] 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.[417] 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.[418]

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,[419] 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.

X. PROCEDURAL REQUIREMENTS AND ISSUES

A. *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.[420] The filing of a mechanic's lien does not constitute sufficient court action to establish a waiver of the right to arbitration.[421]

The issue whether one has waived its right to arbitrate depends on the significance of the action taken in the judicial form.[422] There remains an open question under Iowa law whether foreclosing a mechanic's lien is sufficient court action to waive the right to arbitrate.[423]

S. 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.[424] 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.[425] 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.[426]

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.[427] 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.

T. Amendment of a Mechanic's Lien An action to enforce a mechanic's lien may be amended by leave of court.[428] 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.[429] 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.[430]

U. 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.[431] 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.[432]

V. 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.[433] 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.[434] 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.[435]

W. 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.[436] 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.

X. 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.[437] 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.[438] 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.[439]

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.[440]

Y. Time of Filing In 1987, the legislature set the period of timely filing for mechanic's liens for contractors and subcontractors at 90 days.[441] 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.[442] 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.[443] Subcontractor may not extend the time for filing by performing some trivial amount of work, remedying small defects, or making trifling changes.[444]

Separate contracts cannot be joined for purposed of extending the time period for filing or obtaining an earlier priority date.[445] 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.[446]

II. CONCLUSION The legislature has substantially undermined the value of a contractor's mechanic's liens by making attorney's fees discretionary. Reinstating mandatory awards to prevailing contractors will promote settlement, encourage mechanic's lien actions rather than common law actions, reduce the number of jury trials on construction cases, and expedite payments for work performed. The legislature should repeal its 1999 amendment to Section 572.32(1) and restore the mandatory award of attorney 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 S. Phillips, The Law on Mechanic's Liens 15-16 (3rd ed. 1893).

3 *Id*. at 15.

4 *Id*. at 18-19.

5 Iowa Code § 572.21 (2005).

6 Gollehon, Schemmer & Assoc. v. Fairway-Bettendorf Assoc., 268 N.W.2d 200, 201 (Iowa 1978). Formerly, section 572.2 was strictly construed because it was in derogation of the common law. Now, under the new Iowa Code, the statute is to be "liberally construed with a view to promote its objects and assist the parties in obtaining justice." *Id*.

[7] Ringland-Johnson-Crowley Co. v. First Cent. Serv. Corp., 255 N.W.2d 149 (Iowa 1977); Home Carpet, Inc. v. Bob Antrim Homes, Inc., 210 N.W.2d 652 (Iowa 1973). Defendants in mechanic's lien foreclosure actions may wish to be cautious about motions to dismiss at the close of the plaintiff's presentation of evidence because of de novo review. *See* Sitzler v. Peck, 162 N.W.2d 499, 452 (Iowa 1968).

[8] *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).

[9] Society Linnea v. Wilbois, 253 Iowa 953, 113 N.W.2d 603 (1962); Iowa Code § 572.2 (2005).

[10] Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 92 N.W.2d 638 (1958). The distinction between contractors and subcontractors depends on the person with whom the supplier of material or labor has a contract for the provision of labor or materials. If the supplier has a contract with an owner for the provision of labor or material, the supplier is a contractor. If the supplier's contract is with a contractor, the supplier is a subcontractor. *See* notes 32-46 and accompanying text *infra.*

[11] Golehon, Schemmer & Assoc. v. Fairway-Bettendorf, Assoc., 268 N.W.2d 200, 202 (Iowa 1978) (working without improving the owner's property does not entitle a person to a mechanic's lien).

[12] *See* text accompanying notes 113-57 *infra*.

[13] Keys v. Garben, 149 Iowa 394, 128 N.W.2d 337 (1910), holding that there must be some actual improvement of the property in order for the claimant to obtain a mechanic's lien.

[14] Society Linnea v. Wilbois, 253 Iowa 953, 959, 113 N.W.2d 603, 606-07 (1962). In this regard the court stated that, "whatever he may do under such contract dates, as to his lien, from the day he commences work or furnishes material and not from the date of the performance of the several parts to his undertaking." *Id*.

[15] Iowa Code § 572.5 (2005).

[16] *Id*. § 572.21.

[17] *See* text accompanying notes 231-71 *infra*.

[18] Capital City Drywall Corp. v. C.G. Smith Constr. Co., 270 N.W.2d 608, 613 (Iowa 1978); Dalbey Bros. Lumber Co. v Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943); Willverding v. Offineer, 87 Iowa 475, 54 N.W. 592 (1893).

[19] Iowa Code § 572.28 (2005).

[20] *See, e.g.,* Denniston & Partridge Co. v. Luther, 194 Iowa 464, 1988 N.W. 664 (1922). In *Denniston*, the court rules that subcontractors who failed to file a timely lien statement had no rights under the mechanic's lien statute against subsequent purchasers. *Id*. at 466, 188 N.W. at 667.

[21] Iowa Code § 572.3 (2005).

[22] Iowa Code §§ 572.17-.21 (2005).

[23] *Id*. § 572.1(2).

[24] *Id. See* Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 92 N.W.2d 638 (1958). *See also* text accompanying notes 43-46 *infra.*

[25] Iowa Code § 572.1(2) (2005).

[26] Gordon-Van Tine v. Ideal Heating & Constr. Co., 223 Iowa 313, 271 N.W. 523 (1937); Southern Sur. Co. v. York Tire Serv., 209 Iowa 104, 227 N.W. 606 (1929).

[27] Bourett v. W.M. Bride Constr. Co., 248 Iowa 1080, 1084-89, 84 N.W.2d 4, 6-9)(1957) (extensive discussion by the court of the rights of laborers and materialmen to recover on payment bonds running to the owner).

[28] *See* Skemp v. Olansky, 249 Iowa 1, 7, 85 N.W.2d 580, 583 (1957) (constructive trust will be difficult for a claimant to prove when it is unable to establish a right to a mechanic's lien). *See also* Guldberg v. Green field, 259 Iowa 873, 885, 146 N.W.2d 298, 305 (1966) (where a subcontractor does not properly and timely file under chapter 572, it may not recover on an action for implied contract or unjust enrichment).

[29] Iowa Code § 572.9 (2005).

[30] *Id*. § 572.11.

[31] Home Carpet Inc. v. Bob Antrim Homes, Inc., 210 N.W.2d 652 (Iowa 1973). In *Home Carpet*, since no third party interest had been created in the owner's property after the expiration of the contractor's period for timely filing, the contractor's failure to file had no adverse effect on his right to recover the full value of the materials supplied to the owner. *Id*. at 654.

[32] Iowa Code § 572.10 (2005).

[33] *See* Home Carpet, Inc. v. Bob Antrim Homes, Inc., 210 N.W.2d 652 (Iowa 1973). The reason for the distinction appears to be that the owners will be aware of the contractors with whom they did business and will have some idea of the extent of the contractor's claims; the owner often will not be aware of the subcontractors who worked on a project or the extent of their claims.

[34] 249 Iowa 1364, 92 N.W.2d 638 (1958).

[35] *Id*. at 1373, 92 N.W.2d at 644.

[36] *Id*.

[37] *Id*.

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

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

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

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

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

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

[44] *Id.*

[45] *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).

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

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

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

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

[50] *Id*.

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

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

[53] Iowa Code §572.2.

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

[55] *Id.* at 709.

[56] *Id.* at 709-10.

[57] *Id.* at 710.

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

[59] 576 N.W.2d 112 (Iowa 1998).

[60] *Id.* at 114.

[61] Iowa Code § 572.1(1) (2005).

[62] Society Linnea v. Wilbois, 253 Iowa 953, 959, 113 N.W.2d 603, 607 (1962). The term "owner" under section 572.1 has not been extended "beyond the case where the title holder or holder of some beneficial interest in the property, in some manner acquires or agrees to the making of certain improvements on the property" *Id*.

[63] Iowa Code §572.2.

[64] *Clemens*, 368 N.W.2d at 711.

[65] *Id*. at 710-11.

[66] *Id*. at 711.

[67] *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).

[68] *Ringland-Johnson-Crowley Co,* 255 N.W.2d at 152.

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

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

[71] *Id.* at 188.

[72] *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).

[73] 259 Iowa 719, 145 N.W.2d 621 (1966).

[74] *Id.* at 725, 145 N.W.2d at 625.

[75] *Id*.

[76] *Id*. at 722, 154 N.W.2d at 623.

[77] Iowa Code § 572.18 (2005).

[78] *Id*. § 572.1(2).

[79] Home Carpet, Inc. v. Bob Antrim Homes, Inc., 210 N.W.2d 652, 655 (Iowa 1973). According to the opinion in *Home Carpet*, both the vendor and vendee can be simultaneously owners. The question is not who is "the" owner but it is who is "an" owner within the purview of the mechanic's lien statute. *Id*.

[80] Perkins Supply & Fuel Serv. v. Rosenberg, 226 Iowa 27, 282 N.W. 371 (1938) (unless the mechanic's lien claimant has a contract with the holder of the particular interest against which the claimant attempts to foreclose, no mechanic's lien will attach to that interest).

[81] *See, e.g.*, Stroh Corp. v. K. & S Dev. Corp., 247 N.W.2d 750 (Iowa 1976). In *Stroh* the Supreme Court ruled that a lessor's interest was subject to attachment of a mechanic's lien, even though the lessor did not contract directly with the subcontractor. *Id*.

[82] *See, e.g.*, Knudson v. Bland, 253 Iowa 614, 113 N.W. 2d 242 (1962); Love Bros., Inc. v. Mardis, 189 Iowa 350, 176 N.W. 616 (1920); A.E. Shorthill Co. v. Bartlett, 131 Iowa 259, 108 N.W. 308 (1906); Carney v. Cook, 80 Iowa 747, 45 N.W. 919 (1890).

[83] Edward Edinger Co. v. Hildreth Memorial United Evangelical Church, 199 Iowa 1117, 201 N.W. 569 (1925).

[84] Love Bros., Inc. v. Mardis, 189 Iowa 350, 356, 176 N.W. 616, 618 (1920).

[85] *Id.*

[86] *Id*.

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

[88] *Id.*

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

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

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

[92] 253 Iowa 614, 113 N.W.2d 242 (1962).

[93] *Id*. at 618-19, 113 N.W.2d at 244-45.

[94] *Id*. at 620, 113 N.W.2d at 245.

[95] *See generally* James v. Dalbey, 107 Iowa 463, 78 N.W. 51 (1899); Miller v. Hollingsworth, 33 Iowa 224 (1871); Burdich v. Moon, 24 Iowa 418 (1868); Kidd v. Wilson, 23 Iowa 464 (1867).

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

[97] 3 American Law of Property § 11.29 (A. Casner ed. 1952).

[98] *Id*. Equitable conversion is defined as:

> The exchange of property from real to personal or from personal to real, which take place under some circumstances in the consideration of the law, such as, to give effect to directions in a will or settlement, or to stipulations in a contract although no such change has actually taken place, and by which exchange the property so dealt with becomes invested with the properties and attributes of that into which is supposed to have been converted. It is sometimes necessary however for certain purposes of devolution and transfer to regard the property in its changed condition as though the change has not absolutely taken place.

Black Law Dictionary 300 (5th ed. 1979).

[99] For cases discussing subjection of the vendee's interest in real property to a mechanic's lien, see Knapp v. Baldwin, 213 Iowa 24, 238 N.W. 542 (1931). In *Knapp*, only the vendee's interest, and not the vendor's, was subject to a mechanic's lien. *See also* Darragh v. Knolk, 218 Iowa 686, 254 N.W. 22 (1934) (mechanic's lien could have attached to the vendee's interest except that the vendee's interest was forfeited under the contract for purchase of the property).

[100] Home Carpet, Inc. v. Bob Antrim Homes, Inc., 210 N.W.2d 652 (Iowa 1973); Knudson v. Bland, 253 Iowa 614, 133 N.W.2d 242 (1962); Denniston v. Partridge Co. v. Romp, 244 Iowa 204, 56 N.W.2d 601 (953); Kimball Bros. Co. v. Fehleisen, 184 Iowa 1109, 169 N.W. 445 (1918).

[101] Iowa Code §§ 572.2, .5 (2005).

[102] *See, e.g.,* Darrah v. Knolk, 218 Iowa 686, 254 N.W. 22 (1934).

[103] *See, e.g.,* Knudson v. Bland, 253 Iowa 614, 113 N.W.2d 242 (1962) (vendor was so closely connected with his vendee's plans and contracts for improvement and subdevelopment of the property that the vendor's interest was subject to the mechanic's lien).

[104] *See* Text accompanying notes 276-93 *infra*.

[105] *See, e.g.,* Stroh Corp. v. K & S Dev. Corp., 247 N.W.2d 750 (Iowa 1976) (lessor is owner); Queal Lumber Co. v. Lipman, 200 Iowa 376, 206 N.W. 627 (1925) (lessee is owner).

[106] Perkins Supply & Fuel Serv. V. Rosenberg, 226 Iowa 27, 282 N.W. 371 (1938); Queal Lumber Co. v. Lipman, 200 Iowa 376, 206 N.W. 627 (1925).

[107] *See, e.g.,* Stroh Corp. v. K & S. Dev. Corp., 247 N.W.2d 750 Iowa 1976) (holding that a mechanic's lien for a subcontractor's mechanical work could attach to the lessor's interest where the lease provided for the lessee to make improvements on the real property).

[108] Scott v. Mewhirter, 49 Iowa 487, 489 (1878). The court articulated the general proposition that liens will not attach to other liens, even though it did not specifically refer to mechanic's liens.

[109] Iowa Code §572.2.

[110] *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).

[111] Iowa Code § 572.2 (2005) (emphasis added).

[112] Modern Heat & Power Co. v. Pauls, 158 N.W.2d 8 (Iowa 1968); A.E. Shorthill Co. v. Aetna Indem. Co., 124 N.W. 613, 615 (1910).

[113] Frudden Lumber Co. v. Kinnan, 117 Iowa 93, 90 N.W. 515 (1902); St. Croix Lumber Co. v. Davis, 105 Iowa 27, 74 N.W. 756 (1898); Lee & Jamison v. Hoyt, 101 Iowa 101, 70 N.W. 515 (1898).

[114] Moffit Bldg. Material Co. v. U.S. Lumber & Supply Co., 255 Iowa 765, 124 N.W.2d 134 (1963).

[115] *Id*. at 770, 124 N.W.2d at 137. It was sufficient that the claimant showed that material was furnished for the improvement and delivered to the owner's contractor, that similar material was installed on the house, and that there was no claim that the materials were purchased elsewhere. *Id*.

[116] Lewis v. Saylor, 73 Iowa 504, 35 N.W. 601 (1887). It was not necessary for the plaintiff in *Lewis* to show that the particular materials in question went into the building on which the lien was sought to be established. If the question was of any materiality to the defendant, the burden was on him to show how the materials were used. *Id*.

[117] Modern Heat & Power Co. v. Paul, 158 N.W.2d 8 (Iowa 1968) (where property owner had paid for all materials received from supplier who failed to deliver the remaining materials because of a dispute over the amount due, suppler not entitled to mechanic's lien for materials the owner had contracted to purchase but were not delivered).

[118] 13 UNIFORM LAWS ANNOTATED, UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT, *Article 5, Introductory Comment* 323 (1980 Supp.): "In addition, except with respect to materials specially fabricated for the particular real estate and not saleable in the ordinary course of the materialman's business, a materialman gets no lien unless the materials are actually used in the making of the improvement." This uniform act was introduced in the Iowa House of Representatives in 1980. *See* H.F. 2257.

[119] Iowa Code § 554.2704 (2005).

[120] 254 Iowa 39, 116 N.W.2d 430 (1962).

[121] *Id*. at 44-45, 116 N.W.2d at 433.

[122] *Id*.

[123] W.A. Parsons & Sons, v. Brown, 97 Iowa 699, 66 N.W. 880 (1896).

[124] Gollehon, Schemmer & Assoc. v. Fairway-Bettendorf Assoc. 268 N.W.2d 200 (1978).

[125] Keys v. Garben, 149 Iowa 394, 128 N.W. 337 (1910). *See* text accompanying notes 87-90 *supra*.

[126] Gollehon, Schemmer & Assoc. v. Fairway-Bettendorf Assoc., 268 N.W.2d 200, 202 (1978).

[127] *See* cases cited in note 113 *supra*.

[128] 64 Iowa 539, 21 N.W. 22 (1884).

[129] *Id*.

[130] *Id*. § 572.1(4).

[131] Lumber Supply, Inc. v. Hull, 158 N.W.2d 667 (Iowa 1968).

[132] Coenen v. Staub, 74 Iowa 32, 36 N.W. 877 (1888).

[133] Iowa Code § 572.1(4) (2005).

[134] Spahn & Rose Lumber Co. v. Eells, 195 Iowa 555, 192 N.W. 243 (1923).

[135] Nancolas & Howard v. Hitaffer & Prouty, 136 Iowa 341, 343, 112 N.W. 382, 383 (1907).

[136] Harris v. Schultz, 64 Iowa 539, 21 N.W. 22 (1884).

[137] Moffitt Bldg. Material Co. v. United States Lumber & Supply Co., 255 Iowa 765, 124 N.W.2d 134 (1963).

[138] 217 Iowa 31, 250 N.W. 594 (1933).

[139] *Id*. at 34, 250 N.W. at 595.

[140] *Id*.

[141] 98 Iowa Acts, Ch. 1142, §1.

[142] 98 Iowa Acts, Ch. 1142 §2 discussed *infra*.

[143] 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).

[144] Iowa Code § 572.2 (2005).

[145] 56 Iowa 452, 9 N.W. 344 (1881).

[146] *Id*. at 453, 9 N.W. at 345.

[147] The breaking of prairie is necessary to the growth of crops, but not more necessary than the annual plowing which precedes the planting of crops. If a lien should be allowed for the first breaking of the prairie, we are unable to see upon what principal it would be denied for the subsequent plowings, which are indispensable to the proper cultivation of the soil.
Id.

[148] *See* Royal Lumber Co. v. Hoelzner, 199 Iowa 47, 201 N.W. 53 (1924).

[149] Iowa Code § 572.1(4) (2005).

[150] Dobbs v. Knudson, Inc., 292 N.W.2d 692 (Iowa 1980); Crane Co. v. Westerman, 232 Iowa 1394, 1398, 8 N.W.2d 412, 414 (1943). *See also* Bangs v. Berg, 82 Iowa 350, 352, 48 N.W. 90, 91 (1891).

[151] Crane Co. v. Westerman, 232 Iowa 1394, 1398, 8 N.W.2d 412, 43 (1943).

[152] Wormhoudt Lumber Co. v. Union Bank & Trust Co., 231 Iowa 928, 935, 2 N.W.2d 267, 271 (1942).

[153] Dobbs v. Knudson, Inc., 292 N.W.2d 692 (Iowa 1980).

[154] Keys v. Garben, 149 Iowa 394, 128 N.W. 337 (1910).

[155] Golehon, Schemmer & Assoc. v. Fairway-Bettendorf Assoc., 268 N.W.2d 200, 202 (Iowa 1978).

[156] Knudson v. Bland, 253 Iowa 614, 113 N.W.2d 242 (1962) (where the express contract called only for fine grading of a roadbed, the claimant could recover on a mechanic's lien for an implied contract for rough grading that was necessary to prepare the road for fine grading); Wetmore v. Marsh, 81 Iowa 677, 47 N.W. 1021 (1891) (claimant could recover "extras" provided during the construction of a house).

[157] Welter v. Heer, 181 N.W.2d 134, 138 (Iowa 1970); Denniston & Partridge Co. v. Mingus, 179 N.W.2d 748, 754 (Iowa 1970).

[158] Rohlin Constr. Co. v. Lakes, Inc., 252 N.W.2d 403 (Iowa 1977) (the nine percent statutory interest rate of section 535.2 was allowed to the claimant); Spieker v. Cass County Fair, 216 Iowa 424, 249 N.W. 415 (1933) (holding that only the statutory interest rate of six percent, and not the higher rate provided for in the parties' contract, could be recovered on a mechanic's lien claim). *See also* Olberding Constr. Co. v. Ruder, 243 N.W.2d 872, 879 (Iowa 1976). The general rule was stated that the interest runs from the time that the debt becomes due and payable. *Id*. The owner, however, owes no debt to a subcontractor because it has no contract with the subcontractor and there is no personal liability on a mechanic's lien judgment. Apparently, this case does not settle the issue of when the interest begins to accrue. *Id*.

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

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

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

[162] *Gollehon, Schemmer & Assoc., v. Fairway-Bettendorf Assoc.,* 268 N.W.2d 200, 201 (Iowa 1978).

[163] *Id.* at 201-202.

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

[165] *Id.* at 400.

[166] *Id.* at 400.

[167] *Id.* at 400.

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

[169] *Id*. at 193.

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

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

[172] *Id.*

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

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

[175] *Id.* at 194.

[176] *Id.* at 194.

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

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

[179] McDonald v. Welch, 176 N.W.2d 846, 847 (Iowa 1970) (a prerequisite to holding plaintiff entitled to a mechanic's lien is that the plaintiff prove that this discharge from the work site was without fault on his own part).

[180] 252 Iowa 249, 259, 106 N.W.2d 597, 603 (1960). Rather than denying the mechanic's lien claim for delay in completion of the contract, the court allowed the owner to counterclaim for damages resulting from the delay. *Id.*

[181] *See* Keys v. Garben, 149 Iowa 394, 128 N.W. 337 (1910).

[182] *See* Des Moines Furnace & Stove Repair Co. v. Lemon, 244 Iowa 316, 56 N.W.2d 923 (1953).

[183] *See* Western Elec. Co. v. Iowa Falls Elec. Co., 196 Iowa 19, 193 N.W. 556 (1923). In *Western Electric* the court held:

> a supplier who furnished a contractor material on the contractor's general account after a general plan of extending the contractor credit had been agreed on, prior to the execution of the contract for construction of electric transmission, was not entitled to a mechanic's lien where some of the material so sold was used in the improvement.

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

[185] *Busker v. Sokolowski,* 203 N.W. 2d at 304.

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

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

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

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

[190] Iowa Code § 572.8 (2005).

[191] *See* text accompanying notes 39-40 *supra*.

[192] Iowa Code § 572.8 (2005) (the failure of a contractor or subcontractor to file a timely statement does not bar or limit the claimant's recovery except as otherwise provided in chapter 572). The only "otherwise provided" section in chapter 572 that could affect the rights of contractors who fail to file a timely statement is the second clause of section 572.18.

[193] *See, e.g.,* Moffitt v. Denniston & Partridge Co., 229 Iowa 570, 575-76, 294 N.W. 731, 733 (1940).

[194] *Id*.

[195] Maryland Cas. Co. v. Des Moines City Evangelistical Union, 184 Iowa 246, 257, 167 N.W. 695, 698 (1918).

[196] Eggert & Flater v. Snoke, 122 Iowa 582, 98 N.W. 372 (1904).

[197] Ewing & Jewett v. Stockwell, 106 Iowa 26, 75 N.W. 657 (1898) (inadvertent omission of certain discounts and insurance was excused); Simonson Bros. Mfg. Co. v. Citizens' State Bank, 105 Iowa 264, 74 N.W. 905 (1898) (honest overstatement of the amount due excused).

[198] Stubbs v. Clarinda College Springs & S.W.R.R., 65 Iowa 513, 22 N.W. 654 (1885) (fraudulent failure to allow credit against the wages due the claimant was fatal to the claim for a mechanic's lien).

[199] McDonald v. Welch, 176 N.W.2d 846, 847-49 (Iowa 1970).

[200] Iowa Code § 572.9 (2005).

[201] *Id*. § 572.11; Skemp v. Olansky, 249 Iowa 1, 85 N.W.2d 580 (1957).

[202] *Id*. § 572.14. If the subcontractor files a timely statement, the owner will receive no credit against the subcontractor's mechanic's lien claim for payments made before the expiration of the subcontractor's period for timely filing.

[203] *Id. See also* Diecke v. Lumber Supply, Inc., 260 Iowa 470, 149 N.W.2d 822 (1967).

[204] Iowa Code § 572.11 (2005). Randall v. Colby, 190 F. Supp. 319, 331 (N.D. Iowa 1961).

[205] Iowa Code § 572.11.

[206] *Carson v. Roediger*, 513 N.W.2d at 716.

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

[208] *Ude Corp.,* 392 N.W.2d at 859.

[209] 168 N.W. 2d 802 (Iowa 1969).

[210] *Id.* at 804-05.

[211] Denniston & Partridge Co. v. Mingus, 179 N.W. 2d, 748, 752-54 (Iowa 1970).

[212] Olberding & Const. Co. v. Ruden, 243 N.W. 2d 872, 876 (Iowa 1976).

[213] Denniston & Partridge Co. v. Mingus, 179 N.W. 2d 748, 752-54 (Iowa 1970).

[214] Olberding Const. Co. v. Ruden, 243 N.W. 2d 872, 876 (Iowa 1976).

[215] *See* Iowa Code § 572.11 (2005).

[216] *See* Nielsen v. Buser, 207 Iowa 288, 290-92, 222 N.W. 856, 857-58 (1929); Denniston & Partridge Co. v. Luther, 194 Iowa 464, 188 N.W. 664 (192); Sheldon v. Chicago Bonding & Sur. Co., 190 Iowa 945, 966, 181 N.W. 282, 291 (1921). *See also* Skemp v. Olansky, 249 Iowa 1, 85 N.W.2d 580 (1957); Nancolas v. Hitaffer & Prouty, 136 Iowa 341, 112 N.W. 382 (1907).

[217] *See, e.g.,* Casler Elec. Co. v. Carlsen, 249 Iowa 289, 86 N.W.2d 682 (1957).

[218] 249 Iowa 1, 85 N.W.2d 580 (1957).

[219] *Id*. at 8-9, 85 N.W.2d at 584-85.

[220] 207 Iowa 288, 222 N.W. 856 (1929).

[221] *Id.* at 291, 222 N.W. at 858.

[222] *Id*.

[223] *Id*.

[224] *Id.*

[225] Denniston & Partridge Co. v. Luther, 194 Iowa 464, 467, 188 N.W. 664, 666 (1922).

[226] *See, e.g.,* Skemp v. Olansky, 249 Iowa 1, 8-9, 85 N.W.2d 580, 584-85 (1957). The supreme court held that even where the contract is not completed as of the earlier date, the claimant must show that its return to the property was for more reason than merely to extend the filing period. *Id*.

[227] Nancolas v. Hitaffer & Prouty, 136 Iowa 341, 345, 112 N.W. 382, 383 (1907).

[228] *See* Sheldon v. Chicago Bonding & Sur. Co., 190 Iowa 945, 968-70, 181 N.W. 282, 292 (1921).

[229] Milligan v. Zeller, 197 Iowa 79, 84, 196 N.W. 793, 795 (1924).

[230] 197 Iowa 79, 196 N.W. 793 (1924).

[231] *Id*. at 84-85, 196 N.W. at 795.

[232] 194 Iowa 464, 188 N.W. 664 (1922).

[233] *Id*. at 468, 188 N.W. at 666.

[234] 249 Iowa 289, 86 N.W.2d 682 (1957).

235 *Id.* at 295, 86 N.W.2d at 686.

236 Skemp v. Olansky, 249 Iowa 1, 85 N.W.2d 580 (1957).

237 183 Iowa 1236, 168 N.W. 270 (1918).

238 *Id*. at 1250, 168 N.W. at 276.

239 *See also* Sheldon v. Chicago Bonding & Sur. Co., 190 Iowa 945, 967-68, 181 N.W. 282, 291-92 (1921) (estoppel considered, but facts did not support such a finding).

240 Cedar Rapids Sash & Door v. Heinbaugh, 183 Iowa 1236, 1250, 168 N.W. 270, 276 (1918).

241 249 Iowa 1, 85 N.W.2d 580 (1957).

242 *Id.* at 7, 85 N.W.2d at 583.

243 190 F. Supp. 319 (N.D. Iowa 1961).

244 *Id*. at 326.

245 *See* text accompanying notes 198-201 *supra.*

246 190 F. Supp. at 326.

247 *Id*. Alternatively, this problem might be solved by imposing an equitable lien or a constructive trust in the property on the grounds of unjust enrichment of the owner. It is not likely that the Iowa Supreme Court would adopt such a remedy in light of some of its earlier holdings. *See* text accompanying note 36 *supra*.

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

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

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

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

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

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

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

255 *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).

256 Olberding Constr. Co. v. Ruden, 243 N.W. 2d 872, 876 (Iowa 1976).

257 *See, e.g.,* North Iowa Steel Co. v. Staley, 253 Iowa 355, 357-58, 112 N.W. 2d 364, 365-66 (1961).

258 Denniston & Partridge Co. V. Mingus, 179 N.W. 2d 748, 754 (Iowa 1970).

259 North Iowa Steel Co. v. Staley, 353 Iowa 355, 357-58, 112 N.W. 2d 364, 365-66 (1961); Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 1367, 92 N.W.2d 638, 642-43 (1958); Des Moines Furnace & Stove Repair Co. v. Lemon, 244 Iowa 316, 324, 56 N.W.2d 923, 928 (1953) (joinder of cross-claim permitted).

260 *See* Capital City Drywall Corp. v. C.C. Smith Constr. Co., 270 N.W. 2d 608, 610-11 (Iowa 1978), holding that "when the lien claim does not include the foreclosing plaintiff's entire claim from the transaction the plaintiff may separately plead the remainder of his claim in response to a defendant's pleading of set-off or counterclaim." *Id.*

261 Restatement of Contracts § 346(1) (1932) provides:

(1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:

a. For defective or unfinished construction he can get judgment for either

i. The reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or

ii. The difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff if construction and completion in accordance with the contract would involve unreasonable economic waste.

262 *See* Conrad v. Dorweiler, 189 N.W. 2d 537, 540-41 (Iowa 1971).

263 *See* note 250 *supra.*

264 189 N.W. 2d at 540-41.

265 Kaltoft v. Nielsen, 252 Iowa 249, 456, 106 N.W. 2d 597, 601 (1960).

266 Randall v. Colby, 190 F. Supp. 319, 331 (N.D. Iowa 1961).

267 For cases applying the first of the two alternatives, *see, e.g.,* Johnson v. Vogel, 208 Iowa 44, 48, 222 N.W. 864, 865 (1929); Glowitzer v. Hummel, 201 Iowa 751, 755-56, 206 N.W. 254, 256 (1926); Schmidt Bros. Constr. Co. v. Raymond YMCA, 180 Iowa 1306, 1316, 163 N.W. 458, 463 (1917). For a case applying the alternative measure of damages, *see* Hansen v. Andersen, 246 Iowa 1310, 1316, 71 N.W. 2d 921, 924 (1955).

268 This result is implied by the discussion in Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 1369-70, 92 N.W.2d 638, 642 (1958).

269 *See* text accompanying notes 173-75 *supra.*

270 Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 1369-70, 92 N.W. 2d 638, 642 (1958).

271 Iowa Code § 572.11 (2005).

272 Randall v. Colby, 190 F. Supp. 319, 324-25 (N.D. Iowa 1961); Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 1369-70, 92 N.W. 2d 638, 642 (1958). *See also* Diecke v. Lumber Supply, Inc., 260 Iowa 470, 475-78, 149 N.W. 2d 822, 825-27 (1967).

273 Beane Plumbing & Heating Co. v. D-X Sunray Oil Co., 249 Iowa 1364, 1369-70, 92 N.W. 2d 638, 642 (1958).

274 Iowa Code § 572.14 (2005). *See e.g.* Des Moines Furnace & Stove Repair Co. v. Lemon, 244 Iowa 316, 56 N.W. 2d 923 (1953).

275 Iowa Code § 572.3.

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

277 *Id.*

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

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

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

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

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

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

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

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

[286] Bangs v. Berg, 82 Iowa 350, 48 N.W. 90 (1891).

[287] Iowa Code § 572.8 (2) (2005)

[288] Central Lumber & Coal Co. v. Glass, 199 Iowa 113, 203 N.W. 276 (1925); Bissell v. Lewis, 56 Iowa 231, 9 N.W. 177 (1881). *But see* Roose v. Billingsly, 74 Iowa 51, 36 N.W. 885 (1888) (description "thirty lengths of corn-cribbing" too indefinite to enable the officer to identify the property).

[289] St. Croix Lumber Co. v. Davis, 105 Iowa 27, 74 N.W. 756 (1898); Simonsen Bros. Mfg. Co. v. Citizens' State Bank, 105 Iowa 264, 74 N.W. 905 (1898).

[290] Nancolas v. Hitaffer & Prouty, 136 Iowa 341, 345, 112 N.W. 382, 384 (1907).

[291] Stubbs v. Clarinda College Springs & S.W.R.R., 65 Iowa 513, 22 N.W. 654 (1885).

[292] Iowa Code § 572.8 (2005).

[293] Ewing v. Stockwell, 106 Iowa 26, 75 N.W. 657 (1898).

[294] Stephenson v. Peterson v. Svenson, 187 Iowa 802, 174 N.W. 570 (1919); Stubbs v. Clarinda College Springs & S.W.R.R., 65 Iowa 513, 22 N.W. 654 (1885).

[295] Nelson v. Iowa E.R.R., 51 Iowa 184, 1 N.W. 434 (1879). *See generally* Hunt Hardware Co. v. Herzoff, 196 Iowa 715, 195 N.W. 264 (1923); Cedar Rapids Sash & Door Co. v. Heinbaugh, 183 Iowa 1236, 1237, 168 N.W. 270, 271 (1918). Because a foreclosure against an owner does not depend on the filing of a lien statement, the deficiencies in the statement or amount claimed should not affect the claimant's lien recovery, except where third parties have relied to their detriment on the lien statement. *But see* Chase v. Garver Coal & Mining Co., 90 Iowa 25, 29-30, 57 N.W. 648, 650 (1894).

[296] Iowa Code § 572.22 (2005). *See* Rohlin Constr. Co. v. Lakes, Inc., 252 N.W. 2d 403, 407 (Iowa 1977).

[297] Iowa Code § 572.8 (2005).

[298] *Id*. § 554.9402. *See* J. White & R. Summer, Uniform Commercial Code 837-41 (1972).

[299] Iowa Code § 572.8 (2005).

[300] *See, e.g.,* Milligan v. Zeller, 197 Iowa 79, 81-82, 196 N.W. 793, 794 (1924) (failure to state the county where the lien was filed and failure to state the county where the notary public had jurisdiction did not invalidate the verified statement and jurat). *See also* Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 154-44, 12 N.W.2d 277, 278-80 (1943).

[301] Milligan v. Zeller, 197 Iowa 79, 81-82, 196 N.W. 793, 794 (1924).

[302] *Id.*

[303] Iowa Code § 572.8, .27 (2005)

[304] *Id*. § 572.9.

[305] *Id*. § 572.11. *See* text accompanying notes 260-61 *infra*.

[306] *Id*. § 572.9. *See, e.g.,* Casler Electric Co. v. Carlsen, 249 Iowa 289, 295, 86 N.W. 2d 682, 686 (1957).

[307] Iowa Code § 554.9401 (2005). *See* J. White & R. Summers, Uniform Commercial Code 829-33 (1972).

[308] *See* Iowa Code §§ 572.11-.14 (2005).

[309] Des Moines Furnace & Stove Repair Co. v. Lemon, 244 Iowa 316, 323, 56 N.W.2d 923, 927-28 (1953).

[310] *Id*. at 324, 56 N.W.2d at 928.

[311] *Id*. § 572.15.

[312] *See* text accompanying notes 248-63 *supra.*

[313] Iowa Code § 572.11 (1979).

[314] *Id*. § 572.15. It should be noted that the bond under section 572.15 is conditioned upon the amount the subcontractor may collect. Further, section 572.11 limits the amount a late-filing subcontractor may collect to the amount due the contractor by the owner.

[315] Moffitt Bldg. Material Co. v. United States Lumber & Supply Co., 255 Iowa 765, 769-70, 124 N.W.2d 134, 136-37 (1963).

[316] The source of the following provisions is CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA MECHANIC'S LIEN 159-62 (1972); the recommended provisions have been adopted to the existing Iowa mechanic's lien statute, Iowa Code ch. 572 (1979).

[317] *See, e.g.,* Casler Elec. Co. v. Carlsen, 249 Iowa 289, 295, 86 N.W.2d 682, 686 (1957).

[318] *Id*. at 673.

[319] *Id.*

[320] *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).

[321] *Id.* at 673.

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *Id.* at 674.

[326] *Id.* at 675.

[327] *Id.*

[328] *Id.*

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

[330] *Id.* at 122.

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

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

[333] *Id.* at 936.

[334] *See, e.g.,* Note, *Priority of Mechanic's Liens in Iowa*, 45 Iowa L. Rev. 813, 824-25 (1960).

[335] Priority of interest holders would still have an impact on the holder's rights to redeem under Iowa Code sections 628.1-.27 (1979).

[336] Garrison Grain & Lumber co. v. Farmers Mercantile Co., 181 Iowa 568, 164 N.W. 791 (1917).

[337] 128 Iowa 558, 104 N.W. 802 (1905).

[338] *Id*. at 561, 104 N.W. at 803.

[339] *Id*.

340 *Id*.

341 Chicago Lumber Co. v. Woodside, 71 Iowa 359, 32 N.W. 381 (1877).

342 Iowa Code § 572.18 (1979).

343 401 F. Supp. 682 (N.D. Iowa 1975). *See* Iowa Code § 572.18 (1979).

344 401 F. Supp. at 687.

345 *Id*. at 685.

346 *See generally* Iowa Code § 572.20 (1979).

347 401 F. Supp. at 685.

348 253 Iowa 953, 113 N.W.2d 603 (1962).

349 *Id*. at 955, 113 N.W.2d at 604.

350 *Id*. at 956, 113 N.W.2d at 605-06.

351 Gollehon, Schemmer & Assoc. v. Fairway-Bettendorf Assoc., 268 N.W.2d 200, 202 (Iowa 1976).

352 1943 Iowa Acts ch. 260, § 1.

353 *See* Monroe v. West, 12 Iowa 121 (1861).

354 *See* Neilson v. Iowa E.R.R., 44 Iowa 71 (1876).

355 *See* Queal Lumber Co. v. McNeal, 226 Iowa 631, 284 N.W. 479 (1930) (this case necessarily implies that priority dates from the particular claimants work); Iowa Code § 10287 (1924) (1935) and (1930).

356 Casler Elec. Co. v. Carlsen, 249 Iowa 289, 86 N.W.2d 682 (1957). Although the specific issue was not reached, the question arises as to whether this case means that priority of a claimant dates only from his or her own particular commencement of work.

357 A type of mortgage used to finance building construction.

358 A purchase money mortgage is defined as:

> Generally, any mortgage given to secure a loan made for the purpose of acquiring the land on which the mortgage is given; more particularly, a mortgage given to the seller of land to secure payment of a portion of the purchase price. A mortgage given, concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase price.

BLACK'S LAW DICTIONARY 912 (5th ed. 1979).

359 *See* Iowa Code § 572.20, .21 (1979).

360 *Id*. § 572.20.

361 *Id*. § 572.21.

362 *Id*.

363 *Id*.

364 General Mfg. Corp. v. Campbell, 258 Iowa 143, 138 N.W.2d 416, 420)1965).

365 *Id*. at 152, 138 N.W.2d at 421. *See* Iowa Code § 572.21 (1979).

366 258 Iowa at 152, 138 N.W.2d at 421.

[367] *Id*.

[368] *Id*. at 153, 138 N.W.2d at 421.

[369] Davis, *Mechanic's Liens and Construction Financings─Consistent Priorities?* 51 Iowa L. Rev. 862, 870-81 (1966).

[370] *Id*. at 876.

[371] Lincoln Nat'l Life Ins. Co. v. McSpadden, 211 Iowa 97, 98-99, 232 N.W. 824, 825 (1930).

[372] First State Bank v. Westendorf, 213 Iowa 475, 239 N.W. 73 (1931).

[373] Anfinson v. Cook, 224 Iowa 833, 276 N.W. 762 (1938).

[374] 211 Iowa 97, 232 N.W. 824 (1930).

[375] *Id*. at 98-99, 232 N.W. at 825.

[376] Iowa Code § 572.18 (1979).

[377] All interests of *M1, M2* and *S* are prior to the interest of *M3*.

[378] 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.

[379] 378 N.W.2d 923, 927 (Iowa 1985).

[380] *Id.* at 927.

[381] *Id.* at 926.

[382] 563 N.W.2d 605 (Iowa 1997).

[383] 561 N.W.2d 815 (Iowa 1997).

[384] 564 N.W.2d 398 (Iowa 1987).

[385] 98 Iowa Acts, Ch. 1142, § 3 (codified at Iowa Code § 572.14(2)).

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

[387] 1987 Iowa Acts, Ch. 79, § 5 (codified at Iowa Code § 572.13(2)).

[388] *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).

[389] Iowa Code § 572.26.

[390] Iowa Code § 572.32.

[391] Section 572.30.

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

[393] 98 Iowa Acts, Ch. 1142, § 4.

[394] 99 Iowa Acts, Ch. 104, § 1.

[395] Iowa Code § 572.33(2).

[396] Iowa Code § 572.33(1)(a).

[397] Iowa Code § 572.33(b).

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

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

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

[401] 99 Iowa Acts, Ch. 79, § 4 (codified at Iowa Code § 572.32(1)).

[402] 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)).

[403] *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).

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

[405] *Metropolitan Federal Bank*, 477 N.W.2d at 671.

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

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

[408] 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.

[409] 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).

[410] 1984 Iowa Acts, Ch. 1215, § 1 (codified at Iowa Code § 572.18).

[411] *Metropolitan Federal Bank,* 477 N.W.2d at 672.

[412] *Id.* at 672.

[413] *Id.*

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

[415] *Id.* at 195.

[416] 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.

[417] 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.

[418] Iowa Code § 572.21(2).

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

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

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

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

[423] *Clinton National Bank*, 559 N.W.2d at 283.

[424] Iowa Code § 572.10.

[425] Iowa Code § 572.8.

[426] Iowa Code § 572.11.

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

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

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

[430] Iowa Code § 572.26.

[431] 99 Iowa Acts, Ch. 79, § 2 (codified at Iowa Code §572.23).

[432] Iowa Code § 572.23(2).

[433] 99 Acts, Ch. 79, § 2 (codified at Iowa Code § 572.24(2)).

[434] 99 Iowa Act, Ch. 79, § 4 (codified at Iowa Code § 572.32(2)).

[435] 99 Iowa Acts, Ch. 79, § 4 (codified at Iowa Code § 572.32(2)).

[436] 99 Iowa Acts, Ch. 79, § 3 (codified at Iowa Code § 572.28(2)).

[437] *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).

[438] *Queal,* 200 Iowa at 1380, 206 N.W.2d at 629.

[439] *Clemens*, 368 NW.2d at 709.

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

[441] 1987 Iowa Acts, Ch. 79, § 1 (codified at Iowa Code § 572.9).

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

[443] *Id.* at 452.

[444] *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).

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

[446] *Id.* at 713.