STATE OF IOWA CONSTRUCTION LAW COMPENDIUM

Prepared by
Erick J. Skogman
William S. Vernon
Simmons Perrine Moyer Bergman PLC
115 3rd Street SE
Suite 1200
Cedar Rapids, IA 52401
(319) 366-7641
www.simmonsperrine.com

Revised 2016

I. BREACH OF CONTRACT

A breach of contract occurs when a party fails to perform any promise which forms a whole or a part of the contract without legal excuse, *Employers Mut. Cas. Co. v. United Fire & Cas. Co.,* 682 N.W.2d 452, 455 (Iowa Ct.App.2004). In breach of contract claims, the complaining party must prove (1) the existence of a contract, (2) the terms and conditions of the contract, (3) that it has performed all the terms and conditions required under the contract, (4) the defendant's breach of contract in some particular way, and (5) that the plaintiff has suffered damages as a result of the breach. *Molo Oil Co. v. River City Ford Truck Sales, Inc.* 578 N.W.2d 222, 224 (Iowa 1998). If one party to a contract prevents the other from performing a condition of the contract or fails to cooperate to allow the condition to be satisfied, the other party is excused from showing compliance with this condition. *See Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.,* 326 N.W.2d 328, 332 (Iowa 1982) (holding all contracts contain an implied term that the person for whom the work is contracted to be done will not obstruct, hinder or delay the contractor, but will facilitate the performance of the work to be done by him or her). In Iowa, a breach of an unwritten contract is subject to a five year statute of limitation, and a claim for breach of a written contract is subject to a ten year statute of limitations. Iowa Code §614.1. A cause of action on contract accrues and the limitation period begins to run when the contract is breached, not when the damage results or is ascertained. *Brown v. Ellison*, 304 N.W.2d 197, 200 (Iowa 1981).

II. NEGLIGENCE

Iowa law recognizes claims for negligence based on defective construction. *Lipps v. Hjelmeland Builders, Inc.,* 760 N.W.2d 209 (Iowa Ct. App. 2008). However, the economic loss doctrine bars recovery for negligence claims when the claimant suffers only economic loss. *Annett Holdings, Inc. v. Kum & Go, L.C.,* 801 N.W.2d 499, 502 (Iowa 2011); *see also Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.,* 345 N.W.2d 124, 126 (Iowa 1984) (recognizing "the well-established general rule that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable"). The doctrine applies to prevent one of two parties to a contract from bringing a negligence claim against the other over the injured party's defeated expectations. *Annett,* 801 N.W.2d at 503. The prohibition is based on the presumption that such subject matter should be allocated between the parties in the contract. *Id*. (recognizing the purpose of the rule is to prevent the "[d]eath of [c]ontract" or the "tortification of contact law"): *see also Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988) ("When a buyer loses the benefit of this bargain because the goods are defective … he has his contract to look to for remedies; tort law need not and should not, enter the picture.") (internal citations omitted).

Because of the economic loss doctrine, a home purchaser is unable to successfully assert a negligence claim against the seller for a purely economic loss. *Determan v. Johnson*, 613 N.W.2d 259, 264 (Iowa 2000) (refusing recovery in tort for damages related to home's

inadequate beam support system and improperly installed vapor barrier). As the Iowa Supreme Court explained,

> The line to be drawn is one between tort and contract rather than between physical harm and economic loss. When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract. Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect.

Id. (alterations and citations omitted). Courts consider factors such as the type of risk, nature of the defect, and the manner in which an injury arose to determine whether we should apply the "safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law" to a particular claim. *Id.* at 262. Under Iowa's discovery rule, "a cause of action based on negligence does not accrue until the plaintiff has in fact discovered that he has suffered injury or by exercise of reasonable diligence should have discovered it ..." *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993).

III. BREACH OF WARRANTY

A. Breach of Express Warranty

The Iowa Supreme Court, citing common law from Iowa and other states, has held "that the theory of express warranty can apply to specific representations or warranties contained in contracts for the sale of real estate," and allowed a buyer to recover for breach of express warranty where the builder of a house made representations that particular materials were used and specifications met, and these representations were expressly incorporated into the contract. *Flom v. Stahly*, 569 N.W.2d 135, 140 (Iowa 1997). Parties can create an express warranty, even without using words like "warranty" or "guaranty." *Id.* In order to create an express warranty, "the plaintiff must 'show that the seller made some distinct assertion of quality concerning the thing to be sold as distinguished from a mere statement of opinion or of praise.'" *Id.* (citing *Carleton D. Beh Co. v. City of Des Moines*, 292 N.W. 69, 71 (Iowa 1940)). Also, the plaintiff must show "that [the seller] intended such assertion to be believed and relied on by the purchaser as an undertaking on his part that the article is what he represents it to be." Id. Finally, the plaintiff must show that he understood, believed, and relied on the assertion. Id.

B. Breach of Implied Warranty

Iowa has long recognized that "[i]n construction contracts there is an implied warranty that the building to be erected will be built in a reasonably good and workmanlike manner and that it

will be reasonably fit for the intended purpose." *Kirk v. Ridgway*, 373 N.W.2d 491, 493 (Iowa 1985). Iowa courts have displayed a willingness to expand upon traditional notions of implied warranties in construction contracts. The Iowa Supreme Court has held that a warranty can run from the "buyer of the [construction] services ... to the seller ... based upon the buyer's contract requirements." *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 221 (Iowa 1988) (finding that the buyer created an implied warranty in favor of the contractor where the buyer used tests to develop plans and to require specific techniques that warranted to the contractor that the particular job was feasible).

An implied warranty can also extend to buyers of homes constructed by a "builder-vendor." *Kirk*, 373 N.W.2d at 494. This implied warranty requires that: "(1) the house was constructed to be occupied by the warrantee as a home; (2) the house was purchased from a builder-vendor, who had constructed it for the purpose of sale; (3) when sold, the house was not reasonably fit for its intended purpose or had not been constructed in a good and workmanlike manner; (4) at the time of purchase, the buyer was unaware of the defect and had no reasonable means of discovering it; and (5) by reason of the defective condition the buyer suffered damages." *Id.* at 496. A "builder-vender" is defined as one "who is in the business of building or assembling homes designed for dwelling purposes upon land owned by him, and who then sells the houses, either after they are completed or during the course of their construction, together with the tracts of land upon which they are situated, to members of the buying public." *Id.* (excluding "merchants, material men, artisans, laborers, subcontractors, and employees" from this definition of builder-vendor).

A construction contract can also become subject to an implied warranty of fitness for a particular purpose. *See Semler v. Knowing*, 325 N.W.2d 395, 397 (Iowa 1982). The necessary elements for recovering under such a warranty are as follows: "(1) the seller must have reason to know the consumer's particular purpose; (2) the installation contractor must have reason to know that the consumer is relying on his skill or judgment to furnish appropriate installation services; and (3) the consumer must, in fact, rely upon the installer's skill or judgment." *Id.* at 399.

IV. MISREPRESENTATION AND FRAUD

General contractors may be sued for negligent misrepresentation as well as fraudulent misrepresentation. A contractor may be sued for negligent misrepresentation if he or she fails to exercise due care when acquiring or disseminating information he or she is in the business of supplying. *See First Newton Nat. Bank v. General Cas. Co. of Wis.*, 426 N.W.2d 618, 625 (Iowa 1988). A contractor will be liable for fraudulent misrepresentation if a plaintiff can show, through clear, satisfactory and convincing evidence, that the contractor (1) made a false representation; (2) the representation was material; (3) the contractor knew the representation was false; (4) the false representation was made with the intent to deceive; (5) there was justifiable reliance on the representation; (6) the representation proximately caused

damage; and (7) the amount of damages. *See Lautenbach v. Rowan*, 2005 WL 3115765, (Iowa Ct. App. 2005); *Palmer v. Glasbrenner*, 2004 WL 1159736, (Iowa Ct. App. 2004); *Bradley v. West Bend Mutual Ins. Co.*, 2003 WL 22900373 (Iowa Ct. App. 2003). Punitive damages are available for plaintiffs who prove fraudulent misrepresentation. See *Palmer*, 2004 WL 1159736 (stating the finding of fraudulent misrepresentation "provides the necessary tort for an award of punitive damages in a breach of contract action"); *Bradley*, 2003 WL 22900373 (stating punitive damages are available under claims of fraudulent misrepresentation).

V. STRICT LIABILITY

Iowa courts have allowed claims of strict liability in cases where one party engages in an activity on his land that inevitably results in an invasion of the land of another with resulting damage. *Lubin v. City of Iowa City*, 257 Iowa 383, 131 N.W.2d 765 (1965). Iowa courts have recognized strict liability claims and have adopted the principles set forth in Restatement (Second) of Torts §402A, which summarily says a seller of a defective product may be held liable for harm to the ultimate user or to the user's property. *Hawkeye-Security Ins. v. Ford Motor Co.*, 174 N.W.2d 672, 684 (Iowa 1970). Any strict liability action would have to satisfy the economic loss doctrine as strict liability is a tort remedy. *Richards v. Midland Brick Sales Co., Inc.*, 551 N.W.2d 649 (Iowa Ct. App. 1996) (holding recovery had to be based on contract law and trial court correctly dismissed negligence and strict liability claims). The Iowa Code limits strict liability claims by providing that a person who is not an assembler, designer, or manufacturer, and who wholesales, retails, distributes or otherwise sells a product is immune from suit based on strict liability or breach of implied warranty of merchantability in cases which arise solely from alleged defects in the original design or manufacture of the product. Iowa Code §613.18.

VI. INDEMNITY CLAIMS

A. Express Indemnity

Iowa courts generally recognize indemnification agreements as enforceable. *Herter v. Ringland-Johnson-Crowley Co.*, 492 N.W.2d 672, 674 (Iowa 1992). Indemnification is a type of restitution, and it is common for construction contracts to contain indemnification clauses. *See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570-571 (Iowa 2002). In most cases, an indemnification contract is governed by the same rules as other contracts, however, the rules become more strict when dealing with a clause which indemnifies a person for his or her own negligence. *Id.* at 571.

An express indemnification clause is an agreement whereby one party (indemnitor) agrees or promises to indemnify another party (indemnitee) for liabilities to third parties or losses associated with liability to third parties. *See McNally & Nimergood*, 648 N.W.2d at 570-571. An express indemnification agreement is created when the parties' language evidences an intent

"by one party to reimburse or hold the other party harmless for any loss, damage, or liability." *Id*. at 570. There is no particular language required to form an express indemnification contract, just a clear intent. *See Sward v. Nelson Constr., Inc.*, 2003 WL 118206, (Iowa Ct. App. 2003).

So long as the agreement clearly and unambiguously shows the requisite intent, a contract can expressly relieve an indemnitee from his or her own negligence. *See McNally & Nimergood*, 648 N.W.2d at 571. However, courts are reluctant to uphold such provisions and as such, the contracts containing said provisions are "construed more strictly than other contracts." Id.

B. Implied Indemnity

A construction contract may also include an implied indemnification clause. If the contract entered into between the parties includes "an independent duty that implies a mutual intent to indemnify for liability or loss resulting from a breach of the duty," an implied indemnity agreement arises. *McNally & Nimergood*, 648 N.W.2d at 573. Indemnity is only implied for liability or loss by one contracting party resulting from the other contracting party's breach of a duty under the contract. *Id.* at 574.

C. Third-Party Beneficiary

On the issue of third-party beneficiaries, Iowa has adopted Restatement (Second) of Contracts Section 302, at 439-40 (1981), which provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

See *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 224 (Iowa 1988)

Generally, the intent of the promise is controlling. *RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 320 (Iowa 2006). "In determining such intent, we look to the language of the contract and to the circumstances surrounding it." *Id*. There is no requirement that the parties

intended to benefit a third party directly. *Vogan v. Hayes Appraisal Assoc., Inc.*, 538 N.W.2d 420, 423 (Iowa 1999).

VII. STATUTE OF LIMITATIONS AND REPOSE

Iowa has a two-year general statute of limitations for injuries to persons, "whether based on contract or tort." Iowa Code § 614.1(2). Actions based "on unwritten contracts, ... injuries to property, or ... fraud" are subject to a five-year limitations period. Iowa Code §614.1(4). Plaintiffs face a ten-year limitations period for actions "founded on written contracts ... and those brought for the recovery of real property." Iowa Code § 614.1(5).

The provisions of section 614.1 "establish a limitations period that begins to run when the cause of action accrues." *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993). Iowa uses the discovery rule to determine when a cause of accrues. *Chrischilles v. Griswold*, 150 N.W.2d 94, 100 (1967). Therefore, a cause of action in a construction case does not necessarily accrue on the date when construction is completed. *Bob McKiness Excavating & Grading, Inc.*, 507 N.W.2d at 408. Instead, it accrues when the plaintiff has in fact discovered the injury to the improvement or "by exercise of reasonable diligence should have discovered it." *Id.* (citing *Chrischilles*, 150 N.W.2d at 100).

In addition to statutes of limitations, Iowa also has enacted a statute of repose that can affect many types of construction law claims. The statute of repose bars actions "arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death," when those actions are brought more than fifteen years after the date on which construction of the improvement is complete. Iowa Code
§614.1 (11). Thus, if an action is covered by the repose statute and is brought more than fifteen years after construction is complete, section 614.1(11) bars the action even if the action is otherwise brought within the relevant limitations period.

Importantly, the statue of repose will apply to many types of construction claims, but it does not cover all possible claims. "[C]laims of negligence, implied warranty, and strict liability clearly fall within the scope" of the phrase "tort and implied warranty," as used in the statute, and thus the statute of repose applies. *Bob McKiness Excavating & Grading, Inc.*, 507 N.W.2d at 409. However, the statute of repose does not apply to an "express warranty claim," *Id.*, or to a claim "against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property." Iowa Code §614.1(11).

VIII. ECONOMIC LOSS DOCTRINE

Losses that are purely economic usually arise from the breach of a contract, and as such, should be compensated in contract actions, not tort actions. *Richards v. Midland Brick Sales Co., Inc.*, 551 N.W.2d 649,650-651 (Iowa App. 1996). Consequently, when plaintiffs have suffered only economic harm they are unable to recover in tort. *Id.*; *see also Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 123 (Iowa 1988); *Neb. Innkeepers Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984). This generally recognized principle of law is known as the economic loss doctrine. *See Nelson*, 426 N.W.2d at 123. Iowa courts have held the economic loss doctrine does not necessarily apply to cases of professional negligence. *See Kemin Indus. v. KPMG Peat Marwick, L.L.P.*, 578 N. W.2d 212, 220 (Iowa 1998) (stating that the use of the economic loss doctrine in *Nelson v. Todd's Ltd.* did not "speak to the specialized situation of professional negligence"); *Johnson v. Land O'Lakes*, 18 F. Supp.2d 985, 1001 (N.D. Iowa 1998). In deciding whether a claim is a matter of contract law rather than tort law, the court will focus on the nature of the defect, the type of risk, and the manner in which the injury arose. *Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000).

IX. RECOVERY FOR INVESTIGATIVE COSTS

Iowa follows the general rule that, in the absence of specific authority to the contrary, expenses of a civil suit are not recoverable. *State v. Taylor*, 506 N.W.2d 767, 768 (Iowa 1993). More frequently we are seeing construction contracts with attorney fee provisions, including costs, which should be enforceable. *Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc.*, 522 N.W.2d 837 (Iowa 1994). Iowa statutory law and court rules provide for the recovery of expenses associated with depositions when the depositions are necessarily incurred for testimony offered and admitted upon the trial," which is met when depositions are "introduced into evidence in whole or in part at trial." *Woody v. Machin*, 380 N.W.2d 721, 130 (Iowa 1986). However, "preliminary depositions that have been 'boot strapped' into the record through testimony or subsequent video depositions used at trial may not be taxed against the losing party. *Id.* Another way to recover costs as a defendant is to offer to confess judgment, after an action is brought but before commencement of trial. Iowa Code section 677.10 provides "if the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay defendant's costs from the time of the offer." Iowa courts interpret "costs" more broadly in Chapter 677 than it does in other statutes. *Id.* at 152.

X. EMOTIONAL DISTRESS CLAIMS

An independent ground of liability for damages for mental anguish is “extreme and outrageous conduct [which] intentionally or recklessly causes severe emotional distress to another….” Restatement (Second) of Torts §46 (1965). In *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984), the Court stated: For conduct to be “outrageous” it must be “so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and

utterly intolerable in a civilized community." Restatement (Second) of Torts §46, Comment *d* (1956) (approved in *Roalson v. Chaney*, 334 N.W.2d 754, 756 (Iowa 1983)).

Another area is mental anguish incident to breach of contact. Normally such damages are not recoverable. 22 Am.Jur.2d *Damages* §195, at 275-76 (1965) ("recovery for mental anguish is not, as a general rule, allowed in actions for breach of contract"; 25 C.J.S. Damages §69 (1966). In a narrow area, however, such damages are recoverable. Restatement (Second) of Contracts §353, Comment a (1981):

> Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure. There are, however, two exceptional situations where such damages are recoverable. In the first, the disturbance accompanies a bodily injury. In such cases the action may nearly always be regarded as one in tort, although most jurisdictions do not require the plaintiff to specify the nature of the wrong. See Restatement Second, Torts §§436, 905. In the second exceptional situation, the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. Breach of such a contract is particularly likely to cause serious emotional disturbance. Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may be chance cause even more severe emotional disturbance, but, if the contract is not one where this was a particularly likely risk, there is no recovery for such disturbance.

XI. STIGMA DAMAGES

Stigma damages is another name for diminution in value because of a perceived problem with the property. Iowa case law does not provide specifically for the claim of stigma damages. There is case law on diminution claims involving negligence claims. Additionally, a stigma claim or diminution in value claim may be a part of contractual damages allowed in a case. The diminution in value is the difference between the value of the building if the contract had been fully performed and the value of the performance actually received. *Service Unlimited, Inc. v. Elder*, 542 N.W.2d 855 (Iowa Ct. App. 1995).

XII. ECONOMIC WASTE

The measure of damages for a contractor's breach of contract is usually the amount necessary to remedy any defects or omissions. *Service Unlimited, Inc. v. Elder*, 542 N.W.2d 855, 858 (Iowa Ct. App. 1995). However, if the defects or omissions can only be remedied 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 concept of economic waste is invoked, and damages are measured by the difference in the price of the building had the contract been performed fully and the value of the performance as rendered. *Id.*

XIII. DELAY DAMAGES

Delay damages are generally recoverable in Iowa by contractors and owners alike. If a contract contains a “no damages for delay” clause, however, it will be enforced. *Cunningham Bros., Inc. v. City of Waterloo*, 117 N.W.2d 46 (Iowa 1962). Exceptions to enforcement include situations where the delay (1) was of a kind not contemplated by the parties; (2) amounted to an abandonment of the contract; (3) was caused by bad faith on the part of the contracting authority; or (4) was caused by active interference by such party. *Dickinson Co. v. Iowa State Dept. of Transp.*, 300 N.W.2d 112 (Iowa 1981). Additionally, contracting parties may waive delay damage rights by failing to comply with the contractual notice requirements. An owner's damages for delay may include loss of rental value, loss of use, cost to lease other space, interest, loss of profits or liquidated damages if provided for in the contract.

XIV. RECOVERABLE DAMAGES

A. Direct Damages

The general measure of damages is the difference between the market value of the property before and after the injury. *Service Unlimited Inc. v. Elder*, 542 N.W.2d 855 (Iowa Ct. App. 1995). Where repairs cannot restore the property to its pre-damage condition, the owner may recover the difference between the reasonable market value of his property before and after the damage. An owner can recover for defects in the work of the builder and items needed to complete the contract. *Busker v. Sokolowski*, 203 N.W.2d 301, 304 (Iowa 1974). In construction cases, a nonbreaching party may recover interest payments to third parties if reasonably foreseeable and caused by the defaulting parties breach.

B. Loss of Use

Loss of use damages are recoverable in Iowa. The measure of damage is the rental value of the property that could not be used as a result of the breach of contract. *Hallett Constr. Co. v. Iowa State Highway Comm'n*, 261 Iowa 298,154 N.W.2d 71 (1967); *Moore v. Dubuque County*

Abstract & Title Co., 2001 WL 910844 (Damages caused by a delay in construction may be calculated by lost rental value or loss of use) (citing *City of Corning v. Iowa-Nebraska Light & Power Co.*, 225 Iowa 1380, 1386-87, 282 N.W. 791, 794-95 (1938)).

C. Punitive Damages

Punitive damages may not be recovered for a mere breach of contract; it is only when the breach also constitutes an independent tort or other wrongful or illegal act, that punitive damages become a possibility. *Higgins v. Blue Cross*, 319 N.W.2d 232, 235 (Iowa 1982). Punitive damages are recoverable only upon showing that, "by a preponderance of clear, convincing, and satisfactory evidence", Defendant's conduct constituted "willful and wanton disregard" for the rights and safety of Plaintiff. Iowa Code § 668A.l(1). "Willful and wanton" conduct is defined as "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Fell v. Kewanee Farm Equip. Co., a Div. of Allied Prods*., 457 N.W.2d 911, 919 (Iowa 1990). Merely objectionable conduct will not suffice to meet the procedural requirements of section 668A.1; rather, Plaintiff must be able to offer evidence that Defendant engaged in a persistent course of conduct to show that Defendant acted with no care and with no regard for the consequences of those acts. *See McClure v. Walgreens Co.*, 613 N.W.2d 225 (Iowa 2000).

D. Attorney Fees

In Iowa, there is no recovery of attorney fees permitted as damages unless authorized by statute or contract. *Capital Fund 85 Ltd. Partnership v. Priority Sys., LLC*, 670 N.W.2d 154, 160 (Iowa 2003); *Suss v. Schammel*, 375 N.W.2d 252, 256 (Iowa 1985); *Harris v. Short*, 253 Iowa 1206, 115 N.W.2d 865 (1962). There is "a rare exception" to the general rule against the recovery of attorney fees when the defendant "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Miller v. Rohling*, 720 N.W.2d 562 (Iowa 2006) (quoting *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 152, 158 (Iowa 1993) (discussing standard for recovery of common law attorney fees).

E. Expert Fees and Costs

In Iowa, up to $150.00 of the expense of an expert, plus mileage may be taxed as a cost against the losing party. Iowa Code § 622.72. When costs of defense are properly included in a damage award, those costs need not necessarily be limited to the amount above, for example, when the defendant confesses judgment and the plaintiff does not recover more than the amount confessed. *Kendall v. Lowther*, 356 N.W.2d 181 (Iowa 1984).

XV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

A. Duty to Defend

The insurer has a duty to defend when the petition contains any allegations that arguably or potentially brings the action within the policy coverage. *Employer's Mut. Cas. Co. v. Cedar Rapids TV*, 52 N.W.2d 639, 641 (Iowa 1996). The insurance company is to look at the allegations of fact in the petition against the insured and not the legal theories on which the plaintiff claims the insured is liable. Doubt is resolved in favor of the insured. "An insurer is not required to provide a defense when no facts presently available to it indicate coverage of the claim merely because such facts might later be added by amendment or introduced as evidence at trial." *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 199 (Iowa 1984).

B. Occurrences that Trigger Coverage

An occurrence policy provides coverage for any acts or omissions that arise during the policy period, regardless of when the claim is made. *Hasbrouck v. St. Paul Fire & Marine, Ins. Co.*, 511 N.W.2d 364 (Iowa 1993). Under occurrence-based liability policies, the time of the occurrence is when the claimant sustains damages, not when the act or omission causing the damage takes place. *Tacker v. American Family Mut. Ins. Co.*, 530 N.W.2d 674 (Iowa 1995); *see also Neilson v. Travelers Indem. Co.*, 174 F. Supp. 648, 650 (D.C. Iowa 1959) (where an insured does a negligent act and there is a gap in time between doing the act and the damage caused thereby the insured's liability arises at the time the damage is done).

CGL policies generally define "occurrence" as requiring an accident, including continuous or repeated exposure to substantially the same harmful conditions. The term "accident" is usually not defined in the policy. Iowa law defines "accident" as:

> An undesigned, sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force ... Giving to the word the meaning which a man of average understanding would, we think accident clearly implies a misfortune with concomitant damage to a victim and not the negligence which eventually results in that misfortune.

Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443,448 (Iowa 1970).

The Iowa Supreme Court has considered whether defective or inadequate construction by a contractor constitutes an occurrence. In *Pursell Const. Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (1999), K.P. Investments hired Pursell to build basements, footings, blockworks, sidewalks, and driveways for two houses. The houses were being constructed above the floodplain. A final City inspection revealed that the lowest level of each house fell below the floodplain, and, thus, violated the ordinance. K.P. Investments sued Pursell on theories of

breach of contract and negligence for failing to construct the lowest floor of the house at the elevation required by the ordinance. In a declaratory judgment action brought by the insured against its insurer, the Iowa Supreme Court held that defective workmanship, standing alone, does not constitute an "occurrence" under a CGL policy.

C. Property Damage

Whether intangible losses qualify as property damage in Iowa depends on the language of the policy. In *First Newton Nat'l Bank v. General Cas. Co. of Wis.*, 426 N.W.2d 618 (Iowa 1988), the Iowa Supreme Court considered the issue of whether the term "property damage" included intangible damage, such as diminution in value of tangible property without actual physical damage. The policy in First Newton Nat'l Bank defined property damage as "(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period." The court determined that tangible property rendered useless is injured and hence is covered under the policy, since the definition of damages includes loss of use of property resulting from property damage; *see also Ellsworth-William Corp. Co. v. United Fire & Cas. Co.*, 478 N.W.2d 77, 81-82 (Iowa Ct. App. 1991) (loss of use of undamaged grain bins was a covered loss of use of tangible property where definition of property damage included "loss of use of tangible property which has not been physically injured or destroyed"); *Kartridg Pac Co. v. Travelers Indemnity Co.*, 425 N.W.2d 687, 690 (Iowa 1985) (holding intangible losses, such as diminution in value, do not constitute physical injury to or destruction of tangible property where "physical" modifier is used); *Continental Ins. Co. v. Bones*, 596 N.W.2d 552, 556 (Iowa 1999) (property damage, defined as physical injury to or destruction of real property, including loss of use of the property, requires loss of use damages must arise from physical injury or destruction of tangible property).

XVI. CONSTRUCTION LIENS - PRIVATE AND PUBLIC PROJECTS

Two separate chapters of the Iowa Code provide payment protection for contractors and subcontractors. Iowa Code Chapter 572 addresses rights in private projects known as mechanic's liens and Chapter 573 addresses public projects.

A. Mechanic's Liens

A mechanic's lien is a claim against real property and improvements for work performed or materials supplied for the property. Every person furnishing material or labor for improvements shall have a lien upon such improvement to secure payment for the material furnished or labor performed. A properly filed mechanic's lien attaches to the property as of the date the materials are first supplied or labor is furnished. Iowa Code § 572.2.

The most important aspects of preserving a claim for a mechanic's lien are: (1) compliance with the statutory pre-filing notice requirements; and (2) complying with the perfection rules.

Effective January 1, 2013 the Secretary of State is required to establish and administer a centralized computer data base registry for all mechanic's liens filings. Previously, mechanic's liens were filed with the county clerk of court. To preserve the mechanic's lien right, the Contractor must file a verified statement containing:

1. The date the material was first furnished or labor first performed and the last date the material was furnished or the labor was performed;
2. Legal description of the property;
3. Address of property;
4. Mailing address of the owner; and
5. Tax parcel tax identification number

Iowa Code § 572.8. Once filed, the Secretary of State will mail a copy to the owner. Iowa Code § 572.8(2). Mechanic's liens filings will be posted at the internet website and indexed by owner name, general contractor name, state construction registry number, property address, legal description and tax parcel number.

To protect the right to receive 100% of the amount due, a contractor must avoid statutory limitations relating to: (1) time of filing; (2) failure to give notice to certain interested parties; and (3) prior payment by owner. The inter-relationship between these three items determines the amount that can be collected from a filed mechanic's lien.

Time Limitations. To obtain full protection, a mechanic's lien must be filed within 90 days from the date which the last material was furnished or last labor was performed. A contractor may perfect a mechanic's lien beyond 90 days by posting the lien to the state construction registry website and serving a notice of the posted lien to the owner. Iowa Code § 572.10. No mechanic's lien can be filed after two years and 90 days from the day in which the last material was furnished or labor was performed. Iowa Code § 572.9. If the lien is posted after 90 days, the lien is enforceable only to the extent of the balance due from the owner to the general contractor and owner/builder's buyer to the owner/builder at the time notice is made. Iowa Code § 572.11.

Notice Limitations. In addition to filing a mechanic's lien, a contractor may be required to give additional notices. The purpose of the additional notices is to ensure notice to interested parties that an existing or potential lien may exist. Different rules apply to the type of improvement, residential construction or commercial construction.

Residential Construction Notice: General Contractor - Owner Notice. A general contractor that expects to contract with a subcontractor to furnish material or labor for the anticipated

improvement shall provide the owner notice that subcontractors may be involved and direct the owner to check an internet website address and toll free telephone number of the state construction registry. This notice shall state:

> "Persons or companies furnishing labor or materials for the improvement of real property may enforce a lien upon the improved property if they are not paid for their contributions, even if the parties have no direct contractual relationship with the owner. The state construction registry provides a listing of all persons or companies furnishing labor or materials who have posted a lien or who may post a lien upon the improved property."

Iowa Code § 572.13. Additionally, a general contractor or owner/builder must post a notice on the state construction registry internet website within 10 days of commencement of work on the property. Iowa Code § 572.13A. The notice shall contain:

1. Name and address of the owner;
2. Name, address and telephone number of the general contractor owner/builder;
3. Address of the property/legal description;
4. The date work commenced;
5. The tax parcel identification number.

If a general contractor or owner/builder fails to post the required notice then a subcontractor may post the notice.

Subcontractor Notice - Preliminary Notice. A subcontractor is required to post a preliminary notice to the website before the balance due is paid to the general contractor by the owner or owner/builder. The preliminary notice shall contain all of the following information:

1. The name of the owner;
2. The mechanics' notice and lien registry number.
3. The name, address, and telephone number of the subcontractor furnishing the labor, service, equipment or material.
4. The name and address of the person who contracted with the claimant for the furnishing of the labor, service, equipment, or material.
5. The name of the general contractor or owner-builder under which the claimant is performing or will perform the work.
6. The address of the property or a description of the location of the property if the property cannot be reasonably identified by an address.
7. The legal description of the property That adequately describes the property to be charged with the lien.
8. The date the material or materials were first furnished or the labor was first performed.
9. The tax parcel identification number.

10. Any other information required by the administrator pursuant to rule.

Once filed, the Secretary of State will send notice to the owner. A mechanic's lien is enforceable only to the extent of the balance due the general contractor or the owner/builder at the time of the posting of the preliminary notice unless the improvement is owned by an owner/builder. If the improvement is owned by an owner/builder then this limitation does not apply. Iowa Code § 572.l3B(3).

Notifications Required for Commercial Construction. For commercial construction, a person furnishing labor or materials to a subcontractor (i.e. materials supplier or subcontractor of subcontractor) is not entitled to a lien unless written notice is given to the general contractor or owner/builder describing the scope of the labor furnished or materials furnished to be provided within 30 days of first furnishing labor or materials through which a lien may apply. This is a one-time notice so no additional labor or materials furnished after the notice is covered by this notice. Iowa Code § 572.33.

Payment Limitations. If the subcontractor posted the required preliminary notice then the owner is liable for 100% of payment even though the owner paid the general contractor or owner/builder. Stated otherwise, if the owner pays the general contractor or owner/builder for all or part of the contract price before 90 days has expired, then the owner may be required to pay the subcontractor. Iowa Code § 572.14.

Once the mechanic's lien is filed, an action to enforce a mechanic's lien shall be brought within 2 years from the expiration of 90 days after the date on which the last material was furnished or labor performed. 572.27.

If the contractor has not brought suit, the owner can serve the lienholder a 30 day demand to bring suit or forever be barred. 572.28.

Attorney fees incurred by a prevailing contractor or if a prevailing owner occupied owner challenging the lien may be recoverable. 572.32.

B. Public Improvements

For public improvements, the Iowa Legislature determined that public property should not be sold at foreclosure sales. Accordingly, there is no such thing as a "mechanic's lien" for public improvements. However, a person performing labor or furnishing material for a public project may file with the public entity an itemized, sworn, written statement of a claim for such labor or material, service, or transportation. Iowa Code §573.7. For a county highway improvement project, the claim is filed with the county auditor, and for a farm to market highway system project the claim is filed with the auditor of the Iowa Department of Transportation. Iowa Code §573.8.

Contracts for the construction of a public improvement in excess of $25,000.00 shall be accompanied by a bond (or money deposited in lieu of bond-573.4) to secure payment of all project contractors and subcontractors. Iowa Code §§573.2 - 573.4. A person furnishing only materials to a subcontractor who is furnishing only materials for the public improvement is not entitled to a claim. Iowa Code §573.7. A project bond must be at least 75% of the total contract price. Iowa Code §573.5.

A general contractor must pay a subcontractor no later than 7 days after the general contractor receives payment or a reasonable time after general contractor could have received payment if the reason for nonpayment is not the subcontractors fault. Iowa Code §573.12.

For all public improvement contracts, the public entity may withhold up to 5% of the amount due. Iowa Code §573.12. Claims against this retained amount may be filed at any time before expiration of 30 days immediately following the completion and final acceptance of the improvement or, at any time after the 30 day period, if the public corporation has not paid the full contract price and no action is pending to adjudicate rights to the unpaid portion of the contract price. Iowa Code §573.10. However, the court may permit claims to be filed during the pendency of an action after the 30 day period if the filing will not materially delay the action. Iowa Code §573.10.

If at the end of the period that claims are required to be filed, the public entity shall retain from the unpaid funds due the general contractor a sum equal to double the total amount of all claims on file. Iowa Code §573.14. This amount will be paid after all claims are resolved, whether by mutual agreement by the parties or judicial order. Iowa Code §§573.13 - 573.14. Notwithstanding of the amount of the retained funds, when 95% of the contract is completed, then all retainage can be released except the amount to complete performance of the contract and for twice the total amount of all claims on file. Iowa Code §573.15 A.

Within 60 days after the completion and final acceptance of the improvement, an action to adjudicate all claims may be filed. Iowa Code §573.16. If there are insufficient funds to pay all claims for labor materials, the court shall direct payment in the following order: costs of the action, claims for labor, claims for materials and claims of the public corporation. Iowa Code §§573.18 – 573.19.

The court may tax, as costs, reasonable attorney fee in favor of any claim made for labor and material that has, in whole or in part, established a claim. 573.21. If not paid in full, judgment may be entered against the bond surety. Iowa Code §573.22.

When at least 95% of the work has been completed the public entity can pay the contract in full and enter into a supplemental contract for work remaining to be completed. Iowa Code §573.27.

During this period, provided the contract surety consents and agrees, the bond shall remain in full force and affect. Iowa Code §573.27.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.