

2022 SOUTHWEST BUSINESS & CONSTRUCTION CREDIT VIRTUAL CONFERENCE

(Wednesday) May 11, 2022 - 1:15 PM



**Southwest Business
Credit Services**

Arizona Mechanics' Lien Law Basics

Presented by
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Payment Remedies Generally Available to Suppliers and Contractors

- **Arbitration or Mediation** (AAA, required by statute and civil procedure rules based on size of damages claim, or by agreement between the parties).
- **Basic unsecured collections lawsuit:** breach of contract (written, oral, open account based on credit application, or promissory note/payment plan); unjust enrichment against subcontractor, general contractor or owner.

Payment Remedies: Prompt Payment Claims

- **Civil Prompt Payment Claim**

- Payment within seven (7) days of payment application, 18% interest, and mandatory fees (A.R.S. § 32-1182.A versus owners; A.R.S. § 32-1183.A versus contractors)
- Contractually-compliant billing is deemed approved after 14 days unless owner objects in writing (A.R.S. § 32-1182.D)

Payment Remedies: Prompt Payment Claims

- **Claims Available Through Regulatory Agency (e.g., Registrar of Contractors)**
 - ROC Prompt Pay Complaint (A.R.S. § 32-1183(I))
 - “No-Pay” Complaint (A.R.S. § 32-1154(A)(10) “failure to pay in excess of \$750” unless licensee lacks capacity to pay and is unpaid on project for those materials or for the unpaid labor, *e.g.*, for the specific payment application for which payment is demanded)

Payment Remedies: Prompt Payment Claims, cont'd

- **Claim against Contractor's License Bond (may also serve as claim for civil lawsuit)**
 - For residential projects only, includes recoveries by suppliers against prime contractor (A.R.S. § 32-1152.E)
- **Contractual and/or Statutory Rights to Suspend or Terminate Performance**
 - For work approved and certified under A.R.S. § 32-1182, the prime contractor may suspend performance on a prime contract upon providing owner with written notice at least seven (7) days prior to suspending performance (A.R.S. § 32-1185.A)

Payment Remedies: Contractor Rights to Suspend Work

- **Subcontractor may stop work on a project for nonpayment for work approved and certified under A.R.S. § 32-1182**
 - Upon providing written notice to both the prime contractor and the owner at least seven (7) days prior to suspending performance, if the owner has paid the prime contractor for the subcontractor's work, but the prime contractor has failed to pay the subcontractor (A.R.S. § 32-1185.B), or
 - Upon providing written notice to both the owner and the prime contractor at least three (3) days prior to suspending performance if the owner has failed to pay the prime contractor and the prime contractor has also failed to pay the subcontractor (A.R.S. § 32-1185.C)
- “Stop Work” notice must be served personally or through verifiable third party

Payment Remedies: Security Interests

- **“Secured” Remedies**

- Mechanics’ and Materialmen’s Liens (A.R.S. § 33-981 to § 33-1008)
- Stop Notices (A.R.S. § 33-1051 to § 33-1067)
- Payment Bonds
 - Public (A.R.S. § 34-222 to § 34-223)
 - Private (A.R.S. § 33-1003)
 - must comply with A.R.S. § 34-222.A.2 by providing a bond equal to 100% of the full prime contract amount
 - contrast with lien discharge bond (“lien release bond”) which A.R.S. § 33-1004.B requires must be 150% of the value of recorded mechanics’ lien)

Payment Remedies: Security Interests

- **“Secured” Remedies (cont’d)**
 - Uniform Commercial Code
 - Adopted by Arizona at A.R.S. § 47-1101 to § 47-10101
 - Financing Statements for Security in vehicles, equipment, materials or receivables – A.R.S. § 47-9501 to § 47-9528 (“Article 5 – Filing”)

Arizona Preliminary Twenty Day Notices

- **Overview (A.R.S. § 33-992.01)**
 - “Preliminary twenty-day notice” means one or more statutorily-compliant written and signed notices from a claimant that are required to be served by mail prior to recording a mechanic's lien, filing a stop notice, or making a claim on a payment bond on a non-federal public project

Arizona Preliminary Twenty Day Notices - Purpose

- Preserves secured remedy rights pursuant to Arizona mechanics' lien statutes (A.R.S. § 33-981 to § 33-1008), stop notice statutes (A.R.S. § 33-1051 to § 33-1067), and the Arizona Little Miller Act (A.R.S. § 34-222 to § 34-223) for payment bond rights on state and local public projects
- Best business practice is to serve one on every project regardless of whether it is a Federal Miller Act (40 United States Code § 3131) where no preliminary notice is required, and regardless of whether the customer or owner is likely to object to receiving one

Arizona Preliminary Twenty Day Notices - Contents

- **Contents Required (A.R.S. § 33-992.01(C))**
 - General description of the labor, professional services, materials, machinery, fixtures, or tools already furnished or to be furnished to the project and the contracted-for amount or an estimate of the total price of all materials and labor to be furnished throughout the entire project
 - The name and address of the person furnishing the labor, services, materials, machinery, fixtures or tools
 - This is **YOU**
 - The name of the person who contracted with you, i.e., the name of the prime contractor or subcontractor

Arizona Preliminary Twenty Day Notices - Content, cont'd

- The name of the “reputed” owner
 - “Reputed” as opposed to “actual” parties – check the public records at the county recorder and the assessor’s office and call the prime contractor for updated information. If you document those efforts and the information provided, you have obtained the “reputed” party information.
- Any lender(s) to the construction project

Arizona Preliminary Twenty Day Notices - Content, cont'd

- Description of the jobsite sufficient for identification
 - “Legal description, subdivision plat, street address, location with respect to commonly known roads or other landmarks in the area or any other description of the jobsite sufficient for identification.”
- Assessor’s Parcel Number can be used, but do not use that without additional identification, such as street address or intersection, unless 100% certain you have the right APN
- If project information sheet or other form of communication is received from the General Contractor, save the preliminary notice sheet or retain notes in case you are challenged

Arizona Preliminary Twenty Day Notices - Content, cont'd

- Total value of labor or materials to be supplied to the entirety of the project
 - Prior statute secured monetary rights up to 120% of the stated dollar value of the prelim
 - Effective December 31, 2019, Arizona Senate Bill 1304 increased the protected dollar value to 130% of the amount stated on the preliminary notice
 - Accordingly, lien and bond claims can be secured up to 130% of the dollar value stated on the prelim

Arizona Preliminary Twenty Day Notices – 130% Rule

- assume for purposes of preliminary notices served prior to December 31, 2019, that the protected dollar value will only be 120% of the valued stated in the preliminary notice
- If the total value of labor or materials exceeds 120% for prelims prior to December 31, 2019, or exceeds 130% for prelims served on or after December 31, 2019, you must amend your notice to include the additional dollar value in excess of the protected value on the preliminary notice

Arizona Preliminary Twenty Day Notices - Content, cont'd

- EVERY amended preliminary notice **MUST INCLUDE** the prior dollar values of prior preliminary notices on the project
 - Any amended preliminary notice must include not just the value of the materials supplied in the twenty days immediately prior to service of the prelim, but also the total value of all labor and materials already supplied or to be supplied to the project
- Statement in boldface type intended to explain contents to owner

Arizona Preliminary Twenty Day Notices – Service, cont'd

- **Who must receive service (A.R.S. § 33-992.01(B))**
 - Owner of the project - regardless of whether you are in direct contract with the owner
 - Original “prime contractor.” This is usually a general contractor but not always. Contracts for excavation road repair may involve a prime contractor who does not have a general contractor license.
 - Construction lender (if any) – bank, mortgage lender or investor group

Arizona Preliminary Twenty Day Notices – Service, cont'd

- **Who must receive service (A.R.S. § 33-992.01(B))**
 - Party with whom you contracted – subcontractor, prime contractor, or non-contractor materials supply customer
 - Current prime contractor (if different from the original prime contractor)

Arizona Preliminary Twenty Day Notices - Service, cont'd

- **How service must be made (A.R.S. § 33-992.01(F))**
 - First class mail with certificate of mailing, or
 - Registered mail, or
 - Certified mail
 - For Arizona Little Miller Act claims, Arizona Senate Bill 2688 allows preliminary notices to be served on prime contractor in the same method as service of preliminary notices for any other parties

Arizona Preliminary Twenty Day Notices - Service, cont'd

- Service is complete ***at time of deposit in the mail***, not if or when the preliminary notice is actually received
- NOTE: this is different than service of a ***bond claim letter*** on a prime contractor, which must be ACTUALLY RECEIVED by the prime contractor within ninety (90) days of last day of supply of labor or materials

Arizona Preliminary Twenty Day Notices - Amendments

- Ten Day Request for information, corrections and payment bond appears on the instructions of the preliminary notice (A.R.S. § 33-992.01(I, J))
 - Failure of the owner or other interested party to correct an erroneous preliminary notice within ten days of receipt waives any claims by the OWNER of any inaccuracies in the prelim but does not excuse service defects in the preliminary notice
 - The statute does not mention waiver by any other party, i.e., by the prime contractor or lender

Arizona Preliminary Twenty Day Notices - Amendments

- The claimant must serve upon all parties an amended preliminary notice containing any corrections to the original preliminary notice within thirty days of the claimant's receipt of the corrected information

Arizona Mechanics' Liens - Overview

A claim of mechanic's lien is a document recorded in the Office of the County Recorder in the County in which the property that is subject to the claim for improvements by labor or materials is located

- It is a remedy available to subcontractors and suppliers who supply labor to the owner, the prime contractor, or the prime contractor's subcontractor
- A.R.S. § 33-981(A)-(B) states: "every person who labors or furnishes...materials... in the construction, alteration or repair of any building, or other structure or improvement, shall have a lien on such building, structure or improvement...whether...furnished at the instance of the owner...or his agent."

Arizona Mechanics' Liens - Overview

- A.R.S. § 33-981(B) states: “Every contractor, subcontractor, architect, builder, or other person having charge or control of the construction, alteration or repair...is the agent of the owner for purposes of this article.”
 - “First Tier” subcontractors and suppliers in contract with the prime contractor can have lien rights
 - “Second Tier” subcontractors and suppliers in contract with the prime contractor’s subcontractor can have lien rights
 - Suppliers to suppliers never have lien rights

Arizona Mechanics' Liens - Overview

Mechanics' lien claim description, cont'd:

- It is a secured remedy available only on private projects, and never on public projects
- The owner may withhold funds from the general contractor, equivalent to the lien claim value, otherwise due to the general contractor in the absence of the lien. (A.R.S. § 33-994). Recorded lien claims are expressly assignable rights (A.R.S. § 33-982).

Arizona Mechanics' Liens – Owner-Occupant Protections and Exemptions

No party can claim a lien against dwellings of owner-occupants unless in direct contract with the owner (A.R.S. § 33-1002(B))

- A “Dwelling” is any structure designed for either single one-family or two-family purposes, including an apartment in a horizontal dwelling or condominium

Arizona Mechanics' Liens – Owner-Occupant Protections and Exemptions

- An Owner-occupant:
 - Has recorded a claim of title prior to the commencement of the construction improvement
 - Resides in the dwelling for at least 30 days following completion of the construction and “does not intend to sell or lease the dwelling to others” (can lien a to-be-flipped house)

Arizona Mechanics' Liens - Contents

- **Contents** (A.R.S. § 33-993(A)). A statement in writing, verified, under oath, by the claimant, or by an authorized representative “with knowledge of the facts” (typically an attorney at law or in fact, on behalf of the claimant who has reviewed the documents in question, is sufficient), containing:

Arizona Mechanics' Liens - Contents, cont'd

- The legal description of the lands and improvements to be charged with a lien;
- The name of the owner or reputed owner of the property concerned, if known, and the name of the person by whom the lienor was employed or to whom he furnished materials;
- A statement of the terms, time given and conditions of the contract, if it is oral, or a copy of the contract, if it is written;

Arizona Mechanics' Liens - Contents, cont'd

- A statement of the lienor's demand, after deducting just credits and offsets;
- A statement of the date of completion of the building, structure or improvement, or any alteration or repair of such building, structure or improvement;
- A statement of the date the preliminary twenty-day notice, required by section 33-992.01, was given. A copy of such preliminary twenty-day notice and the proof of mailing, required by section 33-992.02, shall be attached.

Arizona Mechanics' Liens – Recording Requirements

- **Times for Recording.** Claimant must record a lien no later than
 - 60 days after recordation of Notice of Completion (NOC); or
 - 120 days after “completion”
 - “Completion” occurs 30 days after a Certificate of Occupancy issues, or 60 days after continuous cessation of labor
 - If no building permit is issued or if the governmental body that issued the building permit for the improvement does not issue final inspections and written final acceptances, then "completion" means the last date on which any labor or materials were furnished to the property

Arizona Mechanics' Liens – Recording Requirements

- **Place of Recording:**
 - County of Recordation. Notices of Completion must be recorded in the Recorder's Office of the county where the project is located (A.R.S. § 33-993(H)).

Arizona Mechanics' and Materialmen's Liens – Notices of Completion Shortening Recording Deadline

Notices of Completion. These are documents which shorten the time in which the lien claimant may record a lien claim or sue on a bond claim. A Notice of Completion must contain the following, in a written statement, under oath (A.R.S. § 33-993(E)):

- The name and address of the owner
- The nature of the interest or estate of the owner

Arizona Mechanics' and Materialmen's Liens – Notices of Completion Shortening Recording Deadline

Service of the Notice of Completion. The person recording the Notice of Completion has 15 days after recording the notice to mail copies containing a statement of the date of recording to the owner, to the original contractor, and to all persons from whom the recording party has been properly served a valid preliminary notice (A.R.S. § 33-993(I)).

- In the face of late service of the notice of completion, the lienor's time reverts to 120 days from completion (as defined in A.R.S. § 33-993(A)), to record a lien claim.

Mechanic's Liens: Notices of Completion – Contents

- The legal description of the job site or street address
 - The validity of the notice is not affected by the fact that the street address cited is erroneous or that such street address is omitted if the legal description is included
- The name of the original contractor, if any
- The names and addresses of any predecessors in interest if the property was transferred after the beginning of the work or improvement
- The nature of improvements to the real property

Arizona Mechanics' Liens – Service Requirements

- **Service of the Claim of Lien.** Service of a copy of the claim of lien must be made upon the owner of the property, within a “reasonable time” after recording the lien claim (A.R.S. § 33-993(A))

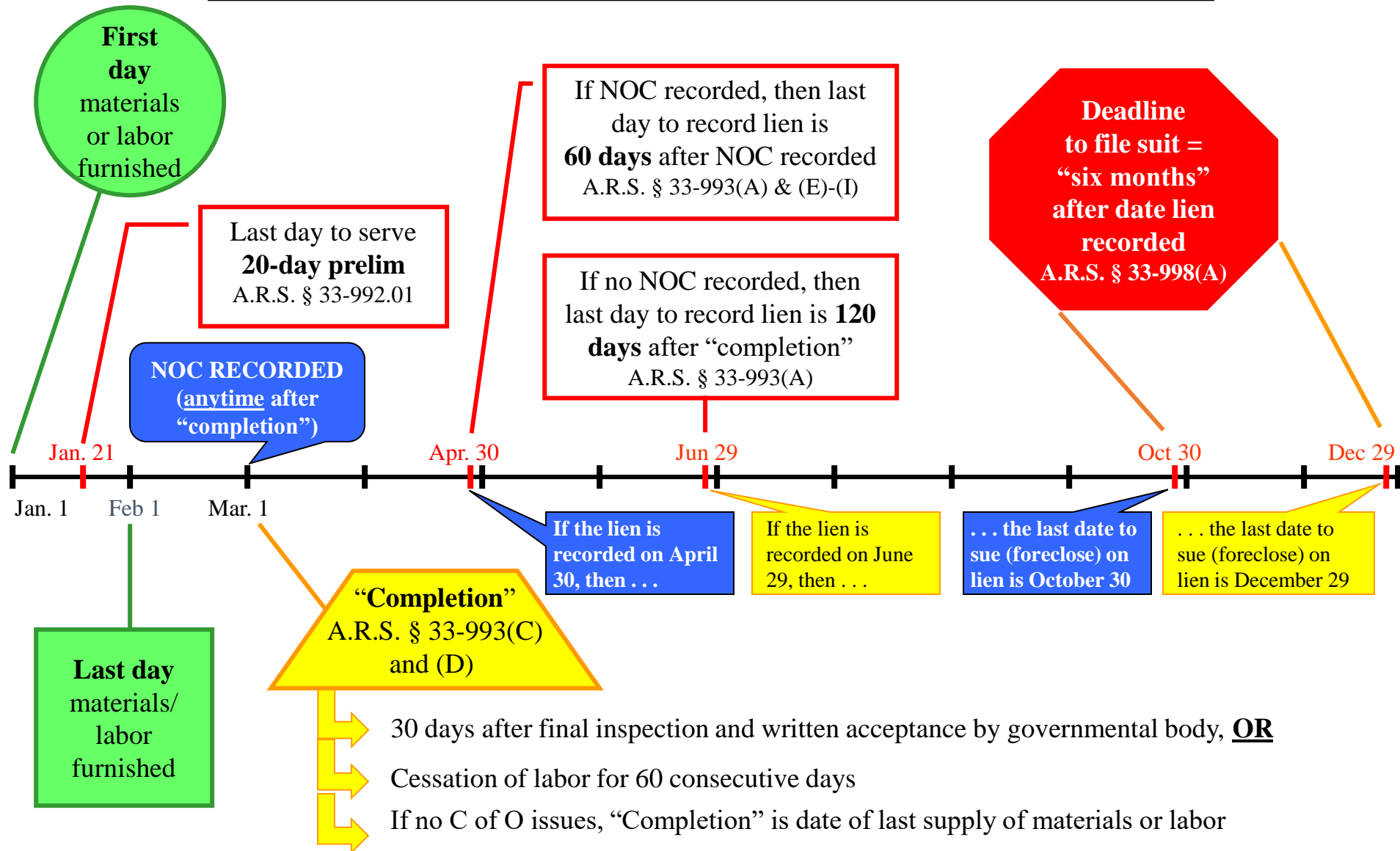
Arizona Mechanics' Liens - Foreclosure

- **Lien Foreclosure.**

- Lawsuit must be filed to foreclose the lien within six (6) months of date lien recorded
- *Lis Pendens* (Latin for “pending claim”) must be recorded within five (5) days of filing and should be recorded within the six-month window from the date of recording the lien claim (if you wait until the last day of the six-month period to file suit, you should record a notice of *lis pendens* that same day)

Arizona Lien Claim Deadlines

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Caveat: This illustration is a guideline only. It is advisable to consult legal counsel regarding applicable legal deadlines such as those illustrated here. State statutes and case law prescribe specific deadlines, content requirements, and methods of service for preliminary notices, liens, bond claims, and stop notices. For these reasons, and because factual circumstances may vary the application of controlling law, this illustration makes no representations concerning specific requirements that may be necessary for any lien, bond or stop notice claim.

Stop Notices - Overview

(A.R.S. § 33-1051 to § 33-1067)

- **What do they do?**
 - A stop notice is a device to “freeze” the flow of money from a construction lender to an owner, or from an owner to the prime contractor, until the stop notice claimant has been paid. The owner, or the construction lender if the stop notice is bonded, must withhold an amount that is sufficient to cover the stop notice claim.

Stop Notices - Overview, cont'd

- **Where are they available?**
 - Stop notice remedies are only available on a private project. (A.R.S. § 33-1053). Stop notices are **not** available against public projects or dwellings of owner-occupants as defined in section A.R.S. § 33-1002.
- **Who can use them?**
 - “Any person entitled to record a claim of lien under article 6 of this chapter, other than the original contractor,” may issue a stop notice against the owner. (A.R.S. § 33-1054). Even the general contractor may issue a stop notice against the construction lender (but not against the owner) (A.R.S. § 33-1055).

Stop Notices - Overview, cont'd

- **When are stop notices effective against lenders?**
 - Stop notices are not effective against construction lenders unless bonded (A.R.S. § 33-1055 and § 33-1058). Lenders may ignore non-bonded stop notices.
- **What if there are defects in form?**
 - Unlike lien claims, a stop notice is not invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information required by this article. (A.R.S. § 33-1052).

Stop Notices - Contents

- **What information is included?** (A.R.S. § 33-1052)
- A signed verified statement by the claimant
- A description of the labor, professional services, materials, machinery, fixtures, or tools furnished or agreed to be furnished by the claimant
- The name of the person to or for whom the labor, professional services, materials, machinery, fixtures, or tools were furnished

Stop Notices - Contents, cont'd

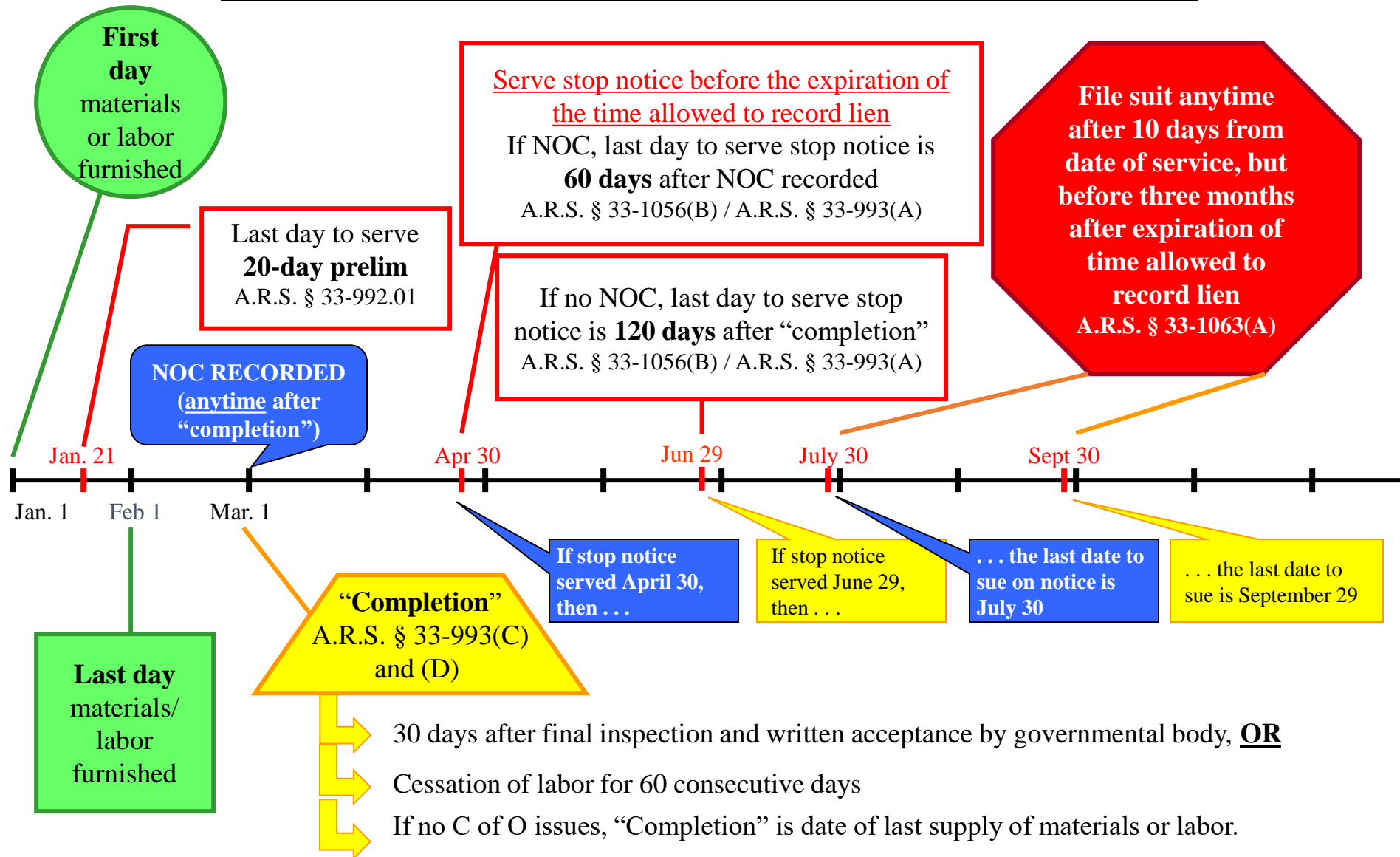
- The amount in value of the labor, professional services, materials, machinery, fixtures or tools already furnished and the total amount agreed to be furnished
- The amount, if any, of payment received by the claimant for the labor, professional services, materials, machinery, fixtures or tools furnished or agreed to be furnished
- The name and address of claimant

Stop Notices, cont'd

- **If Owner or Prime Contractor demands that claimants with stop notice rights serve a stop notice, then to avoid losing those rights:**
 - Stop Notice claimants must serve a stop notice within 30 days or forfeit the right to serve one (A.R.S. § 33-1054)

Arizona Stop Notice Deadlines

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**CONDITIONAL WAIVER AND RELEASE OF LIEN, BOND OR
STOP NOTICE RIGHTS ON PROGRESS PAYMENT**

(Pursuant to A.R.S. § 33-1008(D)(1))

Project: _____ **Job No.:** _____

On receipt by the undersigned of a check from _____ (maker or payor of check) in the sum of \$ _____ (amount of check) made payable to _____ (payee or payees of check), and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's or materialmen's lien, any state or federal statutory bond right, any private bond right, any lien or bond claim for payment and any lien or bond rights under any similar ordinance, rule or statute related to lien or bond claims or lien or bond payment rights for persons in the undersigned's position that the undersigned has on the job of _____ (owner), located at _____ (job description) to the following extent.

This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____ (person with whom undersigned contracted) through _____ (date) only and does not cover any retention, pending modifications and changes or items furnished after that date. This release does not affect contract rights which the claimant possesses in the absence of this release. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

Date: _____ (Company Name) _____
By: _____ (Signature) _____ (Title)

**UNCONDITIONAL WAIVER AND RELEASE OF LIEN, BOND OR
STOP NOTICE RIGHTS ON PROGRESS PAYMENT**

(Pursuant to A.R.S. § 33-1008(D)(2))

Project: _____ **Job No.:** _____

The undersigned has been paid and has received a progress payment in the sum of \$ _____ for all labor, services, equipment or material furnished to the jobsite or to _____ (person with whom undersigned contracted) on the job of _____ (owner) located at _____ (job description) and does hereby release any mechanic's lien, any state or federal statutory bond right, any private bond right, any lien or bond claim for payment and any lien or bond rights under any similar ordinance, rule or statute related to lien or bond claim or lien or bond payment rights for persons in the undersigned's position that the undersigned has on the above referenced project to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____ (person with whom undersigned contracted) through _____ (date) only and does not cover any retention, pending modifications and changes or items furnished after that date. This release does not affect contract rights which the claimant would otherwise possess in the absence of this release.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project up to the date of this waiver.

Date: _____ (Company Name) _____

By: _____ (Signature) _____ (Title)

Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional release form.

**CONDITIONAL WAIVER AND RELEASE OF LIEN, BOND OR
STOP NOTICE RIGHTS ON FINAL PAYMENT**

(Pursuant to A.R.S. § 33-1008(D)(3))

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____ (maker or payor of check) in the sum of \$ _____ (amount of check) made payable to _____ (payee or payees of check), and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's or materialmen's lien, any state or federal statutory bond right, any private bond right, any lien or bond claim for payment and any lien or bond rights under any similar ordinance, rule or statute related to lien or bond claim or lien or bond payment rights for persons in the undersigned's position that the undersigned has on the job of _____ (owner), located at _____ (job description) to the following extent.

This release covers the final payment to the undersigned for all labor, services, equipment or materials furnished to the jobsite or to _____ (person with whom undersigned contracted) except for disputed claims in the amount of \$ _____. This release does not affect claimant's contract rights which the undersigned possesses in the absence of this agreement. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project up to the date of this waiver.

Date: _____ (Company Name) _____

By: _____ (Signature) _____ (Title)

**UNCONDITIONAL WAIVER AND RELEASE OF LIEN, BOND OR
STOP NOTICE RIGHTS ON FINAL PAYMENT**

(Pursuant to A.R.S. § 33-1008(D)(4))

Project: _____

Job No.: _____

The undersigned has been paid in full for all labor, services, equipment or material furnished to the jobsite or to _____ (person with whom undersigned contracted) on the job of _____ (owner) located at _____ (job description) and does hereby waive and release any right to mechanic's lien, any state or federal statutory bond right, any private bond right, any lien or bond claim for payment and any lien or bond rights under any similar ordinance, rule or statute related to lien or bond claim or lien or bond payment rights for persons in the undersigned's position, except for disputed claims in the amount of \$ _____. This release does not affect contract rights which the claimant would otherwise possess in the absence of this release.

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project.

Date: _____ (Company Name) _____

By: _____ (Signature) _____ (Title)

Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional release form.

Your Right to Recover Attorney Fees

- **Standard Contract Litigation (lawsuit or arbitration)**
 - Fee provisions in your customer contract (be aware that a court will normally interpret a unilateral attorney fee recovery provision in your contract that only allows you to recover and not your customer, as a bilateral fees recovery provision that allows either you or your customer to recover attorney fees and costs upon prevailing in court)
 - A.R.S. § 12-341.01(A) (“In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. . . .”)

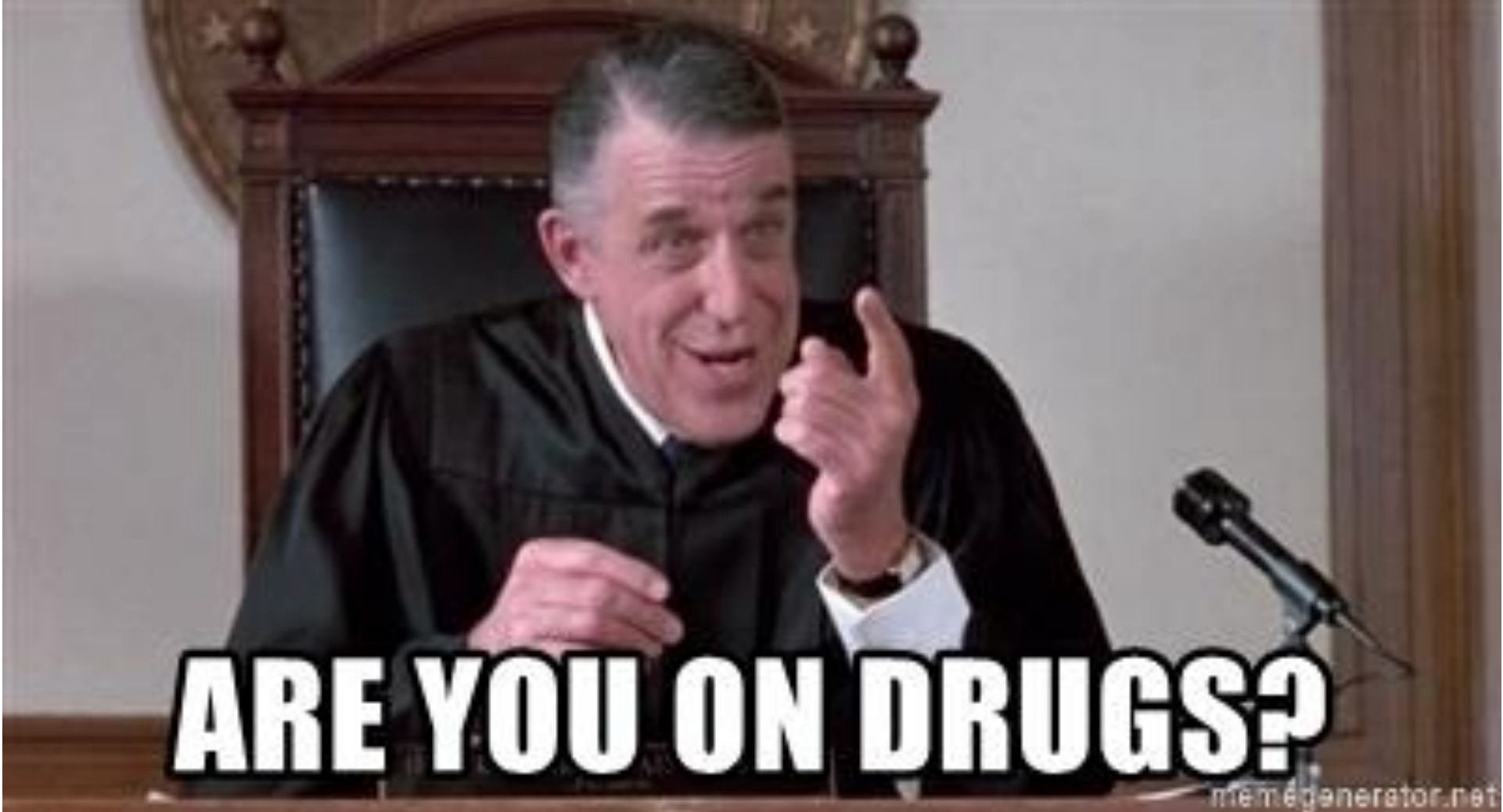
Your Rights to Recover Attorney Fees, cont'd

- **Lien, Bond, Stop Notice, and UCC Remedies**
 - Mechanics' and Materialmen's Liens
 - A.R.S. § 33-995(E) (“the court may, at its discretion, award . . . reasonable expenses . . . including attorney fees, other professional services and bond premiums”)
 - A.R.S. § 33-998(B)) (“In any action to enforce a lien . . . the court may award . . . reasonable attorney fees”)

Your Rights to Recover Attorney Fees, cont'd

- **Stop Notices**
- A.R.S. § 33-1066: “the prevailing party shall be awarded reasonable attorney fees.”

Despite all of those rights, here's what the judge says when I argue that my client is entitled under state or federal law or under the parties' contract to 100% of their attorney fees, and that we expect the court to make a full award.....



ARE YOU ON DRUGS?

ABOUT THE PRESENTER (he's not the cool one, 'nuff said)

