The Effects of COVID-19 Upon Project Completion Under Arizona's Mechanics' Lien Statutes and Arizona's Little Miller Act

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Topic: What is the impact upon the rights of claimants under Arizona's mechanics' and materialmen's lien statutes and Arizona's Little Miller Act from a construction project work stoppage due to COVID-19.

With respect to claimants' rights under Arizona mechanics' and materialmen's lien statutes, and based on (i) imprecise statutory language that is reasonably interpreted as equating "Acts of God" (natural events) with "Force Majeure" (human-caused) events, and (ii) a reasonable expectation that courts would treat the impact of COVID-19 upon Arizona projects as something other than a "human-caused event" and thus within a reasonable interpretation of the statute's reference to "Acts of God", it is reasonable to expect, under Arizona's lien statutes, that courts would NOT interpret construction work stoppages due to COVID-19 to constitute completion of the project, commencing the period within which lien rights should be recorded.

A. With that said, the conservative and recommended strategy is to assume, in the absence of a certificate of occupancy or a building permit, that lien claims on such projects should be recorded within one hundred and twenty days from the last date on which any labor, materials, fixtures or tools were furnished to the property.

B. A reason for this conservative approach is that the project owners and prime contractor might choose to treat the project as complete at the time of work disruption by COVID-19 without notice to any subcontractors or suppliers, or else a court, in retrospect, would view that sixty day period of cessation of labor as the effective completion date.

With respect to Arizona's Little Miller Act, project completion does not determine timeliness of bond claim rights. Therefore, COVID-19 should have no impact on a bond claimant's obligations or rights. However, because a work interruption due to COVID-19 may ultimately constitute the effective completion of a project, a bond claimant should treat its last supply of labor or materials to a project prior to the work interruption due to COVID-19, to constitute the bond claimant's last materials or labor supply to the project for purposes of calculating last dates to serve a ninety day bond claim letter and to file a lawsuit within one year following that last supply by the claimant to the project.

Analysis:

1. **Contract Definitions of "Force Majeure" and "Acts of God":**

    a. "Force Majeure" refers to unforeseeable, human-caused external circumstances making contract performance impossible and therefore excusing non-performance. "Force Majeure" provisions normally appear in prime contracts, and frequently in subcontracts. The provisions are intended to excuse a party from contract performance where an intervening, performance-preventing event was unforeseen and not provided for in the contract. Examples are wartime cutoffs of supply and acts of terrorism.

    b. "Acts of God" are natural events such as severe impacts of weather events, i.e., tornados and flooding, and earthquakes.

    c. "Force Majeure" events and "Act of God" have different definitions but are anticipated to be treated identically with respect to the claimant rights under Arizona's mechanics' lien statutes and Arizona's Little Miller Act.

2. **Impact of COVID-19 upon lien rights of claimants under Arizona's mechanics' and materialmen's lien statutes.**

A.R.S. § 33-993 ("Procedure to perfect lien: notice and claim of lien; service; recording; definitions) states in relevant part:

> A. In order to impress and secure the lien provided for in this article, every person claiming the benefits of this article, ***within one hundred twenty days after completion of a building, structure or improvement, or any alteration or repair of such building, structure or improvement,*** or if a notice of completion has been recorded, within sixty days after recordation of such notice, shall make duplicate copies of a notice and claim of lien and record one copy with the county recorder of the county in which the property or some part of the property is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. The notice and claim of lien shall be made under oath by the claimant or someone with knowledge of the facts and shall contain:
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> [….]
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> 5. A statement of the date of completion of the building, structure or improvement, or any alteration or repair of such building, structure or improvement.
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> [….]

B. For purposes of this section, if a work of improvement consists of the construction for residential occupancy of more than one separate building without regard to whether the buildings are constructed pursuant to separate contracts or a single contract, each building is a separate work and the time within which to perfect a lien by recording the notice of lien pursuant to subsection A of this section commences to run on the completion of each separate building. For purposes of this subsection, "separate building" means one structure of a work of improvement and any garages or other appurtenant buildings in a multibuilding residential project or residential subdivision.

C. For the purposes of subsection A of this section***, "completion" means the earliest of the following events:***

1. ***Thirty days after final inspection and written final acceptance by the governmental body which issued the building permit for the building, structure or improvement.***

2. ***Cessation of labor for a period of sixty consecutive days, except when such cessation of labor is due to a strike, shortage of materials or act of God.***

D. ***If no building permit is issued or if the governmental body that issued the building permit for the building, structure or improvement does not issue final inspections and written final acceptances, then "completion" for the purposes of subsection A of this section means the last date on which <u>ANY</u> labor, materials, fixtures or tools were furnished to the property.***

[….]

Id. (emphasis added).

Where no certificate of occupancy has been issued on a project, a reasonable interpretation is that A.R.S. § 33-993 does not consider a construction project to be complete based on either an "Act of God" or a "Force Majeure" event. Because the statute has no provision for human-caused "Force Majeure" events, and because it is reasonable to expect a court to consider COVID-19 to be other than a human-caused event and therefore within the definition of an "Act of God", project delays due to COVID-19 should not commence the running of a lien claimant's period in which to record a mechanics' and materialmen's lien claim.

With that said, the conservative and recommended approach is to treat project interruption due to COVID-19 as an event leading to project completion under A.R.S. § 33-993(C).

Recommendation: if project construction terminates without issuance of a building permit or certificate of occupancy, the most conservative practice should be used, i.e., defining the completion of the project as the earlier of (i) sixty consecutive days without labor, or (ii) the last date of furnishing **any** labor, materials, fixtures or tools to the project. For (ii), the most conservative practice is to use *the lien claimant's last delivery of any of those items to the project*, since it may be difficult to determine when the overall last subcontract performance or materials delivery occurred.

3. Impact of COVID-19 upon bond claim rights under Arizona's Little Miller Act.

COVID-19 should have no legal impact on a bond claimant's obligations or rights. With that said, the recommended response to a work interruption from COVID-19 is act conservatively and treat the interruption as an event of project completion.

A.R.S. § 34-223 ("Payment bond provisions") states in relevant part:

> A. Every claimant who has furnished labor or material in the prosecution of the work provided for in a contract for which a payment bond is furnished under section 34-222, and who has not been paid in full for the labor or material for the work before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by the claimant or material was furnished or supplied by the claimant for which the claim is made, shall have the right to sue on the payment bond for the amount, or the balance of the amount, unpaid at the time of institution of the suit and to prosecute the action to final judgment for the sum or sums justly due the claimant, and have execution thereon, provided however that any claimant who has a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but not a contractual relationship express or implied with the contractor has a right of action on the payment bond on giving the contractor the following notices:
> 1. A written preliminary twenty-day notice, as provided for in section 33-992.01, subsection C, paragraphs 1, 2, 3 and 4 and subsections E, F and H.

> 2. A written ninety-day notice given within ninety days after the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. The ninety-day notice shall be given by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business, or at the contractor's residence.
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> B. Every suit instituted under this section shall be brought in the name of the claimant but no such suit shall be commenced after the expiration of one year after the date on which the last of the labor was performed or materials were supplied by the person bringing this suit.

Under Arizona's Little Miller Act, overall project completion has no bearing upon a bond claimant's obligations to give timely notices or to timely file suit under the statute, whether in terms of (i) a twenty-day preliminary notice from first delivery of labor or materials, (ii) a bond claim letter served upon the prime contractor within ninety days from the bond claimant's last delivery to the project of labor or materials, or (iii) a lawsuit that must be filed within one year from the bond claimant's last supply of contract-conforming/compliant labor or materials to the project. However, there are no statutory protections for a bond claimant from its confusion over whether an interruption to the project transforms the most recent supply of materials or labor into the bond claimant's last supply of materials or labor to the project. Therefore, the bond claimant must act conservatively in determining the ninety-day and one-year deadlines in which to serve a bond claim notice and file a lawsuit.

Recommendation: if project construction terminates due to factors involving COVID-19, a bond claimant should assume that the project will not restart. Therefore, regardless of whether a contract requires or anticipates further supply of materials or labor to a project, once a bond claimant is aware of work stoppage due to COVID-19, the claimant should treat its most recent provision of materials or labor to the project prior to the work stoppage as the last that it will make. The bond claimant should thereafter serve its bond claim notice upon the prime contractor within ninety days of that last supply date. Similarly, the bond claimant should file its bond claim foreclosure lawsuit within one year from the date of its last supply to the project prior to the work interruption caused by COVID-19.