



# MECHANICS' LIENS IN THE DMV

## Washington Building Congress Morning Seminar

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# Topics We Will Cover

- **Liens 101** – what is a mechanics' lien?
- **Nuts & Bolts** – rights & obligations during the project
- **Procedure** – establishing & enforcing lien rights
- **Regional Challenges** – DC, MD, and VA quirks
- **Practical Tips** – anticipating & preserving your rights

# Liens 101

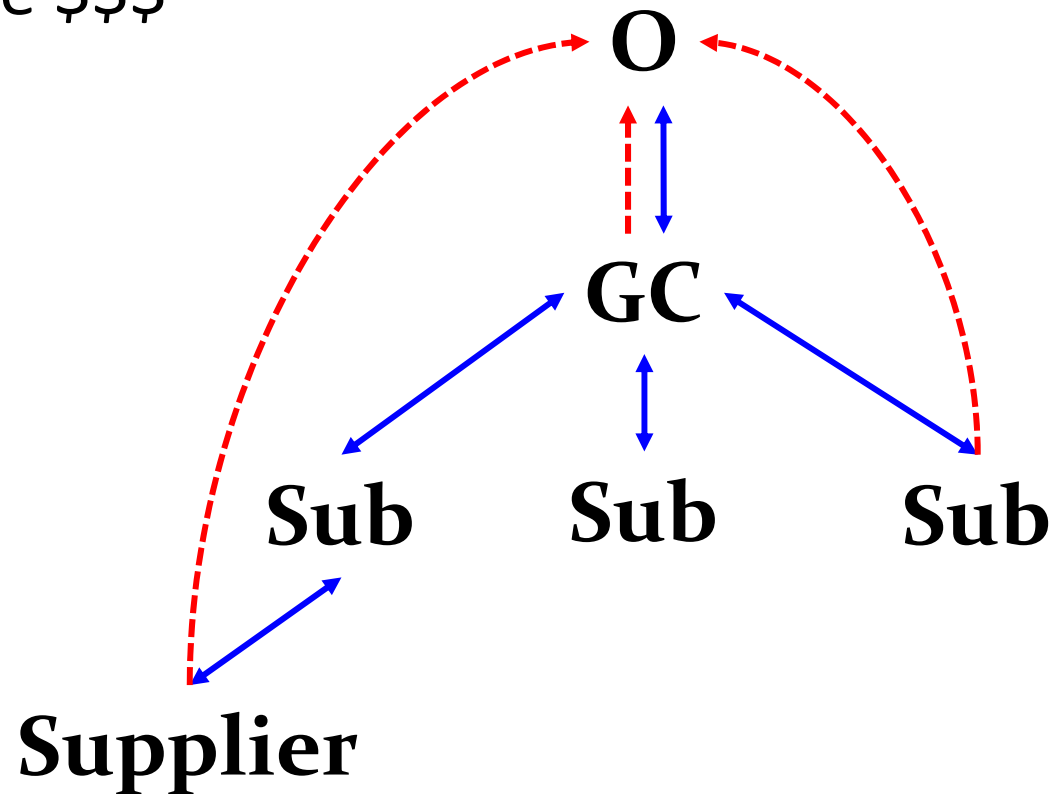
- What is a mechanics' lien?
- Why would I want a lien?
- What can I do with a lien?
- Whose property?

# Liens 101

- What is a mechanics' lien?
  - Mechanics' Liens provide contractors, suppliers, and in some cases architects, engineers, and laborers, a security interest in real property.
  - Statutory right
    - Proscribed by law
    - Cannot be contracted around
  - Right to someone's property
    - *E.g.*, home mortgage – foreclosure

# Liens 101

- Why would I want a lien?
  - Get to the \$\$\$



# Liens 101

- Why would I want a lien?
  - Get to the \$\$\$ (owner)
  - Additional security
  - Strong leverage
  - Timing matters for priority of claims
    - Ahead of later liens / judgments
    - Behind pre-existing liens / mortgages

# Liens 101

- What can I do with a lien?
  - Force a bond *(usually)*
  - Pressure payment *(sometimes)*
  - Sell / own the property *(rarely)*

# Liens 101

- Whose property?
  - Project “owner”
  - Leases
  - Government projects – *not so much*



# Nuts & Bolts

- Rights governed by law
  - Different rules for different jurisdictions
  - Location of the property governs
- Contracts create rights and obligations
  - Owners require property free from liens
  - GCs pass down obligations to subs

# Nuts & Bolts

- Lien Waivers
  - Required for most payments
  - Not always limited to amount of payments
  - Negotiate language **before** signing contract
    - Often overlooked contract exhibit
  - Modify before executing lien waiver
    - Document extent of waiver and additional claims / COs
  - Issues with executing joint checks

# Nuts & Bolts

## Sample Lien Waiver

TYPICAL GENERAL CONTRACTOR  
EXHIBIT K TO SUBCONTRACT

**PARTIAL LIEN RELEASE**

PROJECT NAME: \_\_\_\_\_ PROJECT NO.: \_\_\_\_\_

PROJECT ADDRESS: \_\_\_\_\_

SUBCONTRACTOR: \_\_\_\_\_ SUBCONTRACT NO.: \_\_\_\_\_

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, for and in consideration of the payment(s) made paid by **Typical General Contractor** to the undersigned for labor employed in and/or materials furnished for or about the construction of the above-referenced Project up to and including the \_\_\_ day of \_\_\_\_\_, 20\_\_ does hereby acknowledge payment in the amount of \_\_\_\_\_ and /100 Dollars (\$ \_\_\_\_\_), which is exclusive of any retainage withheld pursuant to the above-referenced Subcontract, and does hereby release and discharge the Owner of the real estate and/or the improvements thereon, the General Contractor, and their Payment and Performance Bond Sureties, from all debts, demands, or claims arising from the project up to and including the date of this Release for which this payment is made. The undersigned hereby waives and releases the Owner of the real estate, and of any improvements thereon of all rights that it may now have or may hereafter have to file a lien for all work done and/or materials furnished up to and including the date hereof for which this payment is made. The undersigned further warrants that it has not and will not assign any claim for payment or its right to perfect a lien against the property and that it has the right to execute this document.

The undersigned does hereby certify and warrant, and it is one of the express conditions upon which payment is made, that all persons, firms, or corporations who have supplied labor, materials, equipment, or services to the undersigned or any subcontractor of the undersigned for the Project have been paid in full, including all pension fund and employee benefit contributions, and that none of such persons, firms, or corporations have any claim, demands, or liens against said premises and further that no chattel mortgage, conditional bill of sale, or retention of title of agreement has been given or executed by the undersigned, or any other party at its request, for or in connection with any materials, appliances, machinery, fixtures, or furnishings placed upon, or installed in, or furnished for or about, the aforesaid premises by the undersigned. The undersigned further certifies and warrants that it has paid and assumes full responsibility for any and all sales and/or use taxes and all other taxes applicable and all pension fund and employee benefit contributions in connection with its operations for said project under the Subcontract referred to above.

SUBCONTRACTOR: \_\_\_\_\_

By: (x) \_\_\_\_\_

Name/Title: \_\_\_\_\_

On oath, \_\_\_\_\_ swears that he/she has read the foregoing affidavit by him/her subscribed; has personal knowledge of the facts set forth therein; that he/she is the person authorized to make oath thereto; and that the statements therein are true and correct.

Subscribed and sworn to me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Notary Public: \_\_\_\_\_ My Commission Expires: \_\_\_\_\_



# Nuts & Bolts – Sample Lien Waiver

## 1<sup>st</sup> Paragraph

That the undersigned, for and in consideration of the payment(s) made paid by Typical General Contractor to the undersigned for labor employed in and/or materials furnished for or about the construction of the above-referenced Project **up to and including** the \_\_ day of \_\_\_\_\_, 20\_\_ does hereby acknowledge payment in the amount of \_\_\_\_\_ and \_\_\_/100 Dollars (\$ \_\_\_\_\_ ), which is exclusive of any retainage withheld pursuant to the above-referenced Subcontract, . . .

**Do the payment  
and date match?**

**Retainage excluded**

# Nuts & Bolts – Sample Lien Waiver

## 1<sup>st</sup> Paragraph (cont.)

. . . and does hereby release and discharge the Owner of the real estate and/or the improvements thereon, the General Contractor, and their Payment and Performance Bond Sureties, from all debts, demands, or claims arising from the project up to and including the date of this Release for which this payment is made. . .

Are “all debts, demands, or claims” as of the “date of this Release” included in the amount of the payment?

Not just releasing liens

# Nuts & Bolts – Sample Lien Waiver

## 1<sup>st</sup> Paragraph (cont.)

. . . The undersigned hereby waives and releases the Owner of the real estate, and of any improvements thereon of all rights that it may now have or may hereafter have to file a lien for all work done and/or materials furnished up to and including the date hereof for which this payment is made. The undersigned further warrants that it has not and will not assign any claim for payment or its right to perfect a lien against the property and that it has the right to execute this document.

Unresolved COs?

Delays or inefficiency costs?

# Nuts & Bolts – Sample Lien Waiver

## 2<sup>nd</sup> Paragraph

The undersigned does hereby certify and warrant, and it is **one of the express conditions upon which payment is made**, that all persons, firms, or corporations who have supplied labor, materials, equipment, or services to the undersigned or any subcontractor of the undersigned for the Project have been paid in full, including all pension fund and employee benefit contributions, and that **none of such persons, firms, or corporations have any claim, demands, or liens against said premises . . .**

**No claims from sub-subcontractors, suppliers?**

**On hook for lower-tier claims**

# Nuts & Bolts – Sample Lien Waiver

## 2<sup>nd</sup> Paragraph (cont.)

. . . The undersigned further certifies and warrants that it **has paid and assumes full responsibility** for any and all sales and/or use taxes and all other taxes applicable and all pension fund and employee benefit contributions in connection with its operations for said project under the Subcontract referred to above.

Potential indemnity obligation



# Nuts & Bolts – Sample Lien Waiver

- What to do?
  - Do not sign
  - Modify language (GC & Owner must agree)
    - Easier if pre-contract signing
  - Add potential and reserved claims
  - Tie date of waiver to date of pay application

# Nuts & Bolts

- Obligations (GCs and Subs)
  - Keep property free from liens
  - Pay subcontractors and suppliers
  - Receive lien waivers
  - Bond off liens

# Procedure

- Filing a lien
  - Rules vary *a lot* by location
  - Timing critical
  - Notices v. petitions to establish (lawsuits)
  - Failure to meet any requirement = ***NO LIEN***

## Regional Challenges - Virginia

- Mechanics' liens have highest priority
  - Lien notices create inchoate liens – relate back
  - If established, higher than mortgages
- Statutory requirements **absolute**
- Defense of payment
  - Owner only has to pay once
- All tiers of subs / suppliers may file liens
  - GC liens cover subcontractors / suppliers
    - Notice required to GC

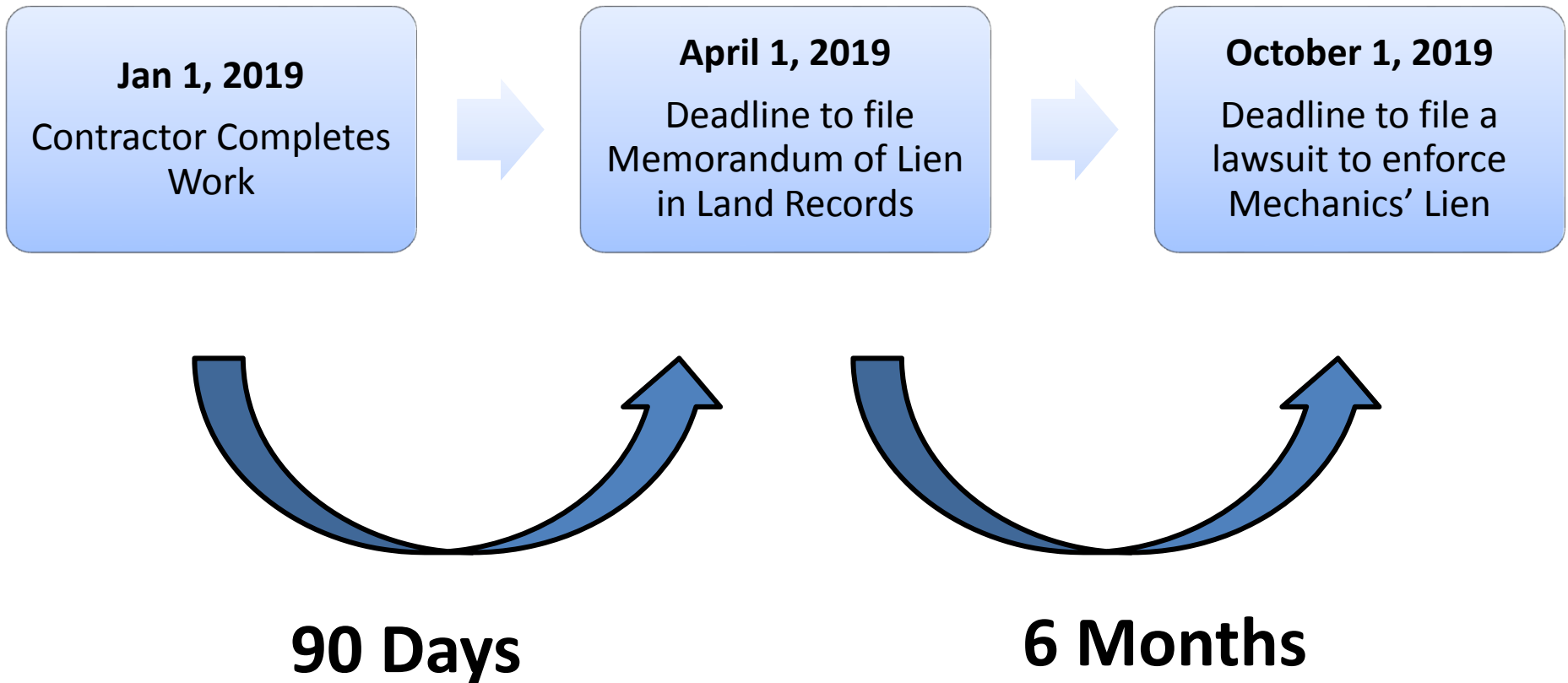
# Regional Challenges - Virginia

- Allocation
  - VA Courts will reject if claimed \$\$ not correct
  - Properly identify parcels of land
    - Condominiums (units v. common elements)
    - Multi-parcel projects
    - “Close enough” should be OK – courts will reject
- Leaseholds
  - Can lien a leasehold interest
  - Limited practical value

# Regional Challenges - Virginia

- Timing
  - Memorandum of lien in land records
    - 90 days from last work or project complete/terminated
  - 150-day look back rule
  - Lawsuit to enforce
    - Later of 6 months from memorandum or 60 days from project complete/terminated
- Residential Pre-Notice
  - 30 days of starting work

# Mechanics' Liens in Virginia



# Regional Challenges - Maryland

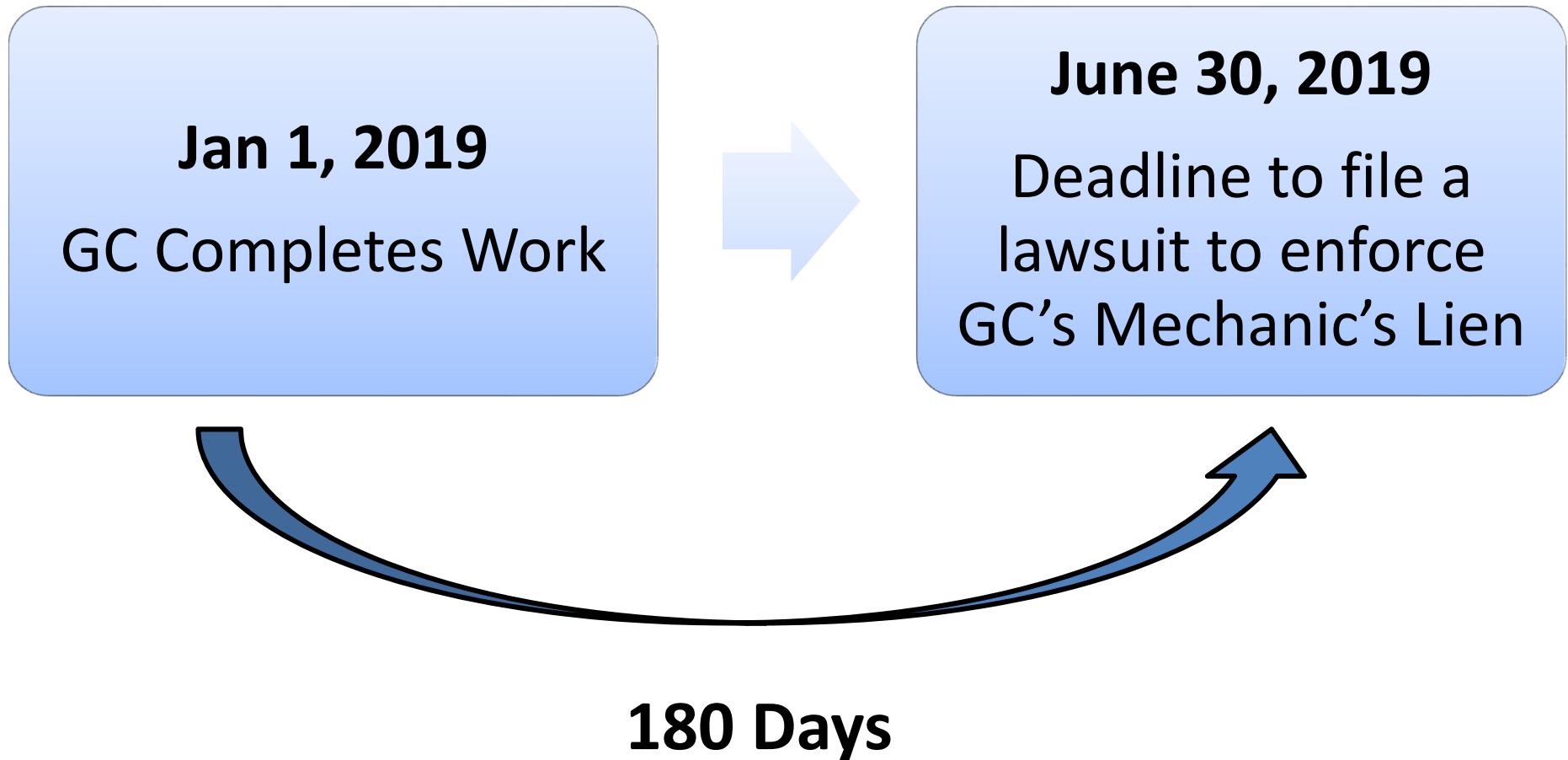
- **Who is entitled to a mechanics' lien?**
  - In Maryland, someone who worked or furnished materials is entitled to file a mechanic's lien.
  - The contractor must also be qualified to do business in Maryland.
  - The caveat in Maryland is that if a building is not newly erected, then the contractor must show that he or she repaired, rebuilt, or improved the value of the property ***by at least 15%***, but this can include not only construction, but landscaping, paving premises, etc.



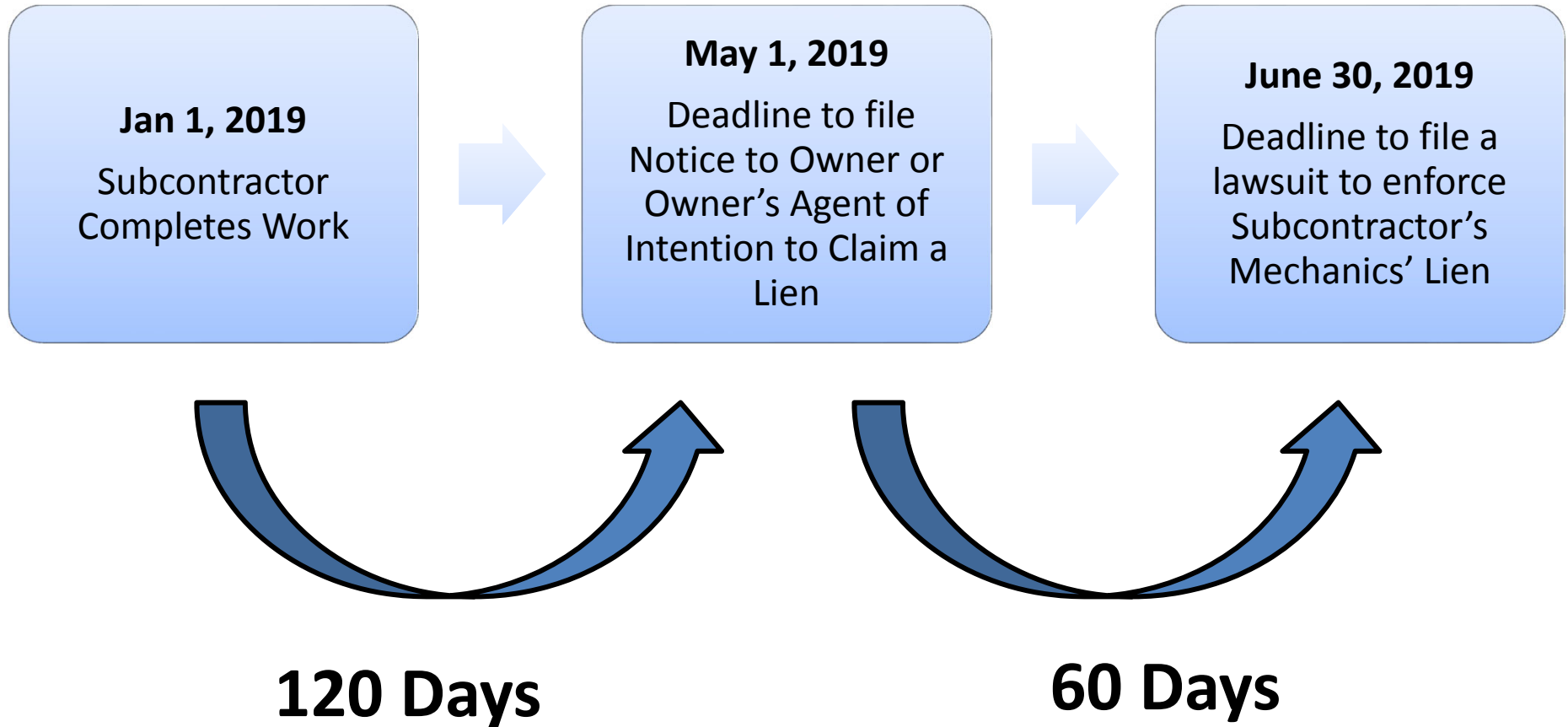
# Regional Challenges - Maryland

- Timing of notice (subcontractors only)
  - **Within 120 days** after doing work or furnishing the last of the materials.
- Lawsuit to Enforce
  - **Within 180 days** after the work has been finished or the materials furnished to enforce your lien by filing a “Petition to Establish Mechanic’s Lien” -- a lawsuit filed in the circuit court where the property is located.
  - No lien until judgment entering lien (does not relate back)
- Defense of Payment
  - Owner has **NO** defense of payment, unless homeowner is project owner

# Mechanic's Liens in Maryland (GCs)



# Mechanics' Liens in Maryland (subs)



# POP QUIZ! (Maryland)

- On January 1, 2019, Subcontractor is employed on the Project and the work is terminated because GC-Alpha has gone bankrupt.
- On January 2, 2019, a new general contractor, GC-Beta, engages Subcontractor to complete her work. Subcontractor completes her work on March 1, 2019.
- The Project was entirely complete on June 1, 2019.
- **What is Subcontractor's deadline to file Notice to Owner of Intention to Claim a Lien?**
  - A) May 1, 2019 (120 days from GC-Alpha's termination)
  - B) May 2, 2019 (120 days from start with GC-Beta)
  - C) June 20, 2019 (120 days from when Sub completed her work)
  - D) September 29, 2019 (120 days from Project completion)

# Regional Challenges - District of Columbia

- Who is entitled to a mechanics' lien?
  - Persons contracted to Owner (*i.e.*, GCs) or persons contracted to them (*i.e.*, subs)
    - **First-tier subcontractors or suppliers ONLY**
  - Lien is subject to the amount of the contract price or, if no written contract, the reasonable value of the project.
- Defense of Payment
  - Owner pays only once until it has notice of potential lien
  - Subcontractors allowed to request accounting from GC or Owner

# Regional Challenges - District of Columbia

- **Timing of Notice**

- File a Notice of Intent **within 90 days** with Recorder of Deeds
  - 90 days from last day of work or project completion/termination – whichever comes first!

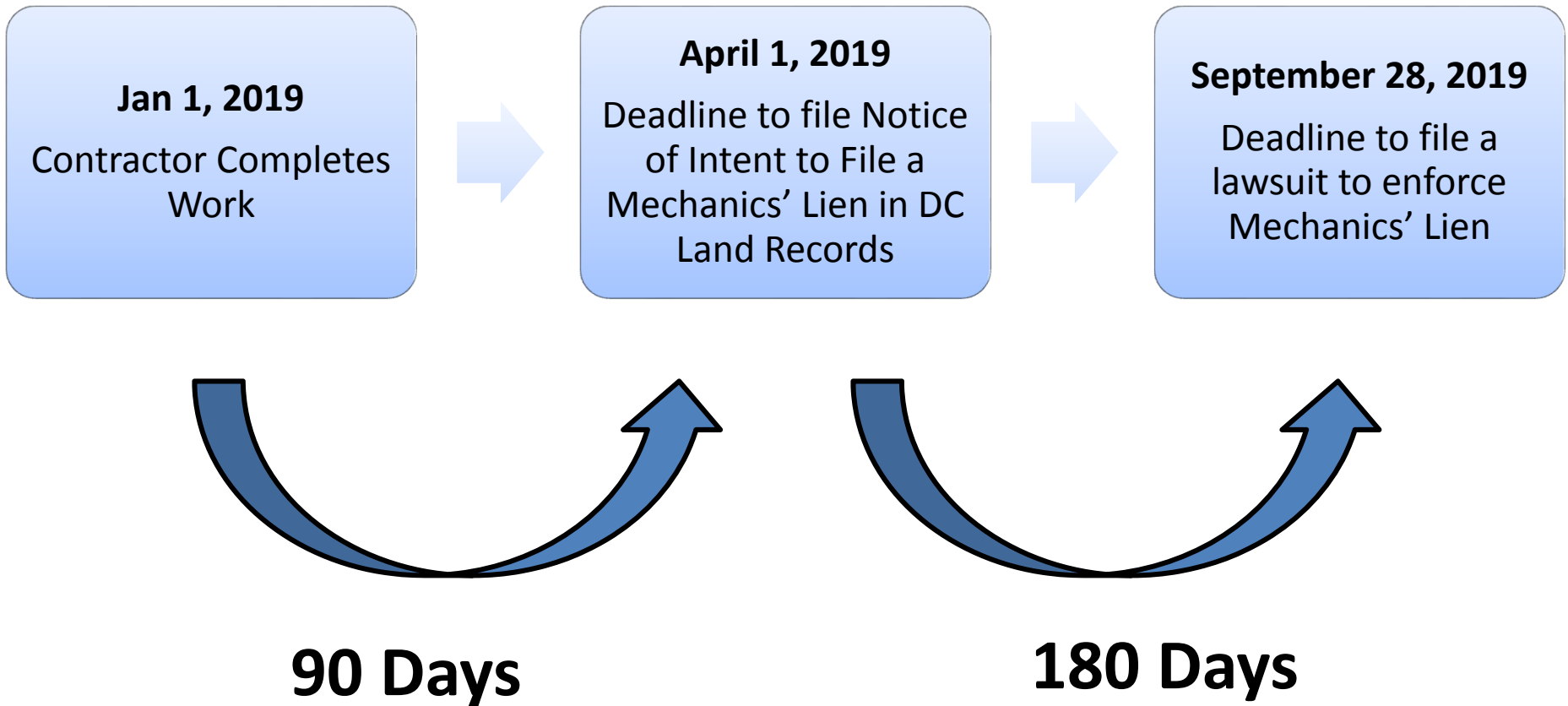
- **Lawsuit to Enforce**

- **Within 180 days** after filing your Notice of Intent.
- Failure to file a lawsuit within the 180-day period will terminate your lien.
  - [For subs/suppliers] Include the GC and any other sub/supplier that have filed a mechanic's lien as a defendant in law suit.
  - Subs/suppliers who have liens, can jointly file one lawsuit to enforce.

# Regional Challenges - District of Columbia

- Priority of Liens
  - Mechanics' Liens have high priority
  - Subs and suppliers are preferred to a GC
- Bonding Off Liens
  - Mechanics' Lien Undertakings (bond) will be substituted for the real property as security
    - Still need to prove entitled to lien, but recover \$ from bond instead of right to property

# Mechanics' Liens in District of Columbia





# POP QUIZ! (DC)

- On March 1, 2019, Subcontractor is employed on the project and GC-Alpha has been terminated for convenience.
- On March 2, 2019, a new general contractor, GC-Beta, engages Subcontractor to complete his work. Subcontractor completes his work on June 1, 2019.
- The Project was entirely complete on September 1, 2019.
- **What is Subcontractor's deadline to file a Notice of Intent to File a Mechanics' Lien?**
  - A) May 30, 2019 (90 days from GC-Alpha's termination)
  - B) May 31, 2019 (90 days from Sub's start with GC-Beta)
  - C) August 30, 2019 (90 from when Sub completed the work)
  - D) December 30, 2019 (90 days from the Project completion date)

# Practical Tips

- Limit lien waivers
- Document all potential claims
- File your liens before the property gets apportioned
- Know your jurisdiction
- Consult an attorney early

**Thank you!**

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## Question #2 (Maryland)

- On January 1, 2019, Subcontractor A completes work on the Project. Subcontractor A is owed \$250,000.
- Subcontractor A misses the May 1, 2019, deadline to file her mechanic's lien.
- On May 11, 2019, Owner asks Subcontractor A to complete additional work on the Project that is clearly part of her original contract. The additional work is for \$100,000.
- The Owner then doesn't pay Subcontractor A for the original and additional work. Subcontractor A is owed a total amount of **\$350,000**.
- Can the Subcontractor file a mechanic's lien going back to the original scope of work (i.e. \$250,000?) Or is Subcontractor A limited to filing a lien for the additional work, \$100,000?

# ANSWER!

- Possibly - Subcontractor A can likely file a mechanic's lien for the entire amount, \$350,000, however if a court sees Subcontractor A only performing the additional work for the purpose of extending time within which notice may be given to the owner, no lien may be established.
- The far safer scenario would have been to send two separate notices – before the 120 day deadlines for the original and additional scope of work.