

KENTUCKY

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I. MECHANIC'S LIEN BASICS

In Kentucky, mechanics' and materialman's liens are creatures of statute (KRS Chapter 376), and the statutory requirements must be followed strictly to perfect the lien. The requirements for perfecting mechanics' and materialman's liens in Kentucky vary depending on whether the project is public or private, as well as on the type of dwelling (owner-occupied homes v. commercial or non-occupied residential property) for private liens. The requirements for mechanics' and materialman's liens on private property will be discussed here, while liens on public projects are discussed in Section II, *infra*. Kentucky does not statutorily permit the recovery of attorneys' fees by lienholders.

A. Requirements

“Any person who performs labor or furnishes materials” to improve real property by contract with or with written consent of the owner, contractor, subcontractor or the owner's authorized agent has a lien on the improvement as well as the land on which the improvement was made. KRS 376.010(1). If the person claiming a lien did not contract directly with the owner or the owner's agent, he or she must send notice to the owner in writing of his or her intention to hold the property liable within seventy-five (75) days, if the claim is less than \$1,000, and within one hundred twenty (120) days, if the claim is more than \$1,000, after the last item of labor or materials are furnished. KRS 376.010(3). This notice must state that the lienholder plans to hold the property liable and the amount claimed and must be sent to the last known address of the owner or to his authorized agent within the Kentucky county where the property is located. *Id.* If the property is an owner-occupied single or double family home, the notice must be sent within seventy-five (75) days after the last item of labor or materials are furnished, no matter the amount. KRS 376.010(4). A lien statement must be filed with the appropriate county clerk within six (6) months after the last item of labor or materials are furnished and mailed to the property owner within seven days of filing or the lien will automatically dissolve. KRS 376.080(1). The lien statement must be signed under oath and must contain the name of the claimant, the amount due to the lienholder, an accurate description of the property, the name of the owner and whether the materials or labor were provided by contract with the owner or a contractor or subcontractor. *Id.*

Kentucky lien statutes are strictly construed. *Prodigy Constr. Corp. v. Brown Capital, Ltd.*, 525 S.W.3d 108, 112 (Ky. App. 2017). Thus, the court found that a purported lienholder's failure to use the language "subscribed and sworn to" in its lien statement rendered the lien defective and void. *Id.* All other provisions of the statutes will be strictly enforced as well.

B. Enforcement and Foreclosure

A private mechanics' or materialman's lien in Kentucky automatically dissolves unless an action to enforce the lien is brought within twelve (12) months after the lien statement is filed in the county clerk's office. KRS 376.090(1). Such an action is treated like a foreclosure action in Kentucky, and must name all of the lienholders and others who hold an interest in the property. KRS 376.110(1). Like in a foreclosure action, the lienholder should file a *lis pendens* notice with the county clerk, putting the burden on subsequent lienholders to join the suit or be barred from recovering. Of course, the owner of the property can always bond off the lien by filing a bond for double the amount of the lien claimed. KRS 376.100.

C. Ability to Waive and Limitations on Lien Rights

Kentucky has adopted the Kentucky Fairness in Construction Act, KRS 371.400, *et seq.*, which applies to all construction contracts entered into after June 26, 2007. Under that Act, provisions of construction contracts that purport to waive or extinguish lien rights are void as against public policy other than partial waivers of lien rights for payments actually made to the contractor or subcontractor. KRS 371.405(2)(b).

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Any person, firm or corporation who performs labor or furnishes materials or supplies for the construction, maintenance, or improvement of any canal, railroad, bridge, public highway, or other public improvement in Kentucky by contract, express or implied, with the owner of the project or by subcontract will have a lien on the public improvement and all of the property of the owner unless that property is owned by the state, any subdivision or agency of the state, a city, a county, an urban-county or a charter county government, in which case the lien will only be on the funds due to the contractor. KRS 376.210(1).

i. Notices and Enforcement

Within sixty (60) days after the last day of the month in which any labor, materials or supplies were furnished, the person entitled to a lien on the funds owed to a contractor on a public improvement project must file with the county clerk's office in the county where the work was performed a written statement verified by affidavit setting forth the amount due, the date on which the labor, materials or supplies were last furnished and the name of the public improvement on which it is claimed. KRS 376.230(1). After filing the statement with the county clerk's office, the lienholder deliver an attested copy of the line statement with the public authority making the contract for the improvement, along with a signed copy of a letter

addressed to the contractor or subcontractor and a post office receipt showing that an attested copy of the lien statement has been sent to that contractor by certified mail, return receipt requested, or by registered mail. KRS 376.240.

If all of the above is done properly, the public authority owner receiving the documentation must endorse on the attested copy of the lien statement the date of its receipt of the document, file the copy and deduct and withhold the amount in the lien statement, plus an amount to cover the fee of the county clerk for filing the statement and attesting a copy, from any amount then due the contract or from amounts that later become due. KRS 376.250(1). The amount withheld must be paid to the lienholder unless the contractor, within thirty (30) days from the date of the delivery of the attested copy, files with the public authority a written protest putting in issue the correctness of the amount due to the lienholder or the liability of the fund for the payment of the amount. KRS 376.250(2). A payment by the public authority under this section releases the public authority from any claim of the contractor for the amount so paid. *Id.*

If there is a protest filed by the contractor, the public authority must send written notice of the protest to the lienholder and must not pay the lienholder unless authorized to do so by the contractor or by an order of the court. KRS 376.250(3). The lien and the withheld funds will automatically be released if the lienholder does not institute a suit and serve summons on the public authority within thirty (30) days after the written notice of protest is mailed to the lienholder. KRS 376.250(4). If the suit is filed and the summons is timely served, the public authority will continue to withhold the funds until it receives a court order. *Id.*

Actions to enforce public improvement liens under KRS 376.210 when there is no protest by the contractor must be brought within six months from the filing of the claim in the county clerk's office and must name all other lienholders. KRS 376.260(1). While the public authority owner must be given notice of the action, the owner shall not be required to respond or participate in the court action. *Id.*

B. Claims to Public Funds

A contractor, subcontractor or supplier who performs work on a public improvement owned by the state, any subdivision or agency of the state, a city, a county, an urban-county or a charter county government must file a lien statement with the county clerk in order to obtain a public improvement lien against the public funds. KRS 376.210. While one could read KRS 376.210 as requiring a preliminary statement of lien to be filed before the work begins for the contractor or subcontractor to obtain a public improvement lien, case law interpreting the predecessor statute states that a preliminary lien statement is not required. *Grigsbey v. Lexington & Eastern Railway Co.*, 150 S.W. 687, 688-89 (Ky. 1912). *See also Sandusky Foundry & Machine Co. v. Wickliffe*, 369 F. Supp. 439, 444 (W.D. Ky. 1972).

The lien statement must be filed within sixty (60) days after the last day of the month in which labor, materials or supplies were furnished and must (1) be in writing, (2) be verified by affidavit of the claimant or an authorized representative, (3) contain the date on which labor, materials or supplies were last furnished and (4) contain the name of the public improvement on which the lien is claimed. KRS 376.230(1). The lien statement will be filed in each county

where the labor, materials or supplies were furnished unless the owner is the state, a county, a charter county, an urban-county or a consolidated local government or city, in which case the lien shall be filed only in the county in which the seat of government of the owner is located. KRS 376.230(1) & (2). The lien will attach only to the unpaid balance due to the contractor for the improvement at the time a copy of the statement, attested by the county clerk, is delivered to the governmental owner. KRS 376.210(3).

i. Notices and Enforcement

In addition to filing the lien statement with the appropriate county clerk's office as stated above, the following must be provided to the public authority making the contract for the improvement to perfect the public improvement lien: (1) an attested copy of the lien statement; (2) a signed copy of the letter addressed to the contractor or subcontractor at the address given in the contract; and (3) a post office receipt showing that an attested copy of the lien statement has been sent by the lien claimant to the contractor or subcontractor by certified or registered mail. KRS 376.240.

After the public authority receives the above information, it must withhold the amount of the lien and an amount sufficient to cover fees from any amounts due to the contractor. KRS 376.250(1). The contractor has thirty (30) days from the date of the delivery of the attested copy of the lien statement to file with the public authority a written protest. If no protest is made by the contractor, the amount withheld shall be paid by the public authority to the lien claimant. KRS 376.250(2). If a protest is filed, the public authority must "promptly" send written notice of the protest to the lien claimant and will not pay to the lien claimant the amount withheld. KRS 376.250(3). The lien claimant must file suit to enforce the lien and have summons served on the public authority or its chairman within thirty (30) days after the written notice of the protest is mailed to the claimant or the lien will automatically be released and the withheld funds paid to the contractor. KRS 376.250(4). Suits to enforce a public improvement lien must be filed in the county where the public improvement is located, with a limited exception for public universities. KRS 376.250(5).

Suits to enforce public improvement liens are also similar to foreclosure actions in that all other lienholders must be made parties. However, if the owner is the state, any subdivision or agency of the state, a city, a county, an urban-county or a charter county government, the owner must be given notice of the action but is not required to respond to or participate in the court action. KRS 376.260(1).

III. STATUTES OF LIMITATION AND REPOSE

In addition to the limitations periods set forth above related to the filing and perfection of mechanics' and materialman's liens, there are several statutes of limitation that may be applicable to claims related to construction. They are discussed below.

A. Statutes of Limitation and Limitations on Application of Statutes

i. Written Contracts: Claims for written contracts must be brought within ten (10) years for all contracts entered into after July 15, 2014. KRS 413.160.

ii. Oral Contracts: Claims for oral contracts must be brought within five (5) years. KRS 413.120(1).

iii. Actions Against Licensed Surveyors and Appraisers: Claims against licensed real estate appraisers and land surveyors must be brought within one (1) year. KRS 413.140(f) & (l).

iv. Professional Negligence: Claims for professional negligence must be brought within one (1) year. KRS 413.245.

v. Actions Against Licensed Home Inspector: Claims against a licensed home inspector must be brought within one (1) year. KRS 413.246(1).

vi. Sale of Goods: Claims related to the sale of goods must be brought within four (4) years. This statute of limitations may be limited by agreement to not less than one (1) year, but may not be extended. KRS 355.2-725(1).

vii. Building Code Violation: Claims for violations of the Kentucky building code or the Uniform State Building Code must be brought within one (1) year of when the damage is or should have been discovered but no later than ten (10) years after the date of first occupation or settlement of the building. KRS 198B.130(2).

viii. Personal Injuries Against Builder: Claims for personal injuries suffered by any person against the builder of a home or other improvements must be brought within five (5) years. KRS 413.120(13). These claims accrue at the time of original occupancy of the improvements erected by the builder. *Id.* See below, however, regarding the constitutionality of this statute.

B. Statutes of Repose and Limitations on Application of Statutes

Kentucky courts have repeatedly held statutes of repose unconstitutional, including those related to construction claims. However, there are currently two relevant statutes of repose that exist in Kentucky, although their ability to withstand constitutional scrutiny is questionable.

Pursuant to KRS 413.135, claims for damages, whether based upon contract or sounding in tort, resulting from or arising out of a deficiency in construction components, design, planning, supervision, inspection or construction of any improvements to real property, or for injury to real or personal property or personal injury or wrongful death arising out of such deficiency, shall be brought within seven (7) years following substantial completion of the improvement. In addition, KRS 413.120(13) states that an action for personal injuries suffered by any person against the builder of a home or other improvement must be brought within five (5) years. The statute further states that “[t]his cause of action shall be deemed to accrue at the time of original occupancy of the improvements with the builder caused to be erected.” *Id.*

As stated above, these two statutes of repose are unlikely to withstand scrutiny. In *Tabler v. Wallace*, 704 S.W.2d 179, 187 (Ky. 1985), the Kentucky Supreme Court found the precursor statute to KRS 413.135 unconstitutional:

The only apparent basis for the present legislation is that a special class, builders, architects and engineers involved in construction, faced with a growing exposure to litigation, lobbied for a statute limiting their liability. There is no social or economic basis presented to justify a special class, only their own self-interest. Other groups similarly situated do not share in their legislative windfall. Their subjective reasons will not withstand public policy analysis.

KRS 413.135 was repealed and then subsequently amended in 1986. However, that version of KRS 413.135 was also declared unconstitutional. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991). The statute was again amended in 1991. However, there have been no constitutional challenges to this latest iteration of KRS 413.135.

In *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973), the Kentucky Court of Appeals (then the highest court in Kentucky) held that under the facts before it, in which third party tenants filed an action against a builder regarding personal injury caused by a latent defect, the precursor statute to KRS 413.120(13) with identical language was unconstitutional as applied. Thus, this statute of limitations will likely not apply at all, at least in a latent defect case. At the very least, it is likely that the requirement in KRS 413.120(13) stating that actions must be brought within five years from the time of original occupancy will not be applied, but rather a general discovery rule will apply. However, all of the requirements of KRS 413.120(13) have been applied without change when the defect is open and obvious. *Breedlove v. Smith Custom Homes, Inc.*, 530 S.W.3d 481, 485-86 (Ky. App. 2017).

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

Kentucky has a statute that requires written notice to be given to a “construction professional” for construction defects actions. KRS 411.258(1). The statute goes on to give the “construction professional” twenty-one days after service of the notice of claim to serve a written response that states that the “construction professional” shall (1) offer to remedy the defect, compromise payment or dispute the claim after an inspection; (2) offer to settle the claim without inspection; or (3) state that he or she disputes the claim. KRS 411.258(2). If the “construction professional” disputes the claim or fails to respond to the notice as stated above, the claimant may immediately file a construction defect action. KRS 411.285(3)(a) The statute goes on to provide a dispute resolution procedure that is a precursor to the owner of the property filing suit against the “construction professional” if he or she offers to remedy the defect or settle the claim. KRS 411.258. However, this statute has no real penalty, and if a claimant files a complaint, counterclaim or cross-claim without meeting the requirements of the statute, the court will simply “issue an order holding the action in abeyance until the parties comply with this section.” KRS 411.258(6). Thus, the statute does not permit dismissal of the lawsuit; it only delays moving forward with the lawsuit. However, sending the notice tolls the statute of limitations, so it may benefit the homeowner to send it. KRS 411.258(8). *See also* KRS 411.264.

It is important to note that a “construction professional” is defined only as a builder. KRS 411.252(3). Moreover, the “construction professional” must provide notice to the homeowner that he or she has the right to offer to cure or the homeowner will not be prevented from filing suit for failing to follow the requirements of KRS 411.258. KRS 411.260. The statute also provides the notice provision that a “construction professional” must substantially follow in form. *Id.*

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Generally, contractors and subcontractors obtain Construction General Liability (“CGL”) insurance policies to provide coverage during construction operations. However, whether these CGL policies extend coverage to claims by property owners depends on whether the construction activity constitutes an “occurrence” under the policy. The Kentucky Supreme Court has held, as a majority of other states have, that claims for faulty workmanship in construction are not, under normal circumstances, an “occurrence” under CGL policies because faulty workmanship is not “truly accidental.” *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 76 (Ky. 2010); *Ryan v. Acuity*, No. 2011-CA-000653-MR, 2012 Ky. App. Unpub. LEXIS 514, at *5 (Ct. App. July 27, 2012); *Liberty Mut. Fire Ins. Co. v. Kay & Kay Contracting, LLC*, 545 F. App'x 488, 492 (6th Cir. 2013) (“[W]e believe that the rationale of the Supreme Court of Kentucky in *Cincinnati Insurance* indicates that the claims presented in this case do not constitute an “occurrence” under a CGL policy.”). However, in *Bituminous Casualty Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 639-40, 642 (Ky. 2007), the court found coverage under a CGL policy when an employee of the contractor arrived early at a demolition site and demolished half of the residence in addition to the carport the contractor had been hired to demolish. The court found that the damage was caused by an accident and, thus, was an occurrence under the policy. *Id.*

B. Trigger of Coverage

Generally, at least in construction contexts, insurance coverage is triggered by an “occurrence” that takes place during the coverage period and leads to the damage for which coverage is sought. While an “occurrence” can be defined differently in insurance policies, generally it is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Cincinnati Ins. Co.*, 306 S.W.3d at 72. These are called “occurrence policies.” Most CGL policies are “occurrence policies.” There are also “claims-made policies” in which coverage is triggered by a claim made against the policy during the coverage period no matter when the incident leading to the claim occurred. *See, e.g., AIG Domestic Claims, Inc. v. Tussey*, No. 2008-CA-001248-MR, 2010 Ky. App. Unpub. LEXIS 741, at *8 (Ky. App. Sept. 17, 2010). Many professional errors and omissions policies are “claims-made policies.”

C. Allocation Among Insurers and Issues with Additional Insurers

There appears to have been some debate in Kentucky over how to allocate loss among various insurers, especially when the possibly applicable insurance policies have escape, excess, other insurance or pro rata clauses in them. For example, the court in *Hartford Ins. Co. v. Kentucky Farm Bureau Ins. Co.*, 766 S.W.2d 75, 76 (Ky. App. 1989), found that when one applicable policy has a pro rata “other insurance” clause in it and the other has an excess “other insurance” clause in it, the pro rata policy will be applied first, and the excess policy will only become effective when the other policy is exhausted.

However, in a more recent case, *Kentucky Farm Bureau Mutual Ins. Co. v. Shelter Mutual Ins. Co.*, 326 S.W.3d 803, 810 (Ky. 2010), the Kentucky Supreme Court held that when a court is faced with two policies that contain excess insurance clauses (i.e., the policy provides coverage only in excess of other insurers’ coverage), one for the owner of a negligently operated vehicle and one for the non-owner driver of the vehicle, the coverage for the vehicle owner has primary liability. In so doing, the court found that the former procedure, which required courts to decide whether the policies were indistinguishable in intent, find them to be “mutually repugnant” if they were, and then apportion liability between the insurers did not help the injured parties and encouraged “insurance companies to continuously draft specific clauses seeking to evade primary liability.” *Id.* at 807.

While neither of these cases is determinative of how the issue would be treated in a case for coverage for construction damages, it does signify that courts will likely focus on the position of the various insurers, the expectation of the insureds and trying to protect the insureds to get them paid as quickly as possible.

VI. CONTRACTUAL INDEMNIFICATION

Kentucky courts recognize the freedom of parties to contract and will generally find the terms of an indemnification provision within a contract to be enforceable by the contract’s terms. *United States Fidelity & Guaranty Co. v. Napier Electric & Constr. Co.*, 571 S.W.2d 644, 646 (Ky. App. 1978); *N. Am. Specialty Ins. Co. v. Masonry Builder's of Ky, Inc.*, No. 7:17-CV-159-REW-EBA, 2018 U.S. Dist. LEXIS 196824, at *8 (E.D. Ky. Nov. 19, 2018) (“In Kentucky, the right of an indemnitee to recover of the indemnitor under a contract of indemnity according to the terms of such a contract is well recognized.”) (internal quotations omitted).

While agreements to have one party indemnify the other for its own negligence can overcome the presumption of invalidity and be found enforceable when their terms are unequivocal and it is clear that the parties were negotiating at arm’s length and understood the significance of the provision, such provisions will not be enforced when the parties to the contract had unequal bargaining power. *Speedway SuperAmerica, LLC v. Erwin*, 250 S.W.3d 339, 344 (Ky. App. 2008).

Moreover, Kentucky has statutorily declared that provisions in construction contracts that purport “to indemnify or hold harmless a contractor from that contractor’s own negligence or from the negligence of his or her agents, or employees” are void and unenforceable. KRS 371.180(2). *See also Pruitt v. Genie Indus., Inc.*, No. 3:10-81-DCR, 2013 U.S. Dist. LEXIS

16010, at *32 (E.D. Ky. Feb. 6, 2013) (holding an indemnity provision is unenforceable pursuant to KRS 371.180).

VII. CONTINGENT PAYMENT AGREEMENTS

A. Enforceability

Contractors often put into their agreements with their subcontractors contingent payment provisions, sometimes called “pay when paid” or “pay if paid” provisions. These provisions state that the contractor only has to pay the subcontractor when the contractor is paid for the work. These provisions are a condition precedent to payment and spread the risk of not being paid to the subcontractors. Generally, courts base their decision to enforce “a pay-if-paid clause on its language being clear and unequivocal.” *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, Nos. 2015-SC-000204-DG, 2015-SC-000636-DG, 2015-SC-000635-DG, 2017 Ky. LEXIS 570, at *31 (Dec. 14, 2017). In relying on foreign authority from sister states, the Supreme Court has “declin[ed] to hold that ‘pay-if-paid’ terms are unenforceable as a matter of public policy.” *Id.* at *34.

What has not been addressed, however, is whether “pay if paid” provisions that might potentially prevent a subcontractor from filing a mechanics’ or materialman’s lien are enforceable in light of the Kentucky Fairness in Construction Act’s prohibition on provisions that purport to waive or extinguish lien rights. *See* KRS 371.405(2)(b). Depending on the exact language of the “pay if paid” provision, it is likely it will not be enforced in the face of a challenge based on the Kentucky Fairness in Construction Act to the extent it could be interpreted as prohibiting a subcontractor from filing a mechanics’ and materialman’s lien.

B. Requirements

In order for Kentucky courts to enforce “pay if paid” provisions in construction contracts, the language of the provision must be clear and unequivocal. *Superior Steel*, 2017 Ky. LEXIS 570, at *31.

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages v. Construction Defect Damages

The crossroads between personal injury damages and construction defect damages takes a wide detour at the economic loss rule. Generally, the economic loss rule, as stated in detail below, prevents a contractor or subcontractor from bringing tort claims for purely economic damages, such as damage to the constructed property. *See Cincinnati Ins. Cos. v. Staggs & Fisher Consulting Engineers, Inc.*, Nos. 2008-CA-002395-MR & 2009-CA-001123-MR, 2013 Ky. App. Unpub. LEXIS 227, at *8-9 (Ky. App. March 15, 2013) (holding that tort claims brought by the insurer of a subcontractor hired by the construction general contractor against the design contractor and subcontractor were prohibited by the economic loss rule and required dismissal because there was no privity between the parties and there was no personal injury or damage to property other than the constructed facility itself).

However, the economic loss rule does not prevent recovery when the negligence of one of the parties leads to personal injury or injury to property other than the constructed facility itself. See *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 738 (Ky. 2011) (“Losses for injuries to people and to ‘other property,’ in these commercial transactions, remain subject to the traditional product liability theories.”); *Hack v. Lone Oak Dev., Inc.*, No. 2007-CA-001431-MR, 2008 Ky. App. LEXIS 188, at *10 (Ky. App. June 13, 2008).

The best bet for a party to recover damages for construction defects is under breach of contract or breach of warranty theories.

B. Attorneys’ Fees Shifting and Limitations on Recovery

Kentucky follows the “American Rule” that parties in litigation pay their own attorneys’ fees absent a contract or statute that shifts those fees. In the construction context, KRS Chapter 198B dealing with building code issues, states that a party can recover its reasonable attorneys’ fees for violations by the defendant of Kentucky’s building codes or the Uniform State Building Code. KRS 198B.130(1). Moreover, Kentucky courts retain equitable powers to award attorneys’ fees even when there is no statutory or contractual duty. See, e.g., *Flooring Gallery, LLC v. Morel Constr. Co.*, No. 2007-CA-001934-MR, 2008 Ky. App. Unpub. LEXIS 1064, at *5-6, 10 (Ky. App. Sept. 5, 2008) (stating that courts have equitable powers to grant attorneys’ fees even when statutes and contracts do not allow for them, but reversing the attorneys’ fees awarded in the case because the actions of the defendant “do not rise to the level of bad faith”).

C. Consequential Damages

Kentucky generally permits the recovery of consequential damages for a breach of contract. *Lawson v. Menefee*, 132 S.W.3d 890 (Ky. App. 2004); *Dennis Anderson Park Lake Apts., LLC v. Louisville & Jefferson County Metro. Sewer District*, No. 2012-CA-000288-MR, 2014 Ky. App. Unpub. LEXIS 822, at *15 (Ky. App. Oct. 17, 2014). However, Kentucky also permits parties to limit consequential damages in certain situations, as long as the limitation is not unconscionable. See KRS 355.2-719(3). Consequential damages are also recoverable under Kentucky law in tort actions if they can be accurately estimated. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 142-43 (Ky. 1991).

D. Delay and Disruption Damages

Kentucky law permits the recovery of delay and disruption damages. *Ford Contracting, Inc. v. Kentucky Transportation Cabinet*, 429 S.W.3d 397, 410 (Ky. App. 2014). In fact, the Kentucky Fairness in Construction Act prohibits as against public policy any provision in a construction contract that “purports to waive, release, or extinguish the right of a contractor or subcontractor to recover costs, additional time, or damages, or obtain an equitable adjustment of the contract, for delays in performing the contract that are, in whole or in part, within the control of the contracting entity.” KRS 371.405(2)(c).

E. Economic Loss Doctrine

The Kentucky Supreme Court formally adopted the economic loss rule in 2011 in a “classic case” of claims related to products liability, although it had been used for some time by lower courts. *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 733, 738 (Ky. 2011). The economic loss rule “prevents the commercial purchaser of a product from suing in tort to recover for economic losses arising from the malfunction of the product itself, recognizing that such damages must be recovered, if at all, pursuant to contract law.” *Id.* While the Kentucky Supreme Court has not extended the rule to construction cases, the Kentucky Court of Appeals has done so in an unpublished decision. *Cincinnati Ins. Cos. v. Staggs & Fisher Consulting Engineers, Inc.*, Nos. 2008-CA-002395-MR & 2009-CA-001123-MR, 2013 Ky. App. Unpub. LEXIS 227 (Ky. App. March 15, 2013). In that case the court held that tort claims brought by the insurer of a subcontractor hired by the construction general contractor against the design contractor and subcontractor were prohibited by the economic loss rule and required dismissal because there was no privity between the parties and there was no personal injury or damage to property other than the constructed facility itself. *Id.* at *8-9. However, a Kentucky federal court has refused to apply the economic loss rule to construction contract cases, stating that the *Giddings & Lewis* case was limited to claims related to the sale of products, not services. *NS Transp. Brokerage Corp. v. Louisville Sealcoat Ventures, LLC*, No. 3:12-CV-00766-JHM, 2015 U.S. Dist. LEXIS 28314, at *7, 13 (W.D. Ky. March 9, 2015).

F. Interest

Kentucky permits pre-judgment interest on liquidated amounts at the rate of 8% per annum, although the parties may negotiate for a higher rate. KRS 360.010(1). Whether to award interest is in the discretion of the court, not a jury. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 144 (Ky. 1991).

In addition, the Kentucky Fairness in Construction Act requires that interest be paid at a rate of 12% per annum to a contractor on the thirty-first business day after receipt of a “properly completed, undisputed request for payment” if payment is not received within thirty (30) days. KRS 371.405(6). The contractor must also pay interest at the rate of 12% per annum to a subcontractor if the contractor fails to pay the subcontractor undisputed amounts within fifteen (15) business days of receipt of payment from the contracting entity. KRS 371.405(9).

G. Punitive Damages

Punitive damages are permitted in certain tort cases in Kentucky. KRS 411.184(2) states that a “plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.” Malice was defined in the statute to mean “either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subject awareness that such conduct will result in human death or bodily harm.” KRS 411.184(1)(c). However, the Kentucky Supreme Court held in *Williams v. Wilson*, 972 S.W.2d 260, (Ky. 1998), that KRS 411.184(1)(c) was unconstitutional and violated the jural

rights doctrine because it did not permit an award of punitive damages for gross negligence. However, the remainder of KRS 411.184 remains valid.

Kentucky courts will look to the factors established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), to ensure that an award of punitive damages does not offend constitutional due process. Those factors are: (1) the degree of reprehensibility of the misconduct; (2) the disparity between the action or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and those imposed or authorized in similar cases. *Mo-Jack Distrib., LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900, at *912 (Ky. App. 2015) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003)).

H. Liquidated Damages

While originally looked at with disfavor, liquidated damages provisions are enforceable in Kentucky, although they should only be used “(1) where the actual damages sustained from a breach of contract would be very difficult to ascertain and (2) where, after the breach occurs, it appears that the amount fixed as liquidated damages is not grossly disproportionate to the damages actually sustained.” *Mattingly Bridge Co. v. Holloway & Son Constr. Co.*, 694 S.W.2d 702, 705 (Ky. 1985). In other words, the liquidated damages must not be a penalty or forfeiture. *Id.* at 706.

IX. CASE LAW AND LEGISLATION UPDATE

In *Louisville & Jefferson County Metro. Sewer Dist. v. T+C Contr., Inc.*, 570 S.W.3d 551, 561 (Ky. 2018), the court analyzed a construction contract that contained (1) provisions requiring that notice be provided by a certain deadline in order to preserve a contractor’s claim and (2) provisions that made an provided that an MSD employee was the final arbiter of a claim rather than a third party and that the decision of the MSD employee were final and binding without a right to appeal. The parties agreed that the provisions preventing appeals to a third party were invalid under the Kentucky Fairness in Construction Act. *Id.* The court held that the provisions that required certain steps to preserve a claim were not null and void and enforced those steps. *Id.* at 562.

As mentioned above, the Kentucky Supreme Court has recently declined to find that “pay-if-paid” provisions are against public policy. *Superior Steel, Inc. v. Ascent at Roebing's Bridge, LLC*, Nos. 2015-SC-000204-DG, 2015-SC-000636-DG, 2015-SC-000635-DG, 2017 Ky. LEXIS 570, at *34-5 (Dec. 14, 2017). However, the Sixth Circuit has been more reluctant to apply such provisions. In *Eagle Supply & Mfg., L.P. v. Bechtel Jacobs Co., LLC*, 868 F.3d 423, 436 (6th Cir. 2017), the Court, applying Tennessee law, viewed “pay-if-paid” provisions in a subcontract as being “practically” analogous to “pay-when-paid” provisions. In making its decision, the Court referenced that Tennessee law disfavors such provisions and only enforces them when there “is clear language.” *Id.* To this end, the Court declined to enforce the “pay-if-paid” provisions because of their ambiguity. *Id.* at 437. While Kentucky courts have found that similar provisions are not against public policy, Kentucky courts seemingly share sister states’ disapproval of ambiguous “pay-if-paid” provisions. Thus, the holding in *Eagle Supply & Mfg.*,

L.P., further illustrates that these types of provisions should be drafted with clarity to avoid negative appellate scrutiny.

Kentucky federal courts have also refused to apply the economic loss rule to construction contract cases, stating that the *Giddings & Lewis* case (discussed in Section VIII(e)) was limited to claims related to the sale of products, not services. *Kamps, Inc. v. Mustang Aviation, Inc.*, No. 5:18-CV-430-REW, 2018 U.S. Dist. LEXIS 215681, *5-7 (E.D. Ky. Dec. 20, 2018); *NS Transp. Brokerage Corp. v. Louisville Sealcoat Ventures, LLC*, No. 3:12-CV-00766-JHM, 2015 U.S. Dist. LEXIS 28314, at *7, 13 (W.D. Ky. March 9, 2015). This is despite the unpublished decision of the Kentucky Court of Appeals in *Cincinnati Ins. Cos. v. Staggs & Fisher Consulting Engineers, Inc.*, Nos. 2008-CA-002395-MR & 2009-CA-001123-MR, 2013 Ky. App. Unpub. LEXIS 227 (Ky. App. March 15, 2013). In that case the court held that tort claims brought by the insurer of a subcontractor hired by the construction general contractor against the design contractor and subcontractor were prohibited by the economic loss rule and required dismissal because there was no privity between the parties and there was no personal injury or damage to property other than the constructed facility itself. *Id.* at *8-9.