



THE CONSTRUCTION CONTRACT TIMELY NOTICE ISSUE

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When a construction Contractor presents a delay damage claim against the Owner, the Contractor must be aware of time limits in the contract for making such a claim. The same is true for Subcontractors making delay damage claims against the Prime Contractor. Both Ohio and Kentucky have enacted statutes related to delay damage claims. But neither statute addresses the timely notice issues which commonly confront Contractors and Subcontractors making delay damage claims.

The typical construction contract allows the Contractor or Subcontractor only a very short time to give notice of a delay damage claim, often just seven days after the event causing the delay. Such short deadlines have led to much litigation. Courts are often called upon to decide if the notice must be in writing if the contract so states. Or if late notice will bar the claim where the Owner or Contractor already knew of the delay even without notice from the claimant. Or whether the Owner or Contractor was actually harmed by the late notice.

The [statute in Kentucky](#) prohibits “no damage for delay” clauses in contracts for both private and public construction projects. About a third of the states have enacted [similar prohibitions](#) on “no damage for delay” clauses, but mostly in public projects only. The Kentucky statute specifically allows clauses which require timely notice of delay damage claims. Unfortunately, there are no cases yet in Kentucky which have construed this Notice provision of the Kentucky statute. And there are no pre-statute cases in Kentucky which address the notice issues mentioned above, where the

Contractor or Subcontractor failed to comply with the timely notice clause in the contract for making delay damage claims. However, although not a delay damage case, there is a helpful [1988 Kentucky Court of Appeals case](#), which held that verbal notice of an “additional compensation” claim is sufficient even though the construction contract required written notice.

Like the Kentucky statute, the [Ohio statute](#) also prohibits “no damage for delay” claims in both public and private project construction contracts. But, in contrast to the Kentucky statute, the Ohio statute makes no reference to the inclusion of mandatory notice provisions. There are, however, reported court decisions in Ohio addressing notice clause issues in both public and private construction project contracts. Early Ohio cases stand for the proposition that constructive or verbal notice is sufficient even where the construction contract requires formal written notice. For example, in 1986, an [Ohio Court of Appeals](#) held that constructive or actual notice is sufficient even if formal notice requirements are not met. In 2003, an [Ohio Court of Appeals](#) re-affirmed this holding.

However, the recent trend in Ohio is to require strict compliance where the contract contains specific notice requirements. In 2007, the Supreme Court of Ohio held in [Dugan & Meyers](#) that written notice must be given if required by the contract unless the claimant can prove that the failure to make the request in writing was harmless to the Owner. In 2009, an [Ohio Court of Appeals](#) further held that where a contract has specific notice requirements, those requirements will be strictly enforced despite actual or constructive notice.

For delay damage claimants in Ohio and Kentucky, strict compliance with notice requirements is the only sure way to preserve the claim. For project Owners, it may be

in their best interest to draft the contract with reasonable, but stringent, procedures for making timely delay damage claims.