Kentucky allows recovery of a variety of damages when there has been a breach of a construction contract or wrongful conduct within the context of a construction job. Actual and incidental contract damages are generally recoverable unless they are otherwise excluded in the contract. Oftentimes, construction contracts have liquidated damages clauses which state the precise dollar amount of damages that may be recovered in the event of a breach of the contract. Kentucky courts enforce liquidated damages clauses as long as they have some reasonable relation to the transaction.

Consequential damages are damages resulting from a party's breach of contract that are not directly related to the breach of the contract itself. To be recoverable in Kentucky, such damages must have been a foreseeable consequence of the breach at the time the contract was entered. Such damages may include delay, lost profits, loss of bonding capacity, financial costs, and unabsorbed overhead. Generally, the courts will enforce reasonable contract clauses that waive the recovery of consequential damages.

The Kentucky Fairness in Construction Act (KFCA), adopted in 2007, contains exculpatory clauses regarding damages. The Act states that certain types of clauses in contracts are unenforceable, including no damages for delay clauses, which attempt to waive the right of a contractor or subcontractor to recovery costs, time or damages for delay, which are in control of the real owner of the property or the public facility. The Act applies to commercial properties, not residential properties and certain utilities. Therefore, delay and disruption damages may be recovered as consequential damages, unless too remote or if they violate the provisions of the KFCA.

In addition, Kentucky has a statute, Ky. Rev. Stat. Ann. § 371.180, that provides “any provision contained in any construction services contract purporting to indemnify or hold harmless the contractor from the contractor’s own negligence or from the negligence of his or her agents, or employees is void and wholly unenforceable.”

Attorneys’ fees are not recoverable as damages unless provided for in statute (such as provided in Kentucky Building Code) or by the contract. The Kentucky Building Code is a unique and powerful statutory provision that requires payment of either the cost to repair to bring the property up to code compliance, payment of the diminution in fair market value of the property because of code infractions, plus a possible award of the cost of litigation, including attorneys’ fees. See Ky. Rev. Stat. Ann. § 198B.130.

Kentucky allows statutory interest on pre-judgment amounts if those amounts are liquidated, and post-judgment interest at a statutory rate.

Kentucky will allow stigma damages only where there has been a “physical injury to the property.” Mercer v. Rockwell Int’l Corp., 24 F. Supp. 2d 735 (W.D. Ky. 1998).
Recovery of Damages for Breach of A Construction Contract

Kentucky allows for the recovery of punitive damages if there is tortious wrongful conduct, which is malicious or wanton in nature. Punitive damages are not available for breach of contract.

The Kentucky Supreme Court has clarified that Kentucky follows the economic loss doctrine, stating that where there is only economic damage, and no personal injury, then contract principles rather than tort principles apply. Kentucky courts strongly favor arbitration clauses, and will resolve any ambiguity in a contract provision regarding arbitration in favor of arbitration. Kentucky has a statute for arbitration procedure, providing for very limited appeal of arbitration damage awards absent manifest injustice, or a clear accounting error. The actual procedure for arbitration is usually provided for in the contract, along with provisions as to recoverable damages.