



## *Construction Law and Insurance Recovery Experts*

With comprehensive construction and insurance recovery practices, Brouse McDowell is uniquely suited to help its clients navigate the complex world of construction contracting and claims.

Our attorneys provide a full complement of legal resources to help at all stages of the construction project, from project conceptualization, design, contract drafting, implementation, monitoring and scheduling, to claims resolution.

And, with five Certified Specialists in Insurance Coverage Law, Brouse McDowell's Insurance Recovery group is one of the most experienced in the nation.

Our attorneys work collaboratively to better shift risk at the contracting stage, and to devise claim and litigation approaches that minimize liability and maximize insurance recovery in the event of a loss.

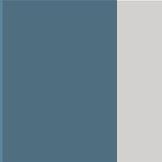
## Construction & Coverage Law Seasonal Newsletter

### Navigating Ohio's Prompt Pay Statute

Ohio's Prompt Pay Statute (O.R.C. § 4113.61) provides substantial incentives for general contractors and higher-tier subcontractors to pay their subcontractors, materialmen, and laborers in a timely manner. The statute provides for strict payment time limits and severe penalties for untimely payments. Depending upon your role in the project, failing to understand the statute and how it applies to you can either cause you to lose leverage in payment negotiations, or subject you to monetary penalties well beyond the amount that may be in dispute.

Below we cover some of the basic obligations imposed by Ohio's Prompt Pay Statute that should always be at the forefront of your mind, from contracting through project closeout.

1. General Contractor's Payment Obligations. If you are a general contractor and a subcontractor or materialman submits its payment application or invoice to you in time for you to include the payment request in your application for payment to the owner, you must pay them within **10 calendar days** of your receipt of payment from the owner.
2. Subcontractor's and Materialman's Payment Obligations to Lower Tiers. Under the statute, subcontractors and material suppliers have the same obligations to their own subcontractors and material suppliers as the general contractor has to them. If a lower tier subcontractor or material supplier submits its pay request to you in time for it to be included in your request to the general contractor, they must be paid within **10 calendar days** of your receipt of payment from the general contractor.
3. Retainage May be Withheld. The statute permits general contractors and upper-tier subcontractors to withhold retainage. However, this retainage must be paid within **10 calendar days** of receipt from the owner or general contractor (or a shorter time if specified in the contract) if the work has been completed in a satisfactory manner and approved by the owner.

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4. Interest Penalty for Non-Payment. Failure to make the payments within the required time periods causes an automatic 18% per annum penalty to accrue on the balance due, beginning on the 11<sup>th</sup> day of non-payment.
  5. Attorney's Fees are Recoverable. A lawsuit to recover the amount due plus interest may be filed 30 days after non-payment. The statute provides that the court "shall award the prevailing party reasonable attorney fees and court costs" unless an award of fees would be "inequitable."
  6. The Statute Protects Construction Laborers. Project laborers are entitled to payment within the same time frame as subcontractors and materialmen, and have the same entitlement to 18% per annum interest and attorney's fees.
  7. Waivers of the Statute's Protections are Void. The statute specifically provides that any contract provision that waives the right to interest, attorney fees, or court costs is void as against public policy.
    - *Importantly, this means that parties may not stipulate to a longer time for payment in their agreements than is provided for in the statute, and any provisions like this will be stricken by the court. Parties may, however, agree to a shorter payment time period.*
  8. Exceptions to the Statute Are Narrowly Applied. Payments otherwise due maybe withheld under certain conditions, such as for retainage or to resolve disputed liens or claims. Courts construe these provisions narrowly, and any attempt to rely on them must be made in good faith. It is important to clearly document any justification for relying on these exceptions.
  9. The Statute Does Not Apply to Certain Residential Projects. The statute specifically provides that it does not apply to any single-, two-, or three-family detached dwelling houses.
  10. There is a Federal Prompt Pay Statute. On federal projects, the Federal Prompt Pay statute will apply. The Federal statute operates somewhat differently than Ohio's, and in general, requires prime contractors to:



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- a) Include provisions in their subcontracts and materials contracts requiring payment to the subcontractor or supplier within 7 days of the prime contractor's receipt of payment from the Federal agency, and providing for an interest penalty for late payments;
- b) Require their subcontractors to include time limitations and interest penalty provisions outlined above in (a) in their own contracts with lower-tier subcontractors and suppliers; and
- c) Provide certain notices to the Federal agency if all or a portion of the payment due to the subcontractor will be withheld as retainage or for other purposes permitted by the subcontract.

Application of both the Ohio and Federal Prompt Pay statutes can be both complicated and vitally important to the success and profitability of your project or the execution of your scope of work. Attention should be paid to these statutes during the pre-construction contracting period and any time a payment is due or withheld to a subcontractor or material supplier.

For questions or comments regarding this article, please contact P. Wesley Lambert at [wlambert@brouse.com](mailto:wlambert@brouse.com)

**“Lunch and Learn” Opportunities.** Brouse McDowell collaborates with its clients and business partners to provide unique opportunities for in-person seminars.

Experienced attorneys from our **Construction Law and Insurance Recovery Group** will meet with individuals in your organization in an informal group setting to provide a legal overview on a variety of topics crucial to your business, including maximizing insurance coverage for your projects, project planning and contracting issues, and dispute avoidance and resolution. Prior to meeting, we will provide a “menu” of options on specific sub-issues within these broad topics for you to select. Feel free to select as many or as few as you like. We can travel to your place of business, meet in a conference room at our office, or reach you over the internet through our unique “webinar” service.

The seminar and lunch are on us! Please contact Amanda Leffler ([aleffler@brouse.com](mailto:aleffler@brouse.com)) or Jim Dixon ([jdixon@brouse.com](mailto:jdixon@brouse.com)) to get on the schedule or for more information.