

## KD Alert: Court Issues Decision With Severe Implications For Delay Damage Pleading

March 21, 2019 – By Andrew Richards, Co-managing Partner of KD's Long Island Office and Chair of the Construction Law Practice Group

The Appellate Division, First Department, just issued a decision which will have a severe impact on the pleading of delay claims in the New York State court system.

The First Department affirmed a lower court decision that dismissed a complaint and the plaintiff's proposed amended complaint alleging delay damages on the ground that the allegations are "palpably insufficient or clearly devoid of merit", conclusory, and did not fit into one of the exceptions to the contractual "no damage for delay" clause under the seminal case of Corinno Civetta. The First Department treated the allegations as nothing more than garden variety allegations of delay which amounted to "inept administration or poor planning". The lower court and the First Department issued their decisions without giving the plaintiff a chance to conduct discovery or provide an expert's report on delay causation and damages.

Traditionally, plaintiffs conduct discovery and then retain an expert to prepare a report stating the cause of delays, responsibility for the delays and the damages caused by the delays. What the First Department has done is require plaintiffs to have an expert's report prepared in advance of the preparation of the complaint based on whatever information is in the plaintiff's possession, and include those findings in the complaint itself. For over 30 years courts of the State of New York have permitted delay claim pleading based on the "notice pleading" requirements of New York State law. Now, a heightened pleading requirement has been established which will change the way pleadings will be reviewed by the courts.