Due Process and Kentucky's Non-Claim Statutes: A Call for Legislative Revision

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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol91/iss1/7
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* J.D. expected 2003, University of Kentucky. The author would like to thank
his wife and family for their unwavering support and encouragement.
INTRODUCTION

State non-claim statutes, those that bar creditors’ claims against the decedent’s estate if not presented within a legislatively defined period, seek to preserve finality.\(^1\) Probate administration generally is designed “to pass good title in the decedent’s assets . . . . and allow distributions free of potential creditor claims.”\(^2\) States employ non-claim statutes to encourage efficient settlement of estates by timely informing the administrators of all claims.\(^3\) According to one source, “[t]he purpose of non-claim provisions of a probate code is to facilitate the administration of estates, the payment of creditors of the estate probated, and the distribution of assets.”\(^4\) The important interest in closing a decedent’s estate and transferring the residue to the distributees may, however, implicate concerns for the due process rights of creditors who had no actual knowledge of the decedent’s death.\(^5\) This due process interest was recognized by the United States Supreme Court in *Tulsa Professional Collection Services v. Pope*: New Due Process Requirements for Decedent’s Creditors—Adios Publication Notice, 34 S.D. L. REV. 359, 365 (1989).

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\(^2\) Id.

\(^3\) E.g., Nathanson v. Superior Court of Los Angeles County, 525 P.2d 687, 694 (Cal. 1974).

\(^4\) 31 AM. JUR. 2D Executors and Administrators § 565 (2002).

Collection Services v. Pope\(^6\) where it held that publication notice of a non-self-executing statute of limitations is insufficient to satisfy constitutional due process requirements.\(^7\)

In light of the decision in Pope, many states have altered their statutes in order to accommodate this due process command.\(^8\) This Note takes the position that Kentucky's non-claim statutes\(^9\) do not comport with the due process mandate set forth in Pope and may subject decedents' estates to uncertainty with regard to the finality of a possible claim by creditors of said estates. Clear and concise legislative revision that takes into account the holding in Pope and state court interpretations of it will remedy the possibility of creditor suits against the decedent's estate being allowed after the deadlines established by the state legislature. While some analysis of the decision in Pope and the constitutional doctrine upon which it was founded will be necessary in order to frame the issue, it is not the objective of this Note to provide a detailed analysis of the Pope decision, or its precedent and historical underpinnings, as the theoretical basis and Supreme Court rationale used in Pope have been thoroughly discussed in numerous publications.\(^10\) This Note seeks to recognize the mandates of Pope, analyze the Pope Court's state court interpretations, and review the state statutory revisions in light of Pope in order to recommend revisions to Kentucky's statutory scheme. The Note contends that Kentucky's statutory scheme is currently insufficient to conform to the Pope mandate.

\(^6\)Id.

\(^7\)Id. at 491 ("We hold that Oklahoma's nonclaim statute is not a self-executing statute of limitations. . . . Thus, if appellant's identity as a creditor was known or 'reasonably ascertainable,' then the Due Process Clause requires that appellant be given 'notice by mail or other means as certain to ensure actual notice.'") (citation omitted).

\(^8\)See, e.g., IND. CODE ANN. § 29-1-14-1(d) (Michie Supp. 2001); OHIO REV. CODE ANN. § 2117.06(B) (Anderson 1998).

\(^9\)While there are some provisions that are found in other areas, Kentucky's non-claim statutes are generally found in Kentucky Revised Statutes [hereinafter K.R.S.] ch. 396. For the purposes of this Note, the primary statutory provisions are K.R.S. § 396.011 and K.R.S. § 396.205.

I. SUPREME COURT CASES GIVING RISE TO THE POPE DECISION

A. Mullane and the Supreme Court's Acknowledgement of an Actual Notice Requirement for a Known or Reasonably Ascertainable Plaintiff

The foundation of the principle that there is a due process notice requirement to "known or reasonably ascertainable" creditors was established through Supreme Court precedent prior to Pope. In Mullane v. Central Hanover Bank & Trust, the defendant, in compliance with statutory mandates, offered only publication notice in connection with its settlement of a common trust fund. It was clear from the record that many of the trust beneficiaries were not residents of the state of New York, where the trust was established and where publication notice was given. The Supreme Court held that publication notice alone, as required by New York law for judicial settlement of accounts, was a violation of property rights without due process of law in contravention of the plaintiff's Fourteenth Amendment rights. Mullane stood for the proposition that, with regard to those beneficiaries whose whereabouts cannot be ascertained with due diligence, publication notice is sufficient. However, where the beneficiaries do not fit into the above category, the Court held that "notice by publication stands on a different footing" and is "not reasonably calculated to reach those who could easily be informed by other means at hand."

B. Mennonite as an Impetus for the Pope Decision

In Mennonite Board of Missions v. Adams, the Supreme Court entertained a suit regarding an individual whose house was sold at a state

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12 Mullane, 339 U.S. at 306.
13 Id. at 309-10.
14 Id. at 309.
15 U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").
16 Mullane, 339 U.S. at 320.
17 Id. at 317.
18 Id. at 318.
19 Id. at 319.
tax sale for deficiencies in property tax payments.\textsuperscript{21} The plaintiff did not receive actual notice of the tax sale.\textsuperscript{22} The notice, however, was given by way of publication in compliance with statutory obligations.\textsuperscript{23} The Court found that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable."\textsuperscript{24} Since the plaintiff in \textit{Mennonite} could have been identified through "reasonably diligent efforts," the Court held that due process required actual notice.\textsuperscript{25}

\section*{II. \textbf{Pope}'s Mandate Regarding Notice to Known or Reasonably Ascertainable Creditors}

\textbf{A. The Background of Pope}

The above two cases, \textit{Mullane}\textsuperscript{26} and \textit{Mennonite},\textsuperscript{27} provided the impetus for the holding in \textit{Pope}.\textsuperscript{28} In \textit{Pope}, the decedent's personal representative furnished notice in compliance with the terms of the non-claim statute of the state of Oklahoma and the creditor did not file its claim within the statutorily required time period.\textsuperscript{29} The statute at issue in \textit{Pope} required only that the decedent's personal representative give publication notice in a newspaper located in the county once per week for two consecutive weeks.\textsuperscript{30} In addition, if notice was supplied in the above manner, a "creditor's failure to file a claim within the 2-month period generally bars it forever."\textsuperscript{31} The Court pronounced that the notice required by this statute did not conform with the requirements of the Due Process Clause of the Fourteenth Amendment when applied to "known or reasonably ascertainable creditors."\textsuperscript{32} It therefore held that actual notice is mandated by the

\textsuperscript{21} \textit{Id.} at 794.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 800.
\textsuperscript{25} \textit{Id.} at 798 n.4.
\textsuperscript{26} \textit{Mullane} v. Cent. Hanover Bank & Trust, 339 U.S. 306 (1950).
\textsuperscript{27} \textit{Mennonite}, 462 U.S. at 791.
\textsuperscript{28} \textit{Tulsa Prof'l Collection Servs. v. Pope}, 485 U.S. 478, 482 (1988).
\textsuperscript{29} \textit{Id.} at 482. The plaintiff, Tulsa Professional Collection Services, was the assignee of a hospital claim for payment of expenses in connection with the decedent's hospitalization prior to death. \textit{Id.}
\textsuperscript{30} \textit{Id.} at 481.
\textsuperscript{31} \textit{Id.} (citing OKLA. STAT. tit. 58, § 331 (1981)).
\textsuperscript{32} \textit{Id.} at 491.
Constitution with respect to such known or reasonably ascertainable creditors.\textsuperscript{33}

\textbf{B. The State Action Requirement}

An elementary principle of constitutional law is that the Fourteenth Amendment is a prohibition on state activity and thus due process is not implicated unless there is a state action rather than merely an action of a private citizen.\textsuperscript{34} However, the Court determined that the fact pattern in \textit{Pope} illustrated "significant state action," and therefore a due process concern was present.\textsuperscript{35} The Supreme Court opined in \textit{Pope} that the crucial factor in determining if a state non-claim statute contains sufficient state action to trigger due process is whether the statute of limitations is self-executing. The Court distinguished self-executing and non-self-executing statutes of limitations by holding that in the case of self-executing statutes of limitations:

The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.\textsuperscript{36}

Unlike the triggering of a statute by a state-sponsored event, such as a probate court proceeding, a self-executing statute extinguishes the plaintiff's claim by operation of law.\textsuperscript{37}

\textsuperscript{33} \textit{Id.} The Court went on to state: As the Court indicated in \textit{Mennonite}, all that the executor or executrix need do is make 'reasonably diligent efforts' to uncover the identities of creditors. For creditors who are not 'reasonably ascertainable,' publication notice can suffice. Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in \textit{Mullane}, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims. \textit{Id.} at 490 (citations omitted).

\textsuperscript{34} 16B AM. JUR. 2D Constitutional Law § 926 (1998).

\textsuperscript{35} \textit{Pope}, 485 U.S. at 487 (describing the appointment of an executor by the probate court as an "involvement . . . so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment").

\textsuperscript{36} \textit{Id.} at 486-87.

\textsuperscript{37} \textit{Id.} at 486.
C. Non Self-Executing Statutes of Limitations Give Rise to State Action and Implicate Due Process

Unlike the limited state involvement the Court perceived in a self-executing statute of limitations, a non-self-executing statute of limitations, such as the Oklahoma statute at issue in Pope, includes "significant state action" that gives rise to due process concerns. "Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature ... necessary to remove any due process problem." Because the two-month limitations period in Pope began to run after a personal representative was appointed by the probate court and notice was given, the probate court was "intimately involved throughout, and without that involvement the time bar is never activated." The state action results because it is "[o]nly after this court appointment is made [that] the statute provide[s] for any notice." Therefore, the Pope decision seems to base its holding on the premise that a limitations period triggered by a legal proceeding is a sufficient state action to afford known or reasonably ascertainable creditors due process protection.

III. STATE COURT APPLICATIONS OF POPE

A. Invalidated Statutes

After the interpretation of the Due Process Clause to require actual notice to known or reasonably ascertainable creditors, several creditors who were similarly situated to the plaintiff in Pope brought suits asserting that they were not afforded due process by the publication notice required by state statutes similar to the one considered in Pope. For instance, the Kansas Supreme Court applied the Pope decision retroactively. In In re Estate of McDowell, the four-month non-claim limitations period expired for the

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38 Id. at 487.
39 Id.
40 Id. ("The nonclaim statute becomes operative only after probate proceedings have been commenced in state court.").
41 Id.
42 In re Estate of McDowell, 777 P.2d 826 (Kan. 1989). But see Hanesworth v. Johnke, 783 P.2d 173 (Wyo. 1989). The Hanesworth court followed the general principle of Pope but held that the Pope decision did not apply retroactively to probate proceedings that were finalized prior to the holding in Pope. Id. at 177.
decedent’s estate on February 22, 1988.\footnote{\textit{McDowell}, 777 P.2d at 828.} However, after the \textit{Pope} decision on April 19, 1988, the creditor filed a petition the following day, seeking allowance of the claim against the decedent’s estate.\footnote{\textit{Id.}} In upholding the decision of a lower court to allow the claim, the Kansas Supreme Court held that due process was not satisfied through the publication notice and that since the Kansas statute and the Oklahoma statute considered in \textit{Pope} were nearly identical, \textit{Pope} mandated that the claim should be allowed, even after the statutory time bar, to the known or reasonably ascertainable creditor who was not afforded actual notice.\footnote{\textit{Id.}}

In 1991, the Wisconsin Supreme Court considered a case with facts strikingly similar to those in \textit{Pope}.\footnote{\textit{In re Estate of Barthel}, 468 N.W.2d 689 (Wis. 1991).} In \textit{In re Estate of Barthel}, the decedent died on August 4, 1988, and on September 13, 1988, pursuant to Wisconsin statute, the probate court entered an order that all creditors’ claims would be barred if not filed within three months.\footnote{\textit{Id.} at 692 (citing \textit{Wis. Stat. §§ 859.05, .07, 879.05(4) (1987-88)}). These sections provided that on application for administration, the court, by order, shall determine a deadline date for claims filed against the decedent’s estate. \textit{Id.}} The personal representative complied with the statutory mandate of publication notice.\footnote{\textit{Barthel}, 468 N.W.2d at 690.} Over five months later, Sears, Roebuck and Company filed a claim against the decedent’s estate for $6,522.73.\footnote{\textit{Id.} at 692.} In reversing a lower court, the Wisconsin Supreme Court held, pursuant to the mandate in \textit{Pope}, that the Wisconsin statutory notice provision did not afford due process protection to the appellant, who was a known or reasonably ascertainable creditor.\footnote{\textit{Id.} at 693.} Noting that the Wisconsin statute was very similar in form to the statute at issue in \textit{Pope}, the court held that “[a]s in \textit{Pope}, these statutes require significant state involvement in triggering the operation of the time limitation and the notice proceedings.”\footnote{\textit{Id.} at 692.}

\textbf{B. Validated Statutes}

In cases involving a state non-claim statute that is nearly identical to the one considered in \textit{Pope}, courts have easily invalidated the state statutes
as violations of Pope’s due process mandate. However, the more difficult and interesting question is how a non-claim statute may be drafted in order to satisfy Pope’s requirements. This interpretation issue was presented to the Ohio Court of Appeals in Fifth Third Bank v. Gottlieb. In Gottlieb, the bank presented a claim against the decedent’s estate that was not timely filed under the Ohio non-claim statute. In rejecting the appeal of the creditor, which argued it was known or reasonably ascertainable and entitled to actual notice under Pope, the court held that the Ohio statute was self-executing and therefore not subject to the requirements of Pope. In its analysis of Ohio’s statute, the court made a critical distinction between the Ohio statute and the one subject to controversy in Pope. It found that in the Ohio statute:

the decedent’s death is the event that triggers the running of the time period for filing claims against the estate. Therefore, we find that under the Tulsa analysis, there is no state action involved and Ohio’s statute is a self-executing statute of limitations. Thus, the due process clause is not applicable.

Gottlieb illustrates the typical state court treatment of non-claim statutes that run from the death of the decedent, rather than from a court order, as being self-executing and not subject to the due process requirements of Pope. In Burnett v. Villaneuve, the Indiana Court of Appeals endorsed a similar type of analysis. The Indiana non-claim sta-

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52 See generally In re Estate of McDowell, 777 P.2d 826 (Kan. 1989) (holding that Pope applied retroactively to invalidate a non-claim statute that did not require that actual notice be given to known or reasonably ascertainable creditors); Barthell, 468 N.W.2d at 689 (holding that a non-self-executing non-claim statute was unconstitutional insofar as it did not require actual notice to a known or reasonably ascertainable creditor).


54 Id. at *2.

55 Id. at *1-2.

56 Id. at *2 (citing OHIO REV. CODE ANN. § 2117.06 (Anderson 1998)). See also OHIO REV. CODE ANN. § 2117.06(B) (“All claims shall be presented within one year after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that one-year period. Every claim presented shall set forth the claimant’s address.”).

57 Gottlieb, 1997 WL 543069, at *2.

tute required that, in order to institute a claim against a decedent’s estate, the claim must be presented within one year of the decedent’s death. Therefore, the court reasoned, the involvement of the state in enacting the statute of limitations was insufficient to trigger a due process concern. In support of this proposition, the court cited language from Pope that reasoned “the State’s involvement in the mere running of a general statute of limitations [is not] generally sufficient to implicate due process.” Thus the Burnett Court held that, with respect to a one-year non-claim limitations period that runs from the time of the decedent’s death, publication notice would be sufficient even to creditors who were known or reasonably ascertainable.

IV. POTENTIAL PROBLEMS WITH KENTUCKY’S NON-CLAIM STATUTES

A. The Last Revision of Chapter 396

As previously mentioned, the statutory provisions governing Kentucky’s non-claim limitations periods are principally found in Kentucky Revised Statutes ("K.R.S.") Chapter 396. This chapter was last amended in 1988, only a short time after the Pope decision was handed down by the United States Supreme Court. It is unfortunate that the last revisions in Kentucky took place within a few short months of the Supreme Court’s landmark decision in Pope, which pronounced an interpretation of the Due Process Clause at odds with many state statutes. Without the benefit
of time to adequately examine the holding in *Pope* or to analyze subsequent state court interpretations of it, the latest amendments to Kentucky’s non-claim statutes contain serious flaws. These flaws could circumvent the intention of the legislature to obtain an expeditious settlement of an estate and distribute property to the distributees free from potential creditor claims after the statutorily defined time period.

B. Kentucky’s Non-Claim Provisions

Kentucky law mandates that creditors be given publication notice,\(^6\) in a qualifying newspaper,\(^6\) of the appointment of the decedent’s personal representative and the amount of time creditors have to file a claim against the decedent’s estate.\(^7\) Furthermore, the statute requires the clerk of the probate court to publish such notice on a monthly basis at minimum.\(^7\) The most important non-claim limitations period appears in K.R.S. § 396.011.\(^7\) This section requires that claims arising before the decedent’s death and not barred by another statute of limitations must be: 1) Presented within six months of the appointment of the personal representative; or 2) Within two years of the death of the decedent where no personal representative is appointed.\(^7\) In addition to the limitations period in K.R.S. § 396.011, this chapter also includes a provision intended to be a “catch all” limitations period.\(^7\) K.R.S. § 396.205 provides that if a cause of action against a decedent’s estate is not barred by any other applicable statute of limitations, including K.R.S. § 396.011, it may not be brought against the personal representative or any distributee “after the expiration of two (2) years from the date of the order of discharge of the personal representative.”\(^7\)

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\(^6\) K.R.S. § 424.340 (Michie 1992 & Supp. 2001). The statute requires the clerk of the probate court to publish “a notice setting forth all fiduciary appointments made since the last publication and including at least the following information: the name and address of the decedent or ward, the name and address of the fiduciary, the date of the fiduciary’s appointment, and the name and address of the attorney representing the fiduciary, if any, and the date by which claims of creditors must be presented.” *Id.*

\(^7\) *Id.*

\(^7\) K.R.S. § 424.340.

\(^7\) *Id.* § 396.011 (Michie 1999).

\(^7\) *Id.*

\(^7\) *Id.* § 396.205.

\(^7\) *Id.*
C. The Potential Difficulties of Kentucky Law in Light of Pope

An analysis of Kentucky’s non-claim statutes reveals several potential problems in the event it is subjected to a Pope attack. First, the only statutory notice mandate is through publication. A personal representative who does not obtain adequate counsel to inform her of the potential problem of complying with all statutory mandates and, being unaware of Pope’s actual notice requirement to “known or reasonably ascertainable” creditors, may inadvertently subject the estate to creditors’ claims after the limitations period has expired. In addition, the limitations period barring claims not presented to the decedent’s personal representative within six months of the representative’s appointment is, according to the definition in Pope and other court cases, not self-executing. This is because, as in Pope, “legal proceedings themselves trigger the time bar.”

D. The Limitations Periods of K.R.S. § 396.011

Since K.R.S. § 396.011 promulgates two distinct limitations periods, it is important to distinguish between them. One provision provides that where a personal representative is not appointed, claims will be barred unless brought against the decedent’s estate within two years of the decedent’s death. This provision will likely survive a due process attack from a known or reasonably ascertainable creditor who did not receive actual notice because of the line of state court cases holding that a statute triggered at the death of the decedent is self-executing and that in such cases there is insufficient state action to implicate due process. However,

76 Id. § 424.340.
77 See, e.g., In re Estate of Barthel, 468 N.W.2d 689 (Wis. 1991); In re Estate of McDowell, 777 P.2d 826 (Kan. 1989). In these cases the statutory notice shortcomings prevented the desired legislative time limit from barring a claim that was filed after this time period. McDowell, 777 P.2d at 830; Barthel, 468 N.W.2d at 690.
78 K.R.S. § 396.011.
79 See McDowell, 777 P.2d at 828; Barthel, 468 N.W.2d at 692.
81 K.R.S. § 396.011(1).
82 See Burnett v. Villeneuve, 685 N.E.2d 1103, 1111 (Ind. Ct. App. 1997) (“[A] self-executing statute of limitation, as opposed to a nonclaim statute triggered by the significant assistance of state officials, is not unconstitutional.”) (citing Pope, 485 U.S. at 486); Fifth Third Bank v. Gottlieb, No. WD-96-054, 1997 WL 543069, *2 (Ohio Ct. App. Aug. 29, 1997) (“[T]he decedent’s death is the event that triggers the running of the time period for filing claims against the estate.
the portion of the statute imposing a six-month presentation requirement from the date of the appointment of a personal representative would clearly be analogous to the statute in *Pope*. The estate therefore may be subject to a claim (well after the limitations period has run) by a creditor who did not receive actual notice.

**E. K.R.S. § 396.205 and its Difficulties**

Perhaps the most troublesome effect of this potential "loophole" in the six-month rule of K.R.S. § 396.011 is its potential effect when combined with K.R.S. § 396.205. As mentioned earlier, where no personal representative is appointed, Kentucky has a self-executing statute of limitations that bars claims not brought within two years of the decedent's death. Another Kentucky statute attempts to put an absolute limitation on any claim, whether it arose before or after the decedent's death. K.R.S. § 396.205 requires that claims be brought within two years "from the date of the order of discharge of the personal representative." It is unfortunate that the Kentucky legislature chose to commence this limitations period from the date of the personal representative's order of discharge and not from the date of decedent's death. While a statute triggered by the death of the decedent is self-executing and not subject to the *Pope* requirements, electing that the statute be triggered by court proceedings subjects it to the argument that the statute is not self-executing and a "known or reasonably ascertainable" creditor could attack it on due process grounds. However, while this conceptually appears to be correct, *Pope* governed a so-called "short-term" statute, similar to the six-month rule of K.R.S. § 396.011, rather than the so-called "long-term" statutes of limitations, such as the one in K.R.S. § 396.205. The Supreme Court explicitly mentioned in *Pope* that it had no occasion to consider non-claim statutes "which generally provide for longer time periods, ranging from one to five years."

The possibility that K.R.S. § 396.205 could be held to be not self-executing, because it is triggered by an action of the probate court, could have a disastrous impact on the personal representative, or, perhaps more

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83 K.R.S. § 396.011(1).
84 Id.
85 Id. § 396.205.
86 See Burnett, 685 N.E.2d at 1111; Gottlieb, 1997 WL 543069, at *2.
88 Id. at 488.
importantly, the distributees of the estate. The availability of claims by “known or reasonably ascertainable creditors” who did not receive actual notice well after the two-year limitations period has expired becomes a distinct possibility. This could subject a devisee or heir to a suit against the estate by a creditor with no limitations period to protect such a distributee except the period applicable to the cause of action against a living person. Such a result would be inconsistent with the purpose of probate administration, which is “promot[ing] finality and allow[ing] distributions free of potential creditor claims.”89 Likewise, long-term statutes of limitations “are designed to bar all claims against an estate which are brought beyond a reasonable time.”90 Given the duration of the statute of limitations applicable to some causes of actions, such as a five-year period for injuries to the rights of the plaintiff not arising under contract or otherwise enumerated,91 and a fifteen-year limitations period for actions upon a written contract,92 this “loophole” may result in the property of the decedent not being judgment-proof for a number of years.

There is thus potential, in a creditor suit under Kentucky law that would ordinarily be barred by K.R.S. § 396.205, that the only self-executing statute of limitations may be a lengthy one attributable to the particular cause of action of the creditor, and not the shorter limitation designed specifically for probate administration.93 Such a possibility is inconsistent with the policy of an expeditious but fair period in which to close a decedent’s estate, allowing heirs or devisees to fully enjoy such property without being subject to litigation. As was previously mentioned, K.R.S. § 396.011 contains a provision stating that claims against a decedent’s estate where no personal representative is appointed are barred unless brought within two years of the decedent’s death.94 The disparity between Kentucky’s non-claim limitations period where a personal representative is appointed and the limitations period where one is not appointed has been referred to as “puzzling.”95

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89 Kness, supra note 1, at 365.
90 Id. at 367.
91 K.R.S. § 413.120(7) (Michie 1999).
92 Id. § 413.090(2).
93 See James E. Hargrove & Walter R. Morris, Jr., Claims Against the Estate, KENTUCKY ESTATE ADMINISTRATION § 9 (Univ. of Ky. Contin. Legal Educ. 3d ed. 2000) (recognizing the possibility of K.R.S. § 396.205 not being self-executing and allowing a suit against an estate well after this two-year period has run).
94 K.R.S. § 396.011(1) (Michie 1999); see supra note 73.
95 Hargrove & Morris, supra note 93, § 9.
V. STATE COURT INTERPRETATIONS
OF STATUTES SIMILAR TO K.R.S. § 396.205

A. Precedent Treating Short and Long-Term Limitations Periods
Differently in Light of Pope

While no Kentucky cases interpret K.R.S. § 396.205,96 other state courts have interpreted similar provisions. There is authority for the proposition that, in terms of due process implications, the short-term non-claim statutes of limitations should be treated differently than long-term ones.97 In Martel v. Stafford,98 the Vermont court interpreted a two-year long-term statute of limitations that was triggered by a probate determination similar to K.R.S. § 396.205.99 The court declined to allow an action against the estate of the decedent more than two years after the probate proceeding that triggered the statute, even though the creditor had no actual notice and was presumably "known or reasonably ascertainable."100 Unlike the Supreme Court in Pope, the Vermont court based its decision on the much longer length of time involved under the statutory limitations period.101 In its analysis, the Court concluded, "We do not believe that a diligent plaintiff will fail to discover the death of a potential defendant after more than two years."102

B. Criticism of the Martel Reasoning and Authority For Treating Short
and Long-Term limitations Periods Similarly Under Pope

While the decision of Vermont's high court in Martel may avert a potentially harsh result, it does not seem to mesh with the U.S. Supreme Court's decision in Pope. First, the Vermont Court's distinction between Martel and Pope appears to be somewhat unprincipled in terms of constitutional law. That is to say, the same level of state action is involved

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96 See K.R.S. § 396.205 (Michie's Statutes Annotated contain no annotations to court decisions considering this section).
98 Id.
99 Id. at 346 (quoting VT. STAT. ANN. tit. 12, § 557(a) (1973) ("After the issuance of letters testamentary... such action, if the cause of action survives, may be commenced... against the executor or administrator within two years, and not after.").
100 Id. at 351.
101 Id.
102 Id.
in both cases, whether it is applied to short-term or long-term statutes of
limitations. Under Pope, a plaintiff creditor has been deprived of property
without due process of law if there is sufficient state action and he or she
was known or reasonably ascertainable.103 This deprivation apparently
occurs whether he or she learns of this deprivation within six months or two
years. The Martel court’s distinction, based on its assertion that a known
or reasonably ascertainable plaintiff instituting a suit after two years is less
diligent than a similar plaintiff instituting a suit at an earlier date104 may be
factually accurate, but it seems irrelevant to the constitutional law question
of whether the former plaintiff is any less deprived of property without due
process of law than the latter.

Allowing two different due process interpretations based on the length
of the limitations period has been criticized elsewhere.105 Professor Thomas
Waterbury contends that long-term statutes of limitations that are triggered
by a probate court proceeding may have been permissible “if the Pope
opinion did not rest on a ‘state-action’ rationale.”106 He contends that
“under Pope’s ‘state-action’ rationale . . . it is difficult to argue that a long-
term statute that relies on an estate distribution supervised by the court to
bar claims is a ‘self-executing’ statute of limitations.”107 Professor
Waterbury concludes that the solution “is to employ a long-term statute that
bars creditors’ claims in traditional fashion—on the expiration of a period
of time following a decedent’s death.”108 This period should be both
“reasonably respectful of creditor interests and likely to expire before an
estate is ready for distribution.”109

The assessment of Professor Waterbury—that long-term probate
statutes of limitations should be held to the same constitutional standards
as short-term ones—is consistent with the views of other commentators as
well. For instance, Bruce N. Kness contends that “long term non-claim
statutes must meet the same constitutional standards when applied against
all creditors as the short term non-claim statute does as applied to known

104 See Martel, 603 A.2d at 350.
105 Waterbury, supra note 10, at 766.
106 Id. at 785.
107 Id.
108 Id. at 786.
109 Id. Professor Waterbury suggested that the long-term expiration period that
bests serves these interests is the one-year period after the decedent’s death. He
notes the reasonableness of requiring creditor suits within this time period and
asserts that most administered estates are not ready for distribution by the
expiration of this one-year period. Id.
creditors. The arguments of the above commentators disagree with the Martel court analysis and follow a principle that the length of the statute should be inconsequential in terms of the due process requirements of the Fourteenth Amendment.

The decision in Martel further conflicts with Pope in that Pope was not decided on the rationale that a creditor was not given a sufficient amount of time to initiate a claim. Pope was based on due process considerations, leading to the conclusion that when state probate proceedings trigger a time bar, persons without notice of those proceedings who have an expired claim have been denied property without due process of law. This rationale seems to apply regardless of the length of the statute.

C. State Court Decisions Applying Pope to Long-Term Limitations Periods

In addition to the potential problems with the Martel analysis discussed above, other state courts have interpreted whether a statute of limitations is self-executing in accordance with the test enumerated in Pope regardless of whether the time bar is short or long-term. For instance, the Colorado Court of Appeals, in In re Ongaro, interpreted whether a longer term (one-year) statute of limitations running from the date of the decedent's death implicated the due process concern outlined in Pope. The court was faced with only precedent from the United States Supreme Court and that from its own state courts, both of which interpreted short-term non-claim statutes exclusively. Nevertheless, the Colorado court found the precedential analysis of these statutes to be controlling with respect to the statutes of a longer term. It held that the one-year provision was "a self-

110 Kness, supra note 1, at 367.
113 Id. (interpreting not the short-term non-claim statute of limitations that limited claims to a four-month presentation requirement, but the long-term statute that barred all claims if not presented within one year of death).
114 Id. at 664 (The Colorado court cites Pope, which interprets a non-claim statute with a two-month time limit.).
115 Id. at 665 (The Colorado court cites Wishbone, Inc. v. Eppinger, 820 P.2d 434 (Colo. Ct. App. 1991), which interprets a non-claim statute with a four-month time limit.).
116 Id. ("Because we find the reasoning in [Pope] and Eppinger persuasive, we conclude that no due process violation occurred here.")
executing nonclaim statute triggered, not by the commencement of probate proceedings in state court, but rather by the decedent’s death. It then reasoned that “unlike a statutory scheme where the nonclaim statute becomes operative only after probate proceedings have been commenced, here there is no state involvement, and consequently, by definition, no violation of due process.”

The decision in Ongaro was ultimately appealed and affirmed by the Supreme Court of Colorado. The state supreme court reasoned that the statute in question was self-executing because “[t]he one-year period for presenting claims begins to run on the day of the decedent’s death, not on the occurrence of an event requiring action by the state.”

The court of last resort in Maine also held that, under the Pope case, a three-year probate statute of limitations that was triggered by the death of the decedent rather than probate court action was self-executing and thus insufficient state action to implicate due process concerns. While the action in question was a petition to be named personal representative and not a claim against an estate, the petitioner claimed she was denied due process, under Pope, by the three-year statute of limitations for the application for appointment of personal representative. The court found that, “[g]enerally speaking, probate statutes of limitations which begin running from the date of the death of the decedent, rather than from a date established by the probate court proceedings, are self-executing.”

The Maine Supreme Court’s statements that long-term probate statutes of limitations run from the decedent’s death seem to be in tune with the views of commentators. For instance, John W. Chapman, Jr. explained that:

[s]tatutes in the second category [long-term statutes] are referred to as statutes of limitation because the time period is not triggered by court order. Statutes of limitation differ from nonclaim statutes in that such statutes usually begin to run at the decedent’s death, whether or not a will is probated or notice of administration has been published.

117 Id.
118 Id.
119 In re Ongaro, 998 P.2d 1097 (Colo. 2000).
120 Id. at 1105.
121 Estate of Kruzynski, 744 A.2d 1054, 1057 (Me. 2000).
122 Id. at 1056-57.
123 Id. at 1057.
124 Chapman, supra note 10, at 473 (footnotes omitted).
Bruce N. Kness also commented that the "second type of non-claim statute runs for a longer term of nine months to six years and starts the moment of the decedent's death."\textsuperscript{125} There appears to be a general assumption that such statutes uniformly run from the death of the decedent rather than from the actions of the state probate court. On the other hand, Kentucky’s long-term statute, K.R.S. § 396.205, is initiated by probate court action rather than the decedent’s death.\textsuperscript{126} The fact that Kentucky’s long-term non-claim statute begins to run at the initiation of probate court action, rather than at the date of the decedent’s death, makes it of questionable validity against a known or reasonably ascertainable creditor. Without a revision of this statute, the position of this Note is that there will be nothing to bar suits against an estate, or more likely at this later date, its beneficiaries, except the applicable non-probate statute of limitations on the claimant’s cause of action.

It is clear that Kentucky’s short-term non-claim statute, K.R.S. § 396.011(1), does not conform to the Pope requirements.\textsuperscript{127} In addition, there is, at minimum, a strong interpretation question as to whether Kentucky’s long-term non-claim statute, K.R.S. § 396.205, is susceptible to a due process attack under Pope, even years after the statute should have run. Because Pope established a “state-action” test, state courts, in deciding whether or not due process applies, should and often do look to the test in Pope regardless of the length of the limitations period. The weight of authority seems to lend credence to an argument that K.R.S. § 396.205 is likely to be interpreted as a non-self-executing statute and thus subject to due process attacks under Pope. Given that there is at the very least an interpretation question on this issue that could result in unnecessary litigation, the next section of this Note suggests possible avenues of improvement for Kentucky’s non-claim statutes.

VI. AN APPEAL FOR STATUTORY REFORM

A. State Legislative Responses to Pope

As was mentioned earlier, Kentucky’s non-claim statute was last amended within close proximity to the Pope decision.\textsuperscript{128} It is unfortunate that this occurred on the brink of a new constitutional requirement that

\textsuperscript{125} Kness, \textit{supra} note 1, at 365.
\textsuperscript{127} See \textit{supra} notes 81-83 and corresponding text.
\textsuperscript{128} See \textit{supra} notes 65-66 and corresponding text.
raises serious questions as to whether the existing statutory formation would carry out the true intention of the state legislature. In the year following the *Pope* decision, the state of Maryland amended its non-claim limitation period with the effect of making the statute self-executing. The prior statute was almost identical to Kentucky’s short-term limitations period, found in K.R.S. § 396.011, in that it barred claims not presented within six months of the appointment of the personal representative. The new statute’s language triggers the running of the six-month limitations period from the date of the decedent’s death. In keeping with the consistent interpretation of state court cases after *Pope*, Maryland courts have held that the new statute is self-executing and therefore does not implicate due process.

A similar legislative response was undertaken in Ohio. Ohio amended its non-claim statute in 1990 to include a prohibition on claims not presented within one year of the decedent’s death. The Ohio legislature implemented this revision, at the suggestion of the Ohio Supreme Court, to eliminate the “state action” elements that subjected the former time bar to due process attacks. Thus, courts have construed Ohio’s new limitations period accordingly, holding that it is self-executing and not subject to the *Pope* requirements.

Indiana took a similar approach to Ohio and Maryland in 2001. The amended non-claim statute eliminated the aspects triggered by court involvement and included a provision to bar claims with a time period running from the decedent’s death. In 1988, California repealed its former non-claim statute to provide that a creditor must file a suit against the estate before the later of four months from the appointment of the personal representative or from sixty days after notice of administration is given to the creditor. Michigan also amended its non-claim statute in

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130 Id. (citing MD. CODE ANN., EST. & TRUSTS § 8-103(a) (1973)).
131 Id. (citing MD. CODE ANN., EST. & TRUSTS § 8-103(a) (1989)).
133 OHIO REV. CODE ANN. § 2117.06(B) (Anderson 1998).
135 E.g., id.
138 CAL. PROB. CODE § 700 (repealed 1988).
139 Id. § 9100 (West 1991 & Supp. 2002).
response to Pope. Its former statute was modified in favor of a scheme similar to that of the Uniform Probate Code. Michigan's new statute provides for a four-month limitations period, if notice is received, that runs from the appointment of the personal representative. If such notice is not received, then there is a three-year limitations period that runs from the decedent's death. Finally, Missouri also altered its statutory scheme by enacting a statute that forecloses all claims that are not filed within one year of the decedent's death, regardless of when or if a personal representative is appointed.

B. The Uniform Probate Code's Response

The Uniform Probate Code adopted a hybrid approach in its non-claim statute. The 1989 amendment bars claims against the decedent's estate that are not presented within one year of the decedent's death. The second part of the Uniform Probate Code approach allows a personal representative to mail or otherwise deliver notice to a creditor of a decedent that the claim will be barred on the occurrence of the later of four months after publication notice or sixty days after mail or delivery notice. Thus, this approach has a self-executing component that bars claims not brought within a relatively lengthy one-year period and a non-self-executing component that, subject to actual notice which takes away a due process concern, allows the limitations period to be much shorter than one year.

C. The Advantages of the Above Statutes Compared to Kentucky's Provision

Statutes such as the ones enacted by Maryland, Ohio, Indiana, and the Uniform Probate Code, eliminate potential due process problems under Pope that arise under Kentucky's current statutory system. Legislative revision would be beneficial in eliminating the potential problems of existing Kentucky law. The question is, which statutory construction better conforms to the goals of the legislature? Kentucky's current system

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141 See infra notes 144-46 and corresponding text.
144 See Unif. Probate Code § 3-803 (amended 1997).
145 Id. § 3-803(a)(1).
146 Id. §§ 3-803(a)(2), 3-801.
includes both short and long-term statutes. Maryland, Ohio, and Indiana simply impose a one-year “middle-length” statute that bars all claims, but this system may not be best in light of the Kentucky legislature’s presumed intention to expedite the probate process with its 1988 revisions. The legislature may wish to keep the current system, consisting of a short and long-term limitations period, to allow claims in certain defined categories to be promptly barred. This could be achieved through the enactment of a statute similar to the Uniform Probate Code.

States have generally employed two different statutory schemes in order to conform their probate non-claim statutes to the requirements of due process as outlined in Pope. The first method is to discard the notions of long and short-term limitations periods and enact one medium-term period, typically one year, which runs from the death of the decedent. While these statutes have been held to conform to the due process notice requirements of Pope, commentators have noted the intrinsic unfairness of such statutes to creditors and a possible amenability to a due process attack on another ground. Professor Mark Reutlinger observed that in order to obviate the application of the Pope decision, many states have simply shortened the length of the long-term statutes and combined them with their short-term statutes. While this rectifies the Pope due process concerns, Professor Reutlinger argued that it is not the proper statutory policy to enact. He contended that a one-year bar from the date of the decedent’s death is insufficient time for some creditors to learn of the decedent’s death and present a claim. Finally, Professor Reutlinger predicted that as non-claim statutes that run from the death of the decedent grow shorter, they may eventually be attacked on due process grounds as allowing insufficient time to present a claim and therefore denying property rights in violation of the Fourteenth Amendment.

The other method states employ in revising their statutes to comply with Pope’s mandate is the inclusion of a short and long-term provi-
sion. These provisions are similar to the Uniform Probate Code in that they provide an expedited claims period for creditors who have received actual notice. There is also a long-term period, generally two or three years from the decedent’s death, which catches all other claims in which actual notice was not received. In light of the concerns Professor Reutlinger expressed concerning the combined statutes, and the Kentucky legislature’s presumed intent to provide both short and long-term statutes, Kentucky should revise its statute in this manner, retaining both a short and long-term non-claim provision.

D. Revising Kentucky’s Short-Term Statute

According to Professor Waterbury, “[t]he goal of revising short-term statutes should be to effect compliance with Pope’s ‘actual notice’ requirement while minimizing the negative impact of such compliance on prompt, efficient, and economical estate settlement.” In light of this goal, the legislature may want to consider a short-term statute similar to the approach taken in the Uniform Probate Code that allows the personal representative to elect to shorten the generally applicable statute of limitations to claims against the decedent’s estate, provided the representative complies with a statutorily defined actual notice requirement to the creditor. This short-term statute will not offend the due process requirements of Pope because it will only apply once actual notice is given. This provision should run from the date of the receipt of notice and should be a few months in duration.

E. Revising Kentucky’s Long-Term Statute

Kentucky should then amend its long-term statute to a time period the legislature feels best balances the interests of all parties and begins to run at the death of the decedent. Limitations periods that trigger the time bar at death have consistently been held by state courts interpreting Pope

156 See Reutlinger, supra note 150, at 433.
158 Waterbury, supra note 10, at 774-75.
161 K.R.S. § 396.205.
162 See Waterbury, supra note 10, at 774 (noting that such statutes generally run from one to five years).
to be self-executing and not subject to the notice requirement. Such a statutory construction will prevent situations that have arisen in other states where there is a constitutional attack under *Pope* that allows a claim to be presented well after the state legislature has determined that such a claim should be barred.

**CONCLUSION**

The *Pope* decision is pertinent to Kentucky's non-claim provisions for two reasons. First, it was decided during approximately the same time-period that the state legislature last amended its chapter governing claims against the decedent's estate. Second, Kentucky's statutory scheme is such that both the short and long-term provisions run from the action of the probate court, and therefore implicate the due process concern enumerated in *Pope*. In light of the litigation and statutory revisions concerning these statutes in other states, legislative revision in Kentucky that takes into account the interests of the creditors and the estate beneficiaries, as well as the efficiency of the probate process, should be undertaken.

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164 K.R.S. ch. 396.

165 *Id.* § 396.011(1).

166 *Id.* § 396.205.

167 See generally *In re Estate of McDowell*, 777 P.2d 826 (Kan. 1989); *In re Estate of Barthel*, 468 N.W.2d 689 (Wis. 1991).

168 See generally *CAL. PROB. CODE* § 9100 (West 1991 & Supp. 2002); *MICH. COMP. LAWS. ANN.* § 700.3803 (West 2002).