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The Kentucky No Action Statute: Down for the Count?

INTRODUCTION

The Kentucky no action statute limits the time for bringing actions involving improvements to real property¹ Since its enactment over two decades ago, the statute has functioned as a source of confusion and uncertainty for potential litigants. Kentucky's statute (the "Act"), like scores of similar statutes enacted across the nation, was promoted by lobbyists for the design and construction industries² as a means of limiting formerly untethered litigation aimed at those industries. These enactments extinguish causes of action against architects and builders after a stipulated number of years following substantial completion of a project.³

¹ KENTUCKY REVISED STATUTES § 413.135 actions for damages arising out of injury.

(1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the construction components, design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, shall be brought against any person after the expiration of seven (7) years following the substantial completion of such improvement.

(2) Notwithstanding the provisions of subsection (1) of this section, in the case of such an injury to property or the person or wrongful death resulting from such injury which injury occurred during the seventh year following substantial completion of such improvement, an action to recover damages for such injury or wrongful death may only be brought within one (1) year from the date upon which such injury occurred (irrespective of the date of death), but in no event may such an action be brought more than eight years after the substantial completion of construction of such improvement.

(3) Nothing in this section shall be construed as extending the period prescribed by statute for the bringing of any action for damages.

(4) As used in this section, the term "person" shall mean an individual, corporation, partnership, business trust, unincorporated association or joint stock company; the term "substantial completion" shall be construed to mean the date upon which the owner of the structure, project or facility first entered upon the occupancy or commenced the use thereof.

KY. REV. STAT. ANN. § 413.135 (Baldwin Supp. 1989) [hereinafter KRS].

² See generally Comment, *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers and Builders*, 60 Ky. L.J. 462, 464-66 (1971-72).

³ *Id.*

The popular name of these enactments, "no action statutes," was derived from the intended effect of the legislation.⁴ The design and construction industries advocated this legislation because construction defects in buildings, and injuries resulting therefrom, may occur decades after the work is completed.⁵ The unique quality of no action statutes becomes apparent when contrasted with traditional statutes of limitation. Traditional statutes of limitation run from the date of the plaintiff's injury, at which time the action "accrues."⁶ No action statutes, however, may extinguish an action before an injury occurs (accrual). Under these statutes, the time limit for bringing an action runs from the date when construction is substantially complete, regardless of when an actual injury occurs.⁷

The confusion regarding no action legislation stems from the history of these statutes. Among thirty-seven states that have enacted some form of this statute, thirty-three have faced constitutional challenges with mixed results.⁸ At least six states have

⁴ See generally Annotation, 93 ALR3d 1242, 1245-49 (1979).

⁵ *Id.* See also Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for No-Action*, 18 CATH. U.L. REV. 361 (1969).

⁶ See Comment, *supra* note 5.

⁷ *Id.*

⁸ The following cases upheld the constitutionality of the statute: *Carter v. Hartenstein*, 455 S.W.2d 918 (Ark. 1970), *appeal dismissed*, 401 U.S. 901 (1971); *Regents of the University of California v. Hartford Accident & Indemnity Co.*, 131 Cal. Rptr. 112 (Cal. App. 1976); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982); *Zapata v. Burns*, 542 A.2d 700 (Conn. 1988); *Cheswold Vol. Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413 (Del. 1984); *Britt v. Schindler Elevator Corp.*, 637 F. Supp. 734 (D.D.C. 1986); *American Liberty Ins. Co. v. West & Conyers, Architects and Eng'rs*, 491 So.2d 573 (Fla. Dist. Ct. App. 1986); *Mullis v. Southern Co. Services*, 296 So. 2d 579 (Ga. 1982); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 644 P.2d 341 (Idaho 1982); *People Ex. Rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 500 N.E.2d 34 (Ill. 1986); *Beecher v. White*, 447 N.E.2d 622 (Ind. App. 1983); *Burmester v. Gravity Drainage Dist. #2*, 366 So. 2d 1381 (La. 1978); *Whiting-Turner Contracting Co. v. Coupard*, 499 A.2d 178 (Md. 1985); *Klein v. Catalano*, 437 N.E.2d 514 (Mass. 1982); *O'Brien v. Hazelet & Erdal*, 299 N.W.2d 336 (Mich. 1980); *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982); *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So.2d 320 (Miss. 1981); *Reeves v. Ille Electric Co.*, 551 P.2d 647 (Mont. 1976); *Williams v. Kingery Constr. Co.*, 404 N.W.2d 32 (Neb. 1986); *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972); *Howell v. Burk*, 568 P.2d 214 (N.M. App. 1977); *Lamb v. Wedgewood South Corp.*, 302 S.E.2d 868 (N.C. 1983); *Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733 (N.D. 1988); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362 (6th Cir. 1984); *Joseph v. Burns*, 491 P.2d 203 (Ore. 1971); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715 (Pa. 1978); *Walsh v. Gowing*, 494 A.2d 543 (R.I. 1985); *Harmon v. Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522 (Tenn. 1981); *Suburban Homes v. Austin-Northwest Dev. Co.*, 734 S.W.2d 89 (Tex. Ct. App. 1987); *Good v. Christensen*, 527 P.2d 223 (Utah 1974); *Smith v. Allen-Bradley Co.*, 371 F. Supp. 698 (W.D. Va. 1974);

amended their statutes in response to constitutional challenges.⁹ In Kentucky alone, the Act failed twice to pass constitutional muster and was amended once as a consequence of judicial action.¹⁰ Despite this scrutiny, Kentucky's statute remains constitutionally unsound. As recently as February of 1989, the Kentucky Court of Appeals noted that the constitutionality of the no action statute in its current, amended form is "dubious."¹¹

This Comment examines the brief, but active history of Kentucky's statute of repose and its current status in light of the 1986 amendment and the Court of Appeals' comments in *Radcliff Homes, Inc. v Jackson*.¹² This Comment also addresses the similar confusion in other states and focuses on possible alternatives and guidelines for future amendments.

I. THE EMERGENCE OF NO ACTION STATUTES: LIABILITY OF ARCHITECTS AND ENGINEERS

Liability for defective design or construction of buildings can be traced from ancient Babylon through English common law to early American jurisprudence.¹³ However, the doctrine of privity

Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 503 P.2d 108 (Wash. 1972).

The following cases held the no action statute unconstitutional: *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725 (Ala. 1983); *Turner Constr. Co., Inc. v. Scales*, 752 P.2d 467 (Ark. 1988); *Shibuya v. Architects Hawaii Ltd.*, 647 P.2d 276 (Haw. 1982); *Fujioka v. Kam*, 514 P.2d 568 (Haw. 1973); *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967); *Pacific Indem. Co. v. Thompson-Yeager, Inc.*, 260 N.W.2d 548 (Minn. 1977); *State Farm Fire & Casualty Co. v. All Electric, Inc.*, 660 P.2d 995 (Nev. 1983); *Henderson Clay Products, Inc. v. Edgar Wood & Assocs.*, 451 A.2d 174 (N.H. 1982); *Broome v. Truluck*, 241 S.W.2d 739 (S.C. 1978); *Daugaard v. Baltic Co-Op. Bldg. Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984); *Kallas Millwork Corp. v. Square D. Co.*, 225 N.W.2d 454 (Wis. 1975); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980).

⁹ FLA. STAT. ANN. § 95-11(3)(c) (Supp. 1980) replaces a 1975 statute held unconstitutional in *Overland Construction Co. v. Simmons*, 369 So. 2d 572 (Fla. 1979); HA. REV. STAT. § 657-8 (1985) replaces earlier statutes twice held unconstitutional; ILL. ANN. STAT. Ch. 110, para. 13-214 (Smith-Hurd 1989) replaces a statute held unconstitutional in *Skinner v. Hellmuth, Obata & Kassalbaum, Inc.*, 500 N.E.2d 34 (Ill. 1986); KY. REV. STAT. ANN. § 413.135 (Baldwin Supp. 1989). MINN. STAT. ANN. § 541.051 (West 1990) supersedes a 1965 statute; NEV. REV. STAT. Chapter 11 (Michie 1989) replaces a 1965 statute held unconstitutional.

¹⁰ See *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) and *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986); KRS § 413.135(1) (Michie Supp. 1988).

¹¹ See *Radcliff Homes v. Jackson*, 766 S.W.2d 63 (Ky. App. 1989).

¹² *Id.* at 63.

¹³ See generally Comment, *Design for Challenge: The Kentucky Statute of Repose for Improvements to Real Property*, 73 Ky. L.J. 1143 (1984-85). That Comment fully describes

of contract,¹⁴ established in 1842, kept the frequency of early litigation against the construction industry at a minimum.¹⁵ Nearly a century passed before this barrier to liability tumbled, leaving the design and construction industries vulnerable to lawsuits from an expanded group of potential claimants. Further, this vulnerability would continue for the entire life of the structure or improvement.¹⁶ In the absence of the privity barrier, any intended beneficiaries of a contract with a builder or designer might recover.¹⁷ With increasing litigation on the horizon, the construction industry mobilized to develop limits on liability resulting from construction projects.¹⁸ The American Institute of Architects, the National Society of Professional Engineers and the Associated General Contractors of America collectively developed model no action statutes.¹⁹ The groups lobbied for enactment of these statutes across the nation, with notable success.²⁰ Kentucky followed suit and enacted a no action statute similar to the model in 1966.²¹

the historical background of the statute in Kentucky and across the nation. This Comment focuses largely on developments since *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986), an opinion not final at press time in the earlier Comment.

¹⁴ "Privity of contract" is defined as a "relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and defendant in respect of the matter sued on." BLACK'S LAW DICTIONARY 1049 (5th ed. 1979).

¹⁵ The doctrine of privity of contract was established in *Winterbottom v. Wright*, 10 M&W 109, 152 Eng. Reprint 402 (1842). A third party sought a judgment against a "design professional" for injuries resulting from unsafe conditions in a structure. Recovery was denied because the third party lacked privity with the "design professional."

¹⁶ Judge Cardozo dealt a blow to the privity restriction in a notorious products liability case. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). However, the "knock-out punch" was delivered in *Inman v. Binghampton Housing Auth.*, 143 N.E.2d 895 (N.Y. 1957), when the privity barriers were broken in the arena of architects' and contractors' liability. See generally Comment, *supra* note 5, at 361.

¹⁷ See A. CORBIN, CORBIN ON CONTRACTS §§ 776-777 (1951).

¹⁸ See Comment, *supra* note 5, at 365.

¹⁹ The model statutes expressly barred actions to recover damages "for any deficiency in the design, planning, supervision or observation of construction or construction of improvement to real property," as well as for injuries to property or person. See Comment, *supra* note 5, at 365 n.31.

²⁰ See OFFICE FOR PROFESSIONAL LIABILITY RESEARCH, VICTOR O. SCHINNERER & Co., A/E LEGAL NEWSLETTER, Special Supplement No. 1, Revision No. 7 (1988). The statutory limitations vary, ranging from two to fifteen years. *Id.*

²¹ Kentucky's legislature initially enacted a law aimed at limiting liability of those connected with the construction industry, whereby causes of action "for personal injuries suffered by any person against the builder of a home or other improvements" were required to be brought within 5 years of the original occupancy of the improvement. KRS § 413.120(14) (1964). In 1966, a "no-action" statute, patterned after the model statute promoted by the construction industry, was enacted. KRS § 413.125 (1966). This statute

Inherent problems soon emerged as, one by one, the statutes met constitutional challenges.²²

The statutes found unconstitutional generally were invalidated on one of three grounds: (1) the statutes violated due process guarantees because their ambiguous titles inadequately apprised the public of the statutes' effects;²³ (2) the statutes ignored equal protection guarantees since the persons involved in the design and construction industries did not compose a class warranting special treatment and immunity from suit;²⁴ or (3) the statutes violated state constitutional prohibitions of legislation that destroys existing legal remedies.²⁵ Kentucky's statute has not been immune to these attacks. To the contrary, KRS section 413.135 withstood several constitutional attacks and has undergone several changes over the past twenty years.²⁶

II. ROUND I. THE CONSTITUTIONAL RIGHT TO A REMEDY FOR PERSONAL INJURIES

The first serious constitutional challenge to Kentucky's no action statute occurred in 1973,²⁷ just seven years after its enactment. The Act had been tested previously in the Sixth Circuit,²⁸ where

attempted to extinguish all actions to recover damages for injury to property or person against those involved in the "design, planning, supervision, inspection or construction of any improvement after five years." KRS § 413.125 (1966). The act specifically excluded from its coverage owners, tenants, and those in control of the improvement. *See generally* Stipanowich, *Kentucky's "No Action" Statute: Recalled to Life?*, 51 KY. BENCH & BAR No. 3, p. 112 (1987).

²² *See supra* notes 8 and 9.

²³ *See, e.g.*, *Plant v. R.L. Reid, Inc.*, 313 So.2d 518 (Ala. 1975).

²⁴ *See Fujioka v. Kam*, 514 P.2d 568 (Haw. 1973). The court held that the statute designated an unsupportable classification that failed to meet the equal protection guaranty. Hawaii's Supreme Court concluded that the statute called for arbitrary and capricious discrimination.

²⁵ *See Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967). The court determined that the Illinois statute violated the state constitutional provision prohibiting the General Assembly from passing local or special laws providing for any corporation, association, or individual any special or exclusive privilege, immunity or franchise. ILL. ANN. STAT. Ch. 110, para. 13-214 has since been amended to a standard "discovery rule" limitation, whereby an action must be brought within four years of the time of discovery of the act or omission of the person engaged in design or construction. *See OFFICE FOR PROFESSIONAL LIABILITY RESEARCH, supra* note 20, at 4-5.

²⁶ *See generally* *Lee v. Fister*, 413 F.2d 1286 (6th Cir. 1969); *Tabler*, 704 S.W.2d 179; *In re Beverly Hills Fire Litigation*, 672 S.W.2d 922, 583 F Supp. 1163 (E.D. Ky. 1984); *Carney v. Moody*, 646 S.W.2d 40 (Ky. 1982); *Ball Homes, Inc. v. Volpert*, 633 S.W.2d 63 (Ky. 1982); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973).

²⁷ *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973).

²⁸ *Lee v. Fister*, 413 F.2d 1286 (6th Cir. 1969).

the statute's validity was upheld.²⁹ However, Kentucky's highest court attracted the attention of the construction industry when it decided to review *Saylor v Hall* on constitutional grounds.³⁰ Amici curiae briefs were submitted by the American Institute of Architects, the National Society of Architects, Kentucky Society of Professional Engineers, Consulting Engineers Council of Kentucky, Kentucky Highway Division, Homebuilders Association of Kentucky and three regional Associated General Contractors groups.³¹ Despite this onslaught of support, the unfairness of the Act was made apparent by the facts of the case. The suit was brought a year after the death and injury of two children caused by the collapse of a fourteen year old stone fireplace in the plaintiff's home.³² The trial court dismissed the case against the builder because the Kentucky no action statute extinguished the plaintiff's cause of action five years after completion of his home.³³ The Court of Appeals reversed and found that a statute that destroys a common law right of action for negligence before it accrues violates Kentucky's constitutional guarantee of a judicial remedy for personal injury or wrongful death.³⁴ The Court admonished the legislature that such statutes "perform an abortion of the right of action, not in the first trimester, but before conception."³⁵ Thus, Kentucky's highest court administered the first blow to the constitutional vitality of the no action statute.

Following *Saylor*, the Act was unenforced for nearly a decade. However, in 1982, without overruling *Saylor*, Kentucky's Supreme Court twice reexamined the "*Saylor* test"³⁶ and adopted a less

²⁹ The Sixth Circuit construed the limitation "as an added protection to builders, who might otherwise be liable for accidents resulting from dilapidated conditions in deteriorating structures. " See *id.* at 1289.

³⁰ 497 S.W.2d at 218 (Ky. 1973).

³¹ *Id.* The court commended the "excellent and exhaustive briefs filed by various interested groups that have appeared by our permission as amici curiae in this appeal. "

³² *Id.* at 220.

³³ *Id.*

³⁴ *Id.* at 224.

³⁵ *Id.*

³⁶ The test applied in *Saylor* determined whether a constitutionally-protected cause of action existed at the time the statute was enacted. See *Saylor*, 497 S.W.2d at 224. It was unsuccessfully argued in *Saylor* that KRS § 413.135 did not extinguish a constitutionally-protected cause of action for negligence where the plaintiff was a third party, possessing no privity of contract with appellee and the defendant was a contractor whose work had been completed and accepted by the owner, with whom appellee shared privity. *Id.* at 223.

stringent guide for application of the no action statute.³⁷ In addressing *Carney v. Moody*,³⁸ the Court distinguished *Saylor* by noting that the common law, as it prevailed in 1891,³⁹ would not have afforded a remedy against the builder for personal injuries in the absence of privity.⁴⁰ Thus, although the *Saylor* test was left intact, the focus of the test was modified to turn on whether such a cause of action existed in 1891, the time the Kentucky Constitution was enacted.⁴¹ The Court concluded that because the privity doctrine had prevented third party causes of action against builders and architects in 1891, the Kentucky Constitution would not now guarantee such causes of action.⁴² The *Carney* decision thereby gave the legislature the prerogative to limit causes of action not constitutionally protected in 1891.⁴³

III. ROUND II: THE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION

Although the Act survived its first constitutional confrontation, it enjoyed only short-lived favor. The *Beverly Hills Fire Litigation* in 1984 marked the beginning of the Act's second series of constitutional challenges.⁴⁴ This suit arose from a tragic fire at the Beverly Hills Supper Club in Northern Kentucky, which killed 265 people and injured hundreds more.⁴⁵ Aluminum wiring manufacturers and suppliers attempted to employ the no action statute as

³⁷ The court held in *Carney v. Moody* that the constitutional protections that were the focus of *Saylor v. Hall* were not violated by application of the no action statute to causes of action not recognized in 1891, the time of passage of Kentucky's constitution. See *Carney v. Moody*, 646 S.W.2d 40, 41 (Ky. 1982).

In 1982 the Kentucky Supreme Court first examined KRS § 413.135 in *Ball Homes, Inc. v. Volpert*, 633 S.W.2d 63 (Ky. 1982). In *Ball Homes*, the court used the *Saylor* test and held that the plaintiff's claim was not one that existed when the no action statute was enacted. The court held that there was, therefore, no constitutional impediment to barring the action and dismissed the case. See *Ball Homes*, 633 S.W.2d at 63. The *Ball Homes* decision did not have the impact of *Carney*. In *Carney*, the court held that the constitutional protections that were the focus of *Saylor* were not violated by application of the no action statute to causes of action not recognized in 1891, the time of passage of the state constitution. See *Carney*, 646 S.W.2d at 41.

³⁸ 646 S.W.2d at 40.

³⁹ The Kentucky Constitution was enacted in 1891.

⁴⁰ See *Carney*, 646 S.W.2d at 41.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *In re Beverly Hills Fire Litigation*, 583 F. Supp. 1163 (E.D. Ky. 1984).

⁴⁵ *Id.* at 1165-66.

a shield against potential liability for the tragedy.⁴⁶ Upon certification of the question by a federal court,⁴⁷ Kentucky's Supreme Court held the statute of repose was inapplicable to manufacturers of construction components such as aluminum wiring.⁴⁸ While expressly reserving determination of the Act's constitutionality, the Court noted that Kentucky's Constitution forbids any "special act" that "arbitrarily or beyond reasonable justification discriminate[s] against some persons or objects and favor[s] others."⁴⁹

The Supreme Court explained that suppliers of materials for construction projects should not be favored in law over suppliers of materials for other products and industries.⁵⁰ This group's exclusion from the shield left the Kentucky no action statute an obtrusive target for the equal protection attack that had precipitated the demise of similar statutes of other states.⁵¹

The holdings in the *Beverly Hills Fire Litigation*⁵² set the stage for the second blow to the no action statute, which was delivered in *Tabler v. Wallace* and *General Electric v. Nucor*.⁵³ Both cases involved appeals from summary judgments in the circuit court barring claims against the architects, contractors and suppliers.⁵⁴ The circuit court judges determined that the claims were not filed

⁴⁶ *Id.* at 1166.

⁴⁷ Pursuant to Ky. R. Civ. Proc. 76.37(1), Judge Wilhoit certified to the Kentucky Supreme Court the question of whether the no action statute was constitutional as applied to the facts of the *Beverly Hills Fire* case. *Id.* at 1165.

⁴⁸ See *In re Beverly Hills Fire Litigation*, 672 S.W.2d at 925.

⁴⁹ *Id.* at 926. Kentucky's Constitution provides as follows:

Local and Special Legislation. The General Assembly shall not pass local or special acts concerning any of the following subjects, namely:

Fifth: To regulate the limitation of civil or criminal causes.

KY. CONST. § 59.

⁵⁰ *In re Beverly Hills Fire Litigation*, 672 S.W.2d at 926.

⁵¹ See *supra* note 24 and accompanying text.

⁵² See *supra* notes 44, 47, 48 and accompanying text.

⁵³ See *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986). *Tabler v. Wallace* and *General Electric v. Nucor* were consolidated for review by the Kentucky Supreme Court. *Tabler v. Wallace* was granted discretionary review while *General Electric v. Nucor* was pending before the Court of Appeals, and the Supreme Court accepted transfer. The cases involved identical issues. See *Stipanowich, supra* note 21, at 12.

The wife of an elevator maintenance man who was fatally injured while working on a hotel elevator in Lexington, Kentucky brought *Tabler v. Wallace*. She sued the elevator company, the installer of the elevator, and the architect who approved the design. See *Tabler*, 704 S.W.2d at 180.

General Electric v. Nucor was initiated by the owner of a warehouse whose roof collapsed due to the failure of the support trusses. The owner sought damages from the architect, the contractor and the supplier of the trusses. See *Tabler*, 704 S.W.2d at 180-81.

⁵⁴ *Id.* at 181.

within five years from the date of substantial completion of the structures, and were thus barred by the statute.⁵⁵

Kentucky's Supreme Court granted *Tabler* discretionary review and accepted transfer of *General Electric v Nucor*⁵⁶ to address the constitutionality of issues yet unanswered.⁵⁷ Justice Leibson, writing the opinion for a divided court,⁵⁸ found that the legislature failed to provide adequate justification for creating a special class of builders, architects and engineers and for " . . . conferring special privileges and immunities on that class. " ⁵⁹ The only apparent justification for the legislation was a persuasive lobbying effort by those faced with increasing exposure to litigation.⁶⁰ Justice Leibson noted the express purpose of Section 59(5)⁶¹ of the constitution is to prevent those who gain sufficient political power or who can afford an influential lobbyist from achieving immunity from laws that govern others.⁶² Other groups, such as the manufacturers and suppliers, possessed insufficient political pull to gain the benefits of this "legislative windfall."⁶³ Justice Leibson concluded that this statute could not withstand public policy analysis,⁶⁴ and that it offended the intent and purpose of Section 59 of the Kentucky Constitution.⁶⁵

IV ROUND III. THE UNFOUGHT BATTLE—VAGUENESS OF TITLE

In *Tabler*, Justice Leibson indicated that the Act may be defective in yet another respect.⁶⁶ Reference to KRS section 413.135

⁵⁵ *Id.*

⁵⁶ *See supra* note 53.

⁵⁷ Kentucky courts had not considered whether the no action statute violated equal protection guarantees or constituted "special legislation." Other states had confronted these issues. *See supra* notes 24 and 25.

⁵⁸ *See Tabler*, 704 S.W.2d at 179. Justice Vance concurred in part and dissented in part. Justice Stephenson dissented by separate opinion and Justice Wintersheimer dissented.

⁵⁹ *Id.* at 187.

⁶⁰ *Id.*

⁶¹ *Id.* Section 59 of the Kentucky Constitution prohibits local and special legislation. *Accord Phillips v. ABC Builders*, 611 P.2d 821 (Wyo. 1989) (invalidating a no action statute under a provision substantially identical to Kentucky's Section 59(5)).

⁶² *See Tabler*, 704 S.W.2d at 187.

⁶³ *Id.*

⁶⁴ *Id.* The *Tabler* court engaged in public policy analysis when it considered the recent catastrophe involving the collapse of an overhead walkway in Kansas City's Hyatt Regency Hotel. This collapse injured hundreds of people and was caused by faulty design and construction. The court found it repugnant to its sense of decency that the interests of a special group should take priority over the protection of the general public.

⁶⁵ *Id.* at 186.

⁶⁶ *Id.* at 184-85. Justice Leibson noted Alabama's struggle with similar issues. *See id.* at 185.

as a statute of limitations⁶⁷ is misleading.⁶⁸ The statute does not function as a limitation on the time within which one may bring an action after it accrues. Instead, this legislation extinguishes a cause of action prior to accrual.⁶⁹

Alabama's no action statute fell victim to a constitutional challenge on grounds alluded to by Justice Liebson in *Tabler In Bagby Elevator and Electric Company, Inc. v. McBride*,⁷⁰ Alabama's Supreme Court held Alabama's no action statute unconstitutional under Alabama's counterpart to Section 51⁷¹ of the Kentucky Constitution. It found Alabama's statute offensive in two ways: (1) the title failed to clearly express the subject of the statute, and (2) the content of the act embraced two subjects, a statute of limitations and a provision abolishing certain rights of action against architects and builders.⁷² Alabama's Supreme Court determined that a title indicating a statute of limitations in the traditional sense⁷³ concealed the true nature of the act, which creates absolute immunity against certain suits. Kentucky's Supreme Court lamented similar problems with KRS Section 413.135; however, the court stopped short of any decision regarding the constitutional validity of the statute's title.⁷⁴

V THE AMENDED STATUTE AND *RADCLIFF HOMES V JACKSON*

In 1986, the legislature followed up on the Supreme Court's admonishments in *Tabler* and amended the no action statute.⁷⁵ The Kentucky General Assembly repaired the statute in three important respects. First, the statute's scope was broadened to encompass manufacturers and suppliers of construction components.⁷⁶ This change apparently was in response to the equal protection criticisms

⁶⁷ See *infra* note 84. The statute is also placed in Chapter 413, entitled "Limitations of Actions." See *infra* note 92 and accompanying text.

⁶⁸ *Tabler*, 704 S.W.2d at 185.

⁶⁹ *Id.* at 185.

⁷⁰ 291 So.2d 306 (Ala. 1974).

⁷¹ *Tabler*, 704 S.W.2d at 184-85. Section 51 of Kentucky's Constitution prohibits laws relating to more than one subject, unless clearly expressed in the title. Section 45 of the Alabama Constitution provides virtually the same protections. See *Tabler*, 704 S.W.2d at 184-85.

⁷² *Bagby Elevator and Electric Company, Inc. v. McBride*, 291 So.2d 306, 312 (Ala. 1974).

⁷³ *Id.* at 312.

⁷⁴ *Tabler*, 704 S.W.2d at 185.

⁷⁵ See *infra* note 92 for the text of the 1986 version of KRS § 413.135.

⁷⁶ See *id.*

voiced by the court in the *Beverly Hills Fire Litigation* and later in *Tabler*. This alteration afforded all members of the construction industry "no action" protection.⁷⁷

Secondly, the amendment added a brief preamble of purpose in an attempt to establish legislative history and thwart future equal protection attacks.⁷⁸ In *Tabler*, Justice Leibson hinted that the absence of legislative history of KRS Section 413.135 contributed to its demise.⁷⁹ In response the legislature provided justification,⁸⁰ albeit scant, for affording special statutory protection to the construction industry.

The third change is somewhat more perplexing. The legislature extended the time within which a plaintiff must sue from five to seven years after substantial completion.⁸¹ This can be explained only as a fairness modification, mitigating the sometimes harsh effects⁸² of the statute.

Apparently, the legislature acted with too much haste, as the amended statute remains riddled with flaws. The problems regarding vagueness, to which Justice Leibson alluded in *Tabler*,⁸³ remain unaddressed. The 1986 statute is described as "An Act relating to limitations of actions."⁸⁴ This title fails to reveal the true nature of the act, which is, effectively, an absolute bar to actions arising from improvements to real property more than seven years after substantial completion.⁸⁵ The title does not give adequate notice to the public of the effect and potential consequences of the statute.⁸⁶

Additionally, in *Radcliff Homes, Inc. v. Jackson*,⁸⁷ the Court of Appeals recently expressed doubts about the constitutionality of

⁷⁷ See *id.*

⁷⁸ H.B. 543, 1986 Reg. Sess., 1986 Acts Issue 1345. The preamble states, "WHEREAS without protection by a statute of limitations there will be a chilling effect on the contributions of builders, architects, engineers, suppliers, manufacturers and materialmen to the state's economy."

⁷⁹ *Tabler v. Wallace*, 704 S.W.2d 179, 184-87 (Ky. 1986).

⁸⁰ See *supra* note 78.

⁸¹ See *supra* note 1 for the text of KRS § 413.135.

⁸² The foreclosure of claims arising from such tragic events as the Beverly Hills Super Club fire, the Hyatt Regency walkway collapse and *Saylor v. Hall* illustrates the sometimes harsh effect of the statute.

⁸³ *Tabler*, 704 S.W.2d at 184-85.

⁸⁴ H.B. 543, Ky. Acts chapter 479, Reg. Sess. (Baldwin 1986). The prior version of the statute was entitled, "An Act relating to the Statute of Limitations." Ky. Acts, ch. 246 (Baldwin 1966).

⁸⁵ *Tabler*, 704 S.W.2d at 184.

⁸⁶ *Id.*

⁸⁷ See *Radcliff Homes, Inc. v. Jackson*, 766 S.W.2d 63, 68 (Ky. App. 1989).

the amended statute. An agitated property owner sued his neighbors, the owners of an odoriferous septic tank.⁸⁸ The owners of the malfunctioning tank then sued the builder of their home, six years and three months after substantial completion.⁸⁹ The builder based his defense upon an anomaly⁹⁰ then found in the amended version of the no action statute.⁹¹ KRS section 413.135(2) was the unaltered remnant of the 1966 statute.⁹² It provided that in the case of injury to property or person during the fifth year following substantial completion, an action could have been brought within one year after the date of injury, “*but in no event may such an action be brought more than six years after the substantial completion of construction of such improvement.*”⁹³ This error caused amended section one of the statute to bar actions seven years after substantial completion, while section two barred actions six years after substantial completion.⁹⁴ Kentucky’s Legislative Research Commission subsequently corrected this anomaly.⁹⁵

The Court of Appeals disregarded the builder’s defense and held that KRS section 413.135 did not bar the plaintiff’s claim.⁹⁶ Although the court did not specifically address the statutory anomaly, it opined that the constitutionality of the amended act is

⁸⁸ See *id.* at 64-65.

⁸⁹ *Id.* at 68.

⁹⁰ See Stipanowich, *supra* note 21, at 58.

⁹¹ *Radcliff Homes*, 766 S.W.2d at 67-68.

⁹² The 1986 version of sections one and two of KRS § 413.135 reads as follows:
Actions for damages arising out of injury.

(1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the construction components, design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, shall be brought against any person after the expiration of seven (7) years following the substantial completion of such improvement.

(2) Notwithstanding the provisions of subsection (1) of this section, in the case of such an injury to property or the person or wrongful death resulting from such injury which injury occurred during the fifth year following substantial completion of such improvement, an action to recover damages for such injury or wrongful death may only be brought within one (1) year from the date upon which such injury occurred (irrespective of the date of death), but in no event may such an action be brought more than six (6) years after the substantial completion of construction of such improvement.

KY. REV. STAT. ANN. § 413.185 (Michie Bobbs-Merrill Supp. 1988).

⁹³ *Id.* (emphasis added).

⁹⁴ *Id.*

⁹⁵ KY. REV. STAT. ANN. § 7.136 (Michie Bobbs-Merrill Supp. 1990).

⁹⁶ *Radcliff Homes*, 766 S.W.2d at 68.

“dubious.”⁹⁷ Apparently, the court determined that the faulty savings clause⁹⁸ was ineffective, as reflected in the court’s remark that, “[w]e need not delve into that bucket of worms as the statute in question only cuts off actions filed more than seven years after completion of the improvement.”⁹⁹ The Court of Appeals did not expand on the reasons for its doubts, but the commentary found in *Radcliff Homes* indicates the Court’s dissatisfaction with the statute in its present form.¹⁰⁰

VI. CONSIDERATIONS FOR AMENDMENT

To address the flaws of the Act, the Kentucky General Assembly need not wait until the state Supreme Court sounds the death knell of the no action statute. Before proceeding, ample consideration should be given to similar legislative stumbles experienced by other states.¹⁰¹ After a flurry of constitutional challenges, other jurisdictions have been innovative in their approaches to no action statute reform.¹⁰² These options deserve careful examination before redraft is attempted.

Many no action statutes enjoying constitutional validity are structured similarly to Kentucky’s version. Colorado’s no action statute combines a short discovery rule limitation with an extended outer limit to actions.¹⁰³ A potential plaintiff is given a brief grace period after discovery to file an action, and the building industry

⁹⁷ *Id.*

⁹⁸ Subsection two of KRS § 413.135 is referred to as a “savings clause” because it extends the limitation period by a year for parties injured near the expiration of subsection one’s limitation period. See Stipanowich, *supra* note 21, at 58.

⁹⁹ *Radcliff Homes*, 766 S.W.2d at 68.

¹⁰⁰ *Id.*

¹⁰¹ See *supra* note 8 and accompanying text; see also OFFICE FOR PROFESSIONAL LIABILITY RESEARCH, VICTOR O. SCHINNERER & Co., A/E Legal Newsletter, Revision No. 7 (Spec. Supp. No. 1 1988).

¹⁰² See COL. REV. STAT. § 13-80-104 (1989). (Action must be brought within two years after a claim for relief arises, but in no event more than six years after the substantial completion of the improvement to real property.)

See also Knapp & Lee, *Application of Special Statutes Concerning Design and Construction*, 23 ST. LOUIS U.L.J. 351, 368 (1979). The discovery rule has been applied in products liability, medical malpractice and other malpractice and negligence actions. This rule tolls the statute until the plaintiff discovers that he has suffered an injury, or by reasonable diligence should have discovered it. W. PROSSER & R. KEETON, PROSSER & KEETON ON TORTS § 30, at 166-67 (5th ed. 1984).

¹⁰³ See COL. REV. STAT. § 13-80-104 (1989). The statute requires that an action must be brought within two years after the claim for relief arises, but in no event more than six years after the substantial completion of the improvement to real property.

enjoys the protection it desires from limitless liability¹⁰⁴ This combination mitigates the harshness of no action legislation while retaining its purpose.

Several states vary the limitation period for suits arising from personal injury and those for suits stemming from injury to property¹⁰⁵ These variations apparently were imposed in response to constitutional challenges regarding preservation of remedies.¹⁰⁶

Utah's no action statute recently met biting vilification from that state's Supreme Court,¹⁰⁷ which found the statute violative of the Utah open courts provision.¹⁰⁸ According to the court, this provision of the state constitution may be permissively implicated only where necessary to promote the public's health, safety, morals and welfare.¹⁰⁹ The Utah court determined that the statute failed to eliminate a social or economic evil, as builders and architects should not be excused from liability merely because substantial time has passed between the negligent act and the resultant damage.¹¹⁰ The court concluded that, even if limiting the construction industry's liability and insurance premiums were legitimate purposes, the statute was an arbitrary and unreasonable means of achieving that end.¹¹¹ The court pointed to studies indicating that only 2.1 percent of all claims made nationwide are initiated more than seven years after a building's completion.¹¹² Therefore, the court decided that it was highly unlikely that the statute resulted in lower insurance rates.¹¹³

Faced with this litany of constitutional issues, the Kentucky General Assembly has a tall order to fill. To compose a constitutionally sound statute, the legislature must provide a clear title that

¹⁰⁴ See *supra* note 8; see also Knapp & Lee, *supra* note 102.

¹⁰⁵ See, e.g., CAL. CIV. PROC. CODE § 337.1 (West Supp. 1977); see also *supra* notes 20 and 25.

¹⁰⁶ See *supra* notes 20 and 25.

¹⁰⁷ See *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes' & Son, Inc.*, 782 P.2d 188, 191-93 (Utah 1989). The Utah Open Courts provision is found in UTAH CONST., art. I, § 11.

¹⁰⁸ *Sun Valley*, 782 P.2d at 188. The Utah Open Courts provision is found in UTAH CONST., art. I, § 11, stating: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law
" *Sun Valley*, 782 P.2d at 191.

¹⁰⁹ *Id.* at 191-92.

¹¹⁰ *Id.* at 192.

¹¹¹ *Id.*

¹¹² *Id.* at 193.

¹¹³ *Id.*

informs the public of the statute's effect and purpose,¹¹⁴ and an exhaustive legislative history that justifies the Commonwealth's desire to protect the construction and design industries from limitless liability.¹¹⁵ The Kentucky legislature also should consider lengthening the time bar to mitigate the harshness of the statute. It may also consider eliminating the no action bar for actions arising from personal injury. Without these reforms, the current statute may be false security for those in the construction industry in Kentucky.

The legislature might consider the following example as a guideline for amendment:

AN ACT BARRING ACTIONS CONCERNING IMPROVEMENTS TO REAL PROPERTY TEN YEARS FOLLOWING SUBSTANTIAL COMPLETION

Whereas, without protection limiting the inherently lengthy duration of liability for those involved in the design, construction and supply of improvements to real property and the attendant risks of stale litigation, there will be a chilling effect on the contributions of builders, architects, engineers, suppliers, manufacturers and materialmen to this Commonwealth's economy; and,

Whereas, the construction industry is an essential component in the continued growth and development of the Commonwealth;

Now therefore, Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sections 1 and 2 are amended to read as follows:

413.135 ACTIONS FOR DAMAGES ARISING OUT OF INJURY BARRED

(1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the construction components, design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of such deficiency, shall be brought against any person after the expiration of ten [10] years following the substantial completion of the improvement.

(2) Notwithstanding the provisions of subsection (1) of this section, in the case of such an injury to property or the person or wrongful death resulting from such injury, which injury occurred

¹¹⁴ See *supra* note 74 and accompanying text.

¹¹⁵ See *supra* notes 49 and 59 and accompanying text.

during the tenth year following substantial completion of such improvements, an action to recover damages for such injury or wrongful death may be brought only within one year from the date upon which such injury occurred (irrespective of the date of death), but in no event may an action be brought more than eleven years after substantial completion.

This model extends the time bar to ten years to fall in line with those state statutes currently enjoying constitutional validity.¹¹⁶ This version extinguishes limitless liability from deteriorating structures, and yet affords a claimant ample time within which to bring an action. Although only a small number of claims are filed after seven years,¹¹⁷ the ten year limit gives the industry the security it seeks and leaves potential plaintiffs with a fair opportunity to recover for negligence.

This draft, unlike the 1986 amendment, provides consistency between sections one and two of KRS section 413.135 and accurately provides a safety net in the *eleventh* year for causes of action accruing in the *tenth* year following substantial completion, consistent with the ten year outer limit. The 1986 anomaly was recently corrected pursuant to KRS section 7.136, the Reviser of Statutes Act,¹¹⁸ and the correction is reflected in a 1989 supplement to the statute.¹¹⁹ This modification relieves the courts of dealing with

¹¹⁶ See *supra* notes 8, 20 and 103.

¹¹⁷ See *supra* note 112 and accompanying text.

¹¹⁸ KRS § 7.136. Alterations in statutes permitted on publication.

(1) The commission, in preparing editions of the statutes or supplements or pocket parts thereto for publication or distribution, may renumber sections and parts of sections of the acts of the general assembly, change the wording of headnotes, divide or rearrange sections and parts of sections, change words when directed by law, change reference numbers to agree with renumbered chapters or sections, or to make corrections in reference numbers when sections referred to are repealed or amended and the correction can be made without change in the law, and correct manifest clerical or typographical errors.

KY. REV. STAT. ANN. § 7.136 (Baldwin 1989).

¹¹⁹ KY. REV. STAT. ANN. § 413.135 (Baldwin Supp. 1989). This reprint corrects the anomaly and the Legislative Research Commission notes:

Subsection (1) of this section was amended in 1986 Acts Ch. 479, Section 1, to extend the period of time in which certain actions may be brought from five to seven years. Inadvertently, when the period of time was extended by committee amendment, subsection (2) was not amended to conform. Pursuant to KRS 7.136, the Reviser of statutes has made a technical correction in order to make the subsections consistent.

nonsensical defenses¹²⁰ founded on the prior anomaly in the statute.¹²¹

The extended preamble of purpose addresses the equal protection and special legislation concerns raised by the Supreme Court in *Tabler* and *Beverly Hills Fire*.¹²² This prefatory note furnishes adequate rational basis for distinguishing and immunizing the construction industry from limitless claims.¹²³

Finally, the title of the draft statute leaves little doubt as to content of the enactment. Admittedly, the title is cumbersome, but it affords notice to the public of the effect of the limitation. This amendment eliminates the vagueness concerns expressed by Justice Leibson in *Tabler*.¹²⁴ The draft statute accounts for and corrects the constitutional deficiencies suggested thus far by Kentucky's appellate courts and foreseeable problems encountered by other jurisdictions.

CONCLUSION

No action statutes are not inherently evil tools of the construction industry. They are, instead, essential barriers to limitless claims, without which the construction industry would suffer dire economic consequences. However, no action statutes, without careful drafting, can be and have been problematic. The judiciary's poignant admonitions, the draft statute, and the enactments of other jurisdictions provide ample guidelines for a constitutionally-sound statute of repose.

Anne Gorham

¹²⁰ See *supra* notes 87-95 and accompanying text.

¹²¹ See Stipanowich, *supra* note 21, at 58.

¹²² See *supra* notes 44-65 and accompanying text.

¹²³ See *supra* notes 58-65 and accompanying text.

¹²⁴ See *supra* notes 71-74 and accompanying text.

