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Kentucky Law Survey: Civil Procedure

John R. Leathers
University of Kentucky

Matthew L. Mooney
University of Kentucky

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Civil Procedure
BY JOHN R. LEATHERS* AND MATTHEW L. MOONEY**

INTRODUCTION

Because the most recent issue of the Kentucky Law Survey omitted coverage of civil procedure, this Survey covers cases involving procedural issues for the two-year period prior to the summer of 1985. This discussion includes cases from both the Kentucky Supreme Court and the Court of Appeals. Only those cases designated "To Be Published" will be discussed.1 Practitioners are reminded that opinions denoted as "Not To Be Published" cannot be cited in Kentucky as authority despite the fact that slip opinions and the Kentucky Law Summary descriptions of such cases are routinely available.2

The cases discussed were selected for various reasons. In some areas the occurrence of several conceptually related cases indicated the necessity of comment. In other instances, a single case appeared worthy of comment standing alone. The authors rejected many cases because the issues the cases presented were not sufficiently unique or important to merit comment. With the omission of such significant numbers of cases, obviously this Survey is not intended to be a comprehensive guide to Kentucky's civil procedure case law for the past two years. Practitioners should make their own updates on prior cases using normal legal research methods.

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* Professor of Law, University of Kentucky College of Law. B.B.A., University of Texas at El Paso; J.D., University of New Mexico; LL.M., Columbia University. Of Counsel, McCoy, Baker & Newcomer, Lexington, Kentucky.

** J.D. Candidate, University of Kentucky, 1986.

1 "Every opinion shall show on its face whether it is 'To Be Published' or 'Not To Be Published'.” Ky. R. Civ. P. 76.28(4)(a) [hereinafter cited as CR]. For the full text of the Rule, see KENTUCKY RULES OF COURT (West 1985).

2 "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state.” CR 76.28(4)(c).
Viewed as a group, both the selected and rejected cases continue the tendency to rely heavily on federal trial and appellate decisions interpreting the Federal Rules of Civil Procedure.\(^3\) With the strong similarity between the Federal Rules of Civil Procedure and the Kentucky Rules of Civil Procedure, such reliance is expected to continue. Federal decisions should remain a good source of authority for the practitioner who is faced with a Kentucky Rule of Civil Procedure issue not previously reached by the Kentucky courts. Additionally, federal commentators remain a fertile source of authority for Kentucky decisions, although the preference for Wright and Miller's\(^4\) well-known treatise over Moore's\(^5\) similar treatise is not as marked as previously.\(^6\) Finally, the practitioner is alerted, as a source of authority for the interpretation of Kentucky Rules of Civil Procedure, to the new version of Clay's *Kentucky Practice*, recently published by United States District Court Judge William Bertelsman and Kurt Philipps.\(^7\) This new version is an excellent update of the prior work and contains more extensive citations and commentary than its predecessor. With these factors, caveats and principles in mind, the various Survey topics are addressed in roughly the order encountered in most civil procedure treatises and casebooks.

I. LONG ARM JURISDICTION

Jurisdiction over nonresidents of Kentucky is controlled by the Kentucky long arm statute.\(^8\) In *Texas American Bank v. Sayers*\(^9\) the Kentucky Court of Appeals continued its expansive reading of the long arm statute, although the court still lacks a comprehensive updating of its jurisdictional philosophy.\(^10\)

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\(^6\) See Leathers, Tomasi & Hunt, *supra* note 3, at 552.


Sayers secured a buyer but was denied his commission. He filed suit in Kentucky, asserting jurisdiction over Mitchell under the long arm statute section concerning transacting business. The issue before the court of appeals was whether the telephone transaction between the parties, viewed in light of Mitchell’s other contacts with the state, fell within the statute.

In upholding Kentucky jurisdiction, the court of appeals noted that “[c]ourts have interpreted Kentucky’s statute to extend to the outer limits of the due process clause.” While it is doubtful that a long arm statute limited to claims arising from the particular contact is actually as broad as due process will allow, the jurisdictional holding in Sayers seems quite defensible.

By applying the three-pronged analysis used by the court of appeals in Tube Turns Div. of Chemetron Corp. v. Patterson Co., the court concluded that Mitchell was subject to personal jurisdiction in Kentucky. First, as Tube Turns requires, Mitchell “purposefully avail[ed] himself of the privilege of acting . . .

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11 674 S.W.2d at 37.
12 Id.
13 KRS § 454.210(2)(a) (1985) provides: “A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person’s: 1. transacting any business in this Commonwealth.”
14 674 S.W.2d at 38.
15 See Leathers, supra note 10, at 772.
16 562 S.W.2d 99, 100 (1978). The three criteria were originally delineated by the Sixth Circuit in Southern Mach. Co. v. Mohasco Indus., 401 F.2d 374, 381 (6th Cir. 1968).
17 674 S.W.2d at 38-39.
or causing consequences" in Kentucky by owning and arranging to sell Owensboro National Bank and Central Bank & Trust of Owensboro. Speaking with Sayers by telephone from Texas while Sayers was in Kentucky seems to constitute purposeful action in Kentucky; Mitchell's offer was heard and accepted in Kentucky. Second, Sayers' claim against Mitchell arose from a contract formed in Kentucky when Sayers by telephone accepted Mitchell's offer to seek a buyer for the Mt. Vernon bank. The final element of the three-pronged *Tube Turns* test is that the nonresident defendant have substantial enough contact for the exercise of jurisdiction to be reasonable. Using the analysis approved by the Sixth Circuit in *First National Bank of Louisville v. J.W. Brewer Tire Co.*, the Sayers court found the third element of reasonableness, noting that: "When the first two elements [purposefully avail and arise from contact] are met, an inference arises that the third, fairness, is also present; only the unusual case will not meet this third criterion."  

The result in *Sayers* seems to be the only reasonable result under the circumstances. While, regarding the particular contract in question, the nonresident defendant did not physically set foot in Kentucky, the defendant knew that he was dealing with a Kentucky resident. Indeed, the offeree was in Kentucky conducting the nonresident offeror's business. A failure to recognize that a nonresident acting in Kentucky by telephone has a significant contact in Kentucky would be to ignore the realities of the modern age of communications. Such a failure would not auger well for the future, which will have increasing electronic contacts rather than the direct physical contacts typical in the past. The Kentucky long arm statute would be "short" rather than "long" if it were interpreted differently.

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18 *Id.* at 39.  
19 *Id.*  
20 680 F.2d 1123 (6th Cir. 1982).  
21 674 S.W.2d at 39. It is interesting to note the reliance by a state court upon a federal decision interpreting a state statute. While state courts understandably rely upon federal interpretations of procedural rules that are almost identical to state rules, the reliance upon federal decisional law aside from rules is harder to justify. There exists, in interpreting the state statute, no analogy to a federal statute. Without such analogy, reliance upon federal precedent in interpreting a state rule is justified only if the federal authority is a particularly persuasive interpretation of exactly the same statute as is later before the state court.
In addition to mandating that the state have jurisdiction before it can adjudicate, due process also requires that the nonresident defendant be given constitutionally sufficient notice of the action pending against him. The Kentucky Supreme Court’s recent decision in Haven Point Enterprises v. United Kentucky Bank\(^{22}\) touched upon that notice requirement. Unfortunately in Haven Point the Court continued to confuse the related issues of jurisdiction and notice.\(^{23}\)

As seems to be typical of most significant notice cases, Haven Point Enterprises involved an attempt by a nonresident defendant to have a default judgment set aside.\(^{24}\) Haven Point Enterprises was a Florida corporation, which had registered an agent in Kentucky for service of process.\(^{25}\) Despite the existence of the registered agent, the plaintiff (United Kentucky Bank) attempted service of process through the Secretary of State as provided in Kentucky Revised Statutes (KRS) section 454.210(3). As statutorily required, the Secretary of State attempted service by certified mail. The Secretary’s return stated that no return receipt was received, nor was the notice itself returned by the United States Postal Service. Haven Point Enterprises argued that, at least in regard to a corporation with a registered agent, such service was insufficient.\(^{26}\)

In rejecting Haven Point Enterprises’ argument, the Kentucky Supreme Court reasoned that the plaintiff had a choice: he could either serve through the registered agent\(^{27}\) or through the Secretary of State.\(^{28}\) Either was an acceptable method; neither was preferred; and the conjunctive use of both was not required.\(^{29}\) The Court noted: “Each confers personal jurisdiction.”\(^{30}\)

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\(^{22}\) 690 S.W.2d 393 (Ky. 1985).

\(^{23}\) See Leathers, Tomasi & Hunt, supra note 3, at 555.

\(^{24}\) 690 S.W.2d at 394. In a case not involving a prior judgment, it is factually difficult for a defendant to argue inadequate notice; if notice were faulty, how could the defendant know to be present to defend upon those grounds? The defendant’s presence defeats the argument as a practical matter. Cf. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) (argument advanced by guardian ad litem).

\(^{25}\) 690 S.W.2d at 394.

\(^{26}\) Id.

\(^{27}\) Service through a registered agent is authorized by KRS § 271A.565 (1981).

\(^{28}\) Service through the Secretary of State is authorized by KRS § 454.210(3).

\(^{29}\) 690 S.W.2d at 395.

\(^{30}\) Id.
This is an unfortunate statement since it confuses jurisdiction with notice. Service has nothing to do with jurisdiction over the nonresident defendant. Though the facts are unclear, nothing in the opinion suggests that Haven Point Enterprises was not subject to personal jurisdiction through Kentucky's long arm statute. Thus the confusion of jurisdiction and notice, which had previously arisen in the case of *Cox v. Rueff Lighting Co.*, continues and seems to imply that jurisdiction depends upon notice. Such is clearly not the case; even actual notice cannot supply jurisdiction when the nonresident defendant's contacts are insufficient. Notice is simply another requirement of due process. Without both jurisdiction and notice, a constitutionally defensible judgment cannot be rendered; but the two are quite separate concepts.

Aside from that semantic difficulty, the Court is on solid ground in holding that a plaintiff may choose the method of service of process. A holding preferring one method over the other would obviate the alternatives that seem to have been statutorily left open. A requirement that both methods be used would be unduly burdensome and repetitious.

In upholding the sufficiency of service without a signed return receipt from the nonresident defendant, the Kentucky Supreme Court verified the court of appeals' position that such a return was not constitutionally or statutorily required. Regarding a possible statutory requirement, the Kentucky Supreme Court noted that the long arm statute allowed the Secretary of State to attach to the return of service a signed registry receipt "if any." From this, the Court concluded that the statute did not require the presence of such a receipt for service to be effective.

In proceeding without the receipt, the Court is on extremely firm constitutional ground. In the early days of service upon nonresident motorists, the United States Supreme Court struck
down as unconstitutional a statute that did not on its face call for the state official to send notice by mail to the nonresident defendant. Later, in *Mullane v. Central Hanover Bank & Trust*, the Court defined "constitutionally required notice" as notice that is reasonably calculated to actually inform the defendant of the pending action. Combining these two holdings, all that is constitutionally required is that a state adopt a statute that on its face sets into motion a notice scheme that is reasonably calculated to inform nonresident defendants of pending actions. Thus, the Kentucky notice provisions are valid because "the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice. . . ." None of the cases has ever suggested that actual notice is required. The effect of such a holding would be a disaster, since it would promote process dodging by nonresidents. Kentucky's statutory scheme does not necessitate that resident plaintiffs prove actual notice to nonresidents. Jurisdiction exists based upon minimum contacts, and notice is provided by a sufficient statutory provision.

II. Statute of Limitations

During this survey period, the court of appeals decided two important cases in which the defendant plead that the action was time barred. As in all pleas of bar by operation of a statute of limitations, the crucial question in each was whether the statutory time had already run at the time of the action. In one case, this question centered on when the cause of action arose. In the other, the question was whether the action had "commenced" under the statute and under Kentucky Rule of Civil Procedure 3 within the statutory time limit.

37 Wuchter v. Pizzutti, 276 U.S. 13 (1928). Service was struck down even though service *had* been mailed and *was* received. The Court reasoned that a statute lacking such notice provision was unconstitutional on its face. *Id.* at 24.


39 *Id.* at 314.

40 276 U.S. at 24.


42 See 664 S.W.2d at 946; *No. 83-CA-475-MR*, slip op. at 5.

43 See 664 S.W.2d 945.

44 See *No. 83-CA-475-MR*, slip op. at 5.
A. Accrual of a Cause of Action: Subjective or Objective Standard

Generally, the statute of limitations begins to run against a cause of action only after the plaintiff suffers an actionable wrong. In malpractice actions against attorneys arising from negligence or omissions, at least three points have been used to start the statute of limitations running: the time of the negligent act, the time of the damage, and the time of the plaintiff's discovery of the harm. Prior to this survey period, this last


46 See, e.g., United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass, 624 F.2d 145, 149 (10th Cir. 1980) (applying Oklahoma law); Robbins v. McGuinness, 423 A.2d 897, 898 (Conn. 1979); Peppers v. Sieffman, 304 S.E.2d 511, 512 (Ga. 1983); McArthur v. Baker, 7 Ky. Law Rep. 441, 441 (1885); Sullivan v. Stout, 199 A. 1, 4 (N.J. 1938); Banton v. Marks, 623 S.W.2d 113, 116 (Tenn. Ct. App. 1981); Goodyear Metallic Rubber Shoe Co. v. Baker's Estate, 69 A. 160, 160 (Vt. 1903); Cornell v. Edsen, 139 P. 602, 603 (Wash. 1914). The harshness of this rule is evident, and perhaps explains why it is not adhered to as universally as it once was. See generally New Developments in Legal Malpractice, 26 Am. U.L. Rev. 408, 439-40 (1977) (The rule imposes upon the client the duty to recognize substandard professional conduct when it happens, either requiring him to be as expert in the law as his attorney, or hire another attorney, and encourages an attorney to violate his or her fiduciary duty by not disclosing his or her own negligence if discovered.); Annot., 32 A.L.R.4th 260, at § 5 (1984 & Supp. 1985); Annot., 18 A.L.R.3d 978, at § 4 (1968 & Supp. 1984).


48 The "Discovery Rule" holds that an action for malpractice accrues and the statute of limitations begins to run when the attorney's negligent act is discovered or should have been discovered by the plaintiff. See, e.g., Yazzie v. Olney, Levy, Kaplan & Tenner, 593 F.2d 100, 103 (9th Cir. 1979) (applying Arizona law); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 433 (Cal. 1971); Johnson v. Haugland, 303 N.W.2d 533, 539 (N.D. 1981); Skidmore & Hall v. Rottman, 450 N.E.2d 684, 685 (Ohio 1983) (overruling all prior inconsistent cases); Melgard v. Hanna, 607 P.2d 795, 796 (Or. Ct. App. 1980); Mills v. Killian, 254 S.E.2d 556, 558 (S.C. 1979). The discovery rule is made a part of the statute of limitations in KRS § 413.245 (Bobbs-Merrill Cum. Supp. 1984), construed in Graham v. Harlin, Parker & Rudloff, 664 S.W.2d 945 (Ky. Ct. App. 1983).
method, the so-called "discovery rule," had been applied in Kentucky to medical malpractice and products liability actions to determine when the applicable statute began to run. The court of appeals' decision in *Graham v. Harlin, Parker & Rudloff*, however, was the first application, in Kentucky, of this doctrine to a legal malpractice action.

The complaint in *Graham* arose out of a divorce decree, entered in 1974, which provided for payment to Mrs. Frances Graham of "$500.00 per month toward the support of the family." In August, 1980, the Internal Revenue Service (IRS) categorized these payments as "alimony," "taxable to Mrs. Graham . . . and assessed a deficiency against her personal income tax returns for . . . $17,260.56." In October, 1980, Mrs. Graham petitioned the United States Tax Court for a reevaluation of the deficiency. The Tax Court was unmoved. Despite a nunc pro tunc order of the Warren Circuit Court declaring that the payments were for the support of the children, the tax court entered an order in August, 1982, assessing the deficiency against Mrs. Graham.

More than a year after the receipt of the deficiency notice, in September, 1981, Mrs. Graham filed a malpractice action against her attorney in the original divorce proceeding for "failing to advise her of the tax consequences of the wording of the original divorce decree and . . . [for] failing to correct that wording to avoid taxation of the payments . . . ." The defendant moved to dismiss the action on the basis of KRS section 413.245. This statute directs that a malpractice action must be

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50 See 580 S.W.2d at 501.
51 664 S.W.2d 945 (Ky. Ct. App. 1983).
52 Early on, Kentucky adhered to the rule that in an action for attorney malpractice, the statute of limitations runs from the time of the negligence. See 7 Ky. Law Rep. 440. Note, however, that this decision was based upon a contractual theory, and was phrased in terms of a cause accruing from the contract's breach. Such a characterization is rendered moot in jurisdictions such as Kentucky that have enacted separate statutes of limitations applicable to legal malpractice.
53 664 S.W.2d at 946.
54 *Id.*
55 *Id.*
56 *Id.*
brought "within one (1) year from the date of the occurrence or from the date when the cause of action was or reasonably should have been discovered by the party injured."57

As the Graham court noted, the statute embodies the discovery rule "approved in Louisville Trust Co. v. Johns-Manville Products."58 In that case, the Kentucky Supreme Court refuted the contention that the discovery rule was an exception59 that applied only to medical malpractice cases, and approved the application of the discovery rule to a products liability action.60 Although the holding in Louisville Trust Co. did not concern the discovery rule's application to a professional malpractice action, KRS section 413.245, enacted in 1980, is a codification of the ruling of that case and by its terms is generally applicable to all malpractice actions.61

The problem in Graham centered upon the meaning of the phrase "from the date when the cause of action was or reasonably should have been discovered."62 Two related points of interpretation of this phrase were tackled in Graham: 1) how is it determined when the plaintiff discovers the required facts,63 and 2) what must the plaintiff discover?64

First, it is unclear exactly what standard should be used to establish when the plaintiff discovered the facts necessary to start the statute running. A fair reading of the statute's "knew or should have known" clause would imply that an objective standard should be used for determining a plaintiff's knowledge of his or her cause of action. Arguably however, neither the statute nor the decision of Louisville Trust Co. "approving" the

57 KRS § 413.245.
58 664 S.W.2d at 947 (citing 580 S.W.2d 497 (Ky. 1979)).
59 580 S.W.2d at 500.
60 Id. at 501.
61 See KRS § 413.245. Following a trend to import the discovery rule from medical malpractice cases to legal malpractice cases, the Kentucky legislature passed the present professional malpractice statute. See Johnston, Attorney Accountability in Kentucky—Liability to Clients and Third Parties, 70 Ky. L.J. 747, 784-87 (1981-82). This general malpractice statute is clearly applicable to legal malpractice actions through a sister statute that defines "professional services" to include the practice of law. See KRS § 413.243 (Cum. Supp. 1984).
62 KRS § 413.245 (quoted in 664 S.W.2d at 947).
63 See text accompanying notes 65-66 infra.
64 See text accompanying notes 67-72 infra.
use of the discovery rule necessarily establishes this.\footnote{In \textit{Louisville Trust Co.}, the Court said: "A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." 580 S.W.2d at 501 (quoting \textit{Raymond v. Eli Lilly and Co.}, 371 A.2d 170, 174 (N.H. 1977)).} The question raised in \textit{Graham} was whether under \textit{Louisville Trust Co.}, as codified in the statute of limitations, a plaintiff has to be subjectively or objectively aware of his or her cause of action before the statutory time begins to run.\footnote{\textit{See} 664 S.W.2d at 947.}\footnote{KRS § 413.245.} \footnote{580 S.W.2d at 501.}

Second, \textit{Louisville Trust Co.} and KRS section 413.245 differ in what the plaintiff must know to start the statute running. Under KRS section 413.245, the injured party must discover a "cause of action;"\footnote{\textit{See} 664 S.W.2d at 947.} while under the ruling of \textit{Louisville Trust Co.} the plaintiff must discover that "he has been injured . . . [and] also that his injury may have been caused by the defendant's conduct."\footnote{\textit{Id.} (citing \textit{Conway v. Huff}, 644 S.W.2d 333, 334 (Ky. 1982)).} The question raised in \textit{Graham} on this point was whether the injured party must know that she had a legal "cause of action" within the technical definition of that word, or whether a mere understanding that she had been harmed would suffice to start the statute running.\footnote{664 S.W.2d at 947.}

The court of appeals, citing the ruling of \textit{Louisville Trust Co.}, dispensed with both points addressed above, holding that "[t]he knowledge that one has been wronged and by whom starts the running of the statute of limitations for professional malpractice, not the knowledge that the wrong is actionable."\footnote{Id. (citing \textit{Conway v. Huff}, 644 S.W.2d 333, 334 (Ky. 1982)).} The court found it evident from Mrs. Graham's testimony that she had actual knowledge that a wrong had been committed against her and by whom in November, 1980, when the IRS assessed a tax deficiency against her resulting from the wording of the divorce decree.\footnote{664 S.W.2d at 947.} Basing its decision at least partly upon testimony as to her subjective knowledge, the court declined to toll the statute of limitations and concluded that the statute of limitations began to run in November, 1980.\footnote{\textit{Id.}}
It should, however, be noted that there is an objective dimension to the court's test. With the statute having been activated by an objective piece of evidence (the deficiency notice), the court concluded that a reasonable person under those circumstances should have known that they had been wronged.\textsuperscript{73} Thus, Mrs. Graham's subjective state of mind coincided with what the objective evidence said her state of mind should have been—her testimony indicated that when she received the deficiency she knew something was wrong.\textsuperscript{74} It is that knowledge, both objectively and subjectively demonstrable, that sets the statute in motion. Whether, in a subsequent case, the court will require the presence of both elements, or whether the presence of one or the other will be sufficient, remains to be seen.

The \textit{Graham} court obviously did not want to hold the plaintiff to a standard of knowledge that an attorney would be judged by as to the meaning of "cause of action." The court, however, did wish to give full effect to the statute of limitations. Consequently, the court rejected Mrs. Graham's suggestion that she did not have the required knowledge under the statute to start the statute of limitation running, since she did not know that she had a "cause of action."\textsuperscript{75} In rejecting this argument, the court essentially ruled that a layman's understanding of a "cause of action" would suffice to begin the statute of limitations running.\textsuperscript{76}

The \textit{Graham} ruling, while perhaps reaching the correct result, has an undesirable consequence to whatever extent it may be read as relying upon the plaintiff's subjective knowledge to set the statute in motion. Specifically, the court in \textit{Graham} has apparently endorsed, in part, a subjective standard for the knowledge required under the malpractice statute of limitations. This is a virtual Pandora's box. The subjective approach presents obvious problems with proof; perjury and protracted proceedings to determine when the statute begins to run are undesirable possibilities. In the future the court should emphasize \textit{Graham}'s objective dimension. A review of the objective evidence and

\textsuperscript{73} Id. at 946-47.
\textsuperscript{74} See id. at 946.
\textsuperscript{75} Id. at 947.
\textsuperscript{76} See id.
measurement against what a reasonable person should have known under those facts is an exercise well-understood by the judiciary. In a case where the evidence demonstrates that the subjective state of mind was what a reasonable person should have known, the case is simple. In case of a divergence, however, the time factor should be governed by the objective standard. While this may foreclose a cause of action for a person who subjectively had no knowledge, rationality dictates a common standard against which all claims can be measured. The goal of statutes of limitations—uniformity—should not be lost sight of in formulating a test for the running of the statute.

To the practitioner, *Graham*'s lesson is clear: cover all bases. If there is a possibility that the statutory time on an action is running: file. In a case such as *Graham* where issues germane to the action are already being litigated elsewhere, institute the second action anyway, and ask the court to stay the action pending the outcome of the prior litigation.

**B. Commencement of an Action**

Federal Rule of Civil Procedure 3 directs that "[a] civil action is commenced by filing a complaint with the court." Federal Rule 3 does not directly address the gap between the time that the action is "commenced" by filing and the time that the notice is given to the opposing party by service of process under Federal Rule of Civil Procedure 4. In other words, it is possible for an action to "commence" under Federal Rule 3, yet for the opposing party not to be served with notice until much later. The statute of limitations problem in this situation is simply that some statutes define commencing an action otherwise than as defined in Federal Rule 3. In such a case, the question becomes whether the statute was tolled when the action was procedurally "commenced by filing," or was tolled when the action "commenced" at some later point in time as defined by the statute itself (e.g., when notice of filing is actually received by the defendant). Federal Rule 4(a) was supposedly

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77 Fed. R. Civ. P. 3 [hereinafter cited as FRCP].
78 See FRCP 3 & 4.
79 See, e.g., KRS § 413.250 (1972).
80 FRCP 4(a).
promulgated to "minimize [this] problem" by requiring the clerk to "forthwith issue a summons" and deliver it for service to the marshal or to any other person authorized by Federal Rule 4(c) to serve it upon filing of an action.  

In Kentucky, the "forthwith" issuance of a summons required in Federal Rule 4 was evidently not enough of a minimization. Kentucky, unlike some close sister states, adds to Federal Rule 3 an extra requirement of "good faith." Kentucky Rule of Civil Procedure 3 reads: "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." The good faith provision in Kentucky Rule 3 is different from the text of Federal Rule 3, but is in line with some authorities' interpretation of Federal Rule 3 as requiring an intent on the part of the plaintiff that the procedures outlined in Federal Rules 3 and 4 will be carried out diligently.

Thus temporal requirements alone do not determine when an action commences under Kentucky Rule 3. "Good faith,"

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82 See FRCP 4(a), (c).
84 CR 3.
85 Id. (emphasis added).

Regardless of the case law debate, in 1983, Federal Rule of Civil Procedure 4(a) was amended to require that the plaintiff have the intent to comply with the rules with due diligence. Federal Rule of Civil Procedure 4(a) reads:

Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

FRCP 4(a) (emphasis indicates 1983 amendments) cited in 2 Moore's Federal Practice, supra note 81, § 4.01[32], at 4-40.
too, is required. In Rose v. Ikramuddin, the Kentucky Court of Appeals faced the issues of exactly what constitutes "good faith" and whether this "requirement" demands something more, or allows something less, than the strict temporal requirements of Kentucky Rule 3 to "commence" an action.

In Rose, a complaint naming Dr. Kamar J. Ikramuddin in a medical negligence action was filed on March 14, 1980, "three days before the expiration of the one-year statute of limitations provided for by KRS section 413.410." On that same day, the Johnson Circuit Court Clerk issued summonses for the three defendants, including Dr. Kamar J. Ikramuddin. The original, and a copy of the summons for Dr. Ikramuddin, were sent by the circuit court clerk to the Sheriff of Floyd County where Dr. Ikramuddin lived and practiced. The Floyd County Sheriff neither served the summons nor returned it to the Johnson Circuit Clerk to be filed in the record. Nothing more was done in the case by either Dr. Ikramuddin or the plaintiff for over one year.

On April 28, 1981, the plaintiff's counsel discovered for the first time that Dr. Ikramuddin had not been served by the Floyd County Sheriff. The plaintiff then caused another summons to be issued for Dr. Ikramuddin, which was served on May 15, 1981. Two weeks later on May 29, Dr. Ikramuddin filed a motion to dismiss the complaint against her on the grounds that it was barred by the statute of limitations. The Johnson Circuit Court at first overruled the motion, but upon a later motion by Dr. Ikramuddin, reversed its earlier ruling and dismissed the case. The plaintiff appealed this ruling claiming that she had complied with both KRS section 413.250, the applicable statute of limitations, and Kentucky Rule 3 by causing a summons to be issued in good faith.

The applicable statute of limitations in Rose read: "An action shall be deemed to commence on the date of the first

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87 See CR 3.
89 Id., slip op. at 3.
90 Id., slip op. at 3-4.
91 Id., slip op. at 4. See also CR 4.01(1)(b).
93 See id., slip op. at 5-8.
summons or process issued in good faith from the court having jurisdiction of the cause of action. This statute's good faith requirement is the same as that required by Kentucky Rule 3. Thus, the court had only to decide whether the plaintiff's good faith, as required by both the statute and the rule, was destroyed by the failure to determine that Ikramuddin had not been served within the period between the issuance of the two summonses. If the plaintiff’s good faith was destroyed, then neither the requirements of KRS section 413.250 nor Kentucky Rule 3 could be met, and the action was not timely under either the rule or the statute.

The court found that while

The lapse of fourteen months . . . exhibits a regrettable lack of diligence on the part of plaintiff's attorney. . . . Such lack of diligence does not destroy the good faith that was exhibited when the attorney delivered his check to the clerk, who caused the summons to be issued and put in the mail . . . in accordance with the procedures established by the Kentucky Rules of Civil Procedure.

The court expressly found that this case was unlike Brock v. Turner Fuel Co., in which the good faith of the plaintiff was destroyed by complete and willful delay, and was like Rucker’s Adm’r v. Roadway Express, Inc., in which the mere attempt by an attorney to ascertain an address for service was sufficient to show good faith and toll the statute of limitations.

At least three facets of the Rose decision are of note procedurally. First, good faith, as it appears in both Kentucky Rule 3 and KRS section 413.250 does not mean a subjective measure of the attorney’s intent to secure service. Second, good faith, at least under this statute of limitations, is established by objective means; specifically by reference to and compliance with the

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94 KRS § 413.250.
95 See No. 83-CA-475-MR, slip op. at 5.
96 See id., slip op. at 5-6.
97 No. 83-CA-475-MR, slip op. at 7 (emphasis added).
98 178 S.W.2d 427 (Ky. 1944).
100 131 S.W.2d 840 (Ky. 1939).
101 See No. 83-CA-475-MR, slip op. at 6-7.
procedures contained in Kentucky Rules 3 and 4. Third, an attorney need exercise only the barest diligence in prosecuting the case to establish good faith and so "commence" an action and toll the statute of limitations. The Rose court clearly establishes the good faith clause in the statute and in the rules as a presumption in favor of the plaintiff who can show compliance with the mechanical requirements of the Rules of Civil Procedure. Accordingly, even sizable delays by the plaintiff's attorney must be shown by the defendant to have been "willful" in order to show bad faith.\textsuperscript{102}

The policy rationale for the Rose court's ruling is evident. The court is reluctant to punish or reward the parties for their attorneys' ineptitude or delay. The plaintiff in Rose was unquestionably injured and had a clear cause of action against the defendants. Ikramuddin, although not served personally, probably had actual notice of the suit and, regardless, was not prejudiced by the delay since "very little had been done in the prosecution of the case following the issuance of the first summons."\textsuperscript{103} Interpreting the good faith clause against the plaintiff would have punished the plaintiff for the attorney's sins.

\section{III. Class Actions}

Despite the existence of a Kentucky class action rule that is identical to the federal rule,\textsuperscript{104} Kentucky case law concerning class actions is relatively rare. This is probably because the practicing bar perceives the federal courts as a more appropriate setting for class action litigation than state courts. Yet, given what might be perceived as a restrictive attitude in the federal system toward class actions,\textsuperscript{105} practitioners should consider the

\footnotesize{\textsuperscript{102} See 178 S.W.2d at 429 (A willful delay "has been uniformly held by this court as destructive of 'good faith' in the issuing of process necessary for the 'commencement' of an action so as to toll limitation statutes."). Accord Garrison v. International Paper Co., 714 F.2d 757, 760 (8th Cir. 1983) ("The most important factor in the balance is the egregiousness of the plaintiff's conduct.").

\textsuperscript{103} No. 83-CA-475-MR, slip op. at 8.

\textsuperscript{104} FRCP 23; CR 23.01-.05.

use of state courts.\textsuperscript{106} During the survey period, two cases were decided in Kentucky touching upon issues relevant to class actions in the state court system.\textsuperscript{107}

As previously noted in regard to long arm jurisdiction, due process requires that parties be given adequate notice of a pending action.\textsuperscript{108} In a class action case, adequate notice is complicated because the case may be either a plaintiff class action or a defendant class action.\textsuperscript{109} The requirement of some sort of notice to bind members of a defendant class seems plain enough without extended commentary. The ability of a properly designated class action to bind the interest of an absent, represented party (i.e., member of the plaintiff class) is well-settled as a matter of constitutional law.\textsuperscript{110} Also, basic fairness would seem to dictate that a represented party be given some sort of notice of a pending action that may bind him. Despite the logic of that conclusion, the Kentucky Court of Appeals recently decided that, at least as to one type of class action, notice to represented parties is not required.\textsuperscript{111}

In \textit{Lexington-Fayette Urban County Gov't v. Hayse},\textsuperscript{112} a library patron attempted to compel the Lexington-Fayette Urban County Government to fund the Lexington Public Library in accordance with the statutory mandate of KRS section 173.360(1).\textsuperscript{113} The relief sought was prospective in nature only; no effort was made to secure unappropriated past funding. Nor were damages requested either for the class or for the representative party. As is frequently true in class actions seeking only declaratory or injunctive relief, there was absolutely no legal necessity for using the class action vehicle.\textsuperscript{114} Had the patron prevailed individually on the merits of the claim, the


\textsuperscript{108} See FRCP 23; CR 23.01.


\textsuperscript{110} 684 S.W.2d at 303.

\textsuperscript{111} 684 S.W.2d 301 (Ky. Ct. App. 1984).

\textsuperscript{112} Id. at 302. KRS § 173.360(1) (Bobbs-Merrill 1980) provides that "the legislative body shall appropriate money annually to furnish such [library] service."

\textsuperscript{113} See 684 S.W.2d at 303.
Lexington-Fayette Urban County Government would have had to comply with the court’s mandate just as though that mandate had run in favor of thousands of persons. Nevertheless, the action was brought as a class suit, probably because of the publicity and political pressure that inure to such actions. As the court of appeals noted, it was not “necessary to maintain this action as a class action, but it [was] allowable.”

The plaintiff class prevailed on the merits in Fayette Circuit Court. On appeal the issue was raised whether the members of the plaintiff class (presumably all users of the Lexington Public Library) should have been notified of the pending action. In holding that no notice to the class members was required, the court of appeals also obviated the necessity of ruling upon what form that notice should have taken.

The issue of notice to represented parties in a plaintiff class action is one that has proven to be quite thorny in the federal court system. Following a convoluted procedural history stretching over almost a decade, the United States Supreme Court ruled in *Eisen v. Carlisle & Jacquelin* that notice by mail was required to all members of the class and that the cost of that notice had to be borne by the representative parties. Those familiar with the holding in *Eisen* may feel that the court of appeals decision in *Hayse* is clearly wrong. A closer examination, however, reveals that the two cases are distinguishable and that the *Hayse* decision serves to clarify one of the points left unsettled in *Eisen*.

The class action in *Hayse* was not an ordinary consumer class action; it was an action solely for declaratory or injunctive relief. Thus the *Hayse* action was certified under Kentucky Rule of Civil Procedure 23.02(b). In contrast, *Eisen* was a

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115 Id.
116 Id.
118 Id. at 173-77.
119 Id. at 177-79.
120 See 684 S.W.2d at 302-03.
121 Kentucky Rule of Civil Procedure 23.02 provides:
An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition: . . . (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class,
normal consumer class action involving common questions of law or fact and seeking monetary damages; it was certified under Federal Rule of Civil Procedure 23(b)(3). Normal consumer class actions under Federal Rule 23(b)(3) or its Kentucky counterpart, Kentucky Rule 23.02(c), are subject to special notice requirements. The notice provisions applicable only to these types of class actions instruct the court certifying the action to direct the giving of notice to represented parties so that they can elect whether to "opt-out" of the action, to appear and participate, or to rely upon the representative parties.

Although it was clear after *Eisen* that the United States Supreme Court required an attempt at actual notice to all represented parties, it was not clear immediately thereafter why the Court reached its conclusion. The reason for the confusion is that portions of the *Eisen* decision indicated that such notice thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

122 Federal Rule of Civil Procedure 23(b)(3) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (b) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

123 Federal Rule of Civil Procedure 23(c)(2) provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Kentucky Rule of Civil Procedure 23.02(c) provides:

In any class action maintained under Rule 23.02(c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

124 See 417 U.S. at 173-77.
arose from the specific notice provisions of Federal Rule 23(b)(3). If that were the basis for the notice holding in Eisen, then the notice standard would be inapplicable to actions brought under Federal Rules 23(b)(1) or (2); its holding would be limited to the actions brought under Federal Rule 23(b)(3). Yet, in addition to its discussion of the rule requirements of notice, the Eisen Court also intimated that the notice standard upheld therein was constitutionally required under due process as explained in Mullane v. Central Hanover Bank & Trust Co. Obviously, if the source of the notice requirement in Eisen was constitutional rather than statutory, then the notice requirements would be applicable to all types of class actions, not just those maintained under Federal Rule 23(b)(3).

After Eisen, courts were in disarray in determining whether Eisen's notice standards had any application outside Federal Rule 23(b)(3) class actions. The leading commentary in the area criticized any attempt to apply Eisen outside Federal Rule 23(b)(3) actions, noting that such application was "directly contrary to the language of Rule 23, itself, ... [failing] to take account of the reasons justifying the different treatment. ..." Actions under Federal Rule 23(b)(3) necessitated a higher notice standard since such classes were "only loosely associated" in relationship to legal or factual issues rather than being united by "any pre-existing or continuing legal relationship," as would be the case for groups assembled under Federal Rules 23(b)(1) and 23(b)(2). This position, holding that the notice standard in Eisen was a product of the rules applicable to Federal Rule 23(b)(3) class actions, has now emerged as a clear-cut majority position.

125 See id.
127 See text accompanying notes 128-131 infra.
129 Id. at 143.
130 See Jones v. Diamond, 594 F.2d 997, 1022-23 (5th Cir. 1979); Ives v. W.T. Grant Co., 522 F.2d 749, 764 (2d Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254-57 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906 (9th Cir. 1975); Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975).
In *Hayse* the Kentucky Court of Appeals simply held: "Notice to members of the class is not required in an action under CR 23.02(b)." In so doing, the court was limiting the opt-out notice requirements to class actions brought under the Kentucky counterpart of Federal Rule 23(b)(3). Thus the Kentucky holding is not violative of due process and keeps the construction of the Kentucky rule in line with the construction being put upon the federal rule.

Class action notice issues pale, however, in comparison with the issue of the appealability of class action certification decisions. Current class action rules require that the trial court decide whether the case is to proceed as a class action; the mere fact that the plaintiff or plaintiffs have so designated the action is not dispositive of that issue.

Certifying an action as a class action obviously has a great effect upon the subsequent litigation. With a class estimated to be in excess of six million persons, in addition to the availability of treble damages under federal laws relating to price fixing, the *Eisen* defendants' potential monetary exposure was virtually incalculable. Thus a decision to certify the action as a class action would have virtually coerced the defendants into settling. The leverage granted to the plaintiffs in such a situation is obvious. By the same token, a decision not to certify in such a case has far-reaching consequences for the representative party.

Despite the crucial nature of class certification decisions, however, the final judgment rule has presented a serious obstacle to appellate review. In most jurisdictions, appellate review of trial court actions is limited to reviewing final judgments. Previously, some federal courts attempted to overcome that obstacle and reviewed certification decisions. Such review was justified on the grounds that practically, if not legally, a certi-

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131 684 S.W.2d at 303.
132 See note 130 supra and accompanying text.
133 See FRCP 23(c)(1); CR 23.03(1).
134 417 U.S. at 160, 166. The petitioner's own personal damages were only $70.00. *Id.* at 161.
136 For a detailed discussion of the five methods developed to appeal an interlocutory denial of class certification, see C. WRIGHT & A. MILLER, supra note 128, § 1802, at 271-84.
fication decision was tantamount to a final judgment on the merits of the case.\textsuperscript{137} The rationale was that a decision not to certify served as the "death knell" of the plaintiff's ability to pursue the action since it would not be pursued individually.\textsuperscript{138} The "reverse death-knell doctrine" held that a decision to certify exposed the defendants to such risk that they would then settle on the merits favorably to the class.\textsuperscript{139} Both lines of reasoning allowed appellate review of what otherwise was not a final judgment.

At the current time, such class certification decisions are no longer reviewable in the federal system. At least regarding a decision not to certify a class, the United States Supreme Court, in \textit{Coopers & Lybrand v. Livesay},\textsuperscript{140} rejected the death-knell doctrine as a vehicle for review. Although not yet ruled upon by the United States Supreme Court, there is no reason to suspect that the reverse death-knell doctrine will fare any better.

In \textit{Bellarmine College v. Hornung},\textsuperscript{141} the Kentucky Court of Appeals followed \textit{Coopers & Lybrand},\textsuperscript{142} and determined that certification decisions are not reviewable in Kentucky until the entry of a final judgment.\textsuperscript{143} Noting that there was no Kentucky authority on the point, the court felt that "an analogy may be clearly drawn from federal cases addressing the issue."\textsuperscript{144} The court held that a trial court decision certifying the action as a class action (thus really involving the reverse death-knell doctrine) was not appealable despite an attempt by the parties and the trial court to make the decision sound like a normal multi-

\textsuperscript{137} \textit{Id.} at 271-77.
\textsuperscript{139} See Blackie v. Barrach, 524 F.2d 891, 896 (9th Cir. 1975). Blackie characterizes the "reverse death knell" doctrine as causing "irreparable harm to the defendant in terms of time and money spent in defending a huge class action." \textit{Id.} citing Herbst v. International Telephone and Telegraph Corp., 495 F.2d 1308, 1312 (2d Cir. 1974).
\textsuperscript{140} 437 U.S. 463 (1978).
\textsuperscript{141} 662 S.W.2d 847 (Ky. Ct. App. 1983).
\textsuperscript{142} 437 U.S. at 477.
\textsuperscript{143} 662 S.W.2d at 848-49.
\textsuperscript{144} \textit{Id.} at 848.
party or multi-claim order under Kentucky Rule of Civil Procedure 54.02.145

The results in Coopers & Lybrand and Hornung appear to contradict Eisen,146 but, in Hornung, the court of appeals reconciled the apparent conflict. Although the United States Supreme Court did review Eisen before a final judgment, that review was not concerned with the certification itself. Rather, the issues before the Court were the form of the notice to be given and who would bear the cost of that notice.147 Review was granted under the exception to the final judgment rule that has become known as the “collateral order" doctrine.148 The notice issue was considered only tangentially related to the merits of the action and subsequent review would have been meaningless; either insufficient notice would have been given or the wrong party would have borne the expense of notice. Thus no meaningful review of the issue would have been available after reaching a decision on the merits.149 There has been no indication that certification decisions fall within that category of collateral orders.

With the limited availability of class actions in the federal system due to subject matter jurisdiction and amount in controversy problems, the state courts seem a natural place to conduct class action litigation. Eisen and Hornung are well-reasoned and place Kentucky squarely in the mainstream of decisional law involving such actions. Future developments in the area are expected as the joinder device becomes more widely used in the state courts.

IV. REMOVING THE CASE FROM THE JURY

During the survey period, the court of appeals had two occasions to address a trial court’s power to control an issue’s submission to the jury. In one case, the question at issue con-

145 Id. at 849. Kentucky Rule 54.02 allows appeals in cases involving multiple claims or multiple parties.
146 417 U.S. 156.
147 Id. at 172-79.
148 The doctrine seems to have had its primary origin in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).
149 417 U.S. at 172-79.
cerned the trial court's power under Kentucky Rule of Civil Procedure 39 to deny a trial by jury merely because the case is complex.\footnote{White v. Sullivan, 667 S.W.2d 385 (Ky. Ct. App. 1983).} In the other, the question concerned what standard the court should use in removing a case from the jury when directing a verdict.\footnote{Grant v. Wrona, 662 S.W.2d 227 (Ky. Ct. App. 1983).}

A. Right to a Trial by Jury

The seventh amendment to the United States Constitution guarantees the right to a jury trial in federal "Suits at common law."\footnote{U.S. CONST. amend. VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.} This provision is echoed in the Kentucky Constitution,\footnote{See Ky. Const. § 7: The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.} and is given procedural effect under Kentucky Rule of Civil Procedure 38.01.\footnote{See Kentucky Rule of Civil Procedure 38.01, which reads: The right of trial by jury as declared by the Constitution of Kentucky or as given by a statute of Kentucky shall be preserved to the parties involvate.} The guarantee of a jury trial in both federal and Kentucky constitutions has been held to preserve the fundamental right to a jury trial as it existed historically.\footnote{See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 459 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). Thus neither constitution creates a fundamental right to a jury trial where the right sued upon is granted by statute. See, e.g., Pernell v. Southall Realty, 416 U.S. 363, 379 (1974) (seventh amendment applies to recovery of possession of real property even though brought under statute since historically there was right in such cases); Simmons v. United States, 29 F. Supp. 285, 286-87 (W.D. Ky. 1939) (recovery under the Taft Act, 28 U.S.C. § 41, is not within the guarantee of the seventh amendment); Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852, 854 (Ky. 1981) (no right to jury trial under KRS § 344.040 (1983) empowering the Commission on Human Rights to award compensatory damages for embarrassment and humiliation caused by unlawful discrimination); Stearns Coal & Lumber Co. v. Commonwealth, 179 S.W. 1080, 1082 (Ky. 1915) (no right to jury trial under Kentucky tax statutes).}

For a discussion of what is meant by "common law," see Parsons v. Bedford, 28 U.S. 433, 447 (1830).\footnote{See, e.g., Pernell v. Southall Realty, 416 U.S. 363, 379 (1974) (seventh amendment applies to recovery of possession of real property even though brought under statute since historically there was right in such cases); Simmons v. United States, 29 F. Supp. 285, 286-87 (W.D. Ky. 1939) (recovery under the Taft Act, 28 U.S.C. § 41, is not within the guarantee of the seventh amendment); Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852, 854 (Ky. 1981) (no right to jury trial under KRS § 344.040 (1983) empowering the Commission on Human Rights to award compensatory damages for embarrassment and humiliation caused by unlawful discrimination); Stearns Coal & Lumber Co. v. Commonwealth, 179 S.W. 1080, 1082 (Ky. 1915) (no right to jury trial under Kentucky tax statutes).}
ically, the right to a jury trial was a legal right, as opposed to an equitable right. Thus, originally, the seventh amendment guarantee applied only to civil cases at law. The merger of law and equity in the United States left the scope of such guarantees unclear. Because the federal and Kentucky courts have taken divergent paths on the right to a jury trial, it is useful to compare the two.

Beginning in 1959, with *Beacon Theatres v. Westover*, the United States Supreme Court began expanding the scope of the traditionally legal right to a jury trial to include actions that were historically equitable. In *Beacon Theaters*, the Court ruled that equitable jurisdiction must be determined in light of the legal remedies and procedures available after the merger of law and equity under the Federal Rules of Civil Procedure. The Court, recognizing the more liberal procedures under the Federal Rules of Civil Procedure, held that when an issue is common to both legal and equitable claims in the same proceedings, the legal issues must be tried to a jury first. Three years later, the United States Supreme Court held in *Dairy Queen, Inc. v. Wood* that the right to jury trial exists for any issue that is an element of a claim cognizable at law, even if that legal claim is inconsequential compared to the equitable claim.

Although the rulings of *Beacon Theatres* and *Dairy Queen* affirmed the right to a jury trial on issues common to legal and

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155 See Carter v. Flegle, 232 S.W. 621, 622 (Ky. 1921) (In a purely equitable action "a party is not entitled as a matter of right to have an issue of fact tried by a jury [...] such right is within the sound discretion of the chancellor... ") ; 179 S.W. at 1082 ("The constitutional right of a jury trial exists only in cases where, by the common law, a jury trial was customarily had and the constitutional right to a trial by jury means a trial according to the course of the common law.").

157 The term "seventh amendment" as used herein will encompass section seven of the Kentucky constitution as well as the seventh amendment to the United States Constitution since both constitutional guarantees have been given similar effect and meaning. See cases cited supra note 155.

158 See 179 S.W. at 1082.

159 359 U.S. 500 (1959).

160 See id. at 509.

161 See id. at 509-11. See also 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302 (1971) ("[T]he order of trial must be so arranged that issues common to both the legal and equitable claim are tried to a jury before the court passes on any purely equitable issues.").


163 See id. at 473.
equitable claims, their applicability to actions that were historically purely equitable was uncertain. Both Beacon Theatres and Dairy Queen involved claims that might have been tried at law, although the issues in Dairy Queen were predominantly equitable in their origin. In Ross v. Bernhard, the United States Supreme Court completed the expansion of the constitutional right to a jury trial by extending that right to a historically equitable action that could not have been brought at law. Ross established the right to a jury trial in a shareholder derivative action, a traditionally equitable cause of action. The Court stated that "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."  

Although the Ross decision actually expanded the right to a jury trial, some federal district courts have argued that a jury trial should be denied if the litigation is so complex that it is beyond the average jury's limitations. This argument has two premises. First, proponents maintain that, historically, courts of equity tried a case before a judge partly because such cases were too complicated for the average jury. Ross is cited for the supportive proposition that the determination of the legal or equitable nature of an issue historically involves consideration of the jury's abilities. Second, proponents claim that some

164 See id. at 479; 359 U.S. at 504.
165 See 369 U.S. at 475-79.
167 See generally Prunty, The Shareholders' Derivative Suit: Notes on Its Derivation, 32 N.Y.U.L. Rev. 980, 986, 994 (1957) (Although a corporation could be sued "at law or equity" in the earliest cases, the derivative suit developed as a "recognition of the equitable right of the shareholder to call his trustees to account.").
168 See 396 U.S. at 538 n.10. There is no authority cited for this footnote in the decision and the Court apparently did not use these criteria in rendering its decision in Ross.
169 Id. at 542-43.
cases are so complex that a jury trial would amount to denying constitutional due process because the jury could never understand or weigh the issues. Thus, proponents conclude that both historically and practically a jury trial is improper in complex cases. This conclusion has not been universally accepted, however, and the status of the "complexity exception" to the seventh amendment is uncertain in the federal courts. It has not been incorporated into the Federal Rules of Civil Procedure, and the federal courts do not agree about its application.

In Kentucky the rule is that especially complex cases are tried by a judge rather than by a jury. Unlike the federal courts, Kentucky courts have expanded the complexity rule without conflicting with the Kentucky Constitution. Indeed, the "ex-

173 See, e.g., In re Japanese Electronic Products Antitrust Litig., 631 F.2d 1059, 1084-86 (3d Cir. 1980); Note, supra note 172, at 910-11.


175 The Ninth Circuit has rejected these arguments, finding that there is no complexity exception to the seventh amendment. See In re United States Financial Sec. Litig., 609 F.2d 411, 424 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980). The Third Circuit agrees, but in a very important case has stated that there may be some instances in which a case is so complex that the use of a jury would violate fifth amendment due process rights. See 631 F.2d at 1080.

176 The Kentucky complexity rule grew out of equity's historical jurisdiction over suits for an equitable accounting, especially in complex business cases. See, e.g., Commercial Union Assur. Co. v. Howard, 76 S.W.2d 246, 247 (Ky. 1934) ("[E]quity has concurrent jurisdiction in matters of accounts where they are of such a complex nature as to render the remedy at law inadequate, and this jurisdiction should be exercised where there is a serious doubt as to the true state of accounts or where there is difficulty in adjusting them or where the questions involved are so numerous and complicated as to render a jury trial impractical.").

Through the years, the Kentucky rule expanded to encompass all types of complex cases. See Manchester Ins. & Indemnity Co. v. Grundy, 531 S.W.2d 493, 500 (Ky. 1975) (jury is not equipped to evaluate the probable chances of recovery in a suit against an insurer for bad faith in not settling a claim against its insured); City of Shively v. Hyde, 438 S.W.2d 512, 515 (Ky. 1969) (trial court properly determined that a suit by sewer contractors against a city for amounts due that was consolidated with an action by the supervising engineers against the city was impracticable for a jury to intelligently try); McGuire v. Hammond, 405 S.W.2d 191, 193-94 (Ky. 1966) (jury trial properly denied by trial court on basis of complexity of taxpayer's suit against school board).

177 See cases cited supra note 176.
ception” in Kentucky has literally become the rule in the form of language incorporated into Kentucky Rule of Civil Procedure 39.01.\textsuperscript{178} It is the effect of this language that the Kentucky Court of Appeals considered in \textit{White v. Sullivan}.\textsuperscript{179}

\textit{White} arose out of a contract action to enforce a covenant not to compete.\textsuperscript{180} In November, 1974, William J. Clancy, an accountant, executed an employment contract containing a covenant not to compete. The covenant provided that upon terminating employment, Clancy would not practice public accounting within fifty miles of the Fayette County border for five years and would not represent anyone who was a client of the employer at the date of the termination.\textsuperscript{181}

A year later Clancy terminated his employment and immediately opened an accounting office in Lexington. One month later, Clancy hired White as a Certified Public Accountant for the office. At the end of that same month Clancy’s former employer filed suit against him and obtained a restraining order requiring Clancy to obey the restrictions of the covenant not to compete. Clancy and White moved to Somerset and continued as before, resulting in Clancy’s suffering a contempt order and judgment against him for violating the restraining order.\textsuperscript{182}

After the contempt judgment, White moved to Lebanon, Kentucky, but continued in the same relationship with Clancy as before, which included serving the clients that Clancy had brought with him from his former employer. In December, 1976, January, 1979, and July, 1979, the court issued three separate show cause orders “directing White to show cause why he should not be held in contempt for aiding and abetting Clancy in violating the injunction.”\textsuperscript{183} The court eventually found that

\textsuperscript{178} Kentucky Rule of Civil Procedure 39.01 prescribes:
When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by a jury, unless . . . (c) the court upon motion or of its own initiative finds that because of the peculiar questions involved, or because the action involves complicated accounts, or a great detail of facts, it is impracticable for a jury intelligently to try the case.

\textsuperscript{179} 667 S.W.2d 385 (Ky. Ct. App. 1983).

\textsuperscript{180} See \textit{id.} at 386.

\textsuperscript{181} See \textit{id.}

\textsuperscript{182} See \textit{id.} at 386-87.

\textsuperscript{183} \textit{Id.} at 387.
White had in fact schemed with Clancy in violating the restraining order, and ordered White to pay compensatory damages and attorney’s fees.

On appeal White contended that he was entitled to a trial by jury on the issue of the fine for contempt. The court of appeals followed the prevailing law in Kentucky, citing Rule 39.01(c), and held:

Here it is obvious that due to the complicated nature of the case, the volumes of facts involved and the difficulty in ascertaining exactly what had transpired between the various accountants and clients it was fully within the trial court’s discretion to refuse to designate this case as one for the jury. 184

On this basis the court approved the trial court’s decision denying a jury trial and holding White liable for over sixty-five thousand dollars in compensatory damages. 185 The unusual aspect of the court of appeal’s decision was not the approval of refusing a jury trial, but the court’s refusal to consider the contempt judgment’s size in deciding whether a jury trial was appropriate. 186

In 1972 the Kentucky Court of Appeals, in Miller v. Vettiner, 187 addressed the issue of whether a defendant in a contempt proceeding was entitled to a jury trial. The court concluded that the trial court may determine matters of fact itself, but if the penalty to be imposed is a fine greater than five hundred dollars or incarceration longer than six months, then the offender must be found guilty by the “unanimous verdict of a jury.” 188

184 Id. at 387-88.
185 See id. at 387, 389. Note that the appellate court reversed the trial court’s award of over thirteen thousand dollars in attorney’s fees. Id. at 389.
186 See id. at 388. The court dismissed Miller v. Vettiner, 481 S.W.2d 32 (Ky. 1972), and International Ass’n of Firefighters v. Lexington-Fayette Urban County Gov’t, 555 S.W.2d 258 (Ky. 1977), as inapplicable to the present case since neither was as “factually complex” as White. For a discussion of Miller and International Ass’n of Firefighters, see notes 187-92 infra and accompanying text.
187 481 S.W.2d 32 (Ky. 1972).
188 See id. at 35. The court stated:

[When the existence or nonexistence of a contempt, civil or criminal, requires the resolution of a factual issue the trial court may itself resolve that issue . . . but may not in such a case inflict a fine greater than $500 and incarceration for more than six months except upon the unanimous
The *Miller* criterion for determining when a jury trial is required in a contempt proceeding was later expressly overturned in *International Ass'n of Firefighters v. Lexington-Fayette Urban County Gov't.* In *International Ass'n of Firefighters*, the Kentucky Supreme Court held:

> Prospectively . . . in a disputed factual situation the limitation of a $500 fine without imprisonment as set out in *Miller*, is no longer applicable. The determining factor will be whether the fine is "petty" or "serious" and that will be determined within the context of the risk and possible deprivation faced by a particular contemnor.\(^{190}\)

Applying this new standard, the Court affirmed the assessment of a ten thousand dollar contempt fine by the trial court without a jury, holding that the fine was "petty" as applied to the Firefighters Union.\(^{191}\)

It is curious that the court of appeals in *White* makes such short work of the ruling in *International Ass’n of Firefighters* considering its relevance to the claim in *White*. The *White* court passes off the ruling of *International Ass’n of Firefighters* with barely a word, noting the case only for the fact that the Court therein approved the levy of a contempt fine without a trial by jury, and finding it "unnecessary to apply this standard here since we have found that the trial court acted correctly in denying a jury trial due to the discretion the court is given in C.R. 39.01(c)."\(^{192}\)

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\(^{190}\) 555 S.W.2d 258 (Ky. 1977).

\(^{191}\) *Id.* at 260 (relying upon the rationale expressed in Muniz v. Hoffman, 422 U.S. 454 (1975)). Cf. cases cited in Annot., 26 L. Ed. 2d 916, 920-25 (1971) (deciding the applicability of the sixth amendment right to a jury trial in cases of criminal contempt).

\(^{192}\) 667 S.W.2d at 388. It is unclear whether the court of appeals thought that the standard in *International Ass’n of Firefighters* was inapplicable to the factual situation, or that the discretion granted the trial court under Kentucky Rule 39 simply overrode that decision.
Some conclusions from *White* are evident. First, in Kentucky, the complexity rule apparently applies even to cases in which other factors might ordinarily give rise to a jury trial. Second, the historical characterization of an issue as legal or equitable is not the basis for the application of Kentucky Rule 39.01(c), despite such factors being relevant to the federal test under *Beacon Theatres* and *Dairy Queen*. Finally, and most importantly, the determining factor in the application of Rule 39.01(c) is the trial court's discretion. In short, under *White*, a complex case is one which the judge says is complex.

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193 Actions for injunctive relief are equitable in nature, and were unknown at common law, therefore there is no constitutional right to a jury trial on a claim for injunctive relief. *See*, e.g., *United States v. State of Louisiana*, 339 U.S. 699, 706 (1950). It follows that there is no right to a trial by jury in a contempt proceeding to punish a contemnor's violation of an injunction. *See* *Shillitani v. United States*, 384 U.S. 364, 370-71 (1966) ("The conditional nature of the imprisonment—based entirely upon the contemnor's continued defiance—justifies holding civil contempt proceedings absent the safeguards of indictment and jury . . . provided that the usual due process requirements are met."); *Eilenbecker v. Dist. Court of Plymouth County*, 134 U.S. 31, 36 (1890) ("If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it."). *See generally* Annot., 45 L. Ed.2d 815, 830-31 (1975) (United States Supreme Court's views as to right to trial by jury in civil contempt proceeding); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2308 (1971) (no constitutional right to jury trial for injunction claim). The standards pronounced in *Miller, Internat'l Ass'n of Firefighters* and *White* demonstrate no consideration of the fact that contempt proceedings are historically equitable in nature.

194 *See* notes 159-63 supra and accompanying text.

195 *See* text accompanying note 192 supra. This is not the case under the federal complexity exception. In *In re Japanese Electronic Prods. Antitrust Litig.*, 631 F.2d 1069, the Third Circuit addressed the dual concerns of the "complexity" standard and the trial court's apparent unfettered discretion to deny a trial by jury under this standard. The court stated that "[t]he complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules." *Id.* at 1088. The court then enumerated three factors that would identify a case as complex: 1) the size of the suit as measured by the length of the trial, the amount of evidence, and the number of issues; 2) the conceptual difficulties in the case as evidenced by the difficulty of the legal issues, the volume of factual evidence, the potential amount of expert testimony to be submitted, and the potential length and detail of jury instructions; and 3) the difficulty of segregating distinct aspects of the case as evidenced by the number of separate issues in dispute that are related to single transactions or items of proof. *See id.* at 1088-89.

As to the trial court's unfettered discretion, the *Japanese Electronic Prods. Antitrust Litig.* court believed that the good faith of trial judges and the limitations of due process would keep the right to a jury trial intact despite judges' discretion to apply the
The most troublesome of these conclusions for the Kentucky practitioner is that *White* offers no standard of complexity to determine the use of Rule 39.01(c). True, *White* involved several parties, a chain of complicated transactions, and lengthy litigation. The question is whether the facts of *White* were really so complex that it was "impracticable for a jury intelligently to try the case."\(^{196}\) If a case is to be deemed complex on these facts, then perhaps medical and legal malpractice cases, as well as products liability cases, class actions, and practically all multi-party cases should fall within the same rubric. Such actions are often quite complex and cover a variety of complicated transactions that the average juror will have trouble "intelligently" understanding. In such cases the practicing attorney should be aware of the preclusive effect of Rule 39 and be prepared to argue for a jury.\(^{197}\)

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**complexity exception. See id.**

Although there are no Kentucky rulings on the nature of the complexity required to support a Rule 39 denial of a trial by jury, the trial court's discretion is not totally unfettered. See *Whitfield v. Cornelius*, 554 S.W.2d 870, 871 (Ky. Ct. App. 1977) (The denial of defendant's demand for a jury trial in an action to recover on a promissory note and counterclaim for money wrongfully taken was reversible error; the mere assertion that it is "impractical for a jury intelligently to try the case" is not sufficient."). Still, Kentucky lacks even general complexity guidelines such as those enumerated in *Japanese Electronic Prods. Antitrust Litig.*; *White* was no help.

\(^{196}\) CR 39.01(c). See note 195 supra.

\(^{197}\) When faced with a Rule 39 motion, a practitioner could argue for a jury trial based on the systematic policy toward expanding rather than restricting the right to a jury trial. This argument is supported by the substance and policy expressed in the seventh amendment to the United States Constitution, section seven of the Kentucky Constitution, the Federal and Kentucky Rules of Civil Procedure, the *Ross* decision in the federal courts, and the *International Ass'n of Firefighters* decision in the Kentucky courts.

First, the seventh amendment to the United States Constitution and section seven of the Kentucky Constitution were enacted to *preserve* the right to a jury trial. Rule 39 cannot as a matter of constitutional or procedural law, by operation of decision, circumvent a constitutional right and the policy that underlies that right merely on the basis of a judge's discretionary determination of practicality.

Second, Rule 38 plainly guarantees the right to a jury trial:

The right of trial [by] jury as declared by the Constitution of Kentucky or as given by a statute of Kentucky shall be preserved to the parties inviolate.

CR 38.01. Furthermore, it is evident from the language granting the United States Supreme Court the power to promulgate rules of procedure that Congress intended to preserve the right to trial by jury. The statute provides:

Such rules shall not abridge, enlarge or modify any substantive right and
B. Directed Verdict

Prior to *Brady v. Southern Ry.*,198 the federal courts had not clearly chosen between the preponderance of evidence and the reasonable man standards for directed verdicts. In *Brady*, however, the United States Supreme Court established the standard as follows:

When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.199

While federal courts since *Brady* have used different formulations of the *Brady* standard, they have generally been consistent in mimicking the language of that case, and holding that a directed verdict is proper when, "without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict."200

shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. 28 U.S.C. § 2072 (1982). The Kentucky Rules also embody this policy to the extent that they are derived from the Federal Rules of Civil Procedure.

Third, the trend in the law is toward expansion rather than restriction of the right to a trial by jury. In the federal arena this is seen in decisions such as *Dairy Queen*, 369 U.S. at 472-73, and *Ross v. Bernhard*, 396 U.S. at 538. In Kentucky, this trend is most obvious in *International Ass'n of Firefighters*, 555 S.W.2d at 258, which expanded the right to a jury trial by adopting the dynamic "petty"/"serious" test.

198 320 U.S. 476 (1943).
199 Id. at 479-80.
200 Id. See, e.g., United States v. Vahlco Corp., 720 F.2d 885, 889 (5th Cir. 1983); Shakey's Inc. v. Covalt, 704 F.2d 426, 430 (9th Cir. 1983); Crowder v. Lash, 687 F.2d 996, 1002 (7th Cir. 1982); Kaye v. Pawnee Constr. Co., 680 F.2d 1360, 1364 (11th Cir. 1982); Strong v. E.I. DuPont de Nemours Co., 667 F.2d 682, 686 (8th Cir. 1981).

Where there is sufficient conflicting evidence so that reasonable men could reach different conclusions, a directed verdict is improper. See *Dace v. ACF Indus.*, 722 F.2d 374, 375 (8th Cir. 1983); *Martin v. Unit Rig & Equip. Co.*, 715 F.2d 1434, 1438 (10th Cir. 1983); *Abshire v. SeaCoast Prod.*, Inc., 668 F.2d 832, 835 (5th Cir. 1982); *Onufer v. Seven Springs Farms*, 636 F.2d 46, 48 (3d Cir. 1980); *Fortner Enter. v. United States Steel Corp.*, 452 F.2d 1095, 1097 (6th Cir. 1971).
The question left unanswered by Brady and its progeny is how much evidence must be in conflict to deny a motion for a directed verdict. The only quantitative consensus seems to be universal agreement that there must be something more than a "scintilla" of evidence in question. Thus federal courts have generally rejected the so-called "scintilla rule," which holds that a court may not direct a verdict so long as there is any evidence to support the proposition tendered by the party opposing the motion.

Although Kentucky initially followed the "scintilla rule," it rejected that rule in 1940 in Nugent v. Nugent's Executor, and adopted a standard similar to that used in the federal courts. Under Nugent, the trial court is granted the discretion to direct a verdict in cases where there is only a scintilla of evidence in issue. The Kentucky Court of Appeals applied this standard during the survey period when it reviewed a directed verdict in Grant v. Wrona.

In Grant, the plaintiff entered into a contract on June 20, 1981, for the purchase of the defendant's lot and house for $40,500. Just over three months later, the plaintiff began an

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201 The United States Supreme Court held that there must be a "sufficient" amount of evidence in conflict before a motion for directed verdict will be denied. See Galloway v. United States, 319 U.S. 372, 386-87 (1943). Lower federal courts often use the term "substantial evidence" to show the amount of evidence that must be in conflict to create a jury question. See Browne v. McDonnell Douglas Corp., 698 F.2d 370, 371 (9th Cir. 1982), cert. denied, 461 U.S. 930 (1983); 680 F.2d at 1364; Rheaume v. Texas Dep't of Pub. Safety, 666 F.2d 925, 929 (5th Cir.), cert. denied, 458 U.S. 1106 (1982); Tackett v. Kidder, 616 F.2d 1050, 1053 (8th Cir. 1980). "Substantial evidence" has been held to denote "evidence of such quality and weight that fair-minded jurors in the exercise of impartial judgment might reach a different conclusion." Moore v. Johnson, 568 F.2d 1184, 1185 (5th Cir. 1978).

202 See 680 F.2d at 1364; Steuber Co. v. Hercules, Inc., 646 F.2d 1093, 1095 (5th Cir. 1981); 568 F.2d at 1185; Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1179 n.6 (3d Cir. 1976), cert. denied, 429 U.S. 1053 (1977); Magnet Corp. v. B & B Electroplating Co., 358 F.2d 794, 797 (1st Cir. 1966); Lovas v. General Motors Corp., 212 F.2d 805, 807 (6th Cir. 1954).

203 The scintilla rule was first adopted by Kentucky in Thompson v. Thompson, 56 Ky. (17 B. Mon.) 22, 29 (1856). See id. at 883. See also W. BERTELSMA & K. PHILIPPS, supra note 7, § 50.01, at 185-87 (directed verdict proper where "the plaintiff produces no more than a scintilla of evidence in his favor").
action to rescind the contract premised upon allegations that the defendants fraudulently concealed structural defects. The case was tried before a jury, and after the plaintiff’s case, the defendant moved for, and was granted, a directed verdict under Kentucky Rule of Civil Procedure 50. In reviewing the trial court’s granting of the motion, the court of appeals stated:

The only question to be determined by the court on a motion for directed verdict is whether the plaintiff has sustained the burden of proof by “more than a scintilla of evidence,” that is, has the plaintiff submitted “evidence of probative value having fitness to induce conviction in the minds of reasonable men.”

The court applied this standard and found that under Kentucky law, although the evidence was circumstantial, a jury might infer from it that the defendants knew about the defects in the house when they sold it. On this basis the court of appeals found that the plaintiff had presented evidence sufficient for a jury determination and reversed the trial court’s granting of the directed verdict.

From Grant, it is evident that Kentucky courts are reluctant to exercise the power granted under Rule 50 to cut off a party’s cause of action. Thus, in Kentucky, only unfounded claims will be subject to a directed verdict, and consequently, the barest conflicting evidence, even circumstantial evidence, will serve to stave off a directed verdict.

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207 See id. at 228.
208 See id.
209 See id. at 229 (quoting James v. England, 349 S.W.2d 359, 361 (Ky. 1961), and citing Louisville & N.R.R. v. Chambers, 178 S.W. 1041 (Ky. 1915)).
210 See 662 S.W.2d at 229-30.
211 See id. at 229.
212 Contrast this reluctance with the court’s ready denial of a jury trial under Rule 39 in White v. Sullivan, 667 S.W.2d 385.

While both Rules 50 and 39 are control measures available to the judge, they have different foundations. The power to direct a verdict is grounded on the premise that some cases are so obvious on their face that the law requires a particular result. See 9 C. Wright & A. Miller, supra note 193, § 2521, at 537. The power to deny a jury trial for complexity is grounded on the opposite premise that some situations are so convoluted that no ordinary jury could understand the facts so as to apply the law to
Kentucky appellate practice continues to be an area fraught with dangers for the practitioner. In part, the dangers stem from the Kentucky Supreme Court's previous decision in *Foremost Insurance Co. v. Shepard*\(^2\) to require "strict compliance" with the various rules relating to appellate practice.\(^3\) What Justice Leibson has called the "Draconian logic" of "strict compliance with rules of procedure regarding appeals" announced in *Foremost* has led us to a point where appellate practice has become a procedural nightmare for the litigant.\(^4\) Conversations with various attorneys from across the state seem to confirm that the practicing bar is more than simply nervous about the pitfalls of appellate practice; apprehensive would be more accurate. Five recent cases,\(^5\) in addition to the class action appeal in *Hayse*,\(^6\) illustrate these traps for the unwary appellate practitioner.

It has long been an axiom that appeals must be made within the time limits set by the law.\(^7\) To put the matter another way, time begins to run on appeal rights whenever an appealable decision is rendered.\(^8\) Because of the practical difficulties inherent in identifying what is a final order in modern multi-party,
multi-claim litigation, Rule of Civil Procedure 54.02\textsuperscript{220} was amended to provide that orders in such cases are not final and appealable unless the trial court expressly orders entry of judgment.\textsuperscript{221} The ritual of that language seems to serve a salutary function both to litigants—as an alert that appeal time has begun to run—and to appellate courts—as an indication that the trial court is finished with the matter.

Despite what appears to be clear protection under Rule 54.02, the court of appeals has now ruled in \textit{Hagg v. Kentucky Util. Co.}\textsuperscript{222} that failure to appeal an “interlocutory judgment” that lacks the rule’s required language is fatal.\textsuperscript{223} The “interlocutory judgment” was a finding by the trial court that the condemning authority had the right to condemn an easement across the parties’ property.\textsuperscript{224} The Kentucky Supreme Court had previously ruled that such judgments, although denominated by the eminent domain statute as “interlocutory,” were in fact appealable immediately after their entry.\textsuperscript{225} In \textit{Hagg}, the judgment in question was entered on August 3, 1983.\textsuperscript{226} No motions were made during the ten day period following entry of the judgment and no appeal was filed within thirty days after the judgment. On September 7, 1983, the landowners moved for time to file “exceptions” to

\textsuperscript{220} Kentucky Rule of Civil Procedure 54.02(1) provides: When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims.

\textsuperscript{221} Federal Rule of Civil Procedure 54(b) provides, “the Court may direct the entry of a final judgment . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”

\textsuperscript{222} 660 S.W.2d 680 (Ky. Ct. App. 1983).

\textsuperscript{223} \textit{Id.} at 680.

\textsuperscript{224} See \textit{id.} at 681. The finding was made pursuant to KRS § 416.610 (1972), which provides that the court's order entered upon the condemning authority's report is interlocutory.

\textsuperscript{225} Ratliff v. Fiscal Court of Caldwell County, 617 S.W.2d 36, 39 (Ky. 1981).

\textsuperscript{226} See 660 S.W.2d at 681.
the August 3 judgment, and the motion was granted by the trial court. The court of appeals ruled that the "exceptions" were in fact an attempt to vacate the previously entered judgment and that such an attempt was untimely under Rule 59.05 since it was brought more than ten days after entry of the judgment. The trial court's allowing the filing of "exceptions" was meaningless since that court was powerless to extend the time for filing a motion to vacate the judgment. The case illustrates that the "certification" provisions of Kentucky Rule 54.02 cannot always be relied upon by the practitioner. The inclusion of the required language did not prevent the class certification from being held nonappealable in Hayse and the lack of the language in Hagg did not prevent the judgment from being appealable. Perhaps the most practical lesson to be learned is this: when in doubt, appeal, thus avoiding killing an appeal through untimeliness.

Once the decision to appeal has been made, the most immediately pressing step is filing the notice of appeal and payment of the filing fee. Manly v. Manly indicates the dangers involved in even these simple steps. In Manly, the notice of appeal was filed on the last day permitted. The appeal was stamped on the filing date but the filing fee was not paid until two days later. Thus, the notice was timely filed but the filing fee was not paid until after expiration of the time for taking an appeal. The issue before the Kentucky Supreme Court was: when was

227 See id.
228 See id. at 682.
229 "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." CR 59.05.
230 When by statute or by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . order the [time] period enlarged . . . but it may not extend the time for taking any action under Rule . . . 59.05 . . . except to the extent and under the conditions stated in them.

CR 6.02.
231 684 S.W.2d at 303.
232 660 S.W.2d at 680.
233 669 S.W.2d 537 (Ky. 1984).
234 See id. at 540 (citing CR 73.02(1)(a)).
the appeal filed—when the notice was stamped or when the fee was paid?235

Adhering to the doctrine of strict compliance, the Court stated:

It is the holding of this court that the payment of a filing fee for appeals is no longer simply a procedural step in perfecting an appeal. The payment of the filing fee is a condition precedent to the filing of a Notice of Appeal, and until the filing fee has been paid, the Notice of Appeal cannot be filed.236

Since the fee was paid two days after the time for appeal expired, the appeal was not timely filed and thus was dismissed as time barred.237

An obvious solution to the dangers of Manly is to habitually attach a check for the filing fee to the notice of appeal. Another solution, and one that would probably serve the practitioner well in areas other than appeals, is simply not to file documents on the very last day permitted by law. Rather than running the risk of accident or a miscount, the prudent course seems to be to plan ahead.

After filing a notice of appeal and paying a filing fee, the next procedural step requiring careful attention is filing a designation of the record.238 In Oldfield v. Oldfield,239 the Kentucky Supreme Court encountered still another appellate case that was wrecked by this seemingly innocent requirement of properly designating the record for appeal.240

In 1980, the Kentucky Court of Appeals clearly warned that documents designating "the entire record" were no longer ac-

235 See id.
236 Id.
237 See id.
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Unless an agreed statement of the case is certified as provided in Rule 75.15, within 10 days after filing a notice of appeal the appellant shall serve upon the appellee and file in the trial court (a) a designation of such untranscribed portions of the proceedings stenographically or mechanically recorded as he wishes to be included in the record on appeal. . . .

CR 75.01(1).

239 663 S.W.2d 211 (Ky. 1984).
240 See id. at 212.
ceptable. In *Oldfield*, a transcript of the evidence and proceedings was prepared by the court reporter and forwarded to the court of appeals with the designation: "The entire record of the herein-above styled action to be included in the record on appeal to the Kentucky Court of Appeals." Adhering to a previous ruling, the Kentucky Supreme Court held that the fact of receiving the required transcript was not dispositive; absent a proper designation, even an actually received transcript could not be considered in ruling on the appeal. Since the case could not be ruled upon without a transcript of the evidence, the appeal was necessarily dismissed.

Much of the current confusion probably stems from conflicting usages of the word "record." The current version of Kentucky Rule of Civil Procedure 75.01 does not require certification to transmit to the court of appeals the "record" as it exists in the circuit court clerk's office. In the parlance of the rules, the "record" is the file that physically exists in the clerk's office. A designation is necessary only if one wishes the appeals court to consider items not included in that "record." To the practicing lawyer, however, "the record" is usually synonymous with "the transcript." Thus, a rule saying that no designation is necessary if one wishes to rely only on "the record" is misleading. The *Oldfield* Court attempted to clarify the issue by pointing out that "[t]he transcript of evidence stenographically reported, the voir dire, and statements of counsel are not a part of the clerk's original record and do not constitute a part of the record on appeal unless they are specifically designated pursuant to C.R. 75.01." "

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241 See Seale v. Riley, 602 S.W.2d 441, 443 (Ky. Ct. App. 1980) (The court held that "a designation of the entire trial court record is not adequate under the current CR 75.01.").
242 663 S.W.2d at 211. The Court cited Seale v. Riley, stating that "[n]otice was given that on and after August 1, 1980, a designation which designates only 'the entire trial court record' shall be held improper and will be grounds for dismissal of the appeal." Id.
244 See 663 S.W.2d at 213.
245 See id.
246 See id. at 212.
247 See id.
248 Id.
The designation rule prevents the costly preparation of unnecessary transcripts and alleviates overburdening appellate courts with irrelevant papers. Yet a bias against as much paperwork as possible should not be taken to mean that papers can uniformly be done away with. A fine balance must be struck between a sufficient "record" and one without unduly inclusive designations. Again, however, as in the case of timely filing, any error must be in favor of including too much rather than too little. Present penalties for over-inclusion cannot possibly offset the dangers of under-inclusion.

While the cases discussed so far might lead a practitioner to believe that almost any small procedural misstep is fatal, there are two recent cases that show a bit more leniency. In Braden v. Republic-Vanguard Life Insurance Co., the Kentucky Supreme Court indicated that all parties from the trial court level need not be included as parties in the appeal. Braden involved a widow's suit against an insurer on a mortgage life insurance policy. The trial court ordered the mortgagee joined as an indispensable party under Kentucky Rule of Civil Procedure 19. The widow lost on summary judgment, which was certified by the trial court as a final appealable order under Rule 54.02. In her appeal, the widow did not join the mortgagee as a party. The Court recognized that, in an appeal, failure to join an indispensable party is fatal, but felt that the presence of the mortgagee was not necessary. The Court reasoned that if the judgment were reversed and the widow received the money, the mortgagee could still be paid from the proceeds of the judgment. The mortgagee also continued to be protected by its lien on the property until payment was made on the underlying note. Nevertheless, had counsel misjudged the necessity of the mortgagee's presence, a potentially meritorious appeal might have

240 657 S.W.2d 241 (Ky. 1983).
241 See id. at 244.
242 See id. at 242.
243 See id. at 242-43.
244 See id. at 243.
245 See Levin v. Ferrer, 535 S.W.2d 79, 82 (Ky. 1975).
246 See 657 S.W.2d at 243.
been lost. A more prudent approach would have been simply to join the mortgagee.

Incongruously, in *Kupper v. Kentucky Board of Pharmacy*, the Kentucky Supreme Court allowed a state licensing board to escape any consequence for committing a cardinal sin in appellate practice—failure to file an appeal brief in a timely fashion. Kupper's license to practice pharmacy had been taken away because he had sold controlled substances with such frequency to certain persons as to indicate their habitual use of the drugs. Despite the Kentucky Board of Pharmacy's failure to file a timely brief in the court of appeals, the Supreme Court approved the court of appeals' refusal to penalize the Board and affirmed the Board's decision to suspend the license.

Whatever might be the case in an ordinary civil suit, it seems inappropriate for the Board of Pharmacy to lose its case due to a failure to file a timely brief. While that sanction might be appropriately imposed on an individual party, its application to the Board would have had a detrimental effect on the public generally. Thus, *Kupper* seems limited by its particular facts and the average practitioner would be well-advised not to even contemplate the late filing of an appeal brief.

VI. Res Judicata

Three cases during the past two years have touched upon various aspects of res judicata. Before turning to a discussion of the cases, one should remember that res judicata has abso-

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257 666 S.W.2d 729 (Ky. 1984).
258 See id. at 729-30.
259 Rule 76.12(8) enumerates the penalties for failure to comply with the requirements for briefs, established by other parts of the Kentucky Rules of Civil Procedure. Rule 76.12(8)(c) provides in pertinent part:
If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.
260 See 666 S.W.2d at 730.
olutely nothing to do with truth, justice, or the correctness of results; the concept simply involves finality. "Courts can only do their best to determine the truth on the basis of the evidence, and the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth."\[262\] If there is a touchstone here, it is that everyone is entitled to only one day in court on related matters; after that, the matter is laid to rest either by the plaintiff's loss (in which case he is barred thereafter) or by his victory (in which case his rights are merged thereafter). The difficulty, of course, is to identify "related matters."

The Kentucky Court of Appeals decision in *Waddell v. Stevenson*\[263\] illustrates some of the simpler aspects of res judicata. As is typical of cases involving more than one suit, however, the facts are somewhat confusing.

Waddell sued Bushart in federal court on a claim for breach of contract in the building of a house.\[264\] Although there were numerous unpaid materialmen, none were joined in the action. Bushart counterclaimed against Waddell for money allegedly due, noting the existence of unpaid materialmen who had asserted liens against the property but taking no steps to join such persons. After a jury trial, Waddell prevailed on his claim and Bushart failed on his counterclaim. The federal court judgment was rendered upon that basis.\[265\]

While the action was pending in federal court, but prior to the entry of judgment, various materialmen filed actions against Waddell to enforce their liens for unpaid construction debts. In one action, Waddell impleaded Bushart for indemnification; in the other, Bushart was a codefendant and Waddell cross-claimed for indemnification. The actions were consolidated by the state trial court. Ultimately the materialmen recovered against Waddell and Waddell's claim against Bushart was dismissed. Waddell argued that the materialmen were barred from recovering against him by the res judicata effect of the federal suit; Bushart argued


\[263\] 683 S.W.2d 955 (Ky. Ct. App. 1984).

\[264\] *Id.* at 956-57.

\[265\] *Id.* at 957.
that the rights of Waddell were merged in the federal suit thus
preventing indemnification by res judicata.266

Waddell's claim that the materialmen were barred by res
judicata was properly rejected by the trial court and affirmed
by the court of appeals.267 Due process mandates that a judgment
can bind only parties or those in privity with parties.268 Clearly
the materialmen were not parties to the federal action, but
whether they were "in privity" with Bushart was more difficult
to discern. The real issue was whether their interest was suffi-
ciently consistent with Bushart's so that it would be fair to bind
them by a judgment against him.269 Although Bushart sought,
as a portion of his counterclaim, to recover the money due the
materialmen, a finding against him could not fairly be applied
to the materialmen. A finding that he charged in excess of the
contract prices would not imply that the materialmen had not
performed under their contracts. The court further found that
the fact that two of the materialmen testified in the federal trial
did not establish such a connection as to bind them by the
judgment.270 Such testimony could only bind a non-party if,
although not formally designated as a party, the witness actually
controlled and conducted the litigation.271

On the other hand, it was quite clear that the federal court
action concerned the rights of Waddell and Bushart arising from
the construction of the house.272 The damages arising to Waddell
from Bushart's breach were adjudicated in federal court. If
Waddell recovered in federal court for the claims he knew existed
in favor of materialmen, then it would be unfair to allow him
to recover a second time in state court. If, on the other hand,
Waddell had not recovered for his contingent liabilities to the
materialmen, then he simply had omitted an element from his

266 Id.
267 Id. at 957-58.
268 Id. at 958 (quoting 46 AM. JUR. 2D Judgments § 518 (1969)).
269 683 S.W.2d at 958.
270 Id. at 958-59.
271 See McKenzie v. Hinkle, 112 S.W.2d 1019, 1021 (Ky. 1938) ("The courts look
beyond the nominal parties, and treat all those whose interests are involved in the
litigation and who conduct and control the action or defense as real parties and hold
them concluded by any judgments. . . . ").
272 See 683 S.W.2d at 958.
cause of action. Whether or not he included all of his damages, the federal court case was his "day in court" on his problem with Bushart.

It is that concept—splitting of a cause of action—that has caused two recent decisions on res judicata. Both cases originated in the district court's small-claims division. In examining the cases, it is important to remember that the small-claims division is a very limited division of what is itself a court of limited and inferior jurisdiction—the district court.

Riherd v. Kirchner arose out of an automobile accident. The plaintiff sued in small-claims court attempting to recover for car rental expenses incurred while his vehicle was being repaired. The defendant prevailed by directed verdict, it having been admitted by the plaintiff that he did not use his vehicle for business purposes. Following that loss, the plaintiff sued defendant in circuit court for his personal injuries sustained in the accident. The defendant contended that the plaintiff had split his cause of action and that his loss in district court served to bar a later suit for personal injuries; the circuit court agreed and entered summary judgment against the plaintiff.

While stating that the issue was one of first impression in Kentucky, the court of appeals held that the cause of action had not been split and thus the plaintiff was not barred in his subsequent action. The court explained that parties would be held to be barred or merged only as to issues actually litigated in a court of inferior jurisdiction. Thus the plaintiff was not barred because the "district court issued a narrow ruling, holding that the [plaintiff] was not entitled to full reimbursement in that he did not use the rental car for business purposes."

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274 At the time these actions were brought, small claims were limited to an amount not in excess of $1,000.00. KRS § 24A.230.
276 See id., slip op. at 2.
277 Id., slip op. at 8.
278 Id., slip op. at 2.
279 Id., slip op. at 3.
280 Id., slip op. at 7.
281 Id., slip op. at 8.
plaintiff was thus successful in dodging the prior adjudication’s preclusive effect.

In *McMillion v. Garrett*, a decision rendered by the court of appeals subsequent to *Riherd*, the plaintiff fell prey to res judicata’s preclusive effect. In *McMillion*, the plaintiff sued successfully in small-claims court to recover property damage arising from an auto accident. The property aspect was settled by an agreed judgment accompanied by a dismissal with prejudice. When the plaintiff then sued in circuit court seeking recovery for personal injuries sustained in the same accident, the court held that her rights merged in her prior victory in small-claims court and thus she was precluded from pursuing her claim for personal injuries. In upholding the trial court’s ruling, the court of appeals stated the general rule of res judicata: res judicata bars or merges not only the rights previously litigated, but also those rights that "properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time."

In the circuit court action, the plaintiff tried to escape res judicata consequences by an argument unique to the no-fault auto insurance setting in which she found herself. She argued that at the time of her small-claims action, her personal injury medical expenses had not crossed the threshold requirement of one thousand dollars, and thus she had no personal injury claim for damages at that time. In other words, her personal injury claim had not arisen at the time of the small-claims action and thus could not be merged into her victory there. The court of appeals rejected that argument, saying that the claim for personal injuries arose at the time of the physical injury, not at the time the threshold was crossed. Thus the plaintiff had split

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283 *Id.*, slip op. at 6, 7.
284 *Id.*, slip op. at 7.
285 KRS § 304.39-060(2)(b) (Bobbs-Merrill Cum. Supp. 1984) provides that a plaintiff may recover from a defendant under the no-fault act only to the extent that the plaintiff's medical bills exceed $1,000.00.
287 *Id.*, slip op. at 9.
her cause of action and her rights were merged into her prior property damage victory in small-claims court.

The conflict between Riherd and McMillion was settled by the Supreme Court in a 4-3 decision reversing Riherd. Unimpressed by arguments based upon the district court's limited jurisdiction, the Kentucky Supreme Court stated: "The fact that the trial court did not reach the question of liability for negligence does not change the fact that there was a judgment on the merits based on a claim that grew out of the automobile accident." Riherd and McMillion should serve as a warning to the practitioner. Both plaintiffs had their personal injury claims merged into minor property claims. As Judge Howerton observed, "I would suggest a conservative and cautious approach by the practitioner." Quite simply, the only prudent approach is not to split up factually related claims. As the Court maintained in Riherd: "[F]airness to the defendant and sound judicial administration require that at some point litigation over a particular controversy be brought to a final conclusion." As far as the Kentucky courts are concerned, that point is sooner rather than later.

288 Kirchner v. Riherd, No. 84-SC-127-DG (Ky. Nov. 21, 1985).
289 Id., slip op. at 5.
291 No. 84-SC-127-DG, slip op. at 5-6.