Design for Challenge: The Kentucky Statute of Repose for Improvements to Real Property

Jayne Moore
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the State and Local Government Law Commons, and the Torts Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol73/iss4/12

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Design for Challenge: The Kentucky Statute of Repose for Improvements to Real Property

INTRODUCTION

The Kentucky "architect's no-action statute," limiting claims against the design and building professions, has served as a blueprint for professional uncertainty since its enactment in 1966. After almost ten years of being considered unconstitutional, Kentucky Revised Statutes (KRS) section 413.135 was resurrected by several court decisions in the early 1980s. Yet, less than two years after Kentucky courts began to apply the reinstated statute, the Kentucky Court of Appeals in Wallace v. Tabler again

1 Kentucky Revised Statute § 413.135 provides in part:
Actions for damages arising out of injury resulting from construction of improvement to real estate.—(1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five (5) years following the substantial completion of such improvement.

KY. REV. STAT. ANN. § 413.135 (Bobbs-Merrill 1972) [hereinafter cited as KRS].

2 The Kentucky Court of Appeals invalidated the statute in Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973).

3 See In re Beverly Hills Fire Litigation, 672 S.W.2d 922 (Ky. 1984); Carney v. Moody, 646 S.W.2d 40 (Ky. 1982); Ball Homes v. Volpert, 633 S.W.2d 63 (Ky. 1982); Housing Now—Village West v. Cox & Crawley, Inc., 646 S.W.2d 350 (Ky. Ct. App. 1982).


EDITORS NOTE: At press time the Kentucky Supreme Court affirmed the Kentucky Court of Appeals decision of Wallace v. Tabler. The Supreme Court, however, declared KRS 413.135 unconstitutional on state grounds and did not reach the federal question. See No. 84-SC-844-DG, slip op. at 8.
declared the no-action statute invalid.\textsuperscript{5} The constitutionality of similar statutes has been challenged in at least thirty-one jurisdictions with rather inconsistent results,\textsuperscript{6} so Kentucky does not stand alone amid this cloud of confusion.

The availability, or lack thereof, of this statute alters the number of claims brought by injured parties for damages based on either contract or tort theory. It also affects the types of defenses advanced by architects, engineers, contractors, builders and others in the construction industry. This Comment will examine the statute’s background and its current status after \textit{Wallace v. Tabler}. This Comment will also discuss the probable handling of the statute by the Kentucky Supreme Court on

\textsuperscript{5} \textit{Id.}, slip op. at 8.


discretionary review\textsuperscript{7} and propose legislative measures that could correct the invalidated statute's weaknesses.

\section*{I. An Historical Look at the Liability of Designers and Builders}

From ancient Babylon\textsuperscript{8} through English common law\textsuperscript{9} to early American jurisprudence,\textsuperscript{10} society has imposed various types of liability for the defective design or construction of buildings.\textsuperscript{11} American courts applied the doctrine of contractual privity to limit liability until the country's growing social conscience moved into the courtroom in the early part of the twentieth century.\textsuperscript{12}

\begin{footnotesize}
\begin{enumerate}
\item See 32 Ky. L. Summ., at 21 [hereinafter cited as KLS].
\item In ancient Babylon, the law recognized the special relationship between a builder and a person injured due to the builder's defective design or construction. This relationship created obligations that were set out in the Code of Hammurabi. The law, in a form of strict liability that required no proof of negligence or privity of contract, imposed harsh punishment on the defendant. The Code required that:
   \begin{enumerate}
   \item If a builder [builds] a house for a man and [does] not make its construction firm, and the house which he has built [collapses] and [causes] the death of the owner of the house, that builder shall be put to death.
   \item If it [causes] the death of a son of the owner of the house, they shall put to death a son of the builder.
   \item If it [the collapsing of the house] [destroys] property, he shall restore whatever it destroyed, and . . . he shall rebuild the house which collapsed from his property [at his own expense].
   \item If a builder [builds] a house for a man and does not make its construction meet the requirements and a wall [falls] in, that builder shall strengthen that wall at his own expense.
   \item As in ancient Babylon, English common law based liability on a "special relationship," but restricted that relationship to those people who actually had contracted with the architect or builder. Thus, privity of contract was a prerequisite for bringing a claim; designers and builders were immune from liability to a person who may have been able to prove the elements of negligence but were unable to establish the existence of contractual privity with the defendant. Id. at 1222.
   \item American jurisprudence, with roots in English common law, continued using the privity doctrine to control the limits of liability until the landmark case of MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), which launched an assault on the privity requirement. The MacPherson court imposed liability on an automobile manufacturer despite lack of contractual privity with the ultimate purchaser. See 111 N.E. at 1054. See also Comment, Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders, 60 Ky. L.J. 462, 463 (1971-72).
   \item See generally Annot., 97 A.L.R.3d 455 (1980).
   \item In MacPherson, the court "put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else." 111 N.E. at 1053.
\end{enumerate}
\end{enumerate}
\end{footnotesize}
The privity requirement gradually lost its all-encompassing power to bar third-party suits, and in 1957 the veil of immunity was lifted from architects and engineers. These professionals then faced liability despite the lack of a legally recognized relationship with the injured party.

With the widespread abandonment of fictional barriers to lawsuits, architects and builders became liable, not only to a broader group of injured third parties, but also for a potentially longer period of time. The design professions did not accept

---

13 Although the privity requirement lost some of its vitality, courts continued to apply it. For example, Justice Cardozo refused to abolish the privity doctrine and barred a third party from recovery for negligent misrepresentation by an accountant. See Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931). His distinction between foreseeability and unlimited liability allowed usage of the privity doctrine for many more years. He wrote that "it is liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." Id. at 444. There are several reasons for the longevity of the privity doctrine. Privity keeps intended contractual duties in check without allowing an unintended extension of duty to third parties. It also guards against unfair reliance by third parties on professional services for which they have not paid. As a matter of public policy, "privity allows the court to limit the professional's liability in recognition of the importance of his services to the public." Note, Liability of Architects and Engineers to Third Parties: A New Approach, 53 Notre Dame Law. 306, 312-13 (1977-78).


15 The privity rule was further eroded by extending design professionals' liability to anyone who reasonably could be anticipated to use or enter a building. See Comment, Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action, 18 Cath. U.L. Rev. 361, 362-63 (1968-69). See also Montijo v. Swift, 33 Cal. Rptr. 133, 135 (Dist. Ct. App. 1963) (architect's duty to exercise standard of ordinary care extended to third party not in contractual privity with the architect); Laukkanen v. Jewel Tea Co., 222 N.E.2d 584, 589 (Ill. App. Ct. 1966).

16 Sources of professional liability claims include negligence in project design; negligence in preparation of drawings or specifications; negligence from services performed during the construction phase while acting as the owner's agent; improper use of new materials or products; use of old products in a new manner without adequate testing; noncompliance with governmental regulations, such as building codes, environmental laws or occupational safety standards; alleged negligence in meeting demands to complete projects more quickly than normal design and construction procedures might allow; and changing attitudes of courts and society regarding the accountability of professionals for their acts. See 4 Office for Professional Liability Research, Victor O. Schinerner & Co., The Liability of Design Professionals, No. 6 p.2 (1974).

17 Amenability to third party suits had wide ramifications for persons burdened with the new liability. . . . As to the owner the architect's breach of duty occurs when the defective structure is completed and accepted, and
this swiftly developing trend toward seemingly unlimited liability without resistance.\textsuperscript{18} Professional groups and their lobbyists pushed for adoption of model legislation\textsuperscript{19} in statehouses across the country.\textsuperscript{20} To replace protections lost with the demise of the privity doctrine, they sought legislation that would limit liability through statutes of repose.\textsuperscript{21} The model statute was ultimately enacted in a variety of forms, and the liability of architects, engineers and builders for defective design and construction once again knew limits.\textsuperscript{22} In 1966 the Kentucky legislature followed

\begin{quote}
\textit{since the owner then has a cause of action, the limitation period may begin to run. A third party, however, has no action against the negligent architect until injury, which may occur many years after performance of services. The statutory period in such a case would usually begin on the date of injury, and the architect theoretically would be liable throughout his professional life and into retirement.}
\end{quote}

Comment, supra note 15, at 363.

\textsuperscript{18} Three powerful professional organizations—the American Institute of Architects, the National Society of Professional Engineers and Associated General Contractors—mounted an offensive to curb the growing liability. Comment, supra note 10, at 464. Not since the 1842 ruling in Winterbottom v. Wright, 152 Eng. Rep. 402, which established the privity requirement, had architects been exposed to third-party suit. Id. at 463.

\textsuperscript{19} The text of the model statute, on which KRS § 413.135 was based, provides in part:

\begin{quote}
\textit{Section 1. No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property (ii) for injury to property, real or personal, arising out of any such deficiency, or (iii) for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction, or construction of such an improvement more than four years after substantial completion of such an improvement.}
\end{quote}


\textsuperscript{20} In two years, thirty jurisdictions enacted or amended statutes of limitations specifically designed to protect architects, engineers, contractors, and in some states, such as Kentucky, builders. Comment, supra note 10, at 464.

\textsuperscript{21} By 1983, 43 jurisdictions had existing limitations of actions pertinent to the design and construction professions. \textit{Office for Professional Liability Research, Victor O. Schinnerer & Co., A/E Legal Newsletter, Special Supplement No. 1 (1983).}

\textsuperscript{22} The statutes typically bar causes of action after a specific time period, usually from 4 to 12 years. The statutory period commences upon either completion or substantial completion of the project. Many of the statutes differ in the membership of the class to whom protection is extended. Some states restrict coverage to professional
this trend and enacted KRS 413.135, thereby cutting off liability for architects, builders and engineers in tort and contract claims brought more than five years after substantial completion of the building project involved in the injury.  

II. THE CONSTITUTIONALITY OF THE KENTUCKY STATUTE

A. Early Challenges to the Statute

Three years after the enactment of KRS section 413.135, in Lee v. Fister the Sixth Circuit Court of Appeals considered the
relationship between the Kentucky statute and existing statutes of limitation. Because the plaintiff had been injured three years prior to bringing his claim, the federal district court dismissed the action as being time barred by the general one-year statute of limitations for personal injuries. In affirming the district court's dismissal, the Sixth Circuit reconciled the one-year statute of limitation for tort and contract claims with the five-year no-action statute. To avoid extending the time in which to assert damage claims, the one-year statute would continue to govern claims for injuries occurring within the first five years following substantial completion of an improvement to real estate. However, after the five-year period expired, the no-action statute barred all claims, regardless of the plaintiff's effort to bring the claims within one year of the date of injury. The court explained that the legislature had intended to grant immunity to builders and architects because negligent maintenance, not defective design, would be the most likely cause of injuries occurring after the five-year statutory period.

The federal court's description of the legislature's intent was of little utility when the Kentucky Court decided Saylor v. Hall.

argued that the more recent statutes (KRS § 413.135 enacted in 1966 and its precursor, KRS § 413.120 which was enacted in 1964) should by implication repeal any prior statutes of limitation. Plaintiff so argued in order to have his claim governed by the five-year period found in KRS §§ 413.135 and 413.120. See 413 F.2d at 1287-88.

See 413 F.2d at 1288. KRS § 413.140 (Cum. Supp. 1984) states: "(1) The following actions shall be commenced within one (1) year after the cause of action accrued: (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant."

The court said:

[D]espite this apparent irreconcilable inconsistency in the two statutes, we feel that the appellant's contention must fail. We note first that there are no Kentucky cases on point. We must therefore attempt to determine how a Kentucky court would interpret the statutes... [A]pparent conflicts in statutes on the same general subject matter should be reconciled whenever possible... [and] repeal by implication is to be avoided whenever possible. 413 F.2d at 1289 (citing Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1956)).

The court explained that no right of action exists for any injury, whether personal or economic, sustained more than five years following completion "even though the injured would otherwise have a full year within which to sue." Id.

The court looked to policy reasons to explain the difference, concluding: "[T]his piggyback limitation was intended as an added protection to builders, who might otherwise be held liable for accidents resulting from delapidated conditions in deteriorating structures, rather than as an extension to the rights of this particular class of injured persons." Id.

497 S.W.2d 218 (Ky. 1973).
Disregarding the "pragmatic considerations" reflected in the statute, and perhaps responding to the sympathetic facts of the case, the Court held the statute violative of the state constitution because it abolished common law rights of action for injuries and death caused by negligence. The Court felt strongly that KRS sections 413.135 and 413.120(14) should be invalidated because they destroyed the plaintiff's cause of action before it legally existed. Furthermore, the Court held that a constitutionally protected right of action—one that existed at the time the statutes were enacted—could not be destroyed.

After Saylor, KRS 413.135 was considered unconstitutional for almost ten years. The legislative intent to build in protec-

---

1. 435 F.2d at 1289. In Saylor the Court stated: "We are aware of the various considerations of social policy that have been debated by the contending parties.... These pragmatic considerations, however, are not relevant to the confined holding made in this opinion." 497 S.W.2d at 225.
2. A six-year-old boy had been crushed to death and his four-year-old brother severely injured when a stone chimney and mantle fell inside their parents' rented home. The structure had been built in 1955 by the defendant builder, who had sold the home to its present owner/lessor. The Saylors, parents of the boys, sued the owner and the builder within one year of the accident. The action against the builder had been barred by application of KRS § 413.135 in Jefferson Circuit Court, but the court of appeals reversed the judgment and remanded the case. See 497 S.W.2d at 225.

In our judgment KRS 413.120(14) and KRS 413.135 cannot be applied to bar the plaintiff's claims in this action. Such application is constitutionally impermissible because it would violate the spirit and language of Sections 14.54, and 241 of the constitution of Kentucky when read together.

Id. at 225.

4. See id. at 225.

5. Id. The Court's language is closely tied to another controversial but unrelated ruling from 1973, viz. Roe v. Wade, 410 U.S. 113. Not only did the Court quote from Justice Rehnquist's dissent on judicial restraint, but it also used terms that became familiar during the Roe era to infuse more emotion into Saylor. The Saylor opinion, based on a claim for the wrongful death of a child, unabashedly compared the statutory denial of such a claim to the termination of a pregnancy. Cf. Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932). In Ludwig the Kentucky automobile guest statute was struck down as violative of the same state constitution provisions. In its ruling the Court said: The [automobile guest-passenger] statute under consideration violates the spirit of our Constitution as well as its letter found in sections 14, 54 and 241. It was the manifest purpose of the framers of that instrument to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for his injury.

49 S.W.2d at 351.

6. A look at the parties represented confirms the importance of this decision to a broader audience than just legal circles. In addition to counsel for the appellant and
tions from liability for the design and construction industries was pushed aside. However, in 1982 the Kentucky Supreme Court revived the issue by considering two cases challenging the invalidity of the statute.

B. The Short-lived Reinstatement of KRS 413.135

Two 1982 cases effectively reinstated the repose statute in Kentucky. In Ball Homes Inc. v. Volpert, the Court again applied the Saylor test but found that the cause of action was not one that existed when the statutes were enacted. In barring the claim, the Court stated: "[T]he law of this state did not provide a cause of action by the vendee of real estate against the vendor on the basis of an implied warranty. . . . Hence there is no constitutional impediment. . . ." Later in 1982, the Court redefined the Saylor test and upheld the Kentucky no-action statute as constitutional in Carney v. Moody. In Carney, the

appellee, the American Institute of Architects, National Society of Professional Engineers, Consulting Engineers Council, Associated General Contractors of America, state chapters of these organizations and the Homebuilders Association of Kentucky were jointly represented by counsel. See 497 S.W.2d at 219.

The Saylor court distinguished Lee v. Fister by saying that the Sixth Circuit had not considered state constitutional guarantees when ruling on the statute's application. Kentucky's constitution, the Court said, contained built-in protections not found in many state constitutions. The Saylor Court concluded: "[O]ur state constitution, however, has been held to prohibit the legislative branch from abolishing common-law rights of action for injuries to the person caused by negligence or for death caused by negligence." 497 S.W.2d at 222.

The cases of the early 1980s substantially reduced the precedential power of Saylor, yet none expressly overruled it. See notes 40-51 infra and accompanying text.

633 S.W.2d 63 (Ky. 1982). In Ball Homes, the plaintiffs purchased a new home from its builders in 1972 which was destroyed by fire in 1978. Plaintiffs claimed that the loss of their property was caused by a defect in the wiring system. The trial court dismissed the action as barred by KRS § 413.135. The Kentucky Court of Appeals reversed on the ground that the statute was unconstitutional, relying on Saylor. The Kentucky Supreme Court affirmed the ruling of the trial court and dismissed the claim without expressly overruling Saylor. See 633 S.W.2d at 63.

The Saylor test is applied by determining whether there was a constitutionally protected cause of action existing at the time of the statute's enactment. See Saylor v. Hall, 497 S.W.2d at 224.

633 S.W.2d at 64. The doctrine of implied warranty, as applied to the professional builder who sells new homes, was adopted by the Kentucky Court in Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969), three years after the enactment of KRS § 413.135. It was a departure from the recognized rule of caveat emptor espoused in Osborne v. Howard, 242 S.W. 852, 853 (Ky. 1922) and Fannon v. Carden, 240 S.W.2d 101, 103 (Ky. 1951).

646 S.W.2d 40 (Ky. 1982).
Court, to some extent, validated arguments that had been summarily rejected in *Saylor*. In *Saylor*, the Court had founded its ruling entirely on the fact that injury or death due to negligence was a recognized cause of action. As such, any claim based on the general term "negligence" was protected by the state constitution. Adopting a narrower approach to the issue of protected causes of action in *Carney* the Court held that the only constitutionally protected rights were those that would have existed, not only when the statute was enacted, but also when the state constitution was adopted in 1891. Because the privity rule was then in place, no remedy was allowed in 1891 for injured third parties against negligent home builders. Thus, the Court concluded, the Kentucky Constitution does not prevent limiting these causes of action. The Court further explained that, simply because the general concept of negligence existed in 1891, all claims resting on any sort of negligence theory need not be constitutionally protected.

---

44 The defendant-appellee in *Saylor v. Hall* argued that the statute did not destroy a constitutionally protected cause of action because at the time the statutes were enacted "there was no existing right of action for negligence in this state where the plaintiff was a third party and the defendant was a builder whose work had been completed and accepted by the owner with whom he had contracted." 497 S.W.2d at 223.

45 *Id.* at 225.

46 "[T]he legislature may not abolish an existing common-law right of action for personal injuries or wrongful death caused by negligence." *Id.* at 224 (emphasis added).

47 See 646 S.W.2d at 41. The Court noted that in *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932) the inquiry into possible violations of sections 14 and 54 of the Kentucky Constitution was directed at whether the right of action was established prior to 1891. This approach was once again taken in *Fireman's Fund Ins. Co. v. Government Employees Ins.*, 635 S.W.2d 475, 477 (Ky. 1982). That ruling upheld the constitutionality of the Motor Vehicle Reparations Act which limited a no-fault insurer's right of recoupment against a third-party tortfeasor. The Court held, in a foreshadowing of *Carney*, that no right of recovery existed for such a claim when the state constitution was adopted. Even had there been such a right in 1891, the right to indemnity would not have fallen within the protection granted by sections 14 and 54. See 635 S.W.2d at 477.

48 See 646 S.W.2d at 41.

49 The Court stated:

This would mean... that every enlargement in the field of liability for negligent conduct, whether effected by statute or by decision of this court, would assume constitutional status beyond the power of either court or legislature to overrule or repeal it. We cannot accede to that proposition. *Id.* As noted in *Loyal Order of Moose Lodge 1735 v. Cavaness*, 563 P.2d 143 (Okla. 1977), the legislature had exercised its power to abolish certain common-law causes of action. The Oklahoma court pointed to certain heart balm causes of action such as seduction and alienation of affection. See 563 P.2d at 146 n.12.
Although not expressly overruling Saylor, Carney did mark a return to an earlier test for constitutionality that permits greater deference to the legislature. Unless the specific cause of action was recognized in 1891, the legislature has the power to create or abolish rights as it deems proper.

C. 1984 Decisions Leading to Invalidation

The Kentucky Supreme Court’s answer to a certified question from the federal district court in In re Beverly Hills Fire Litigation further clarified application of the statute and provided precedent for the Kentucky Court of Appeals’ invalidation of the no-action statute in Wallace v. Tabler. The claims in Beverly Hills stemmed from deaths and injuries sustained in the 1977 Beverly Hills Supper Club fire. The plaintiffs brought suit in federal district court against the manufacturers of the “old technology” aluminum wiring that allegedly had caused the fire. The manufacturers claimed immunity under the Kentucky no-

646 S.W.2d at 41 (emphasis added).

49 See note 47 supra and accompanying text.

Our construction of these constitutional provisions is and should be that which leaves to the policy-making arm of government the broadest discretion consistent with their language. That the statutes limiting the period of a builder’s exposure to liability for faulty construction may occasionally leave injured parties without a remedy, or without a solvent defendant, cannot justify the courts taking corrective measures that more appropriately fall within the prerogative of the legislature.

6 See In re Beverly Hills Fire Litigation, 672 S.W.2d 922 (Ky. 1984).


44 The Kentucky Court ruled on the issue of whether material suppliers were included in the statute’s immunity. The question was certified by the federal district court, pursuant to Ky. R. Crv. P. 76.37(1) (1984) which was amended to allow district courts to certify questions of law on which there is no controlling state precedent. See 583 F. Supp. at 1165.


56 The original claims were brought as a class action in the United States District Court for the Eastern District of Kentucky. A general judgment was entered for the defendant wire manufacturers and plaintiffs appealed. An appeal was granted because of impermissible jury conduct. In its opinion, the Sixth Circuit Court of Appeals noted that it was unsure of the status of KRS § 413.135 and Saylor as precedent. The defendants had cross-appealed on the ground that the lower court erred in denying their motion to dismiss the claims on the basis that the action was barred by KRS § 413.135. See In re Beverly Hills Fire Litigation, 695 F.2d 207, 223-27 (6th Cir. 1982), cert. denied, 103 S.Ct. 2090 (1983).
action statute, reasoning that they had "designed" component parts for an earlier renovation at the club.\(^{57}\)

Although *In re Beverly Hills* was essentially a products liability claim\(^{58}\) governed by another Kentucky statute,\(^{59}\) the Kentucky Supreme Court nevertheless addressed the applicability of KRS section 413.135 to manufacturers and material suppliers. Holding that express language is required for coverage by the statute, the Court found that Kentucky's no-action statute protects neither "materialmen, nor...construction projects unless they are an 'improvement to real property.' "\(^{60}\)

While the Court tried to construe the statute in the manner most favoring constitutionality,\(^{61}\) both inclusion and exclusion of material suppliers seemed to create no-win situations. To include material suppliers would risk violation of section 59 of the state constitution which prohibits special legislation.\(^{62}\) Inclusion also would unreasonably favor manufacturers of products to be used in construction over manufacturers of the same products which conceivably could have uses outside the building industry.\(^{63}\) However, the express exclusion of material suppliers opened the statute to attack on equal protection grounds, based

---

\(^{57}\) See 695 F.2d at 224.

\(^{58}\) See 672 S.W.2d at 923.

\(^{59}\) KRS § 411.300(1) (Cum. Supp. 1982) provides: "[A] 'product liability action' shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product."

\(^{60}\) See 672 S.W.2d at 925.

\(^{61}\) See id. The Court felt "motivated in part by its duty to render the acts of the legislature viable by interpreting such acts consistent with constitutional mandates, and to avoid construction that 'threatens unconstitutionality,' wherever reasonably possible." Id. (quoting George v. Scent, 346 S.W.2d 784, 790 (Ky. 1961)).

\(^{62}\) Ky. Const. § 59 provides: "Local and special legislation.—The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: . . . Fifth: To regulate the limitation of civil or criminal causes."

"Special acts," as used above, has been defined by the Kentucky Supreme Court as "legislation which arbitrarily or beyond reasonable justification discriminates against some person or objects and favors others." City of Louisville v. Klusmeyer, 324 S.W.2d 831, 834 (Ky. 1959). See also King v. Commonwealth, 238 S.W. 373, 376 (Ky. 1922) (defining special legislation as such that relates to "particular persons, places, or things" or to persons, places or things "separated by any method of selection from the whole class").

\(^{63}\) 672 S.W.2d at 926.
on the lack of protection for suppliers whose risks are substantially no different than those faced by architects and engineers. As the Court admitted, it did not address "the underlying question of constitutionality of KRS 413.135 as to those persons who are within its purview." 64

Equal protection proved to be the argument that toppled the statute in Wallace v. Tabler. 65 For reasons quite different than those discussed in Saylor v. Hall, 66 the Kentucky Court of Appeals declared the statute unconstitutional. The ruling was handed down less than three months after the express exclusion of material suppliers from the statute's protection.

III. THE SUCCESSFUL EQUAL PROTECTION CHALLENGE

Challenges to similar statutes in other jurisdictions have been aimed at equal protection, due process or special legislation violations. 67 Equal protection attacks, often joined with due process arguments, 68 are usually based on one of two grounds.

64 Id.
65 No. 83-CA-2160-MR.
66 497 S.W.2d 218. The decision in Saylor was premised upon the common law right of action for injuries. See notes 30-39 supra and accompanying text.
67 Due process challenges alone have not been successful in overturning any statutes of repose. The due process argument is sometimes discussed simultaneously with equal protection or special legislation. McGovern, supra note 22, at 613. See also Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972); Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (Statute did not deny due process, but violated equal protection guarantee and was special legislation.).
68 The permissibility of a statute barring claims is supported by a long line of United States Supreme Court decisions that have provided the guidelines often used by state courts to determine the validity of statutes of repose. At the heart of these decisions is the general rule that the United States Constitution does not forbid the creation of new rights or the abolition of old ones. The Court in Silver v. Silver, 280 U.S. 117 (1929), allowed a legislature to dismantle old rights recognized by common law as long as the action furthered a reasonable legislative goal. The Court pointed out that it was within the power of the legislature to draw lines that determine liability where it saw fit. As long as the "statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs," the Court would uphold the statute. Id. at 124.

One could argue that the statute strikes at the "evil" of indefinite liability that architects and builders face long after their work has been removed from their control. The court in Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972), explained how a statute of repose might cut off liability without disturbing a vested right:

[The statute] does not bar a cause of action; its effect, rather is to prevent what might otherwise be a cause of action from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm forms no basis for recovery. The injured party literally has
It is argued either that classification of the protected class was irrational or that the policy reasons for making such classifications are not being fulfilled by a particular statute. If the state has a constitutional provision prohibiting special legislation, as does Kentucky, separate or simultaneous attacks can be brought on those grounds.

In equal protection challenges, the legislative history of the statute is crucial because of the nature of the traditional "ra-

no cause of action. . . . The function of the statute is thus rather to define the substantive rights than to alter or modify a remedy.

Id. at 667.

See, e.g., Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973). In Fujioka it was contended that HAWAII REV. STAT. § 657-8 (1954) violated equal protection by establishing a 10-year statute of limitations on actions for damages based on "professional services or licensed construction to improve real property." 514 P.2d at 569. Because of that statute, the contractor and the engineer of a fallen roof would be immune from liability, while the owner of the building would be totally responsible for the injuries caused by the collapsed roof. Id. The Supreme Court of Hawaii stated:

It is clear that the classification does not rest upon some reasonable consideration of differences . . . which have a fair and substantial relation to the object of the legislation. Nor is the classification founded upon a reasonable distinction or difference necessitated by state policy. A statute making such an unsupportable classification fails to meet the requirements of the equal protection guaranty.

Id. at 571.

See McClanahan v. American Gilsonite & Co., 494 F. Supp. 1334, 1346 (D. Colo. 1980); Loyal Order of Moose Lodge 1784 v. Cavaness, 563 P.2d at 147. COLO. REV. STAT. § 13-80-127(l)(a) (Supp. 1984) provides that "[a]ll actions against any architect, contractor, engineer, or inspector brought to recover damages for injury to person or property caused by the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property" were required to be brought within 10 years of "substantial completion." In McClanahan v. American Gilsonite Co. the court recognized the legislative concern for those classes of persons protected by the statute. By forcing plaintiffs to bring actions within a "reasonable time," the legislature hoped to avoid difficulties in proof which frequently arise from the passage of time. 494 F. Supp. at 1345. The objective was achieved, the court conceded, but was done in a discriminatory way, "raising the suspicion that those who have sufficient political power or who can afford a persuasive lobbyist may achieve immunity from accountability to the laws that govern others." Id. at 1346.


Not all equal protection or due process challenges to such statutes of repose in other states have been based on alleged violations of the United States Constitution. Many utilize United States Supreme Court standards to test the statutes for possible violation of state constitution provisions that mirror the federal equal protection or due process clauses of the fourteenth amendment. See U.S. CONST. amends. V, XIV. See notes 73-76 infra and accompanying text for discussion of Supreme Court standards for equal protection. Kentucky's constitution contains a provision that specifically guarantees
This two-pronged test requires that any statutory classification be rational—more specifically, that the classification not have been enacted by the legislature for arbitrary or capricious reasons. Also, there must be a reasonable relationship between the statute and furtherance of a legitimate legislative goal.

In *Wallace v. Tabler*, the Kentucky Court of Appeals invalidated KRS section 413.135 because it found "no rational equal protection. See Ky. Const. § 3.

The validity of statutes like KRS § 413.135 has never been tested by the United States Supreme Court. However, the Court impliedly approved an Arkansas decision upholding the constitutionality of a statute similar to KRS § 413.135 by dismissing an appeal of the decision "for want of a substantial federal question." See Carter v. Hartenstein, 455 S.W.2d 918 (Ark. 1970), appeal dismissed, 401 U.S. 901 (1971). Carter is discussed at notes 100-04 infra and accompanying text.

The Arkansas statute is nearly identical to KRS § 413.135. The statute provides:

Personal injury or wrongful death—Four-year limitation.—No action in tort or contract (whether oral or written, sealed or unsealed) to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision or observation of construction or the construction and repairing of any improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction or the construction and repair of such improvement more than four (4) years after substantial completion of same.


Both the Kentucky and Arkansas statutes exclude material suppliers and owners from the immunity granted by the statutes. The Arkansas statute has a four-year statutory period, compared to Kentucky's five-year time limit. If the Kentucky Supreme Court upholds the court of appeal's invalidation of the no-action statute, the United States Supreme Court would possibly review the decision as a federal question erroneously decided by a state court.

Economic regulations that neither interfere with a fundamental right nor discriminate against a suspect class are analyzed for the existence of a rational basis to justify such regulation. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (mandatory retirement of state police officers at age 50 rationally related to goal of assuring physical preparedness); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) (excluding from food stamp program any household whose members are not "all related to each other" found to be without any rational basis).

The equal protection guarantee does not deny a state the right to classify its citizens with laws that will affect some groups differently than others. As long as the classification rests on grounds reasonably related to achieving the state objective, "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

See United States Dep't of Agriculture v. Moreno, 413 U.S. at 533.

Id. at 534.

No. 83-CA-2160-MR (Ky. Ct. App. Sept. 7, 1984). The claim was for the wrongful death of plaintiff's husband who was killed while repairing an elevator at the
basis to exclude materialmen, and controlling owners and tenants from the immunity granted architects, engineers, and builders by [the statute].”

Concluding that there are no significant differences between the groups protected by the statute and those excluded from its protection, the court found the distinction to be unreasonable. Thus, the statute violated the state and federal equal protection guarantees.

The Kentucky court rejected the reasoning relied upon by other jurisdictions which have upheld the validity of similar statutes. In particular, the court disagreed with the distinction between suppliers and builders that the Pennsylvania Supreme Court made in Freezer Storage Inc. v. Armstrong Cork Co. The Pennsylvania court based its validation of the state’s no-action statute on the existence of quality-control methods employed within most factories. These procedures, the court noted, allow manufacturers to test products before they are sold on the market. The Kentucky Court of Appeals found this to be an irrelevant distinction:

The high quality of control in the factory ends at the factory gates. Once a material supplier’s goods are taken to the site and incorporated into the structure, the supplier is at the mercy

Harley Hotel in Lexington, Kentucky. The defendants-architect, elevator company and hotel-were granted summary judgment pursuant to KRS § 413.135, the “architect’s no-action statute.” See 83-CA-2160-MR, slip op. at 1-2.

See id. slip op. at 8.

See id.

The case was reviewed pursuant to the equal protection provisions of the state and federal constitutions. See U.S. Const. amends. V, XIV; Ky. Const. § 3.

Judge Howard dissented from the decision contending that “[t]his [equal protection] issue was never raised before the trial court, and under well-considered and long-standing precedents, it cannot be considered for the first time on appeal.” No. 83-CA-2160-MR, slip op. at 11 (Howard, J., dissenting).

For a comprehensive list of cases upholding the validity of similar statutes, see note 6 supra.


See id. at 718-19.

Suppliers who typically provide items by the thousands, can easily maintain high-quality-control standards in the controlled environment of the factory. A builder, on the other hand, can pre-test his designs and construction only in limited ways—actual use in the years following construction is their only real test. Further, every building is unique and far more complex than any of its component parts.

Id. at 719.
of those who construct, maintain and control the property. Suppliers assume the exact risks of the protected class yet receive no protection. . . . It is the identical nature of the risk that the separate, but similarly situated, groups are exposed to and not the conditions under which they work that is controlling. 85

The court accepted the reasoning of a long line of cases headed by Skinner v. Anderson. 86 Skinner, which invalidated the Illinois statute, 87 was one of the first cases in which an architect’s no-action statute was declared unconstitutional. 88 The Illinois court felt the statute singled out the architect and contractor for special privileges that bore no reasonable relationship to the legislative purpose. 89 The Kentucky court relied on the Skinner court’s language, 90 even though the Illinois case was based not on equal protection but on a special legislation challenge. 91

---

85 No. 83-CA-2160-MR, slip op. at 10 (emphasis added).
86 231 N.E.2d 588 (Ill. 1967). The claim in Skinner was for damages resulting from the plaintiff’s personal injuries and the wrongful deaths of her husband and daughter. The claim was against an architect who negligently designed a ventilation system that allowed poisonous gases to escape into the decedents’ residence. See id. at 589.
87 ILL. ANN. STAT. ch. 83, § 24(f) (Smith-Hurd 1966) (codified as amended at ILL. CODE CIV. PROC. § 13-214 (West 1983)). The statute was later amended to include those involved with the “observation or management” of the improvement and extends the statutory period from 6 to 12 years.
88 See note 6 supra and accompanying text.
89 The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It can not be said that the one event is more likely than the other to occur within four years after construction is completed.
90 See No. 83-CA-2160-MR, slip op. at 10-11.
91 See 231 N.E.2d at 590.
The Kentucky Court of Appeals pointed out a valid similarity between architects and material suppliers that has not been so succinctly defined by other courts. The analysis penetrated the Freezer Storage rationale by first arguing that quality control is a factor that differentiates suppliers from designers at the manufacturing stage. But the Kentucky court concluded that the determining factor is not the control they maintain at that stage but the lack of control over the product once that product leaves the factory.

The Kentucky Court of Appeals found that this lack of control created precisely the same type of risk that architects and engineers have faced—liability for injuries due to another party’s negligence. Just as an architect’s completed design may be subjected to negligent maintenance by a third party owner, a material supplier’s product may be improperly installed or incorporated into a building. This is a fine distinction that has been explained more clearly by the Kentucky court than by most other courts.

The significance of control to the Kentucky no-action statute was first judicially recognized in Lee v. Fister. The Sixth Circuit explained that the Kentucky legislature intended to protect building professionals because these professionals relinquish control upon completion of the project. The legislature wanted to cut off liability from injuries due to “delapidated” and “deteriorating” conditions caused by the owner’s negligence. Although the Wallace court recognized the legislative purpose in eventually shifting the entire burden of liability to where it might properly belong—the negligent owner or tenant—the court felt the protection provided by KRS 413.135 should not be limited to one

---

92 See No. 83-CA-2160-MR, slip op. at 10.
93 Id. See also text accompanying notes 83-85 supra.
94 See No. 83-CA-2160-MR, slip op. at 10. The court stated: “We fail to see any rational basis for distinguishing [architects, engineers and contractors] from suppliers or materialmen whose products, while uniform, are incorporated into unique structures, thus becoming uniquely used and placed under the control of third-party owners and tenants.” Id.
95 Id.
96 413 F.2d 1286 (6th Cir. 1969).
97 See id. See also notes 82-85 supra and accompanying text.
98 See 413 F.2d at 1289.
group when another experiences the same loss of control and faces identical risks.99

While the court's analysis is compelling and makes an affirmance by the Kentucky Supreme Court likely, there are persuasive cases from other jurisdictions that would support reversal and a reinstatement of the statute.100 For example, in *Carter v. Hartenstein*,101 the Arkansas Supreme Court held that a similar statute102 was based on a rational distinction between the protected parties and those excluded from protection.103 The Arkansas court reasoned that "a vital distinction, nonetheless, exists between owners or suppliers and those engaged in the professions and occupations of design and building. This is not arbitrary or unreasonable. It is a legitimate and practical exercise of the legislative function."104

IV. REENACTMENT OF THE STATUTE

If the Kentucky Supreme Court affirms *Wallace v. Tabler*,105 the legislature has two choices: let the invalidated statute fade

---

100 See note 6 supra.
101 455 S.W.2d 918 (Ark. 1970). In *Carter* the plaintiff's son was killed in an elevator accident. She sued the elevator company, architect and contractor who had worked on the project. The suit was barred because the death had occurred after the expiration of the four-year statutory period. The plaintiff appealed, claiming the statute violated due process, contravened equal protection of the laws, and was local and special legislation. See id. at 919-20.
102 For a discussion of the similarities of the Arkansas and Kentucky statutes, see note 72 supra.
103 See 455 S.W.2d at 921. One suggested rationale for such classification is "the problem of proof, and arguably the legislature could reasonably have concluded that evidentiary problems facing the architect and contractor are greater than those facing the materialmen." Comment, supra note 15, at 371.

The *Carter* court made a strong point of the rationale for excluding owners. It reasoned that owners "are not in the same class as those described in the act. This is particularly true after construction is substantially completed and accepted by the owners. Part of acceptance is to accept some future responsibility for the condition of the premises." 455 S.W.2d at 920 (emphasis in original).

For stronger language supporting the exclusion of material suppliers, see Reeves v. Ille Electric Co., 551 P.2d 647, 653 (Mont. 1976) (manufacturer of whirlpool bath was not part of the "construction team" but merely furnished an appliance installed in the project); Howell v. Burk, 568 P.2d 214, 220 (N.M. 1977) ("[M]anufacturer makes standard goods and develops standard processes. Defects are harder to find in the contractor's special jobs.") (quoting 2 HARPER & JAMES, THE LAW OF TORTS § 18.5 at 1043 (1956)).
104 455 S.W.2d at 921.
into memory or reenact the statute with changes.\textsuperscript{106} A reenactment of KRS section 413.135 with changes could not only produce a statute capable of withstanding equal protection challenges but it could also produce a statute fairer to injured parties and more palatable to consumers generally. Since the Kentucky challenge was founded on the lack of protection for people who share the same risks as architects and engineers, the simplest means of enhancing the statute's constitutionality would be to include those people in the protected class.\textsuperscript{107}

In reenacting the statute, the legislature could also refine the law in a variety of ways. The Kentucky legislature could avoid limiting claims for personal injury or wrongful death arising from an improvement to real property.\textsuperscript{108} The statute could be amended to only govern claims for damages to real or personal property, so it would not delve into the emotional arena of barring the claims of persons who have physically suffered from a defective design or product.

The statute could also be modified to include a discovery rule provision\textsuperscript{109} that would toll the statute until injury is discovered or reasonably should be discovered with due diligence.\textsuperscript{110} The discovery rule has been accepted by several courts in recent

\textsuperscript{106} Some states have reenacted amended no-action statutes to overcome the constitutional infirmities that led to the original statute's being invalidated. See, e.g., ILL. CODE CIV. PROC. § 13-214 (West 1983) (12 years); MINN. STAT. ANN. § 541.051 (West 1984) (15 years); OKLA. STAT. ANN. tit. 12, § 109 (West Supp. 1983) (10 years).

\textsuperscript{107} This route was taken by the Hawaii legislature after its no-action statute had twice been invalidated. See HAWAII REV. STAT. § 657-8 (Supp. 1983). The new Hawaii statute not only includes suppliers and manufacturers within its protection, it also extends the statutory period from 6 to 10 years. The statutory period begins to run upon completion of an improvement to real property. See id.

\textsuperscript{108} This approach was also taken with the Hawaii statute. See id.

\textsuperscript{109} "This 'discovery rule' appears to be infectious and it has been spreading from doctors to dentists, accountants, architects, lawyers, manufacturers of defective products, and miscellany of negligence and other tort actions." PROSSER & KEETON, PROSSER & KEETON ON TORTS, § 30; at 166-67 (5th ed. 1984).

\textsuperscript{110} See Chrischilles v. Griswold, 150 N.W.2d 94 (Iowa 1967). The traditional approach is that the statute begins to run at the time of the architect's or builder's negligent act, usually when the structure is designed or built. In more liberal jurisdictions, the discovery rule has been applied when the statute is vague on commencement of the time period. In Chrischilles, the court pointed out that the plaintiff homeowner could not maintain a claim until he was aware of the injury to his interest. The commonly advanced rationale for such statutes of limitation—to keep plaintiffs from sleeping on claims—is not served if the plaintiff is unaware he has any injury. See id. at 100. See generally Annot., 90 A.L.R.3d 507, 521-24 (1979).
years because it makes statutes of repose seem less harsh and unfair to plaintiffs whose claims are otherwise barred. Although the Kentucky Court of Appeals has rejected application of a discovery rule to the no-action statute, this decision was based on the language of the statute itself. Consequently, a statutory discovery rule should be enforceable.

Because the discovery rule leaves the defendant vulnerable to claims indefinitely, it should be supplemented with an outer time limit, after which all claims would be barred. This concept is consistent with discovery rules now being used in Kentucky in cases involving medical malpractice, products liability,

---

111 See, e.g., City of Aurora v. Bechtel Corp., 599 F.2d 382, 389 (10th Cir. 1979) ("[W]e are of the view that the reasons for delayed accrual in actions for malpractice apply as much to the engineering and architectural profession as to others."); Board of Directors v. Regency Town Ventures, 635 P.2d 244, 248 (Hawaii App. 1981) ("The statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have discovered that an actionable wrong has been committed."); Sisters of Mercy of U. in U.S. v. Gaudreau, Inc., 423 A.2d 585, 588 (Md. Ct. Spec. App. 1980) ("[T]he Statute of Limitations may be likened to a time bomb, lying dormant. When a claimant discovers or should have, with due diligence, discovered that he or she has a cause of action . . ., at that moment the detonating device is triggered, and statute begins to tick away."); Hartford Fire Ins. Co. v. Osborn Pl. & Htg., 225 N.W.2d 628, 632 (Wis. 1975) ("[T]he cause of action accrues and the statute of limitations begins to run when an injury occurs."); Barnes v. Town of Dayton, 474 P.2d 300, 303 (Wyo. 1970) (this view supports tendency in recent years "to increase the obligations and liabilities of architects and engineers").

112 Prosser and Keeton have noted that the discovery rule has been implemented to overcome the difficulties of the traditional approach. The literal, traditional approach can sometimes bar a claim "before the plaintiff discovers that he has suffered injury, and sometimes even before the plaintiff himself has suffered the injury." PROSSER & KEETON, supra note 109, § 30, at 165.

113 See Housing Now—Village West Inc. v. Cox & Crawley Inc., 646 S.W.2d 350, 351 (Ky. Ct. App. 1982) (rejecting the discovery rule because "the language in [KRS § 413.135] is controlling").

114 One of the suggested model statutes requires that all claims be brought within two years of discovery, but under no circumstances can a claim be brought more than six years after substantial completion. See Knapp & Lee, Application of Special Statutes of Limitations Concerning Design and Construction, 23 St. Louis U.L.J. 351, 368 (1979). See also Comment, supra note 15, at 385-87.

115 Kentucky began applying the discovery rule in medical malpractice cases in Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970). See also Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971). The discovery rule has been statutorily imposed in medical malpractice cases. See KRS § 413.140(2) (Cum. Supp. 1982).

116 The discovery rule was adopted for use in products liability actions in Louisville Trust Co. v. Johns-Manville Products, 580 S.W.2d 497, 501 (Ky. 1979) (overruling Columbus Mining Co. v. Walker, 271 S.W.2d 276 (Ky. 1954)). The statute creating liability for products manufacturers does not express an exact time for commencing the
professional negligence and certain other actions. An outer time limit would provide greater equity for the injured potential plaintiff and certainty for designers and builders that claims will be barred after a specified time.

Alternatively or simultaneously, the Kentucky legislature should extend the present five-year statutory period that follows substantial completion. The modern trend in reenacting or amending such statutes is to extend the period to increase the chances that all meritorious claims will be addressed. An extension would better balance the interest of injured parties with the professional person's ability to acquire insurance to cover extended, but not indefinite, liability.

CONCLUSION

No-action statutes, or statutes of repose that limit liability for architects and builders, were enacted after the demise of the privity doctrine. Not unlike most of the no-action statutes en-

statutory period. The Court decided "to extend the discovery rule of our medical malpractice cases to tort injuries resulting from a latent disease caused by exposure to a harmful substance." 580 S.W.2d at 499. See also KRS §§ 411.300-.340 (Cum. Supp. 1982).

The Court's action in adopting the discovery rule was consistent with other courts which are hesitant to apply a discovery rule when there is a specific statute that mandates another approach but are likely to adopt a discovery rule when the statute is vague. See Prosser & Keeton, supra note 109, § 30, at 167.

117 The statute governing actions for professional service malpractice has a one-year statutory period, to commence "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." KRS § 413.245 (Cum. Supp. 1982).

118 Discovery rules have long been applied to worker's compensation claims and actions based on fraud or mistake. Cooper, Kentucky Law Survey—Civil Procedure, 66 Ky. L.J. 531, 534-35 (1977-78).

119 See authorities cited supra note 106.

120 One study shows that 99.6% of all claims are brought within 10 years of completion. In contrast, only 89.7% are initiated within five years of completion, as required by the Kentucky statute. See Comment, supra note 15, at 367.


122 Insurance rates for professional designers are admittedly high, but not as high as for some other professions. Professional liability insurance rates for architects and engineers have increased 439% from 1962 to 1974, when liability was extended by the fall of the privity doctrine. Compare, however, the 826% increase for surgeons during that same period. 4 Office for Professional Liability Research, Victor O. Schnurer & Co., The Liability of Design Professionals, Vol. No. 6 (1974).
acted in the 1960s, KRS Section 413.135 has had a "checkered" history. It was declared unconstitutional in 1973 in Saylor v. Hall, reinstated in 1982 by Carney v. Moody, and again invalidated in 1984 in Wallace v. Tabler as violative of state and federal equal protection guarantees.

The statute was invalidated because of the exclusion of material suppliers, who were found to face the same types of risks as those within the protected class. The Kentucky Court of Appeals found that the statute arbitrarily distinguished between groups of persons involved in the construction industry who basically face identical risks.

If the Kentucky Supreme Court upholds Wallace v. Tabler, the legislature may reenact the statute with modifications. In addition to broadening the protected class to avoid equal protection challenges, the legislature should consider other amendments to the no-action statute. Lengthening the statutory period, adopting a discovery rule with an outer time limit, and exempting personal injury claims from the statute would make the statute both fairer and more effective.

Jayne Moore