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Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope

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Comment

Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of *Pope*

I. INTRODUCTION

The stern warnings published in Missouri newspapers used to read, "All creditors of the decedent are notified to file claims in court within six months from the date of first publication of this notice or be forever barred."[1] This language reflected section 473.360 of the Revised Statutes of Missouri.[2] However, the decision of the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*[3] limited the effective operation of this strict statute. According to the Court in *Pope*, to deny some creditors a claim against the estate based on notice by publication alone would deprive those creditors of property without due process of law.[4] The Court held that claims filed by "reasonably ascertainable" creditors who do not receive actual notice could not be barred by the statute.[5]

This conflict between the language of the statute and due process considerations continues. Probate courts can no longer determine the viability of a creditor's claim by noting the date a claim was filed. *Pope* has opened a Pandora's box of new issues that judges will be forced to address. These issues include: (1) Did the creditor receive actual notice?[6] (2) Which creditors are reasonably ascertainable?[7] (3) Does the six month time limit apply to creditors who receive actual notice near the end of that period?[8] (4) Who would be liable for the claim of a creditor who should have received actual notice, but did not?[9] (5) Do due process notice requirements also apply to the long-term nonclaim statute?[10]

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1. MO. REV. STAT. § 473.033 (1986) (amended 1989).
2. MO. REV. STAT. § 473.360.1 (1986). Throughout the remainder of this Comment, this statute will be referred to as either the six month or short-term nonclaim statute. See *infra* text accompanying note 14 for the text of this provision.
3. 485 U.S. 478 (1988).
4. *Id.* at 490-491.
5. *Id.* at 490.
6. *See infra* part IV.
7. *See infra* part V.A.
8. *See infra* part V.B.
9. *See infra* part V.C.
10. *See infra* part V.D.

Missouri courts are just beginning to face some of these new issues.[11] Inevitably, courts will have to address them all. This Comment will review the case law addressing notice requirements and nonclaim statutes, discuss Missouri's response to *Pope*, analyze the issues that are likely to be faced in the future, and, when appropriate, propose some legislative solutions to these problems.

II. LEGAL BACKGROUND

A. The Statutory Framework Before Pope

When a person dies testate in Missouri, the probate process begins when the personal representative of a decedent applies for letters testamentary in the probate court in the county of the decedent's domicile.[12] Once letters testamentary are issued, notice of the appointment of the personal representative and notice to decedents' creditors that they must file claims within six months or their claims will be barred must be published in the local newspaper once a week for four consecutive weeks.[13] This notice is designed to warn the creditors of the decedent of section 473.360 of the Missouri Revised Statutes, which provides:

> Except [claims by judgment], all claims against the estate of a deceased person . . . which are not filed in the probate division, or are not paid by the personal representative, within six months after the first published notice of letters testamentary or of administration, are forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent. . . .[14]

In addition to the six month nonclaim period provided by Section 473.360, Missouri law also included a long-term nonclaim statute.[15] This long-term nonclaim statute provided, "All claims barrable under the provisions of [the six month nonclaim statute], in any event, are barred if administration of the estate is not commenced within three years after the death of the decedent."[16]

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11. *See infra* part IV.
12. *See* MO. REV. STAT. §§ 473.010.1(1), 473.017, 473.110 (1986)
13. MO. REV. STAT. § 473.033 (Supp. 1993).
14. MO. REV. STAT. § 473.360.1 (Supp. 1993).
15. MO. REV. STAT. § 473.360.3 (1986) (repealed 1989).
16. *Id.*

Because of the United States Supreme Court's holdings in *Mullane v. Central Hanover Bank & Trust Co.*[17] and *Mennonite Board of Missions v. Adams*,[18] there was some question whether barring a claim under the six month nonclaim statute based only on notice published in the newspaper satisfied the Due Process Clause.[19]

B. Notice and the Due Process Clause

In *Mullane*, the Supreme Court held that notice of state action affecting property is central to the Due Process Clause.[20] As the Court said, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[21] Under the circumstances of that case, the Court held that notice solely by publication was not sufficient.[22]

The Court also found notice by publication constitutionally deficient in *Mennonite Board of Missions v. Adams*.[23] In *Mennonite*, the Court addressed a state law that established a two year period following any tax sale of property during which the owner or any lienholder could redeem the property.[24] The property owner received actual notice of the tax sale and the redemption period, while other parties were only given notice by publication.[25] The Court found that a mortgagee of property that had missed the redemption period was entitled to more than publication notice.[26] The Court held that "actual notice is a minimum . . . to a proceeding which will

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17. 339 U.S. 306 (1950).

18. 462 U.S. 791 (1983).

19. *See* Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C. L. REV. 659 (1985); *See also* John A. Borron Jr., *Due Process of Law: Sufficiency of Published Notice of Letters Granted*, 41 J. MO. B. 149 (1985).

20. *Mullane*, 339 U.S. at 314.

21. *Id.*

22. *Id.* at 319. *Mullane* involved a trustee of a common trust fund who petitioned for a judicial settlement of its account. *Id.* at 309. Such settlement was to be binding on every person having any interest in the common trust fund. *Id.* Under New York law, only notice of the petition was required to be published in a local newspaper. *Id.* at 309-10.

23. 462 U.S. 791 (1983).

24. *Id.* at 793 (citing IND. CODE § 6-1.1-25-1 (1982)).

25. *Id.* (citing IND. CODE §§ 6-1.1-24-3, 6-1.1-24-4 (1982)).

26. *Id.* at 798.

adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable."[27]

C. Notice, Due Process and Nonclaim Statutes

The constitutionality of nonclaim statutes that provided only for notice by publication was challenged in *Continental Insurance Co. v. Moseley* [*Moseley I*].[28] In that case, the Nevada Supreme Court refused to apply *Mullane* notice standards to an estate creditor, holding that a nonclaim statute that provided only for notice by publication did not violate the Due Process Clause.[29] On appeal, the United States Supreme Court vacated the decision and remanded the case for consideration in light of *Mennonite*.[30] On remand, the Nevada Supreme Court reconsidered and held that under the standards set forth in *Mullane* and *Mennonite*, a readily ascertainable creditor was entitled to "more than service by publication."[31]

Shortly after *Moseley III*, this issue surfaced in Missouri. The Missouri Supreme Court had the opportunity to address the constitutionality of the notice by publication provision of the nonclaim statute in *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*[32] The Ferrell-Duncan Clinic filed a claim for medical services the clinic had provided to Leo A. Busch prior to his death.[33] Because this claim was filed eleven months after notice of letters granted was first published, the probate court held that the claim was barred by the six month limit provided by Section 473.360.[34] The clinic appealed, attacking the sufficiency of notice by publication under the Due Process Clause in light of the *Mullane* and *Mennonite* decisions.[35] The *Busch* court distinguished

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27. *Id.* at 800.

28. 653 P.2d 158 (Nev. 1982), *vacated and remanded*, 463 U.S. 1202 (1983). The nonclaim statute at issue in *Moseley I* was essentially similar to Missouri's short-term nonclaim statute except that the Nevada statute provided that all claims would be barred within 60 days of first publication rather than six months. *Compare* NEV. REV. STAT. § 145.060 (1991) *with* MO. REV. STAT. § 473.360.1 (1986).

29. *Moseley I*, 653 P.2d at 160. The court held that notice by publication was "reasonably and sufficiently calculated to provide actual notice" to potential creditors. *Id.*

30. Continental Ins. Co. v. Moseley, 463 U.S. 1202 (1983) [hereinafter *Moseley II*].

31. Continental Ins. Co. v. Moseley, 683 P.2d 20, 21 (Nev. 1984) [hereinafter *Moseley III*].

32. 700 S.W.2d 86 (Mo. 1985).

33. *Id.* at 87.

34. *Id.*

35. *Id.*

Mullane and the cases following it because in *Mullane*, the person was made an actual party to the litigation by the notice, and the judgment of the court operated directly on that person's property.[36] However, the court noted that "[n]otice under a nonclaim statute does not make a creditor a party to the proceeding; it merely notifies him that he may become one if he wishes."[37] Furthermore, the court found that the nonclaim statute was a self-executing statute of limitations.[38] Under the rule of *Texaco, Inc. v. Short*,[39] because the statute cut off potential claims by the passage of time, the court held that there was not sufficient state action to implicate the Due Process Clause.[40]

In its analysis, the Missouri Supreme Court explicitly rejected the holding in *Moseley III*, concluding that "the Supreme Court's procedure—granting certiorari, vacating and remanding in light of [*Mennonite*]—does not conclusively indicate the Supreme Court has held, or will hold, *Mullane* applicable in the circumstances of the remanded case. We are not persuaded by the Nevada Court's holding after considering the *Mennonite* case."[41] Accordingly, the court held that the clinic's claim was barred by the nonclaim statute.[42]

The Oklahoma Supreme Court relied in part upon *Busch* in upholding the Oklahoma nonclaim statute in *In re Estate of Pope*.[43] Similar to *Busch*, the *Pope* case involved a claim for the expenses of the last illness of the decedent that was barred by the Oklahoma nonclaim statute because it was not filed within the two month period provided by statute.[44] On appeal, however, the United States Supreme Court reversed the judgment of the Supreme Court of Oklahoma.[45]

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36. *Id.* at 88.

37. *Id.*

38. *Id.* at 89.

39. 454 U.S. 516 (1982). In *Short*, the Court addressed a state statute which provided that unless a mineral interest owner filed a claim with the county recorder, a mineral interest that was unused for 20 years would lapse and revert to the surface property owner. *Id.* at 520. The Court held that the statute was self-executing because the lapse was triggered by the running of time rather than a judicial proceeding. *Id.* at 533-36. Since the statute was self-executing it was not subject to due process notice requirements. *Id.*

40. *Busch*, 700 S.W.2d at 89.

41. *Id.* at 87 n.2.

42. *Id.* at 89.

43. 733 P.2d 396 (Okla. 1987), *rev'd*, 485 U.S. 478 (1988).

44. *Id.* at 397-98.

45. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988). For a more detailed analysis of this case see John W. Chapman Jr., Note, *Probate Nonclaim Statutes and the* Tulsa *Decision: Requiring Actual Notice to Reasonably Ascertainable Creditors*, 18 STETSON L. REV. 471 (1989); Jeffrey T. Granza, Note,

The Court began by reviewing the *Mullane* and *Mennonite* cases,[46] and applied those principles to the case at hand.[47] The Court held that the Fourteenth Amendment Due Process Clause protects the creditor's interest in an unsecured claim for an unpaid bill.[48] However, the Court noted that the Fourteenth Amendment only protects this interest from deprivation by state action.[49] The estate, relying on *Busch* and *Short*,[50] argued that the nonclaim statute was self-executing and therefore should not be considered state action.[51] The Court rejected this argument, holding that because the probate court's involvement triggered the time bar of the nonclaim statute, the statute was not self-executing.[52] The probate court's intimate involvement was sufficient state action to implicate the Due Process Clause.[53]

After passing the state action hurdle, the Court was then left to decide exactly what notice was due under the Due Process Clause. The Court held that in light of *Mullane* and *Mennonite*, the decedent's estate was required by the Due Process Clause to make reasonably diligent efforts to give "known or reasonably ascertainable creditors" actual notice of the probate proceedings.[54] Publication notice would be sufficient only for creditors who are not "reasonably ascertainable."[55] The Court remanded the case for further proceedings to determine if "reasonably diligent efforts" would have identified the hospital's claim.[56]

Due Process Requires Actual Notice to Known or Reasonably Ascertainable Estate Creditors, 58 U. CIN. L. REV. 303 (1989); Bruce N. Kness, Note, Tulsa Professional Collection Services v. Pope: *New Due Process Requirements for Decedent's Creditors —Adios Publication Notice*, 34 S.D. L. REV. 359 (1989); Marshall Wilson, Note, *New Requirements of Creditor Notice in Probate Proceedings*, 54 MO. L. REV. 189 (1989).

46. *Pope*, 485 U.S. at 484-85. *See supra* text accompanying notes 17-27.

47. *Pope*, 485 U.S. at 485.

48. *Id.*

49. *Id.*

50. *See supra* text accompanying notes 32-42.

51. *Pope*, 485 U.S. at 486.

52. *Id.*

53. *Id.* at 487. In dissent, Chief Justice Rehnquist argued that there was not sufficient state action to implicate the Due Process Clause. *Id.* at 493 (Rehnquist, C.J., dissenting). Rehnquist believed that the distinction between nonclaim statutes and other statutes of limitation was artificial. *Id.*

54. *Id.* at 489-90.

55. *Id.* at 490.

56. *Id.* at 491.

III. MISSOURI'S RESPONSE TO *POPE*

After *Pope*, the Missouri General Assembly had the opportunity to revise the nonclaim statute to conform with the standards set forth by the United States Supreme Court. However, the legislature made very few changes in response.[57] The General Assembly failed to enact proposed section 473.034, which would have required the personal representative to give actual notice to known or ascertainable creditors.[58] Although this statute would not have altered the substantive rights of the creditor or the duties of the personal representative, the statute would have had the effect of codifying the due process requirements of *Pope*. Such a codification would make those unfamiliar with probate practice aware of the requirement of actual notice imposed by *Pope*.

The effect of the legislature's failure to pass this law is that section 473.360, the six month nonclaim statute similar to the statute involved in *Pope*, was not altered in any way. Only the form of the notice to be published was amended to read all claims not filed within six months "will be forever barred to the fullest extent permissible by law," rather than just "forever barred."[59] Also, the long-term nonclaim statute, which barred all claims after three years from the decedent's death,[60] was reduced to one year.[61]

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57. *See* Mark E. Rector, *1989 Probate Code Amendments*, 46 J. MO. B. 119, 120-22 (1990).

58. Section 473.034 would have provided:

> 1. Within one hundred twenty days of the date of first publication, the personal representative of the estate shall mail a copy of the notice prescribed by section 473.033 by ordinary mail to all known or reasonably ascertainable creditors whose claims may not be paid or acknowledged by the personal representative to be due as provided in section 473.035.
>
> 2. The burden of proof on any issue as to whether a creditor was known or reasonably ascertainable by the personal representative shall be on the creditor.

H.R. 145, 85th Gen. Assembly, 1st Reg. Sess. (1989).

59. *See* MO. REV. STAT. § 473.033 (Supp. 1993).

60. The long-term nonclaim statute provided: "All claims barrable under the provisions of [the six month nonclaim statute], in any event, are barred if administration of the estate is not commenced within three years after the death of the decedent." MO. REV. STAT. § 473.360.3 (1986) (repealed 1989).

61. MO. REV. STAT. § 473.444 (Supp. 1993).

IV. THE MISSOURI NONCLAIM STATUTES AFTER *POPE*

The Missouri Supreme Court had its first opportunity to review the Missouri six month nonclaim statute after the *Pope* decision in *Missouri Highway & Transportation Commission v. Myers*.[62] In *Myers*, the court noted that "*Pope* applies the due process analysis of *Mullane* to probate nonclaim statutes, effectively vitiating *Busch*."[63] However, the court emphasized that the *Pope* court did not declare the Oklahoma nonclaim statute void; it just ruled that the Due Process Clause required more than notice by publication for known or reasonably ascertainable creditors.[64] The court reasoned that under *Mullane* and *Pope*, the Due Process Clause requires that the creditor be given "notice by mail or such other means as might be reasonably available to ensure 'actual notice.'"[65] But the court asserted that the *Pope* Court "did not declare a deprivation of due process as to creditors who have actual notice but fail to meet the statutes' time requirements."[66]

Taking these due process requirements into consideration, the court held that nothing in *Pope* "invalidates Missouri's nonclaim statute in the circumstances here."[67] The circumstances of *Myers* were that in addition to published notice of the probate proceedings of Flora Myers, the Commission had received actual notice of the proceedings but still failed to file a claim within the six month period.[68] The court found that the Commission had actual notice of the proceedings because it knew "(1) it was a claimed creditor of Flora Myers, (2) that she had died, (3) that her estate had been opened and the court in which this occurred, (4) the number assigned to the estate, and (5) the name and identity of the executor five months before expiration of the claim period."[69] Because the creditor in the instant case had actual notice, the Due Process Clause was satisfied. Therefore, the court held that section 473.360 effectively barred the untimely claim of a creditor who had actual notice of the probate proceedings, even though the personal representative did not formally give the creditor actual notice.[70]

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62. 785 S.W.2d 70 (Mo. 1990). The court assumed that *Pope* should be applied retroactively, but noted that there were persuasive arguments that it should not. *Id.* at 74.

63. *Id.*

64. *Id.* at 75.

65. *Id.* (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988)).

66. *Id.* at 74.

67. *Id.*

68. *Id.* at 75.

69. *Id.*

70. *Id.* at 74.

The issue of whether a creditor received actual notice was again presented in *In re Estate of Wilkinson*.[71] In *Wilkinson*, the court, applying the factors set forth in *Myers*,[72] found that a claimant against the estate did not receive actual notice.[73] Therefore, under *Pope*, the court held that the six month nonclaim statute did not bar the claim against the estate.[74]

After resolving whether the creditor received actual notice, the court briefly addressed whether section 473.444 should be applied in the instant case.[75] Section 473.444, like section 473.360, is a limitation on the time a creditor has to file against the estate. However, instead of six months from the date letters testamentary are issued, section 473.444 provides for a claim period measured one year from the date of the decedent's death.[76] The issue the court faced was whether section 473.444 should be applied retroactively. The statute became effective as of July 13, 1989, but Wilkinson died on July 6, 1989.[77] The court set forth the general rule that statutes are not to be applied retroactively unless the legislature shows an intent that it be retroactive and the statute is procedural only and does not affect any substantive rights of the parties.[78] The court could not find any such legislative intent nor could the court find any reasons for barring the creditor's claim by applying the statute retroactively.[79]

V. ISSUES AWAITING ANSWERS

The *Wilkinson* case represents the first reported case in Missouri in which *Pope* has been relied on to hold the nonclaim statute unconstitutional as applied to creditors who did not receive actual notice and whose claims are barred. The precise issue in that case, whether a creditor received actual notice, seems to be well settled. The standards of actual notice are clearly set forth in *Myers*, and appellate review is limited to a review of the weight of the evidence.[80] However, in part because of the Missouvi legislature's minimal response after *Pope*, several related issues are not so clearly resolved.

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71. 843 S.W.2d 377 (Mo. Ct. App. 1992).
72. *See supra* text accompanying note 69.
73. *Wilkinson*, 843 S.W.2d at 381.
74. *Id.*
75. *Id.*
76. *See* MO. REV. STAT. § 473.444 (Supp. 1993).
77. *Wilkinson*, 843 S.W.2d at 381-82.
78. *Id.* at 382 (citing Robinson v. Heath, 633 S.W.2d 203, 205 (Mo. Ct. App. 1982)).
79. *Id.*
80. *Id.* at 381.

Several important questions remain to be answered by future litigation. First, what constitutes a reasonably diligent search for known or ascertainable creditors? Second, if notice is published and the creditor also receives actual notice, when is the creditor's claim barred? Third, who is liable for a creditor's claim that is not barred for failure to give actual notice? Finally, do the notice requirements that *Pope* applied to the short-term nonclaim statute also apply to the Missouri long-term nonclaim statute? Some of this litigation could be avoided by resolving these problems by legislation.

A. Who Are Reasonably Ascertainable Creditors?

Although the *Pope* Court held that personal representatives must give actual notice to known or ascertainable creditors, the Court gave little instruction as to how much effort a personal representative must exert to ascertain creditors. The Court merely said that all the personal representative must do is make "'reasonably diligent efforts' . . . to uncover the identities of creditors."[81] The phrase "reasonably diligent efforts" was clarified only to the extent that the Court explicitly did not require "impracticable and extended searches . . . in the name of due process."[82] Aside from this general statement, the Court offered no other guidance as to what constitutes reasonable diligence.

Since these standards are so ambiguous, it seems likely that Missouri courts are going to have to clarify the issue. Professor Falender proposed a set of guidelines to judge the reasonableness of a personal representative's diligence.[83] She posited that reasonable diligence should include:

> [A] timely search of the decedent's home, office, and safe deposit box; an investigation of the books and records uncovered by the search, including the decedent's tax returns; and an inquiry of those of the decedents's relatives, acquaintances, business associates, and professional advisers whom the representative believes to be fertile sources of information.[84]

A similar approach was adopted by the Illinois Appellate Court in *Estate of Anderson v. Central Illinois Trucks, Inc.*[85] In that case, the court said:

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81. *Pope*, 485 U.S. at 490 (citing Mennonite Board of Missions v. Adams, 462 U.S. 791, 798 n.4 (1983)).

82. *Id.* (citing Mullane v. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950)).

83. Falender, *supra* note 19, at 695.

84. *Id.*

85. 615 N.E.2d 1197 (Ill. App. Ct. 1993).

> Minimum standards of diligent inquiry would necessitate a good-faith search of decedent's personal and business financial records to disclose debts of the estate, a search comparable to that required to marshall assets and compile a complete inventory of the estate. Since decedent ran his own business, reasonably diligent efforts might include inquiry of those persons and concerns with whom [the decedent's business] had continuing business . . . as to what debts, if any, the decedent had outstanding.[86]

Unfortunately some courts that have faced the issue have failed to establish such useful guidelines, favoring instead more general standards.

For example, in *In re Estate of Thompson*,[87] the only substantive standard announced by the court was that "the personal representative must act with good faith and from proper motives, and within the bounds of reasonable judgment."[88] Applying this standard to the facts, the court found that a search was reasonably diligent when the representative examined the decedent's business and legal files under the decedent's name and talked to his business associates, the board of directors of his company, and the partners and shareholders in his current business.[89] However, reasonable diligence did not include speaking with all the employees of the stores owned by the decedent or with all former business associates, or reviewing all the legal files kept under the names of businewsew* which the decedent was involved.[90]

The California legislature, by statute, has tried a different approach to the problem by addressing the scope of the personal representative's duty to search for creditors. Section 9053 of the California Probate Code states that nothing in the code "imposes a duty on the personal representative to make a search for creditors of the decedent."[91] This lenient statement must be read with the Comment accompanying the section.[92] The Comment states that the personal representative must notify only those creditors who come the attention of the personal representative during the course of administration.[93] However, the Comment emphasizes that the statute does not authorize the representative to willfully ignore information that would likely communicate

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86. *Id.* at 1206.

87. 484 N.W.2d 258 (Minn. Ct. App. 1992).

88. *Id.* at 261 (citing Waterbury, *infra* note 141, at 782-83 n.97).

89. *Id.*

90. *Id.*

91. CAL. PROB. CODE § 9053(d) (West Supp. 1993). *See also* MICH. COMP. LAWS ANN. § 700.703(1) (West Supp. 1993) (same).

92. CAL. PROB. CODE § 9053, Cmt. (West 1991).

93. *Id.*

knowledge of a creditor.[94] For example, the Comment to section 9050 provides the example that a personal representative may not refuse to inspect a file of the decedent marked unpaid bills.[95]

Other states have codified a clearer definition of reasonable diligence on the part of the personal representative.[96] These statutes require a personal representative to exercise reasonable diligence to ascertain the creditors of the decedent.[97] The statutes then define due diligence as inspecting the decedent's financial records and consulting those people known to the personal representative who are likely to have knowledge of the decedent's debts.[98] Significantly, these statutes also provide that when a personal representative has met the standards of diligence defined by the statute, those remaining undiscovered creditors are presumed to be unascertainable creditors.[99] This presumption can only be rebutted by clear and convincing evidence.[100]

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94. *Id.*

95. CAL. PROB. CODE § 9050, Cmt. (West 1991).

96. *See* IND. CODE ANN. § 29-1-7-7.5 (Burns Supp. 1993); WASH. REV. CODE ANN. § 11.40.012 (West Supp. 1993).

97. IND. CODE ANN. § 29-1-7-7.5(a) (Burns Supp. 1993); WASH. REV. CODE ANN. § 11.40.012 (West Supp. 1993).

98. IND. CODE ANN. § 29-1-7-7.5(b) (Burns Supp. 1993) provides:

> (b) A personal representative is considered to have exercised reasonable diligence under subsection (a) if the personal representative:
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> (1) [c]onducts a review of the decedent's financial records that are reasonably available to the personal representative; and
>
> (2) [m]akes reasonable inquiries of the persons who are likely to have knowledge of the decedent's debts and are known to the personal representative.

Similarly, WASH. REV. CODE ANN. § 11.40.012(1)-(2) (West Supp. 1993) provides:

> The personal representative is deemed to have exercised reasonable diligence to ascertain the creditors upon (1) conducting, within the four-month time limitation, a reasonable review of the deceased's correspondence (including correspondence received after the date of death) and financial records (including checkbooks, bank statements, income tax returns, etc.), which are in the possession of or reasonably available to the personal representative, and (2) having made inquiry of the deceased's heirs, devisees, and legatees regarding claimants.

99. IND. CODE ANN. § 29-1-7-7.5(d) (Burns Supp. 1993); WASH. REV. CODE ANN. § 11.40.012 (West Supp. 1993).

100. IND. CODE ANN. § 29-1-7-7.5(d) (Burns Supp. 1993); WASH. REV. CODE ANN. § 11.40.012 (West Supp. 1993) (clear, cogent, and convincing evidence required).

These statutes are an attractive alternative to waiting for the courts to come up with a clear standard. By explicitly defining the personal representative's duty to search, and thereby determining who is an ascertainable creditor, some simplicity is returned to the nonclaim statute. Instead of having to litigate the issues of whether a personal representative was diligent and a creditor was ascertainable on a case by case basis, courts are able to resolve the issue more quickly by determining if the personal representative complied with the statutory requirements. The Missouri legislature could prevent future litigation by adopting a similar statute.

Furthermore, by codifying the requirements of a reasonably diligent search, those unfamiliar with probate practice will have some concrete guidance as to the steps necessary to conduct an acceptable search. Personal representatives could consult the statute for guidance rather than searching case law for a definition of their obligations. People would be more inclined to serve as personal representatives if their obligations were clearly spelled out, and compliance with these statutory requirements would protect them from any possible liability for failing to notify a creditor entitled to notice.[101]

B. If Creditors Receive Actual Notice, When Are Their Claims Barred?

The *Pope* Court held that due process prevents barring a creditor's claim under a short-term nonclaim statute without giving ascertainable creditors actual notice of the probate proceedings.[102] However, once creditors receive actual notice, it is unclear how much time they have to file their claims before the claims are barred.

Section 473.360 provides that creditors' claims must be filed within six months of the first publication of notice of letters testamentary or the claims will be forever barred.[103] After *Pope*, this six month period still applies to those creditors who are not ascertainable by the personal representative's diligent search. Whether the same date would apply to those creditors who receive actual notice of the probate proceedings is not so clear.

If a personal representative gives a creditor actual notice early in the administration of the estate, there seems to be no problem with barring that creditor's claim after the end of the six month period. These creditors will have adequate time to prepare and file their claims against the estate. For example, in *Myers* the court held that a creditor's claim could be barred when

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101. *See infra* part V.C.

102. *Pope*, 485 U.S. at 491.

103. MO. REV. STAT. § 473.360.1 (Supp. 1993). See *supra* text accompanying note 14 for the text of this section.

the creditor had actual notice of the probate proceedings and the identity of the personal representative five months before the expiration of the six month nonclaim period.[104]

At the other extreme, for the creditors who receive notice closer to the end of the six month period because they were not immediately ascertainable from the personal representative's search, it seems inequitable to bar their claims at the end of the same six month period.[105] These creditors may not have sufficient time to prepare and file their claims against the estate.[106]

After *Pope*, the drafters of the Uniform Probate Code addressed this question when they proposed the amendments to the Code.[107] Under Section 3-801, creditors have four months after the publication of notice or sixty days after receiving actual notice, whichever is later, to file their claims before the claim is barred.[108] Creditors are thus given at least sixty days to file their claims before they can be barred.

Several states have enacted variations of this provision that extends the time for creditors who receive actual notice to file claims.[109] Other states provide for a limited time period after receiving notice in which the creditor can file claims, without reference to the period that runs from the publication of notice.[110]

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104. Missouri Highway & Transp. Comm'n v. Myers, 785 S.W.2d 70, 75 (Mo. 1990).

105. The most extreme case would be a creditor who receives notice the day before the nonclaim period would expire. Such a situation may not be as implausible as it seems. *See, e.g.*, Continental Insurance Co. v. Moseley, 653 P.2d 158, 159 (Nev. 1982), *vacated and remanded*, 463 U.S. 1202 (1983), *on remand*, 683 P.2d 20 (Nev. 1984).

106. This situation seems most likely to arise for creditors who are entitled to installment payments on an annual or semiannual basis. A personal representative may not discover these obligations until payment is due and the creditor inquires as to why the payment has been missed. If these payments are not due until near the end of the nonclaim period, the personal representative may not discover the identity of the creditor until there is little time for the creditor to respond. *See* Reutlinger, *infra* note 122, at 460.

107. UNIF. PROB. CODE § 3-803, Cmt., 8 U.L.A. 247 (Supp. 1993).

108. UNIF. PROB. CODE § 3-801(b), 8 U.L.A. 243 (Supp. 1993).

109. *See, e.g.*, ARK. CODE ANN. § 28-50-101(a) (Michie Supp. 1993) (if notice given within 30 days of bar date, creditor has additional 30 days to file); IOWA CODE § 633.410 (1993) (four months from second publication of notice or 30 days after actual notice, whichever is later); ME. REV. STAT. ANN. tit. 18-A, § 3-801(b) (West 1992) (identical to U.P.C. § 3-801); S.D. CODIFIED LAWS ANN. § 30-21-17 (Supp. 1992) (four months from first publication of notice or 30 days after actual notice, whichever is later); WASH. REV. CODE ANN. § 11.40.013 (West Supp. 1993) (same).

110. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-3803 (Supp. 1992) (four months after

A similar statute was proposed in Missouri but failed to pass in the legislature.[111] However, such a provision may be beneficial in Missouri because it both clarifies the question of when a creditor's claim is barred and protects the creditor against having inadequate time to file after notice is provided.

C. Who Is Liable If A Creditor's Claim Is Not Barred?

Another problem that will exist in the wake of *Pope* is determining who will be liable if a creditor's claim is not barred because the personal representative failed to notify the creditor of the probate proceedings. Should creditors pursue their claims against the personal representative, the estate, or the distributees? If the claim is pursued against the estate or distributees, should the personal representative be liable for contribution?

The question whether a personal representative is liable for failure to notify creditors has never been addressed in Missouri because under section 473.033, the clerk of the circuit court is responsible for publishing notice.[112] Section 473.820 of the Missouri Revised Statutes does provide that personal representatives are "individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if [the personal representative] is personally at fault."[113] However, it could be argued that a creditor's claim is not an obligation arising from ownership or control of the estate because the obligation to pay the creditor arose before the commencement of the administration of the estate. On the other hand, if the personal representative had given the creditor notice and the creditor had filed a timely claim, the personal representative would have the obligation to pay the claim. Therefore, it is not certain that the personal representative would be personally liable under current law for the claim of a creditor that is not barred because the creditor did not receive actual notice.

Professor Falender argues that from a policy standpoint, liability should fall on the personal representative to ensure that the personal representative

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actual notice); MD. EST. & TRUSTS CODE ANN. § 8-103(a)(2) (Supp. 1992) (two months after actual notice).

111. Section 473.035 would have provided: "If the personal representative mails the notice provided by section 473.034 to a creditor within the last thirty days of the one hundred twenty-day claims period, the creditor shall have an additional thirty days following the one hundred twenty-day period ending date to file a claim." H.R. 145, 85th Gen. Assembly, 1st Reg. Sess. (1989).

112. Wilson, *supra* note 45, at 201.

113. MO. REV. STAT. § 473.820.2 (1986).

uses reasonable diligence to find and notify creditors.[114] However, this may frustrate the competing policy consideration of encouraging people to serve as personal representatives if people are dissuaded from serving because of the risk of potential liability.[115] Other states have addressed this issue directly through legislation. These states have generally provided that the personal representative is not personally liable for a good faith failure to notify creditors.[116] The creditors can pursue their claims only against the estate or the distributees. Further, the distributees cannot seek contribution from the personal representative for the amount of the claim as long as the personal representative's failure to notify was in good faith. These states have also anticipated a converse problem that may arise if the personal representative gives notice to a creditor who is not entitled to actual notice and whose claim would otherwise have been barred. Should the distributees or the estate have a claim against the personal representative for the amount they would have otherwise received? This question was answered by legislation that protects the personal representative from liability for notifying those creditors who were not actually required to receive notice.[117]

By shielding the personal representative from personal liability for good faith performance, these statutes achieve two significant goals. First, they encourage the personal representative to accept the job. Many may be reluctant to act as a personal representative if there is the possibility of being personally responsible for paying creditors' claims that did not come to their attention during the administration of the estate. Second, these protective statutes also serve creditors' interests by encouraging personal representatives to send notice to all who may be possibly entitled to it.

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114. Falender, *supra* note 19, at 696. However, if the failure to notify a creditor was due to a false or misleading response from someone the personal representative questioned about the decedent's debts, that person, not the personal representative, should be liable for that debt. *Id.*

115. Wilson, *supra* note 45, at 204.

116. *See, e.g.*, CAL. PROB. CODE § 9053(b) (West Supp. 1993); FLA. STAT. ANN. § 733.212(4)(c) (West Supp. 1993) (estate is liable); 755 ILL. COMP. STAT. ANN. 5/18-12(d) (Smith-Hurd 1993) (estate is liable if assets not distributed, otherwise distributees are liable); MICH. COMP. LAWS ANN. § 700.704(2) (West Supp. 1993) (estate is liable); N.C. GEN. STAT. § 28A-14-1(c) (Supp. 1992).

117. *See, e.g.*, CAL. PROB. CODE § 9053(a) (West Supp. 1993); FLA. STAT. ANN. § 733.212(4)(b) (West Supp. 1993) (estate is liable); MICH. COMP. LAWS ANN. § 700.704(1) (West Supp. 1992) (estate is liable); N.C. GEN. STAT. § 28A-14-1(c) (Supp. 1992).

D. Do Notice Requirements Also Apply To Missouri's Long-term Nonclaim Statute?

The *Wilkinson* court did not have the opportunity to apply section 473.444,[118] Missouri's new long-term nonclaim statute that runs for one year following the death of the decedent, because the court would not apply it retroactively.[119] However, there is some question whether this section also violates due process by barring a creditors's claim without notice. Instinctively, it seems illogical that a statute which provides for less notice than the one the *Pope* Court found to be violative of due process would not suffer from the same constitutional infirmity.[120]

Section 473.444 bars all claims against an estate made more than one year after the death of the decedent, whether or not notice has been given.[121] Statutes such as this arguably do not violate due process because the time bar is triggered independently of any probate court involvement.[122] Unlike the

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118. Section 473.444 provides:

> Unless otherwise barred by law, all claims against the estate of a deceased person, other than costs and expenses of administration, exempt property, family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, which are not filed in the probate division, or are not paid by the personal representative, shall become unenforceable and shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent one year following the date of the decedent's death, whether or not administration of the decedent's estate is had or commenced within such one-year period and whether or not during such period a claimant has been given any notice, actual or constructive, of the decedent's death or of the need to file a claim in any court. No contingent claim based on any warranty made in connection with the conveyance of real estate is barred under this section.

MO. REV. STAT. § 473.444.1 (Supp. 1993).

119. Estate of Wilkinson v. Estate of Wilkinson, 843 S.W.2d 377, 382 (Mo. Ct. App. 1992).

120. Professor Reutlinger quipped that solving the insufficiency of notice problem by eliminating notice altogether is something that would be found in a Burns-Allen script. Reutlinger, *infra* note 122, at 433.

121. MO. REV. STAT. § 473.444.1 (Supp. 1993).

122. Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice if Some Notice is Not?*, 24 REAL PROP., PROB. & TR. J. 433, 440-41 (1990).

statute in *Pope*, there is insufficient state action to implicate the Due Process Clause.[123] If there is not sufficient state action involved, notice to estate creditors of the running of the limitations period is not constitutionally required by the Due Process Clause.[124]

The constitutionality of section 473.444 and similar statutes that bar claims made after a period from a decedent's death thus primarily depends on whether courts will agree that these statutes do not involve sufficient state action to implicate the notice requirements of the Due Process Clause.

1. State Action

The Due Process and Equal Protection Clauses of the Fourteenth Amendment only guarantee protection against infringements by the State.[125] A complex body of law has developed to try to clarify exactly what constitutes state action.[126] The *Pope* Court found that there was sufficient state action to implicate the Due Process Clause because the running of the Oklahoma nonclaim statute was triggered by the involvement of the probate court and because the court was "intimately involved throughout."[127] The Court thus distinguished this kind of nonclaim statute from general statutes of limitation that begin running for a fixed time period after a certain event occurs.[128] Such statutes of limitation are considered "self-executing" and the state action of enacting these statutes is insufficient to require notification under the Fourteenth Amendment.[129]

Professor Reutlinger refutes the characterization of probate nonclaim statutes similar to section 473.444 as self-executing statutes of limitation and

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123. *Id.* at 441. The only state action is the enactment of the statute. "While enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." *Pope*, 485 U.S. at 486-87. However, the *Pope* Court explicitly refused to address whether the notice requirements also applied to nonclaim statutes that run from the date of death. *Id.* at 488.

124. Falender, *supra* note 19, at 677.

125. U.S. CONST. amend. XIV.

126. A thorough explanation of the state action doctrine is beyond the scope of this Comment. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 16.1-16.5 (2d ed. 1992). However, these authors did state that the only constant factor in all the state action cases was the Court's unwillingness to adopt a formal test for the amount of contacts with the government that will amount to sufficient state action. *Id.* § 16.3, at 543. State action must be considered on a case by case basis. *Id.*

127. *Pope*, 485 U.S. at 487-88.

128. *Id.* at 485-86.

129. *Id.* at 486-87.

argues that these kinds of nonclaim statutes involve sufficient state action to implicate the Due Process Clause.[130] Professor Reutlinger attacks the two decisions that have formed the basis for the notion that a self-executing statute of limitations is not subject to due process scrutiny—*Flagg Brothers, Inc. v. Brooks*[131] and *Texaco, Inc. v. Short.*[132]

In *Flagg Brothers*, the Court found that a New York statute, which allowed a warehouseman to sell the goods that he was storing to satisfy a lien, did not involve sufficient state action to implicate the Due Process Clause.[133] The Court held that merely enacting the statute was not state action; the state was not responsible for the warehouseman selling the property.[134] Reutlinger argues that this case is not analogous to probate statutes of repose because the state is depriving the creditor of property both by enacting the nonclaim statute and enforcing the statute by dismissing untimely claims.[135] Professor Reutlinger states, "If enactment of the statute is not sufficient state action, surely enactment plus ultimate dismissal is."[136]

Professor Reutlinger also argues that *Short* is not precedent to establish that self-executing statutes of limitation do not involve sufficient state action to implicate the Due Process Clause.[137] Professor Reutlinger points out that the Court never directly addressed the state action issue in *Short.*[138] The discussion of self-executing statutes of limitation was in reaching the merits on the constitutional claim.[139] Therefore, according to Professor Reutlinger, *Short* should be read to hold that notice is not required by the Due Process Clause for some self-executing statutes of limitation, not that all self-executing statutes of limitation do not involve sufficient state action to implicate the Due Process Clause.[140]

Similarly, Professor Waterbury also argues that it is likely that state action will be found for a nonclaim statute that runs from the date of the decedent's death.[141] He states, "The fact that a short-term statute appears to

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130. Reutlinger, *supra* note 122, at 446-52.

131. 436 U.S. 149 (1978).

132. 454 U.S. 516 (1982).

133. The Court rejected both the argument that the sale was a public function and the argument that the statute compelled the private actor. *Flagg Brothers*, 436 U.S. at 157-66.

134. *Id.* at 165-66.

135. Reutlinger, *supra* note 122, at 451.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Thomas L. Waterbury, *Notice to Decedents' Creditors*, 73 MINN. L. REV.

be just as 'self-executing' as the statute of limitations in *Short* provides no assurance that the Court would deem the statute consistent with due process for want of state action."[142] Professor Waterbury points to the ambiguity of the state action doctrine and the apparent willingness of courts to find sufficient state action when the "harm to protected rights outweigh[s] the value of the challenged practice."[143] If this is true, state action is likely to be found when statutes provide for less notice than the *Pope* Court found to be a denial of due process.[144]

Court decisions after *Pope* that have examined statutes similar to Section 473.444 have not concurred with the positions of Professors Reutlinger and Waterbury.[145] For example, in *Ohio Casualty Insurance Co. v. Hallowell*,[146] the court found that the Maryland nonclaim statute that barred all claims made more than nine months after the date of the decedent's death[147] did not violate due process as applied to a creditor who did not receive notice of the probate proceedings.[148] The court distinguished the Maryland statute from the Oklahoma statute addressed by the *Pope* Court because the Maryland statute was self-executing and there was not sufficient state action to implicate the Due Process Clause.[149] The court stated:

> [T]he statutory provision at issue here provides that the bar runs automatically from the time of death. The state court is not "intimately" involved. In fact, no action by the state court is necessary to activate the time bar. It is not dependent on the opening of an estate, the appointment of a personal representative, the providing of notice, or the filing of notice. Death commences the running of the period of time and the passing of

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763, 785 n.102 (1989).

142. *Id.*

143. *Id.* (quoting 2 RONALD D. ROTUNDA ET. AL., TREATISE OF CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.5, at 196-97 (1986)). *See also* Reutlinger, *supra* note 122, at 448 ("[S]tate action may be found if the Court or its dissenters wish to reach the merits of the underlying constitutional issue, and may be missing if they do not.").

144. Waterbury, *supra* note 141, at 785 n.102.

145. *See, e.g.*, Wishbone, Inc. v. Eppinger, 829 P.2d 434 (Colo. Ct. App. 1991), *cert. denied*, 113 S.Ct. 198 (1992); Ohio Casualty Ins. Co. v. Hallowell, 617 A.2d 1134 (Md. Ct. Spec. App. 1993); Lampton v. LaHood, 617 A.2d 1142 (Md. Ct. Spec. App. 1993).

146. 617 A.2d 1134 (Md. Ct. Spec. App. 1993).

147. MD. EST. & TRUSTS CODE ANN. § 8-103(a)(1) (amended 1992) (now 6 six months from decedent's death).

148. *Hallowell*, 617 A.2d at 1138.

149. *Id.*

> that period, regardless of state action. Accordingly, we conclude that the statute at issue here is a self-executing limitation statute. Thus, due process concerns are not implicated, and the statute is not unconstitutional.[150]

On the basis of this decision and the reluctance of the Missouri Supreme Court to find state action where the six month nonclaim statute was concerned,[151] it seems unlikely that a Missouri court will find state action involved when a claim is barred by the operation of section 473.444. However, because of the flexibility of the state action doctrine, given an otherwise inequitable result, a court may be inclined to find state action.[152]

2. Self-Executing Statutes and Due Process

Assuming the state action requirement is satisfied, it remains to be seen whether "self-executing" statutes similar to section 473.444 actually violate due process by barring creditors' claims without notice. Professor Reutlinger distinguishes these kinds of statutes[153] from other self-executing statutes of limitation, which were held in *Short* not to require notice under the Due Process Clause.[154] Professor Reutlinger points out that in the situation of typical statutes of limitation, "the event that triggers the running (commencement) of the statute is or should be known to the person affected, the potential plaintiff or claimant."[155] For example, a party to a contract that has been breached is generally aware of the breach that causes the statute of limitations to start running.[156] Therefore, no notice is required for typical statutes of limitation.

On the other hand, the situation is different for a probate claim. In that case, the creditor is not usually aware of the decedent's death, but the decedent's death is what causes the running of the statute.[157] Because the running of the statute is triggered by an event a creditor will not likely be aware of, notice to the creditor of the decedent's death should be required to satisfy due process.

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150. *Id.*

151. *See supra* notes 32-42 and accompanying text.

152. *See supra* text accompanying notes 141-44.

153. Reutlinger characterizes nonclaim statues similar to section 473.444 as "statues of repose." Reutlinger, *supra* note 122, at 434.

154. Reutlinger, *supra* note 122, at 455-56.

155. *Id.* at 456.

156. *Id.*

157. *Id.*

Although Professor Reutlinger's argument may not ultimately be accepted by a court, it is clear from his discussion that section 473.444 may not be the simple answer to the notice problem that the Missouri legislature envisioned it to be.[158]

VI. CONCLUSION

The days are gone when a probate court judge could just look at the date a creditor's claim was filed and decide whether it should be barred under the nonclaim statute. After *Pope*, judges now must consider whether the creditor was ascertainable, whether the personal representative's search was diligent, and whether the creditor received actual notice of the probate proceedings. The Missouri legislature's reaction to *Pope* was to shorten the long-term nonclaim statute.[159] Unfortunately, if this statute is subject to the same due process analysis as the short-term nonclaim statutes,[160] there has not been any significant improvement. The only options for certain improvement would be for the Missouri legislature to clarify certain issues, such as what is a diligent search,[161] when is a creditor who receives actual notice barred,[162] and who is liable for failure to notify creditors.[163] Although these approaches will not return the nonclaim statutes to their pre-*Pope* level of simplicity, they would clarify some of the issues that remain and prevent some of the otherwise inevitable litigation.

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158. Reutlinger also argues that a one year provision may be unreasonably short to protect the claims of creditors. Reutlinger, *supra* note 122, at 457-64.

159. *See supra* part III.

160. *See supra* part V.D.

161. *See supra* part V.A.

162. *See supra* part V.B.

163. *See supra* part V.C.