Barbed Wire in the Borderland: Statute of Limitations Choices for Wrongful Discharge Claims

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In creating exceptions to the doctrine permitting termination of an "at-will" employee without cause, courts have focused largely upon the reasons for creating particular exceptions to the doctrine and the elements of proof needed for each. With the recognition of the causes of action for wrongful discharge claims, however, comes a need to examine secondary rules and policies of implementation, chief among them the choice of appropriate statutes of limitations. This Article examines the three exceptions to the at-will doctrine, and explores the typical range of limitations choices for each. Solutions are suggested which will maximize the enforcement goals of the wrongful discharge cause of action, and at the same time achieve the traditional policies of statutes of limitations.

INTRODUCTION

The development of different theories of liability for wrongful discharge of at-will employees has precipitated a number of problems, one of which is choice of a statute of limitations. Drawn from a variety of choices, the various substantive theories of wrongful discharge must be matched to the appropriate limitations periods. Unfortunately, the statutes are not congruent within the legal framework of

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obligation and remedy now emerging in wrongful discharge, an area occupying the "borderland" between contract and tort.[1] The statutes often require a court to characterize a claim as either contract or tort or one seeking redress for personal injury or property damage. Further confusion is added by the existence of special limitations periods for actions based upon statute. This raises the question of whether such statutes apply when an element of the claim is determined by reference to legislative policy.

The emerging law of wrongful discharge represents an area of complex doctrinal and remedial jurisprudence in the realms of contract, tort, and enforcement of legislative policy. Unfortunately, potential statutes of limitations, relics of a bygone era of legal formalism, are inadequate to meet the demands of new substantive doctrines. A consistent and principled basis for the choice of a limitations statute is necessary to advance reasoned development and fair enforcement of the substantive law involved. In the absence of legislative reassessment, the courts will have to struggle with the present statutory categories.

This Article reviews the typical statute of limitations choices as applied to three developing theories of wrongful discharge: discharge in violation of public policy, breach of implied-in-fact contract, and breach of the implied covenant of good faith and fair dealing. Following an initial discussion of the history and policies of limitations periods in general, this Article will analyze the statute of limitations choices available for each theory of liability. Such an analysis will be undertaken with a view towards coordinating the purposes of the substantive doctrine with those of the statute of limitations, and achieving the goal of doctrinal and remedial consistency when those purposes are the same. Because the California limitations scheme is representative,[2] these statutes will be used as models both to describe the problems presented and to suggest avenues of principled solution.

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1. Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163 (1983); W. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380 (1954).

2. As discussed in the text *infra* accompanying notes 3-41, the statutes are California Civil Procedure Code section 337(1)(four years), section 338(1)(three years), section 339(1)(two years), section 340(3)(one year), and section 343(four years). For two early comparative studies, see Mix, *State Statutes of Limitation: Contrasted and Compared*, 3 ROCKY MTN. L. REV. 106 (1931), and Littel, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23 (1945).

With regard to the substantive law of wrongful discharge, Professor Estreicher advises all attorneys to assume that California law applies in discharge cases, for the purpose of evaluating them in light of the "most restrictive standards." Estreicher, *Unjust Dismissal: Preventative Measures*, in UNJUST DISMISSAL 1984: EVALUATING, LITIGATING, SETTLING, AND AVOIDING CLAIMS 741, 743 (1984).

THE CALIFORNIA STATUTORY SCHEME

The use of a limitations period to restrict legal remedies may be traced to the 1623 English Limitations Act (Limitations Act).[3] It has been surmised that the purposes of the Limitations Act were to keep inconsequential claims out of the King's courts and to minimize the hardship on a poor defendant of defending in those courts.[4] Depending upon the form of action, the Limitations Act provided different periods of limitation.[5] The choice of a four-year period for personal injury actions, and a six-year period for most other claims, is thought to reflect an early disfavor of the former as well as a recognition of attendant evidentiary problems.[6]

The Limitations Act had a profound, and still apparent, influence upon American statutes of limitations.[7] Regarding both English law and the early American statutes, the intent of the enacting legislatures is not readily apparent. One only can speculate as to the purpose behind the choices made in distinguishing types of actions and limitations periods chosen.[8] This difficulty in discerning a consistent

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3. Limitations Act, 1623, 21 Jac. ch. 16. For a history of the statute of limitations, see *Developments in the Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178-81 (1950) [hereinafter cited as *Developments*].

4. *See Developments*, *supra* note 3, at 1178.

5. "Actions of trespass *quare clausum fregit*, debt, detinue, replevin, and actions on the case or for account were limited to six years; trespass, assault, battery, wounding, and imprisonment four years; and actions on the case for words two years." *Developments*, *supra* note 3, at 1192 n.148.

6. *See id.*

7. *See id.* at 1192. The amended New York Code of 1849 (Field Code) substituted code definitions for the common law forms of action specified in the former statute of limitations and derived from the Limitations Act. *See* Gaines v. City of New York, 215 N.Y. 533, 109 N.E. 594 (1915); *see also* Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d 399 (1944). For a history of the codification in California, see Blume, *Adoption of the Field Code in California: A Chapter in American Legal History*, 17 HASTINGS L.J. 701 (1966). The six-year period may still be seen in the laws of many states. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 260, § 2 (West Supp. 1985); NEW YORK CIV. PRAC. LAW § 213 (McKinney Supp. 1984); MICH. COMP. LAWS ANN. § 600.5807(8) (West 1968); PA. STAT. ANN. tit. 42, § 5527 (Purdon Supp. 1985). *See generally* Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131 (1974); Mix, *supra* note 2, at 108.

8. *See Developments*, *supra* note 3, at 1185 ("[L]egislatures seldom reconsider [statutes of limitations] in the light of the various functions that they actually perform.") Occasionally a legislature provides a glimpse into its reasoning, usually when a special statute of limitations is involved. For example, in amending the New York Civil Practice Law in 1981 to revive or extend "Agent Orange" claims and to provide an alternate discovery accrual date, the New York Legislature made findings that the former statute of limitations, Civil Practice Law section 214, was enacted by a legislature principally motivated by the desire to discourage "belated litigation" which resulted in the failing memory of witnesses and the disappearance of evidence. "It was never the intent of the

legislative concept of statutes of limitations poses particular problems in the nether regions of tort and contract, which today are populated by claims such as those for wrongful discharge.

The current judicial perception of statutes of limitations focuses upon several factors: the need for repose for the defendant in ordering his or her affairs;[9] inhospitality to "stale" claims for which evidence has become unreliable through lapse of time, lost physical or documentary evidence, and faded memories;[10] and the desire to punish a plaintiff whose lack of diligence raises the suspicion of negligence at a minimum,[11] and the suspicion of false or fictitious claims at a maximum.[12] Sometimes cited as a reason for a short limitations period is distaste for a particular type of claim[13] or a de minimus claim.[14] In terms of public policy, a short limitations period may have a salutary stabilizing effect on commerce by limiting the number of outstanding unsettled claims,[15] and on the legal system itself

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legislature in imposing limitations, to foreclose the citizens of this state from prosecuting legitimate claims, provided such claims are diligently and expeditiously pursued." 1981 N.Y. Law ch. 266, § 1. Similar statutes are found in Florida, *see* FLA. STAT. ANN. § 95.11(4)(f) (West Supp. 1985), and in Delaware, *see* DEL. CODE ANN. tit. 10, § 8131 (Supp. 1985). *See* Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d 399 (1944)(short statute of limitations for insurance claims the result of insurer's insistence on protection against fraud); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982)(history of passage of statute of limitations for claims for faulty architecture); *see also* Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158 (1980) (history of statute of limitations for injury claims arising from improvement to real property); Comment, *Limitation of Action Statutes for Architects and Builders - Blueprints for Non Action*, 18 CATH. L. REV. 361 (1969).

9. *See* Weber v. Harbor Comm'rs, 85 U.S. 57 (1873); Neff v. New York Life Ins. Co., 30 Cal. 2d 165, 169, 180 P.2d 900, 903 (1947); Tevis v. Tevis, 79 N.J. 422, 430, 400 A.2d 1189, 1194 (1979); Kittinger v. Boeing Co., 21 Wash. App. 484, 585 P.2d 812 (1978).

10. *See* Order of R.R. Tel'rs v. Railway Express Agency, Inc., 321 U.S. 342, 348 (1944); Davies v. Krasna, 14 Cal. 2d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975) (en banc); California Savings & Loan Soc'y v. Culver, 127 Cal. 107, 59 P. 292 (1899); Beynon Bldg. Corp. v. National Guardian Life Ins. Co., 118 Ill. App. 3d 754, 455 N.E.2d 246 (1983); Hossler v. Barry, 403 A.2d 762, 766 (Me. 1979); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978); Cassidy v. Finley, 173 Mont. 475, 568 P.2d 142 (1977).

11. *See* W. BLACKSTONE, 3 COMMENTARIES 188 (1803); Shain v. Sresovich, 104 Cal. 402, 406, 38 P. 51, 52 (1894).

12. *See* Weber v. Harbor Comm'rs, 85 U.S. 57 (1873); Barclay v. Blackinton, 127 Cal. 189, 59 P. 834 (1899); Lamont v. Wolfe, 142 Cal. App. 3d 375, 380, 190 Cal. Rptr. 874, 877 (1983); Kittinger v. Boeing Co., 21 Wash. App. 484, 585 P.2d 812 (1978).

13. *See* Barclay v. Blackinton, 127 Cal. 189, 59 P. 834 (1899); *Developments*, *supra* note 3, at 1185-86.

14. *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879); *Developments*, *supra* note 3, at 1185; *see also* Aetna Casualty & Sur. Co. v. Superior Court, 233 Cal. App. 2d 333, 339, 43 Cal. Rptr. 476, 480 (1965), *overruled on other grounds sub nom.* Van Tassel v. Superior Court, 12 Cal. 3d 624, 526 P.2d 969, 116 Cal. Rptr. 505 (1974).

15. *See* Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 665, 464 A.2d 1020, 1026 (1983).

by promoting judicial economy.[16] The only restriction placed upon a legislature in devising a statute of limitations period is that it must not be so unreasonable as to amount to a denial of justice.[17]

The California scheme remains largely unchanged from that enacted by the first state legislature in 1850,[18] which was based in large part upon the New York Field Code of 1849.[19]

The 1850 statute distinguished between actions upon a contract or obligation founded upon a written instrument, which had a four-year limitations period, and actions upon a contract or obligation not founded upon a written instrument, which had a two-year limitations period.[20] This latter period was subsequently held to apply to implied-in-fact contracts and quasi-contracts as well as to oral agreements.[21] The purpose of the distinction in California presumably was to confer a shorter period where the evidence was oral and thus more susceptible to loss.[22] The present code preserves those distinctions.[23] This contrasts with systems in other jurisdictions providing for the same limitations period for actions based on both written and oral agreements.[24]

As originally enacted, the "tort" statute of limitations contained an enumeration of particular types of personal torts: libel, slander, assault, battery, and false imprisonment.[25] But it was not until 1905

16. *Id.* at 665, 464 A.2d at 1026.

17. *See* Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944); Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1005 (Ala. 1982); Ocean Shore R.R. v. City of Santa Cruz, 198 Cal. App. 2d 267, 272, 17 Cal. Rptr. 892, 895 (1961).

18. 1850 Cal. Stat. 343.

19. *See* Blume, *supra* note 7, at 108; Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d 399 (1944).

20. 1850 Cal. Stat. 343.

21. *See* Davies v. Krasna, 14 Cal. 3d 502, 509 n.6, 535 P.2d 1161, 1166 n.6, 121 Cal. Rptr. 705, 710 n.6 (1975)(en banc).

22. *See Developments*, *supra* note 3, at 1195; Kersten v. Continental Bank, 129 Ariz. 44, 47, 628 P.2d 592, 595 (Ariz. Ct. App. 1981); Matherly v. Hanson, 359 N.W.2d 450, 457 (Iowa 1984); El Ranco, Inc. v. New York Meat & Provision Co., 88 Nev. 111, 116, 493 P.2d 1318, 1322 (1972).

23. CAL. CIV. PROC. CODE § 339(1) (West Supp. 1985) (two years); CAL. CIV. PROC. CODE § 337(1)(four years)(West Supp. 1985). Other states also have a shorter period for unwritten contracts. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5526 (Purdon Supp. 1985) (five years); 42 PA. CONS. STAT. ANN. § 5525 (Purdon Supp. 1985)(four years); ILL. REV. STAT. ch. 110, ¶ 13-205 (five years); ILL. ANN. STAT. ch. 110, ¶ 13-206 (Smith-Hurd 1985)(ten years); OHIO REV. CODE ANN. § 2305.07 (Page 1984) (six years); OHIO REV. CODE ANN. § 2305.06 (Page 1981)(fifteen years).

24. COLO. REV. STAT. § 13-80-110 (1974)(six years); MICH. COMP. LAWS ANN. § 600.5807 (West 1968)(six years); MINN. STAT. ANN. § 541.05(1) (West 1985)(six years).

25. 1850 Cal. Stat. 819. This probably was due to the influence of the use of the English forms of action as categories of limitations in the Limitation Act. *See supra* note

that the California Legislature added to this one-year provision a general category for personal injury torts,[26] a categorization which still exists today.[27]

The one-year period for personal injury torts operates to hamper such actions, and it highlights the favor which contract claims, particularly written contract claims, are endowed. The short period is necessary because evidence in such actions is inclined to go stale quickly.[28] Further, the disparity between time periods for contract and personal injury tort cases also provides incentive for a plaintiff to recharacterize claims as contractual.

Although some states have one limitations period for all torts,[29] California and other states further have distinguished personal injury torts from torts for injury to property interests.[30] With the development of torts involving invasions of intangible personal property interests, for which the damage was economic, the California courts were faced with an early categorization issue for statute of limitations purposes. After 1905 California's one-year tort statute applied to actions for invasions of personal rights.[31] Because California's residual statute of limitations was held to apply only to actions in equity,[32] a category was needed for legal actions not involving injury to the person. The language of the oral and implied contract statute was most receptive. Thus it was held that such torts were actions based upon an "obligation . . . not founded upon an instrument in writing".[33] As a result, the one-year statute applies to personal in-

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5 and accompanying text.

26. 1905 Cal. Stat. 231.

27. CAL. CIV. PROC. CODE § 340(3) (West Supp. 1985). A three year statute exists for torts involving injury to goods or chattels. CAL. CIV. PROC. CODE § 338(3) (West Supp. 1985).

28. *See* Lamont v. Wolfe, 142 Cal. App. 3d 375, 380, 190 Cal. Rptr. 874, 877 (1983); *Developments*, *supra* note 3, at 1185; Comment, *Tort in Contract: A New Statute of Limitations*, 52 OR. L. REV. 91, 92 (1972).

29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-542 (1982) (two years); D.C. CODE ANN. § 12-301(7) (1981) (three years); VA. CODE § 243 (1984) (two years).

30. ALASKA STAT. § 6-2-34(1)(1975) (personal injury); ALASKA STAT. § 6-2-34(2)(1975) (property damage); CAL. CIV. PROC. CODE § 340 (West 1982) (personal injury); CAL. CIV. PROC. CODE § 338 (West 1982) (property damage); DEL. CODE ANN. tit. 10, § 8106 (1975) (personal injury); DEL CODE ANN. tit. 10, § 8107 (1975) (property damage); FLA. STAT. ANN. § 95.11(o) (West 1982) (personal injury); FLA. STAT. ANN. § 95.11(h) (West 1982)(property damage); ILL. ANN. STAT. ch. 110, ¶ 13-202 (Smith-Hurd 1985) (personal injury); ILL. ANN. STAT. ch. 110, ¶ 13-205 (Smith-Hurd 1985) (property damage); KAN. STAT. ANN. § 60-510(4)(1983) (personal injury); KAN. STAT. ANN. § 60-513(2) (1983) (property damage); MINN. STAT. ANN. § 541.05(5) (West 1985) (personal injury); MINN. STAT. ANN. § 541.05(4) (West 1985) (property damage).

31. *See* Chain v. State Farm Mut. Auto. Ins. Co., 62 Cal. App. 3d 310, 132 Cal. Rptr. 860 (1976) (invasion of privacy).

32. *See* Piller v. Southern Pac. R.R., 52 Cal. 42 (1877); Dore v. Thornburgh, 90 Cal. 64, 27 P. 30 (1891).

33. Wood v. Currey, 57 Cal. 208, 209 (1881) (unlawful levy). Examples of application of the statute may be found in Smith's Cash Store v. First Nat'l Bank, 149 Cal.

jury torts, and a two-year statute applies to business or economic torts involving the invasion to these intangible property interests.[34] No explanation ever has been attempted for a purpose behind the distinction. If any rationale exists, other than lack of any other applicable statute, it simply might be a species of favor accorded to business litigation over personal injury litigation.[35]

The original 1850 statute contained a provision for a three-year period for liability based on statute.[36] Separate from this three-year period was a one-year provision for a statutory action for a penalty or forfeiture.[37] Both categories have been retained in California, while similar provisions are found in the laws of other states.[38]

Because the three-year limitations period in California is more hospitable than the period for implied contracts and torts, the dilatory plaintiff obviously will attempt to "plead into" a statute. Generally, the courts express disapproval at such attempts to circumvent a

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32, 84 P. 663 (1906) (wrongful refusal to pay check); Churchill v. Pacific Improvement Co., 96 Cal. 490, 31 P. 560 (1892)(innkeeper negligence); McCusker v. Walker, 77 Cal. 208, 19 P. 382 (1888) (malicious attachment); McFaddin v. H.S. Crocker Co., 219 Cal. App. 2d 585, 33 Cal. Rptr. 389 (1963)(interference with business); Italiani v. Metro-Goldwyn Mayer Corp., 45 Cal. App. 2d 464, 114 P.2d 370 (1941)(misappropriation of screenplay); Baxter v. King, 81 Cal. App. 2d 192, 253 P. 172 (1927) (refusal to deliver corporate dividends).

34. *See* TU-VU Drive-In Corp. v. Davies, 66 Cal. 2d 435, 426 P.2d 505, 58 Cal. Rptr. 105 (1967).

35. In Neikirk v. Central Ill. Light Co., 128 Ill. App. 3d 1069, 471 N.E.2d 1027 (1984), the plaintiff attempted to argue that justice and logic were violated by different statutes of limitations for personal injury and property damage torts. The court rejected this argument, reasoning that it would not disturb the legislative determination implicit in the statutes.

36. 1850 Cal. Stat. 231.

37. *Id.*

38. CAL. CIV. PROC. CODE § 338(1) (West Supp. 1985) (three years); CAL. CIV. PROC. CODE § 340(1) (West Supp. 1985) (one year); *see also* ARIZ. REV. STAT. ANN. § 12-541 (1982) (liability based on statute); DEL. CODE ANN. tit. 10, § 8106 (1975) (liability based on statute); FLA. STAT. ANN. § 95.11(3)(f) (West 1982)(liability based on statute); IDAHO CODE § 5-218 (1979) (liability based on statute); IDAHO CODE § 5-219 (1979) (penalty); KAN. STAT. ANN. § 60-512 (1983) (liability based on statute); KAN. STAT. ANN. § 60-514 (1983) (penalty); KY. REV. STAT. ANN. § 413.120(2) (Baldwin 1982) (liability based on statute); KY. REV. STAT. ANN. § 413.120(3)(Baldwin 1983) (penalty); MICH. COMP. LAWS ANN. § 600.5809 (West 1968) (penalty); MO. ANN. STAT. § 516-120(c) (Vernon 1952) (liability based on statute); N.Y. CIV. PRAC. LAW § 214(2) (McKinney 1972) (both); OHIO REV. CODE ANN. § 2305.07 (Page 1981) (liability based on statute); OR. REV. STAT. § 12.080(2)(1983) (liability based on statute); OR. REV. STAT. § 12.100 (1983)(penalty); WIS. STAT. ANN. § 893.93 (West 1983) (liability based on statute). In the absence of a "based on statute" provision, such an action may be governed by the residual statute. *See* Blakeslee's Storage Warehouse, Inc. v. City of Chicago, 369 Ill. 480, 17 N.E.2d 1 (1938). In Texas, such actions are placed within the category of actions on debt. *Cf.* McGuire v. Baker, 421 F.2d 895 (5th Cir. 1970), *cert. denied*, 400 U.S. 820 (1970).

common-law claim.[39]

California's residual statute for all other claims provides for a relatively short four-year period.[40] Because the statute initially was interpreted to apply only to equitable claims, only recently has it received extended application.[41]

Principles for Choosing a Statute of Limitations

The choice of a statute of limitations in wrongful discharge cases can present three types of problems. The first is the choice between a contract statute and a tort statute. The second is the choice between a personal injury tort statute and a property damage tort statute. Finally, a third choice sometimes must be made between a statute of limitations for claims based on statute and a statute of limitations for other claims.

Traditional Principles and Approaches

The body of law concerning the characterization of claims as contract or tort, as well as that concerning appropriate allocation of remedies for personal injury or property damage, in many cases is the result of issues presented in situations unrelated to a statute of limitations problem.[42] In many of these cases the solution has been either to characterize the claim as "sound[ing] both in contract and tort,"[43] or to award a remedy traditionally not permitted.[44] Mechanical application to limitations problems of terminology developed in another context yields inconsistent and confusing results.[45] Further-

39. *See* Franceschi v. Scott, 7 Cal. App. 2d 494, 46 P.2d 764 (1935); McFarland v. Cordero, 99 Cal. App. 352, 278 P. 889 (1929); Churchill v. Pacific Improvement Co., 96 Cal. 490, 31 P.2d 516 (1892); *see also* City of Los Angeles v. Belridge Oil Co., 42 Cal. 2d 823, 271 P.2d 5 (1954), *appeal dismissed*, 348 U.S. 907 (1955).

40. Cal. Civ. Proc. Code § 343 (West Supp. 1985).

41. *See* Marshall v. Kleppe, 637 F.2d 1217 (9th Cir. 1980) (applying section 343 to action for a fifth amendment violation). In some states the residual statute is held to apply to newer torts not found at common law. *See* Citizens for Pretrial Justice v. Goldfarb, 415 Mich. 255, 327 N.W.2d 910 (1982).

42. Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158 (1980).

43. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 432, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967); *see also* Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 203 Cal. Rptr. 524 (1984) (assignability).

44. *See* Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980); State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 9 Cal. App. 3d 508, 527, 88 Cal. Rptr. 246, 258 (1970).

45. *See Developments*, *supra* note 3, at 1195-96. The law has been described as a "snarl of utter confusion." W. Prosser, *supra* note 1, at 434. The same authority also has commented that "[t]here is probably no more barren and unrewarding group of decisions to be found in the law." *Id.* at 432; *see also* W. Prosser, The Law of Torts § 92 (4th ed. 1971); Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977); Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158 (1980).

more, the carryover of liberal claim characterization to a statute of limitations context, coupled with modern liberal pleading rules, permits plaintiffs to avoid short statutes by pleading their claims as those to which longer statutes apply. But courts, conscious of their obligation to give effect to the statutes, have looked unfavorably upon such attempts.[46]

Courts often feel compelled to follow the plaintiff's complaint in order to assign an appropriate statute of limitations. The goal has been to develop guidelines for such an analysis; the attempt, however, largely has been unsuccessful. Many courts decreed the need for an assessment of "interests" or "rights" at stake in choosing a limitations statute.[47] This required an examination of the pleading in order to determine the "gravamen"[48] or "gist"[49] of the action, as well as identification of applicable principles of substantive law.[50] While the pleading itself was not determinative, the characterization of the "gist" of the matter was made by examining the pleading.[51] Some jurisdictions, perhaps more aware of the effect of an adverse ruling upon a plaintiff who might not actually have been able to predict which statute would apply, announced as a general principle that in cases of ambiguity the longer statute would apply.[52] This

46. *See* Christ v. Lipsitz, 99 Cal. App. 3d 894, 160 Cal. Rptr. 498 (1979); Yeager v. Dunnavan, 26 Wash. 2d 559, 174 P.2d 755 (1946) (plaintiff not permitted to characterize a tort action as a contract action in order to avoid the statute of limitations); *see also* Brueck v. Krings, 230 Kan. 466, 638 P.2d 904 (1982).

47. *See* Hedlund v. Superior Court, 34 Cal. 3d 695, 704, 669 P.2d 41, 45, 194 Cal. Rptr. 805, 809 (1983); Davies v. Krasna, 14 Cal. 3d 502, 515-16, 535 P.2d 1161, 1170, 121 Cal. Rptr. 705, 714 (1975); Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984); Wilkerson v. Carlo, 101 Mich. App. 629, 300 N.W.2d 658 (1981); Mosley v. Federals Dep't Stores, Inc., 85 Mich. App. 333, 271 N.W.2d 224 (1978).

48. *See* Leeper v. Beltrami, 53 Cal. 2d 195, 208, 347 P.2d 12, 21, 1 Cal. Rptr. 12, 21 (1959).

49. *See* Craft v. Rice, 671 S.W.2d 247 (Ky. 1984); Elizabeth Gamble Deaconess Home v. Turner Constr., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984).

50. *See Leeper*, 53 Cal. 2d at 214, 347 P.2d at 24, 1 Cal. Rptr. at 24.

51. *See* Au v. Au, 63 Hawaii 210, 214, 626 P.2d 173, 177 (1981); Malone v. University of Kan. Medical Center, 220 Kan. 371, 374, 552 P.2d 885, 888 (1976); Elizabeth Gamble Deaconess Home v. Turner Constr., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984).

52. *See* Marshall v. Kleppe, 637 F.2d 1217, 1224 (9th Cir. 1980); Woodward v. Chirco Constr. Co., 141 Ariz. 520, 687 P.2d 1275 (Ariz. Ct. App. 1984), *aff'd as modified*, 141 Ariz. 514, 687 P.2d 1269 (1984)(en banc); Sonne v. Sacks, 314 A.2d 194 (Del. 1973); Au v. Au, 63 Hawaii 263, 264, 626 P.2d 173, 182 (1981); Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Williams v. Lee Way Motor Freight, 688 P.2d 1294, 1297 (Okla. 1984); *see also* County of Los Angeles v. Security First Nat'l Bank, 84 Cal. App. 2d 575, 580, 191 P.2d 78, 82 (1948) (a strained construction of limitations statute in barring claim should be avoided).

may have helped the litigating plaintiff, but the statute then became applicable to all such subsequent claims. The results have been described as the product of ad hoc determination rather than the product of any coherent legal theory.[53]

Choice Between Contract and Tort Statutes

The problem of choosing between a contract or tort statute of limitations is the product of two developments in the law: the evolution of contract obligations into tort obligations, exemplified by the law of professional malpractice and products liability; and the rise of new types of tort obligations imposed upon parties to a contract, epitomized by the bad faith insurance cases. These developments are part of a larger trend towards accountability in contract beyond the perimeters of agreement, fueled by the development of more sophisticated concepts of contract obligation and remedy.[54]

These types of claims do not fall neatly into the traditional categories of tort or contract, that is, tort encompassing a legally-imposed obligation and contract governing an obligation voluntarily undertaken by agreement.[55] In the absence of agreement, these obligations would not exist, even though they are not the clear product of the parties' intent.

The procedural and remedial aspects of such claims often force their characterization as tort or contract. In many cases, damage has been the determinative issue, as the courts attempt to distinguish between the interests protected by, and remedies imposed for, viola-

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53. *See* Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 252, 611 P.2d 1158, 1163 (1980); Note, *Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions*, 22 B.C.L. REV. 545 (1981).

54. *See* G. GILMORE, THE DEATH OF CONTRACT 90 (1975); Note, *"Contort": Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts - Its Existence and Desirability*, 60 NOTRE DAME LAW. 510 (1985); Speidel, *supra* note 1. One court has suggested that the search for new forms of tort relief may be motivated by a desire for vengeance in business disputes. *See* Quigley v. Pet, Inc., 162 Cal. App. 3d 223, 235, 208 Cal. Rptr. 394, 401, *modified*, 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (1984).

55. *See* Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 237 (D. Mass. 1983); Tamarac Dev. Co. v. Delameter, Freund & Assocs., P.A., 234 Kan. 618, 675 P.2d 361 (1984); Elizabeth Gamble Deaconess Home v. Turner Constr. Co., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984). *But see* Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 675, 345 N.E.2d 565, 570, 382 N.Y.S.2d 22, 27 (1976), stating

> The distinctions between contracts and torts are not contained in the natural order but are the products of the faltering legal grammar that men apply to the facts of life in order to make them tractable to verbalized rules. The distinctions, however, are not to be confused with pronouncements from Mt. Sinai.

See also Ashmun v. Nichols, 92 Or. 223, 234, 180 P. 510, 512 (1919) ("Perhaps under our Code systems, we should not attempt to place too much stress upon a somewhat arbitrary and ill-defined distinction between torts and contracts.").

tions of the tort and contract theories of liability.[56] Other cases involve less determinative issues such as venue[57] and defenses.[58]

The cases are inconsistent; some courts characterize the claims as contractual,[59] while others call them tortious.[60] In choosing a statute of limitations, some courts attempt a distinction based upon the source of the obligation breached. For example, a suit for breach of an obligation to achieve a specific result is based upon contract and thereby is treated under the applicable contract statute of limitations. On the other hand, a suit involving a mere promise to perform, enhanced by the imposition of an obligation regarding the quality of performance, is determined by reference to tort principles.[61] While this test may be useful in malpractice cases,[62] in many situations it is difficult to appreciate the difference.[63] Moreover, such a rule makes

56. *See* Hart Eng'g Co. v. FHC Corp., 593 F. Supp. 1471 (D.R.I. 1984) (no negligence claim for economic loss resulting from defective products); Bostwick v. Foremost Ins. Co., 539 F. Supp. 517 (D. Mont. 1982); L.L. Cole & Son, Inc. v. Hickman, 282 Ark. 6, 665 S.W.2d 278 (1984); Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co., 232 Kan. 76, 652 P.2d 665 (1982); *cf.* Tate v. Mountain States Tel. & Tel. Co., 647 P.2d 58 (Wyo. 1982) (contract limitations-of-damages provision inapplicable to negligence claim).

57. *See* Davidson v. Hess, 673 S.W.2d 111 (Mo. Ct. App. 1984).

58. *See* Crowder v. Vanendeale, 564 S.W.2d 879 (Mo. 1978)(en banc) (suit for breach of implied warranty against contractor better treated as contract case in terms of defenses and proof); *see also* Malone v. University of Kan. Medical Center, 220 Kan. 371, 552 P.2d 885 (1976)(dealing with immunity).

59. *See* Dumas v. Southern Guar. Ins. Co., 408 So.2d 86 (Ala. 1981)(tort statute applied to bad faith claim against insurer); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 662, 328 P.2d 198, 203 (1958)("because it was as much a part of the instrument as if it were written out," the choice was given to the plaintiff)(en banc); Nowakowski v. Rozbicki, 39 Conn. Supp. 454, 466 A.2d 353 (1983)(attorney malpractice); Ragnar Benson, Inc. v. Bethel Mart Assocs., 308 Pa. Super. 405, 454 A.2d 599 (1982) (commercial contract).

60. *See* Davis v. State Farm Fire & Casualty Co., 545 F. Supp. 370 (D. Nev. 1982) (applying Nevada law); Gates v. Life of Mont. Ins. Co., 668 P.2d 213 (Mont. 1983).

61. *See* Video Corp. of America v. Frederick Flatto Assocs., 85 A.D.2d 448, 448 N.Y.S.2d 498 (1982), *aff'd as modified*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983); Erickson Hardwood Co. v. North Pac. Lumber Co., 70 Or. App. 557, 690 P.2d 1071 (1984), *review denied*, 298 Or. 705, 695 P.2d 1371 (1985); Yeager v. Dunnavan, 26 Wash. 2d 559, 174 P.2d 755 (1946).

62. *See, e.g.*, Barnard v. Dilley, 134 Mich. App. 375, 350 N.W.2d 887 (1984).

63. *See* Tamarac Dev. Co., Inc. v. Delamater, Freund & Assocs., P.A., 234 Kan. 618, 619-20, 675 P.2d 361, 363 (1984). The court in Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 260, 611 P.2d 1158, 1167 (1980), cautioned that the rule called for "close decisions." An example of an attempt to deal with the rule is found in Erickson Hardwood Co. v. North Pac. Lumber Co., 70 Or. App. 557, 690 P.2d 1071 (1984), in which the court, interpreting allegations of breach of fiduciary duty for statute of limitations purposes, held that the breach sounded in tort even though the action was in contract.

little sense when attempting to characterize the suit for breach of the implied covenant of good faith and fair dealing. A distinction not susceptible to prediction and reliance hardly is satisfactory, particularly in the realm of determining an appropriate statute of limitations.

Some states have imposed a statutory solution to the limitations problem. Such legislative action amounts to an abandonment of the tort-contract distinction in favor of a single limitations period for certain categories of cases.[64] With regard to the implied covenant of good faith and fair dealing, some jurisdictions are permitting the plaintiff to "elect" a statute of limitations by choosing a remedy.[65] Such a rule can permit a plaintiff claiming only contract-type damages to sacrifice the larger tort recovery in order to avoid the bar of the statute of limitations.[66] The policy of affording a shorter statute to tort claims for personal injury and punitive damages is not undermined by such an approach.

The difficulty with this approach stems from the breakdown and readjustment of old tort-contract remedy distinctions. While one aspect of this breakdown manifests itself in the creation of new torts arising out of the contract relationship, it also may be seen in the

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64. For example, many states have one statute of limitations for products liability cases. *See, e.g.*, ARK. STAT. ANN. § 34-2803 (Supp. 1983); FLA. STAT. ANN. § 95.11(14) (West 1982); IDAHO CODE § 6-1403(2) (Supp. 1985); ILL. ANN. STAT. ch. 110, ¶ 13-213 (Smith-Hurd 1984); IND. CODE ANN. § 34-1-2-2 (Burns 1973); MICH. COMP. LAWS ANN. § 600.5803(9) (West Supp. 1985); MINN. STAT. ANN. § 541.05(2) (West Supp. 1985); NEB. REV. STAT. § 25-224 (1979); N.H. REV. STAT. ANN. § 507-D:2 (1983); TENN. CODE ANN. § 29-28-103 (1980).

A single statute of limitations for malpractice cases also is popular. *See, e.g.*, 1985 Ariz. Sess. Laws ch. 84 (approved by the Governor on April 16, 1985)(medical); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1985)(medical); DEL. CODE. ANN. tit. 10, § 8128 (Supp. 1984)(medical); FLA. STAT. ANN. § 95.11(4)(a) (West Supp. 1985)(other than medical malpractice); FLA. STAT. ANN. § 95.114(4)(b)) (West Supp. 1985)(medical); ILL. ANN. STAT. ch. 110, ¶ 13-212 (Smith-Hurd 1985) (medical); IND. CODE ANN. § 34-4-9-1 (Burns Supp. 1985)(medical); MASS. GEN. LAWS ANN. ch. 260, § 4 (West Supp. 1985); MICH. COMP. LAWS ANN. § 600.5805 (West Supp. 1985); MO. ANN. STAT. § 516-105 (Vernon Supp. 1985); MO. ANN. STAT. § 516.140 (Vernon Supp. 1985)(medical); N.Y. CIV. PRAC. LAW § 214 (McKinney Supp. 1985)(other than medical); N.Y. CIV. PRAC. LAW § 214-A (McKinney Supp. 1985)(medical); OHIO REV. CODE ANN. § 2305.11 (Page Supp. 1985); TEX. CIV. CODE ANN. § 4590(i) (Vernon Supp. 1985).

65. *See* McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (C.D. Cal. 1975) (applying California law); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 663, 328 P.2d 198, 203 (1958) (noting that personal injury negligence cases are always treated as torts); Frazier v. Metropolitan Life Ins. Co., 169 Cal. App. 3d 90, 214 Cal. Rptr. 883 (1985); *see also* Spanish Fort Mobile Homes, Inc. v. Sebrite Corp., 369 So. 2d 777 (Ala. 1979) (election between fraud and contract theories); Succession of Dubos, 453 So. 2d 323 (La. Ct. App. 1984). The term "election" is slightly deceptive. The plaintiff is allowed to proceed upon whichever theory is not precluded by the statute of limitations.

66. Often from a practical perspective the difference between tort damages and contract damages is not substantial. Video Corp. of America v. Frederick Flatto Assocs., 85 A.D.2d 448, 451, 448 N.Y.S.2d 498, 501 (1982), *aff'd as modified*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S. 2d 439 (1983)(malpractice).

willingness of courts to authorize the award of emotional distress damages for simple breach of contract, at least in cases in which contract damage principles of foreseeability are not compromised.[67] To the extent that the longer limitations period for contract reflects a determination that claims based upon agreement are preferred, such a policy is not undermined by application of a contract statute despite allegations of emotional distress. Arguably, however, the emotional distress claim resembles the type of personal injury damages intended by the legislature to be governed by the shorter tort period.

If any clearer line can be drawn between contract and tort, it can be drawn between claims supporting punitive damage allegations and those which do not. Traditionally, punitive damages have not been awarded in contract cases for policy reasons deeply embedded in the law of contract,[68] including the advantage of calculating with certainty the amount of damage and the desire to permit efficient

67. *See* Allen v. Jones, 104 Cal. App. 3d 207, 211, 163 Cal. Rptr. 445, 448 (1980); State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 9 Cal. App. 3d 508, 527-29, 88 Cal. Rptr. 246, 258 (1970); Dold v. Outrigger Hotel, 54 Hawaii 18, 501 P.2d 368 (1972); Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 295 N.W.2d 50 (1980); Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501, 418 A.2d 224 (1980); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 353 comment a (1981). The principle stems from the damage rule announced in Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854), a "fixed star in the jurisprudential firmament." G. GILMORE, *supra* note 54, at 83; *cf.* Quigley v. Pet, Inc., 162 Cal. App. 3d 223, 208 Cal. Rptr. 394 *modified*, 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (1984)(no emotional distress damages for breach of commercial contract); Loehr v. Ventura Community College Dist., 147 Cal. App. 3d 1071, 1081 n.4, 195 Cal. Rptr. 576, 582 n.4 (1983)(citing 1903 authority for the proposition that damages for emotional distress cannot be awarded in a discharge contract case); Valentine v. General Am. Credit, Inc., 123 Mich. App. 521, 526, 332 N.W.2d 591, 594 (1983), *aff'd*, 420 Mich. 256, 362 N.W.2d 628 (1984) (refusal to allow emotional distress damages for breach of employment contract, characterizing it as a "commercial contract").

68. *See, e.g.*, L.L. Cole & Son, Inc. v. Hickman, 282 Ark. 6, 665 S.W.2d 278 (1984); Quigley v. Pet, Inc., 162 Cal. App. 3d 223, 208 Cal. Rptr. 394, *modified*, 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (1984); Pogge v. Fullerton Lumber Co., 277 N.W.2d 916 (Iowa 1979); General Motors Corp. v. Piskor, 281 Md. 627, 381 A.2d 16 (1977); Kewin v. Massachusetts Life Ins. Co., 409 Mich. 401, 295 N.W.2d 50 (1980). *But see* Vernon Fire & Casualty Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976)(punitive damages allowed upon proof of serious wrong by contracting party, tortious in nature, although not an independent tort). In Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985), the Supreme Court remarked that a tort suit against an insurer for breach of covenant of good faith and fair dealing was nothing more than "a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available . . . ." *Allis-Chalmers*, 105 S. Ct. at 1914. *See generally* Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 485-87 (1985); Note, *Punitive Damages in Contract Actions — Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980); Speidel, *supra* note 1, at 193 ("[T]he head and shoulders of the punitive damage camel will soon be . . . inside the contract tent.").

breaches.[69] Courts for the most part have been unwilling to extend the concept of punishment to the act of breach of contract. Application of a tort statute of limitations to punitive damage allegations is appropriate to the extent that the statute reflects a legislative judgment that social stability is fostered by a short life span for such claims. The application of the contract statute would erode this policy.

Permitting a plaintiff to take advantage of the longer contract limitations period, if he seeks only contract type relief, is a solution that has been reached by a number of courts.[70] In *McDowell v. Union Mutual Life Insurance Co.*,[71] a federal district court, applying California statutes of limitations to a bad faith insurance claim, rejected an analysis based upon the "predominance" of tort or contract elements. Rather, the court reasoned that the plaintiff was free to make an "election".[72] The *McDowell* rationale was followed in *Frazier v. Metropolitan Life Insurance Co.*,[73] which involved a bad faith claim against an insurer in which emotional distress damages were sought. The court interpreted prior case law to indicate that pleading damages for emotional distress did not amount to an irrevocable election of the tort remedy, and thus refused to apply the tort statute of limitations.[74] Instead, the court applied the four-year statute of limitations for written contracts.

The better approach is to abandon any attempt to characterize a claim for breach of the implied covenant of good faith and fair dealing as one based upon tort or contract. In cases in which the claim sounds in both tort and contract, the claimant should be permitted to proceed on the theory not barred by the shorter statute of limita-

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69. *See* Dependahl v. Falstaff Brewing Corp. 653 F.2d 1208, 1217 (8th Cir.), *cert. denied*, 454 U.S. 968, *and* 454 U.S. 1084 (1981). The efficiency argument has been criticized in Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

70. In Rodgers v. Pennsylvania Life Ins. Co., 539 F. Supp. 879 (S.D. Iowa 1982), the court separated the breach of the implied covenant of good faith and fair dealing claim into allegations for personal injury and allegations for economic loss. Applying the personal injury statute of limitations to the former, the *Rodgers* court dismissed the claim insofar as it alleged damages for emotional distress, but allowed the plaintiff to proceed on the allegations of economic loss. *See also* Campos v. Oldsmobile Div., Gen. Motors Corp., 71 Mich. App. 23, 246 N.W.2d 352 (1976); Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 396-97, 372 N.E.2d 555, 559-60, 401 N.Y.S.2d 767, 771 (1977)(both contract and tort statutes applied; shorter statute barred tort damages); Williams v. West Pa. Power Co., 502 Pa. 557, 467 A.2d 811 (1983)(plaintiff suing for breach of warranty has option either of tort or of Uniform Commercial Code statute of limitations).

71. 404 F. Supp. 136, 145 (C.D. Cal. 1975).

72. *Id.* at 145 n.7.

73. 169 Cal. App. 3d 90, 214 Cal. Rptr. 883 (1985).

74. *Id.* at 101, 214 Cal. Rptr. at 889; *see also* Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501, 506, 418 A.2d 224, 228 (1980)("[S]uffice it to say that a prayer for such relief does not require that the action be deemed one in tort.").

tions, with an appropriate restriction of remedy. Thus, if the tort statute has run, punitive damage allegations could be severed and dismissed. In jurisdictions refusing to recognize emotional distress damages in contract actions, such allegations also could be dismissed if the tort statute has run. But if the jurisdiction does recognize emotional distress awards in contract actions, allegations of such damages should not prevent application of the contract statute.

Choice Between Personal Injury Action and Property Damage Action

Many states have a statute of limitations specifically applicable to personal injury actions. Some statutes specifically govern only actions "not arising from contract";[75] many statutes without such a restriction have been interpreted to apply only to tort claims.[76] These statutes often force a choice between a personal injury tort statute and a property damage tort or residual statute, a choice that has confused the courts and muddled the law.[77]

Just as the remedial categories separating tort from contract are experiencing a period of evolution, so too are traditional categories of personal injury tort and property damage tort. Recognition that tortious invasions of "property" interests may cause personal injury damages—particularly emotional distress damages—presents the

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75. *E.g.*, ALA. CODE § 6-2-39 (1977); ALASKA STAT. § 09.10,070 (1984); MO. ANN. STAT. § 516-120 (Vernon 1952); OR. REV. STAT. § 12-110 (1983); WIS. STAT. ANN. § 893.53 (West 1983) ("not arising on contract").

76. *See* McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136, 143-44 (C.D. Cal. 1975)(applying California law); De Malherbe v. International Union of Elevator Constrs., 449 F. Supp. 1335 (N.D. Cal. 1978)(applying California law); *Developments, supra* note 3, at 1194-95. *But see* Brown v. Bleiberg, 32 Cal. 3d 426, 186 Cal. Rptr. 228, 651 P.2d 815 (1982)(personal injury statute applies to claim for breach of warranty); Citizens for Pretrial Justice v. Goldfarb, 415 Mich. 255, 327 N.W.2d 910 (1982); *cf.* Elizabeth Gamble Deaconess Home v. Turner Constr. Co., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984)(interpreting statute applicable to claims involving improvements to real property). Cases holding that the personal injury statute applies to contract claims for personal injury include Folladori Indus., Inc. v. Sims Motor Trans. Lines, 51 Ill. App. 3d 171, 366 N.E. 2d 557 (1977), and Bodne v. Austin, 156 Tenn. 353, 2 S.W.2d 100 (1928). Some personal injury action statutes specifically state that they apply to contract lawsuits. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 260, § 2A (West Supp. 1985); IOWA CODE § 614.1 (1950). *See generally* Note, *Warranty: Tort and Contract Characterization: Statutes of Limitation*, 43 CAL. L. REV. 546 (1955).

77. *See* McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136, 144 (C.D. Cal. 1975)(applying California law). The Michigan experience is chronicled in Huhtala v. Travelers Ins. Co., 401 Mich. 118, 257 N.W.2d 640 (1977)(action for breach of contract, fraud and estoppel against insurer for failure to settle). A products liability statute of limitations passed in 1978 alleviated some of the problems illustrated by *Huhtala. See* MICH. COMP. LAWS ANN. § 600.5805(9) (West Supp. 1985).

same type of statute of limitations problem found in bad faith cases in which both types of damages are pleaded. The court is forced either to attempt a characterization of the "predominant" nature of the claim,[78] a useless exercise if the statute expressly commands consideration of the remedy sought, or to permit a plaintiff to elect a limitations period on the basis of the remedy actually sought.[79]

Liability Based Upon Statute and Suit for Statutory Penalty

Many states create specific statute of limitations for statutory actions.[80] In California the three-year statute gives a plaintiff more time to file than do the oral contract or tort statutes.[81] No doubt this reflects a preference for such actions in furtherance of underlying statutory policy.

Generally, these statutes of limitations have been interpreted restrictively: the liability must be one which would not exist but for the statute.[82] Applying this principle, the "based on statute" provision has been held applicable to a claim based upon a municipal ordinance.[83]

In cases in which the cause of action embodied in the statute has its origins in the common law, the "based on statute" provision will not apply.[84] But the provision does apply in situations in which the statute itself, as opposed to a contract or principles of tort law, serves as the source of the rule of decision.[85] Some jurisdictions require that the statute in question expressly create liability in favor of the individual plaintiff or class to which the plaintiff belongs, as distinct

78. Richardson v. Allstate Ins. Co., 117 Cal. App. 3d 8, 172 Cal. Rptr. 423 (1981).

79. Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158 (1980).

80. *E.g.*, ARIZ. REV. STAT. ANN. § 12-541 (West 1982) (one year); DEL. CODE ANN. tit. 10, § 8106 (1975) (three years); FLA. STAT. ANN. § 95.11(3)(f) (West 1982) (four years); MO. ANN. STAT. § 516.120 (Vernon 1952) (five years); WIS. STAT. ANN. § 893.93(A) (West 1983) (six years).

81. *Compare* CAL. CIV. PROC. CODE § 338(1)(West Supp. 1985), *with* CAL. CIV. PROC. CODE § 339(1)(West Supp. 1985) (two years for oral contract), *and* CAL. CIV. PROC. CODE § 340(3) (West Supp. 1985) (one year for personal injury torts).

82. *See* Maricopa County Mun. Water Conservation Dist. No. 1 v. Warford, 69 Ariz. 1, 206 P.2d 1168 (1949).

83. *See* City of Los Angeles v. Belridge Oil Co., 42 Cal. 2d 823, 271 P.2d 5 (1954), *appeal dismissed*, 348 U.S. 907 (1955). *But see* DeCelle v. City of Alameda, 221 Cal. App. 2d 528, 34 Cal. Rptr. 597 (1963).

84. Hyatt Chalet Motels, Inc. v. Salem Bldg. & Constr. Trades Council, 298 F. Supp. 699, 703 (D. Or. 1968) (applying Oregon law). *See Developments*, *supra* note 3, at 1196-97.

85. *See* County of San Diego v. Sanfax Corp., 19 Cal. 3d 862, 568 P.2d 363, 140 Cal. Rptr. 638 (1977)(en banc); *cf.* Wilson v. Garcia, 105 S. Ct. 1938, (1985)(analogizing to tort law claims arising under 42 U.S.C. § 1983 governed by personal injury limitations statutes).

from the general public.[86]

Generally, the "statutory penalty"[87] statute of limitations is fairly short, which probably indicates a disfavor for such claims and favor for speedy resolution of "penalty" lawsuits.[88] But the provision does not apply to suits seeking any form of compensatory relief.[89]

Though California provides for punitive damages by statute,[90] this provision alone has been held not to invoke a "statutory penalty" statute of limitations.[91] The result surely is correct, for punitive damages were known at the time the statutes were enacted,[92] and the legislature provided other limitations periods for substantive theories of liability which supported punitive damage allegations.[93] While the availability of punitive damages may signal that the appropriate treatment of the claim for limitations purposes is tort law, it does not warrant treatment of the claim as a statutory penalty.

Suggested General Guidelines

Statutes of limitations are just that: statutes. A court concerned with judicial restraint in the area of statutory interpretation must consider whether allowing a plaintiff unfettered freedom to make an election is contrary to legislative intent. Judicial integrity demands

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86. *See* Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494 (S.D. Ga. 1974) (applying Georgia law); Pecenka v. Alquest, 6 Kan. App. 2d 26, 626 P.2d 802 (1981)(statute must disclose legislative intent that disregard of the statute should result in liability).

87. *See supra* note 38 and accompanying text.

88. *See Developments*, *supra* note 3, at 1180.

89. The application of the statutory penalty provision to a wrongful discharge claim was rejected in Henon v. Lever Bros. Co., 114 Ill. App. 3d 608, 449 N.E.2d 196 (1983), and in Yanta v. Montgomery Ward & Co., 66 Wis. 2d 53, 224 N.W.2d 389 (1974). *Cf.* McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136, 146 (C.D. Cal. 1975)(punitive damage allegations in suit for insurer's breach of covenant of good faith not a statutory penalty).

90. CAL. CIV. CODE § 3294 (West 1973).

91. McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (C.D. Cal. 1975); *accord* Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984); Jones v. Harding Glass Co., 619 P.2d 777 (Colo. Ct. App. 1980), *vacated on other grounds*, 640 P.2d 1123 (Colo. 1982). But, actions in which the imposition of double or treble damages is required, as opposed to permitted, are considered actions to enforce penalties subject to the one-year statute. *See* G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 195 Cal. Rtpr. 211 (1983).

92. *See* Dorsey v. Manlove, 14 Cal. 553 (1860). Statutes are to be interpreted by assuming that the legislature was aware of the existing judicial decisions. Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960). *See generally* K. REDDEN, PUNITIVE DAMAGES § 2.2(A)(2)(1980); Mallor, *supra* note 68, at 472.

93. This was the reasoning of the court in McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (C.D. Cal. 1975).

recognition that the categories embodied in the statutes, though they are inadequate, are indicative of some sort of legislative policy, however outmoded or imprecise. For example, to the extent that statutes are more hospitable to claims based on statute or contract than ordinary tort claims, the choice of statute should effectuate that policy. Similarly, in cases in which possible staleness of evidence will harm a defendant, a shorter statute should be considered. Courts should allow more latitude when the plaintiff's claim is a novel one having elements of several statute of limitations categories. Thus, a policy in favor of hospitality to plaintiffs in the vindication of particular rights, recognized by the specific cause of action, should be juxtaposed against a policy in favor of repose in order to prevent the unrest and instability in the workplace that can result from allegations of wrongful discharge.[94]

In addition to considerations of statute of limitations policy, the choice of a limitations period should be made with reference to the purposes to be effectuated by the substantive law underlying the asserted claim. This principle is under-utilized in state courts when the issue is a choice of statute for a state claim,[95] but customarily it is employed in federal courts when the court is forced to choose a state statute of limitations for a federal claim and no applicable federal statute exists.[96] A corollary of this principle is that claims effectuating similar substantive policies should be treated alike for limitations purposes.

Consistency should be an important goal of any statute of limitations policy—not only consistency of policy but also consistency that comes from treating similar types of lawsuits in a similar manner. Such a policy achieves procedural fairness and permits the parties to predict the lifespan of the claim.[97] In the absence of predictability, a plaintiff does not deserve to be punished for dilatory behavior, and a defendant cannot anticipate repose in the same fashion as a defendant relying upon a clearly applicable statute.

Finally, clear pleading should be required of a plaintiff.[98] Identifi-

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94. *See* De Malherbe v. International Union of Elevator Constrs., 449 F. Supp. 1335 (N.D. Cal. 1978) (employment discrimination).

95. *But see* Williams v. West Pa. Power Co., 502 Pa. 557, 467 A.2d 811 (1983). In *Williams* the court refused to choose a tort statute over a contract statute in a products liability case because doing so would be a move towards restoration of the outmoded and rejected concept of privity in such actions.

96. *See* Wilson v. Garcia, 105 S. Ct. 1938 (1985); Occidential Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977); Pauk v. Board of Trustees of City Univ. of N.Y., 654 F.2d 856, 862 (2d Cir. 1981); De Malherbe v. International Union of Elevator Constrs., 449 F. Supp. 1335, 1340-41 (N.D. Cal. 1978).

97. Wilson v. Garcia, 105 S. Ct. 1938 (1985); *see also* Note, *Statutes of Limitation: Time for Reform in Oklahoma*, 33 OKLA. L. REV. 178, 188 (1980).

98. *See* Knox College v. Celotex Corp., 88 Ill. 2d 407, 430 N.E.2d 976 (1981); *see also* Kamens v. Summit Stainless, Inc., 586 F. Supp. 324, 329 n.3 (E.D. Pa. 1984)

cation of the plaintiff's claim and the type of remedy sought is needed to aid the court in making the necessary choices, in identifying an election if one is to be permitted, and in achieving the policy of repose for the defendant which is at the heart of all statutes of limitations.

APPLICATION OF STATUTES OF LIMITATIONS TO WRONGFUL DISCHARGE THEORIES OF LIABILITY

The rapidly developing law of wrongful discharge of at-will employees is widely discussed in the literature,[99] and will be summarized to provide a context for the analysis of appropriate statutes of limitations. The substantive law and policies underlying each of the three theories will be discussed, and an analysis of the appropriate

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(claims for discharge in violation of public policy and for breach of implied contract separate and distinct; claim brought on one theory will not imply claim on the other); *cf.* L.L. Cole & Son, Inc. v. Hickman, 282 Ark. 6, 665 S.W.2d 278 (1984)(clear pleading required in order to determine whether punitive damages appropriate); Davis v. Tyee Indus., Inc., 295 Or. 467, 668 P.2d 1186 (1982)(same). *But see* Cancellier v. Federated Dep't Stores, Inc., 672 F.2d 1312, 1319 (9th Cir. 1980)(under federal pleading rules, when complaint alleged discharge in breach of covenant of good faith, specific prayers for emotional distress and punitive damages were unnecessary).

99. *See generally* Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *Worker's Rights against Employers and Unions: Justice Francis — A Judge for Our Season*, 24 RUTGERS L. REV. 480 (1970); De Giuseppe, *The Recognition of Public Policy Exceptions to the Employment At-Will Rule: A Legislative Function*, 11 FORDHAM URB. L.J. 721 (1982); De Giuseppe, *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1 (1981); Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEG. HIST. 118 (1978); Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457 (1979); Miller & Estes, *Recent Judicial LImitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65 (1982); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); *Symposium*, 16 U. MICH. J.L. REF. 201 (1983); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777; Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743 (1979); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1975); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

limitations statute to be applied will follow.

Discharges in Violation of Public Policy

Substantive Law and Underlying Policies

As a general proposition, many states have accepted the notion that a discharge of an at-will employee in violation of public policy is actionable.[100] These discharges, often termed "retaliatory" or "abusive,"[101] have been recognized as unlawful not so much to protect the interests of individual employees as to effectuate public policy.[102]

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100. Courts accepting the principle in some form include: Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Parnar v. American Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Murphy v. City of Topeka, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322 (Tex. Ct. App. 1984); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978); Shanholtz v. Monogalhela Power Co., 270 S.E.2d 178 (W. Va. 1980); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

Several courts, in dicta, have indicated receptiveness to the doctrine. *See* Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977); Gaulden v. Emerson Elec. Co., 284 Ark. 149, 680 S.W.2d 92 (1984); Abrisz v. Pulley Freight Lines, 270 N.W.2d 454 (Iowa 1978); Larrabee v. Penobscot Frozen Foods, 486 A.2d 97 (Me. 1984); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (1984); Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979). *But see* Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 321 S.E.2d 618 (1984), *cert. granted*, 285 S.C. 85, 328 S.E.2d 480 (1985).

Cases refusing to embrace the doctrine include: Garcia v. Aetna Fin. Co., 752 F.2d 488 (10th Cir. 1984) (applying Colorado law); Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1980) (applying both Georgia and Texas law); Amos v. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 594 F. Supp. 791 (C.D. Utah 1984) (applying Utah law); Meeks v. Opp Cotton Mills, Inc., 459 So. 2d 814 (Ala. 1984); Deamrco v. Publix Super Mkts., Inc., 384 So. 2d 1253 (Fla. 1980); Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978); Currey v. Lone Star Steel Co., 676 S.W.2d 205 (Tex. Ct. App. 1984).

101. *See* Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 825 (E.D.N.Y. 1980); Adler v. American Standard Corp., 291 Md. 432, 36 n.2, 432 A.2d 464, 467 n.2 (1984).

102. Garibaldi v. Lucky Stores, Inc., 726 F.2d 1367, (9th Cir. 1984); Messenger v. Volkswagen of America, Inc., 585 F. Supp. 565 (S.D.W. Va. 1984); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). *But see* Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Mallor, *supra* note 68, at 489 ("Fundamentally, however, the objective of [all theories] is to correct the imbalance of power which results from the practical inability of unorganized employees to bargain individually for

The Oregon Supreme Court typifies judicial efforts to distinguish the discharge that offends public policy and the discharge resulting purely from a personal dispute. In *Delaney v. Taco Time International*,[103] the court identified three types of wrongful discharge claims: those in violation of some socially important public policy; those in retaliation for the employee's exercise of some personal statutory employment right; and those in retaliation for the employee's exercise of a purely personal right unsupported by a socially important public policy.[104] This mode of distinction may prove unworkable,[105] but it highlights the continuing struggle to avert total erosion of the at-will doctrine.

Many jurisdictions characterize wrongful discharge as tortious, thereby authorizing a possible award of punitive damages.[106] A key problem is identifying the nature and source of public policy which supports the cause of action. In an early and influential California case, *Petermann v. International Brotherhood of Teamsters*,[107] public policy was defined as "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."[108] In *Petermann*, the court

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job security.").

103. 297 Or. 10, 681 P.2d 114 (1984).

104. *Delaney* cited Campbell v. Ford Indus., Inc., 274 Or. 243 546 P.2d 141 (1976), as an example in which it was held that an employee fired for exercising his statutory right to inspect corporate records did not have a cause of action. In McQuary v. Bel Air Convalescent Home, 69 Or. App. 107, 684 P.2d 21 (1984), reporting violations of laws regulating nursing homes was deemed an "important societal obligation." *See also* Burgess v. Chicago Sun-Times, 132 Ill. App. 3d 181, 476 N.E.2d 1284, (1985); Rice v. Grant County Bd. of Comm'rs, 472 N.E.2d 213 (Ind. Ct. App. 1984); Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 100 (Me. 1984).

105. Such a distinction is criticized in Comment, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1948-50 (1983).

106. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (prospective); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984) (same); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984). *But see* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (public policy exception permitted on contract theory only); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651 n.1, 576 P.2d 356 n.1 (1978); *see also* Hicks v. Tulsa Dynaspan, Inc., 695 P.2d 17 (Okla. Ct. App. 1985) (punitive damages are available for violation of wrongful discharge statute). The significance of a punitive damage award is particularly important in cases in which actual damages are minimal, as when the employee has obtained another job. *Hicks*, 695 P.2d at 19. *See generally* Mallor, *supra* note 68.

107. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

108. *Id.* at 188, 344 P.2d at 27 (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)).

permitted an at-will employee to sue his employer after he was terminated for refusing to commit perjury at the insistence of the employer. The California Supreme Court approved the *Petermann* decision and language in the seminal case of *Tameny v. Atlantic Richfield Co.*[109] *Tameny* recognized the public policy exception and applied it to a situation in which an employee was terminated for refusing to engage in his employer's price fixing scheme in violation of antitrust laws.

The broad language suggests that the courts will define appropriate public policies for which a retaliatory discharge is unlawful. Most courts, however, have been hesitant to engage in such judicial activism, a reluctance which reflects the perception that the at-will doctrine serves some useful purpose,[110] and a sense that the legislature is the more appropriate body to declare public policy.[111] Some of this hesitation flows from the fact that the at-will doctrine may be embodied in statute.[112] An overly broad view, which eventually would lead to the result that an at-will termination is itself contrary to public policy, is not embraced by courts sensitive to these restraints.[113] This has led some courts to conclude that they have no power to declare public policy in this area.[114]

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109. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

110. *See* Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981) ("[T]he very foundation of the free enterprise system could be jeopardized" by recognition of the public policy exception); Stanley v. Sewell Coal Co., 285 S.E.2d 679, 684 (W.Va. 1981) (Neely, J., dissenting) (describing the public policy exception as bent upon a "morbid, Grendel-like rampage through our economic system").

111. Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1206 (1979); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). In some instances judicial inaction has prompted legislative action. The Alabama Legislature provided a statutory cause of action for retaliatory discharge for jury service after such a claim was rejected in Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980). See also 1984 N.Y. Laws ch. 660 (effective September 1, 1984), providing a discharge remedy for "whistleblowing" employees in response to the refusal of the New York Court of Appeals to recognize the public policy exception in *Murphy*. Other states recently have enacted whistleblowing statutes. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1985); MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1981); WIS. STAT. ANN. § 230.80 (West 1985); WIS. STAT. ANN. § 895.65 (West 1985). Some statutes protect only public employees. *See, e.g.*, ILL. ANN. STAT. ch. 127, ¶ 63b119c.1 (Smith-Hurd Supp. 1985); 1984 Kan. Sess. Laws ch. 301; N.Y. LAB. LAW § 740 (McKinney Supp. 1984); TEX. STAT. ANN. art. 6252-16a (Vernon Supp. 1985); WASH. REV. CODE ANN. § 42.40.050 (West Supp. 1985). The Commonwealth of Puerto Rico protects employees against discharges without just cause. P.R. LAWS ANN. tit. 29, §§ 185a-185i (Supp. 1983).

112. *E.g.*, CAL. LAB. CODE § 2922 (West 1971); MONT. CODE ANN. § 39-2-503 (1983). *See* Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984). This may be more of an objection when the public policy cannot be found in statute.

113. *See* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 477 n.5, 199 Cal. Rptr. 613, 618 n.5 (1984) (approving trial court's order).

114. *See* Martin v. Platt, 179 Ind. App. 688, 386 N.E. 2d 1026 (1979); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (citing, as an example, Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960)). The

In most jurisdictions that have accepted the public policy exception, the policy itself must be embodied in a statute.[115] The difficulty with identifying a legislative expression of public policy is that, to the extent that the legislature has expressed its views in a statute, the implementation of statutory policy commonly is imperfect because no remedy for retaliatory discharge is provided.[116] Indeed, in those situations in which the legislature has provided a remedy for the discharged employee, the employee may be precluded from pursuing a common law remedy.[117]

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holding in *Mallard*, that an at-will employee could be terminated for serving on a jury, undoubtedly is no longer good law in light of *Tameny's* approval of *Petermann*. *See supra* notes 107-09 and accompanying text. In any event, the *Mallard* court did not state that courts have no power to declare public policy in the absence of statute; rather, the court chose to defer to the legislature in the enactment of a uniform public policy involving jury service. *Mallard*, 182 Cal. App. 2d at 394, 6 Cal. Rptr. at 174-75. Such a statute subsequently was enacted. *See* CAL. LAB. CODE § 230 (West 1971). It also is worth noting that in other contexts courts have not been so reluctant to declare public policy. *See, e.g.*, Altschul v. Sayble, 83 Cal. App. 3d 153, 147 Cal. Rptr. 716 (1978).

115. *See* Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979); Rice v. Grant County Bd. of Comm'rs, 472 N.E.2d 213 (Ind. Ct. App. 1984). This approach is approved in Note, *Limiting the Right to Terminate At-Will - Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982). Some courts require that the public policy be specific, not general. *See* Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978); Corbin v. Sinclair Mktg., Inc., 684 P.2d 265 (Colo. Ct. App. 1984) (policy embodied in state occupational safety act too broad).

116. Certain jurisdictions do provide a statutory remedy to a discharged employee when the discharge violates a statute. Examples include: remedies for a discharge in response to the exercise of political activities, CAL. LAB. CODE § 1102 (West 1971); COLO. REV. STAT. § 8-2-108 (1973); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 1975); NEV. REV. STAT. § 613.040 (1983); N.Y. CIV. SERV. LAW § 107(1)(McKinney 1973); jury service, CAL. LAB. CODE § 230 (West 1971); IDAHO CODE § 2-218 (1979); MASS. GEN. LAWS ANN. ch. 268, § 14A (West 1970); N.Y. JUD. LAW § 519 (McKinney Supp. 1985); wage garnishment, CAL. LAB. CODE § 2929 (West Supp. 1985); ILL. ANN. STAT. ch. 48, ¶ 39.11 (Smith-Hurd Supp. 1985); N.Y. CIV. PRAC. LAW § 5252 (McKinney 1978); exercising rights under the workers' compensation laws, CAL. LAB. CODE § 132a (West Supp. 1985); ILL. ANN. STAT. ch. 48, ¶ 138.4 (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 176.82 (West Supp. 1985); MO. ANN. STAT. § 287.780 (Vernon Supp. 1985); discrimination, CAL. GOV'T CODE § 12940 (West Supp. 1985); D.C. CODE § 1-2515 (1981); N.Y. EXEC. LAW §§ 290-301 (McKinney 1982); MO. ANN. STAT. § 296.020 (Vernon Supp. 1985); exercise of rights under toxic substances disclosure laws, ILL. ANN. STAT. ch. 48, ¶ 1414(b) (Smith-Hurd Supp. 1985); MASS. GEN. LAWS ANN. ch. 111F, § 13 (West Supp. 1985); N.J. STAT. ANN. § 34:5A-17 (West Supp. 1985).

117. The age discrimination provisions of the California Fair Employment and Housing Act have been held to constitute an exclusive remedy for wrongful discharge on the basis of age. Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287 (N.D. Cal. 1983) (applying California law); Strauss v. A.L. Randal Co., 144 Cal. App. 3d 514, 194 Cal. Rptr. 520 (1983); *accord* Bruffet v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982) (age-applying Pennsylvania law); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910 (E.D. Mich. 1977), *modified*, 456 F. Supp. 650 (E.D. Mich. 1978)(sex/age); Fischer v. Sears, Roebuck & Co., 107 Idaho 197, 687 P.2d 587 (1984)(age); Dykstra v. Crestwood Bank, 117 Ill. App. 3d 821, 454 N.E.2d 51, (1983)(age); Melley v. Gillette

Courts have recognized a public policy in a statute that encourages the activity for which the employee was terminated.[118] Moreover, some jurisdictions have been willing to go further and recognize a public policy embodied in a statute which provides the source of a duty breached by the employer in situations where the employee "blows the whistle."[119] Fairly well accepted is the public policy found in a statute making unlawful any activity in which the employee refused to engage at the insistence of the employer.[120] Courts

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Corp., 19 Mass. App. 511, 475 N.E.2d 1227 (1985) (age); Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980)(age); Dillon v. Great Atl. & Pac. Tea Co., Inc., 43 Md. App. 161, 403 A.2d 406 (1979) (handicap); Ohlson v. DST Indus., Inc., 111 Mich. App. 580, 314 N.W.2d 699 (1981)(unsafe working conditions). *But see* Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982) (applying California law) (age); Wynn v. Boeing Military Airplane Co., 595 F. Supp. 727 (D. Kan. 1984) (applying Kansas law) (race); Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982)(Cal-OSHA violations); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1978)(exercising rights under workers' compensation laws); Holien v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984)(sex).

Federal law may preempt wrongful discharge claims. *See* Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978) (Railway Labor Act); Johnson v. Transworld Airlines, Inc., 149 Cal. App. 3d 518, 196 Cal. Rptr. 896 (1983)(ERISA); Witkowski v. St. Anne's Hosp., Inc., 113 Ill. App. 3d 745, 447 N.E.2d 1016 (1983)(ERISA); Anco Constr. Co. v. Freeman, 236 Kan. 626, 693 P.2d 1183 (1983)(NLRB jurisdiction). *But see* Garibaldi v. Lucky Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (Labor Management Relations Act); Thomas v. Kroger Co., 583 F. Supp. 1031 (S.D. W. Va. 1984) (no preemption by Labor Management Relations Act); Mungo v. UTA French Airlines, 166 Cal. App. 3d 327, 212 Cal. Rptr. 369 (1985) (no preemption by Railway Labor Act); *cf.* Farmer v. United Brotherhood of Carpenters & Joiners Local 25, 430 U.S. 290 (1977) (intentional infliction of emotional distress claim not preempted by National Labor Relations Act).

118. Cases implicating such statutes involve dismissals of employees engaging in activities affirmatively protected by statute, including serving on a jury, *see* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978), exercising constitutional rights of free speech, *see* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania law); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982), exercising rights under workers' compensation laws, *see* Smith v. Piezo Technology & Professional Adm'rs, 427 So.2d 182 (Fla. 1983); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Sventko v. Kroger, 69 Mich. App. 644, 245 N.W.2d 151 (1976); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); *see also* Darnell v. Impact Indus., Inc., 105 Ill. 2d 158, 473 N.E.2d 935 (1984) (workers' compensation claim against former employer), refusing to take a polygraph test where statute made such a requirement a misdemeanor, *see* Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law), and working in dangerous conditions, *see* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981).

119. *See* Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); McQuary v. Bel Air Convalescent Home, Inc., 69 Or. App. 107, 684 P.2d 21 (1984). Several states have statutes protecting whistleblowers in various situations. *See* statutes cited *supra* note 111.

120. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Petermann v. International Bd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959); Sheets v. Teddy's Frosted Foods, Inc.,

also have found sufficient expressions of public policy in the federal constitution or laws,[121] in state constitutions,[122] administrative regulations,[123] local ordinances[124] and codes of professional conduct.[125]

Little recognition exists of judicially-created public policy totally unsupported by statute.[126] More typical is the refusal to declare a public policy in favor of such things as "humanity and common decency",[127] and a deference to the employer's business judgment in choosing employees.[128] To the extent that the wrongful discharge

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179 Conn. 471, 427 A.2d 385 (1980); Trombetta v. Detroit, T. & I. Ry., 81 Mich. App. 489, 265 N.W.2d 385 (1978); Pierce v. Ortho Pharmaceutical Corp., 160 N.J. Super. 335, 399 A.2d 1023 (1979); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978); *see also* Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (applying Arkansas law).

121. *See* Adler v. American Standard Corp., 538 F. Supp. 572 (D. Md. 1982); McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (1980); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322 (Tex. Ct. App. 1984); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). *But see* Anco Constr. Co. v. Freeman, 236 Kan. 626, 693 P.2d 1183 (1985) (wrongful discharge claim protects only state law interests).

122. Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983)(applying Pennsylvania law); Delaney v. Taco Time Int'l, 297 Or. 10, 681 P.2d 114 (1984).

123. Nye v. Department of Livestock, 196 Mont. 222, 639 P.2d 498 (1982); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

124. Gould v. Campbell's Ambulance Serv., Inc., 130 Ill. App. 3d 598, 474 N.E.2d 740 (1984).

125. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982). *But see* Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982).

126. But perhaps "an ingenious lawyer can nearly always find a right 'implicit in a statute.' " Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 734 (Ky. 1983) (Stephenson, J., dissenting). Some jurisdictions have recognized the possibility of judicially-created public policy. *See* Ring v. River Walk Manor, Inc., 596 F. Supp. 393 (D. Md. 1984) (remanded to state court for determination of public policy); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981); Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981).

127. *See* Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ariz. Ct. App. 1977); Ising v. Barnes Hosp., 674 S.W.2d 623 (Mo. Ct. App. 1984); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (personal morality). Yet inquiring into the social importance of the public policy alleged, as sanctioned in Delaney v. Taco Time Int'l, 297 Or. 10, 681 P.2d 114 (1984), may involve a similar type of judicial interventionism.

128. Sheriff v. Revell, Inc., 165 Cal. App. 3d 297, 211 Cal. Rptr. 465 (1985); Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980); *see also* Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc). This approach is suggested in Note, *Defining Public Policy Torts in At Will Dismissals*, 34 STAN. L. REV. 153, 171 (1981). Nevertheless, in Crosier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 1140, 198 Cal. Rptr. 361, 366 (1983), a suit for wrongful discharge brought under breach of implied covenant of good faith and fair dealing, the court rejected the creation

remedy effectuates underlying public policy, the law in this area enlarges civil remedies for violations of statutorily-expressed policies. This remedy is similar to implying private causes of action for violation of statute.[129] Viewed from this perspective, the wrongful discharge claim appears to be a creature of statute.

Choice of a Statute of Limitations

Although the relationship between employer and employee is created by contract, the employer's obligation not to terminate the em-

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of a business judgment defense for the employer, stating that it would preclude review of the employer's reasons for the discharge and would permit the employer to be the "sole judge and final arbiter" of the propriety of the discharge.

129. The ascertainment of legislative intent is the primary focus of an inquiry regarding implied remedy. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979). Indications of intent may be determined by examining whether the plaintiff represents a class for whose benefit the statute was enacted, whether evidence exists of explicit or implicit legislative intent to create such a remedy, whether implication of a remedy is consistent with the underlying legislative scheme, and whether an adequate remedy already is provided. *See* Cort v. Ash, 422 U.S. 66 (1975). The *Cort* analysis has been followed in a number of jurisdictions. *See* Sawyer Realty Group, Inc. v. Jarvis Corp., 89 Ill. 2d 379, 432 N.E.2d 849 (1982); Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35 (Iowa 1982); Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97 (Me. 1984); Burns Jackson Miller Summit and Spitzer v. Lindner, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983). *See generally* Note, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243 (1978).

Despite the similarity of the implied remedy issue to that of creating a "common law" claim for wrongful discharge in violation of a legislative public policy, courts have not employed such a structured approach in wrongful discharge cases. Many have considered the availability of other remedies. *See* Shanahan v. WITI-TV, Inc., 565 F. Supp. 219, 224-25 (E.D. Wis. 1982); McCluney v. Joseph Schiltz Brewing Co., 489 F. Supp. 24, 26-27 (E.D. Wis. 1980); Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1055-56 (E.D. Pa. 1977), *aff'd*, 619 F.2d 276 (3d Cir. 1980); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973). Consideration of the importance or specificity of the public policy in question may be a form of inquiry similar to asking whether the legislation is designed to protect the class of which plaintiff is a member. *See supra* note 115. *Compare* Yanta v. Montgomery Ward & Co., 66 Wis. 2d 53, 61, 224 N.W.2d 389, 394 (analogizing creation of claim for wrongful discharge in violation of sex discrimination law to concept of negligence per se based on violation of statute); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981) (applying the Second Restatement of Torts section 874A concerning torts based on violation of statute to discharge for exercising rights under workers' compensation laws); Smith v. Pieza Technology & Professional Adm'rs, 427 So. 2d 182 (Fla. 1983) (implied cause of action for wrongful discharge in retaliation for pursuing workers' compensation remedy); Cooke v. Optimum/Ideal Managers, Inc., 130 Ill. App. 3d 180, 473 N.E.2d 334 (1984) (remedy not implied under workers' compensation laws for interference with employee's statutory right to receive copies of medical reports); Stepanischen v. Merchants Despatch Trans. Corp., 722 F.2d 922, 925-27 (1st Cir. 1983) (applying *Cort* principles to find implied remedy for discharge in violation of federal Railway Labor Act).

One federal court has approved a claim for discharge in violation of public policy in a case in which the state's highest court had held that no implied civil remedy existed for violation of the statute embodying the public policy. McKinney v. National Dairy, 491 F. Supp. 1108, 1122 (D. Mass. 1980). The court stated that the state court case had been decided prior to recognition of the public policy exception to the at-will doctrine. *McKinney*, 491 F. Supp. at 1121-22.

ployee in violation of public policy does not stem from the contract. This obligation is recognized in *Shanholtz v. Monongahela Power Co.*,[130] in which the Supreme Court of West Virginia ruled that the contract statute of limitations was inapplicable to a claim for wrongful discharge. The employee alleged that he was terminated for his efforts to obtain workers' compensation benefits. The court distinguished prior case law holding that the longer contract statute could be applied to claims based either on contract or on tort. The court stated that:

> [H]ere there was no manner in which the alleged contract of employment could be breached by termination thereof. Either party could terminate the at-will employment with or without cause and no cause of action would accrue. Only by a tortious act could a cause of action accrue to the plaintiff. The wrong done, if any, is not the act of discharging the plaintiff (the employer had that right under the alleged at-will employment contract), but the act of contravening public policy in carrying out such discharge.[131]

Because no contractual obligation is breached,[132] and because the courts are obliged to give some weight to the distinction between contract and tort customarily found in statutes of limitation, it makes sense not to use a contract statute. This conclusion also makes sense when a remedy is considered. Many states approve an award of emotional distress damages for breach of contract if such damages are foreseeable from the nature of the contract.[133] Such damages are a likely result of a wrongful discharge.[134] Nonetheless, in cases in

130. 270 S.E.2d 178 (W. Va. 1980).

131. *Id.* at 182; *accord* Scott v. Union Tank Car Co., 402 N.E.2d 992 (Ind. Ct. App. 1980); *see also* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1375 (9th Cir. 1984); Shaeffer v. General Motors Corp., 586 F. Supp. 870, 873 n.1 (E.D. Mich. 1984); Harless v. First Nat'l Bank, 16 W. Va. 116, 246 S.E.2d 270 (1978). In Newfield v. Insurance Co. of the West, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984), the court held without discussion, and in apparent dicta, that the California one-year personal injury statute would apply to a claim for discharge in violation of public policy. And in Daniele v. Fesco Div. of Cities Serv. Co., 733 F.2d 623 (9th Cir. 1984) (per curiam), the court held in a brief opinion that the California two-year statute of limitations for tortious invasions of property interests applied to a wrongful discharge claim. The *Daniele* court did not identify the factual basis for the wrongful discharge claims, and it offered no reason for its choice of the two-year statute. *See also* Arvie v. Century Tele. Enter., Inc., 452 So. 2d 392 (La. App. 1984) (one-year tort statute applied); Henon v. Lever Bros. Co., 114 Ill. App. 3d 608, 449 N.E.2d 196 (1983) (residual statute applied to wrongful discharge claims characterized as a tort arising out of a contract).

132. The implied covenant of good faith and fair dealing may be violated by a discharge in violation of public policy. *See infra* notes 157-62 and accompanying text. Such a claim is characterized by both contract and tort elements, but since the violation of public policy is crucial to the successful assertion of the cause of action, the claim should be analyzed as a straight public policy discharge case.

133. *See* cases cited *supra* note 67.

134. *Cf.* Valentine v. General Am. Credit, Inc., 123 Mich. App. 521, 332 N.W.2d

which the employment relationship is at-will, it cannot be said that the employer contracted with the foresight that he would have to compensate the employee for emotional distress upon termination. What makes the termination wrongful, and generates the emotional distress, is the breach of the obligation not to offend public policy. This makes the emotional distress appear less the result of a contract breach than the result of an intentional tort.[135]

Moreover, the availability of punitive damages for discharge in violation of public policy makes application of a contract statute of limitations to such a claim unjustifiable not only as a matter of remedial policy but also as a matter of judicial restraint. To endow a claim for punitive damages brought under the public policy exception with a contract statute of limitations would undermine the presumed legislative policy that social stability is achieved by giving a shorter life to tort claims.

The problem is not solved once a contract statute of limitations has been rejected. A further choice must be made between a tort statute of limitations and the limitations period for actions "based on statute." This question arises because of the adherence to the requirement that the discharge violate a public policy of legislative creation. To the extent that the wrongful discharge remedy affords an additional enforcement mechanism for the effectuation of that policy, the liability is indeed "based on statute." The issue is acute in

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591 (1983) (claim for emotional distress rejected); Yanta v. Montgomery Ward & Co., 66 Wis. 2d 53, 224 N.W.2d 389 (1974) (discharged plaintiff's recovery limited to lost wages because aggravated circumstances insufficiently alleged).

135. A personal injury tort statute of limitations has been applied to causes of action for intentional infliction of emotional distress. *See* Christman v. American Cyanamid Co., 578 F. Supp. 63 (N.D. W. Va. 1983) (applying West Virginia law); Rodgers v. Pennsylvania Life Ins. Co., 539 F. Supp. 879 (S.D. Iowa 1982) (applying Iowa law); Bruffett v. Warner Communications, Inc., 534 F. Supp. 375, 377 (E.D. Pa. 1982), *aff'd*, 692 F.2d 910 (3d Cir. 1982) (applying Pennsylvania law); McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (C.D. Cal. 1975) (applying California law); Hanson v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (Ariz. Ct. App. 1981); Scannell v. County of Riverside, 152 Cal. App. 3d 596, 199 Cal. Rptr. 644 (1984); Goldner v. Sullivan, Gough, Skipworth, Summers & Smith, 105 A.D.2d 1149, 482 N.Y.S.2d 606 (1984).

Other courts have rejected application of the personal injury statute. *See* Craft v. Rice, 671 S.W.2d 247 (Ky. 1984); Campos v. Oldsmobile Div., Gen. Motors Corp., 71 Mich. App. 23, 246 N.W.2d 352 (1976); Yeager v. Local Union 20, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) (governed by residual statute, not enumerated tort statute); Williams v. Lee Way Motor Freight, 688 P.2d 1294 (Okla. 1984) (same).

There is some suggestion that the emotional distress claim is not separate from a bad faith claim. *See* Burda v. National Ass'n of Postal Supervisors, 592 F. Supp. 273 (D.D.C. 1984) (emotional distress so intertwined with other claims that statute of limitations applicable to latter applies to former as well); Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 203 Cal. Rptr. 524 (1984); Richardson v. Allstate Ins. Co., 117 Cal. App. 3d 8, 172 Cal. Rptr. 423 (1981) (emotional distress damages for bad faith acts of insurer as an aggravation of financial damages and not a separate cause of action); *see also McDowell*, 404 F. Supp. at 147 n.8. *But see* Mosley v. Federals Dep't Stores, Inc., 85 Mich. App. 333, 271 N.W.2d 224 (1978); Carsner v. Freightliner Corp., 69 Or. App. 666, 688 P.2d 398 (1984).

jurisdictions such as California in which limitations periods for liability based on statute are more hospitable than the tort or implied contract statutes.

Applying the rule that the "based on statute" limitations period governs only claims unknown at common law would not eliminate its applicability to a public policy exception discharge claim, a claim rejected at common law. The applicable question is whether the liability, which is determined to be appropriate as a matter of public policy, is sufficiently "based on statute" in a situation in which the statute is silent as to such liability. The choice is between treating the claim as an intentional tort, with the statute merely providing the source of the duty, or treating it as a cause of action implied from the statute. Viewing the discharge remedy as merely a judicially-devised remedy for a liability already embodied by statute would support application of the longer statute of limitations.

This approach appears sensible considering the purpose for permitting recovery in such discharge cases. That purpose primarily is not to protect the employee but to effectuate public policy. Applying the "based on statute" period to such claims does not appear inconsistent nor seem unfair to employees not terminated in violation of public policy.[136] Rather, the rights of the employee terminated in violation of public policy seem similar to those of individuals harmed in other ways, by statutory violations, who are provided a statutory remedy and a hospitable limitations period.

Applying the "based on statute" rationale is appropriate if the rationale supports legislative preference for suits vindicating statutory policies. In jurisdictions willing to recognize a cause of action for

136. A separate issue is posed by the situation in which the statute articulating public policy provides remedies *and* a special limitations period. Even if the discharged plaintiff is not an individual given a remedy, a question arises whether a special limitations period should apply to the discharge cause of action in order to achieve remedial consistency in enforcing the particular statute in question. In Davis v. Potomac Elec. Power Co., 449 A.2d 278 (D.D.C. 1982), the one-year limitations period for filing an administrative complaint with the District of Columbia Office of Human Rights was held applicable to a civil claim as well, on grounds that the impermanent nature of evidence and the need to promote rapid compliance with the Act justified this result. However, this approach was rejected in Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983), in which the New York Court of Appeals ruled that both the difference between administrative proceedings and adjudication and the indicated desirability of staggered time periods indicated a legislative intent to not have the administrative limitations period applied to civil suits under the Human Rights Law.

If the plaintiff is given a remedy by the statute, he or she may be prohibited from asserting a common law discharge claim. *See supra* note 117.

discharge in violation of a judicially-created public policy, such claims will resemble bad faith discharge claims as courts develop policies supporting the cause of action. The choice of a limitations statute for such claims presents problems similar to the choice of a statute for discharges in breach of the implied covenant of good faith and fair dealing discussed below.

Discharge as a Breach of Implied-in-Fact Contract

Substantive Law and Underlying Policies

In cases in which no express promise by the employer to terminate the employee only for cause exists, the facts and circumstances of the relationship nevertheless may give rise to the implication that the employer did in fact make such a promise. This principle stems from the traditional contract notion of implied-in-fact promises.[137] To the extent that the implied contract principle recognizes that parties to an employment contract may modify what otherwise would be an at-will arrangement to provide for termination only for cause, the purpose of giving effect to the agreement is simply that it effectuates the intent of the parties. In this sense, the purpose of recognizing the "exception" to the at-will doctrine, if it is an exception, is the contract law principle of recognition and enforcement of private party agreement, and specifically, protection of the employee's rights under the agreement.

Some courts require that the employee show "independent consideration" for the employer's implied promise to terminate only for cause.[138] The modern view, however, is that such a requirement serves only an evidentiary function—a function that also can be served by examining the relationship.[139] An allied theory is the use of personnel policies and manuals to locate the source of a promise to terminate the employee only for cause.[140]

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137. *See* Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985) (applying California law); Steed v. Busby, 268 Ark. 1, 593 S.W.2d 34 (1980); Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947 (1953); Allegri v. Providence-St. Margaret Health Center, 9 Kan. App. 2d 659, 684 P.2d 1031 (1984); Bell v. Hegewald, 95 Wash. 2d 686, 628 P.2d 1305 (1981); Kramer v. Hayward, 57 Wis. 2d 302, 203 N.W.2d 871 (1973). *See generally* A. CORBIN, CORBIN ON CONTRACTS § 18 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

138. *See* Page v. Carolina Coach Co., 667 F.2d 1156 (4th Cir. 1982) (applying Maryland law); Price v. Mercury Supply Co., 682 S.W.2d 924 (Tenn. Ct. App. 1984).

139. Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958, 959 (Alaska 1983); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *see also* Allegri v. Providence-St. Margaret Health Center, 9 Kan. App. 2d 659, 684 P.2d 1031 (1984); Helle v. Landmark, Inc., 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984).

140. *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania law); Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969); Brooks v. Trans World Airlines, Inc., 574 F. Supp. 805 (D. Colo. 1983); Chamberlain v. Bissell,

In *Pugh v. See's Candies, Inc.*,[141] the California Court of Appeal, rejecting the "independent consideration" requirement, enumerated various factors which indicate that an employment contract contains an implied agreement to terminate only for cause. Such factors include personnel policies and practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and practices of the industry involved.[142]

In *Pugh*, an employee, who began work for See's Candies as a dishwasher in 1941 and who advanced over a period of thirty-two years to the position of vice-president in charge of production, was told to "look deep within [himself]" for the reasons for his termination. The court ruled that the plaintiff stated a claim for breach of

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Inc., 547 F. Supp. 1067 (W.D. Mich. 1982) (applying Michigan law); Wagner v. Sperry Univac, Div. of Sperry Rand Corp., 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd*, 624 F.2d 1092 (3d Cir. 1980); Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Walker v. Northern San Diego County Hosp. Dist., 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982); Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. Ct. App. 1984); Falls v. Lawnwood Medical Center, 427 So. 2d 361 (Fla. Dist. Ct. App. 1983); Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974); Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Pine River State Bank v. Mettile, 333 N.W.2d 622 (Minn. 1983); Hinkeldey v. Cities Serv. Oil Co., 470 S.W.2d 494 (Mo. 1971); Arie v. Intertherm, Inc., 648 S.W.2d 142 (Mo. Ct. App. 1983); Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983); Murphy v. American Home Prods. Corp.,, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); Wiener v. McGraw Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359 (N.D. 1984); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1977); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983); Hamby v. Genesco, Inc., 627 S.W.2d 373 (Tenn. Ct. App. 1982); Paicitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc). *But see* Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd*, 609 F.2d 500 (3d Cir. 1979) (applying Pennsylvania law); Uriarte v. Perez-Molina, 434 F. Supp. 76 (D.D.C. 1977); White v. Chelsea Indus., Inc., 425 So. 2d 1090 (Ala. 1983); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982); Edwards v. Citibank, N.A., 100 Misc.2d 59, 418 N.Y.S.2d 269 (1979); Richardson v. Charles Cole Memorial Hosp., 320 Pa. Super. 106, 466 A.2d 1084 (1983).

141. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

142. *Id.* at 327, 171 Cal. Rptr. at 925; *see also* Hillsman v. Sutter Community Hosps., 153 Cal. App. 3d 743, 753, 200 Cal. Rptr. 605, 611 (1984); Walker v. Northern San Diego County Hosp. Dist., 135 Cal. App. 3d 896, 905, 185 Cal. Rptr. 617, 622 (1982).

an implied-in-fact contract of continued employment.[143] The court reasoned that a promise was implied from such indications as plaintiff's length of employment, the absence of criticism, and indications of praise from the employer. The court's discussion of the need to revise the at-will doctrine to reallocate the balance of power in the employment relationship, coupled with the discussion of plaintiff's employment history, make it clear that the court was willing to find an implied promise to protect Pugh's reliance upon his job security. Thus the implied contract exception can be viewed both as a means to protect employee reliance, and as a mechanism to redress the bargaining power inequities in the workplace, rather than purely as a means to enforce agreement reached by mutual consent. This is also indicated by the fact that length of employment is a critical factor,[144] so that the so-called promise of the employer did not arise at the commencement of the relationship. In fact, *Pugh* does not indicate at what point in time the promise does arise. An agreement seems implied not so much as the result of any clear expressions of promise, but rather as a result of the employer's conduct causing the employee to enjoy a feeling of job security.[145]

These "reliance protection" and "reallocation of bargaining power" underpinnings of the implied-in-fact contract exception suggest that the courts are imposing a legal obligation upon the employer, rather than merely giving effect to the intent of the parties. However, the exception does embody traditional contract notions such as the rule that the agreement must be interpreted in light of the reasonable expectations of the parties. The position that the exception primarily is based upon traditional contract principles is bolstered by court rulings that such a cause of action is unavailable to a

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143. Nonetheless, the court rejected the public policy theory advanced by the plaintiff on the ground that the evidence failed to support it. *Pugh*, 116 Cal. App. 3d at 324, 171 Cal. Rptr. at 922-24.

144. *See* Newfield v. Insurance Co. of the West, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984) (two years insufficient); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 407, 199 Cal. Rptr. 613 (1984) (three and one half years insufficient); *see also* Comerio v. Beatrice Foods Co., 600 F. Supp. 765 (E.D. Mo. 1985) (three years insufficient under California law); Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983) (less than two years insufficient).

145. *See* Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984). A promissory estoppel theory has been suggested as a further alternative to the at-will doctrine. Ryan v. J.C. Penney Co., 627 F.2d 836, 838 n.2 (7th Cir. 1980) (applying Indiana law); McKinney v. National Dairy Council, 491 F. Supp. 1108, 1116-17 (D. Mass. 1980) (although theory was not presented at trial); Pepsi Cola Gen. Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 1982); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981); *But see* Rawson v. Sears, Roebuck & Co., 554 F. Supp. 327 (D. Colo. 1983). Another form of protection for the employee's reliance may be a fraud theory. *See* Brudnicki v. General Elec. Co., 535 F. Supp. 84 (N.D. Ill. 1982); DuSesoi v. United Ref. Co., 540 F. Supp. 1260 (W.D. Pa. 1982)(interpreting both Missouri and Pennsylvania law). *But see* Jacobs v. Georgia Pac. Corp., 172 Ga. App. 319, 323 S.E.2d 238 (1984) (fraud claim not allowed as exception to at-will doctrine).

person hired pursuant to an *express* agreement of at-will employment.[146] To this extent any purpose of the law in recognizing this exception is founded upon traditional notions of contract enforcement.

Choice of a Statute of Limitations

To the extent that the purpose of according the at-will employee a cause of action for breach of implied contract is to effectuate an agreement of continued employment, and to the extent that the obligation being enforced was intended by the parties, there seems to be no objection to applying the statute of limitations for oral or implied-in-fact agreements.

A plaintiff, relying upon a written employee manual or employer policy guide as evidence of the promise, may attempt to plead the longer limitations period often accorded written contract cases. Such a plaintiff may have difficulty in light of the restrictive view often taken of written contract lawsuits; many courts indicate that the entire obligation should be contained in the writing in order for the longer statute of limitations to apply.[147]

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146. Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *see also* Gianaculas v. Trans World Airlines, 761 F.2d 1391 (9th Cir. 1985) (applying both California and New York law); Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983) (applying California law); Summers v. Sears, Roebuck & Co., 549 F. Supp. 1157 (E.D. Mich. 1982) (applying Michigan law to situation of demotion as well as discharge). *But see* Stone v. Mission Bay Mortgage Co., 99 Nev. 802, 672 P.2d 629 (1983) (statement on employment application insufficient as a matter of law to bind employee to its terms).

The public policy exception has been applied to employees covered by collective bargaining agreements, although it is likely the other exceptions to the at-will doctrine would not apply. *Compare* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1373 n.9 (9th Cir. 1984), *with* Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348, 1350 (9th Cir. 1984), *and* Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984). *See also* Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 142, 473 N.E.2d 1280 (1984). In Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985), the Supreme Court ruled that a claim for bad faith handling of a disability insurance claim contained in a collective bargaining agreement was preempted by the Labor Management Relations Act. The Court refused to decide whether the Act would preempt a claim for breach of an independent non-negotiable state-imposed duty which did not create problems of contract interpretation. *Allis-Chalmers*, 105 S. Ct. at 1914 n.11.

147. *See* Kerston v. Continental Bank, 129 Ariz. 44, 628 P.2d 592 (Ariz. Ct. App. 1981); Weaver v. Watson, 130 Ill. App. 3d 563, 474 N.E.2d 759 (1984); Matherly v. Hanson, 359 N.W.2d 450, 454 (Iowa 1984); Chilson v. Capital Bank, 10 Kan. App. 2d 111, 692 P.2d 406 (1984); Miller v. William A. Smith Constr. Co., 226 Kan. 172, 603 P.2d 602 (1979); Beekman v. Cornhusker Farms, 214 Neb. 418, 333 N.W.2d 918 (1983); Regina Apartments, Inc. v. Village Green, Inc., 60 Ohio App. 2d 345, 397 N.E.2d 420 (1978); National Bank of Commerce v. Preston, 16 Wash. App. 678, 558 P.2d 1372 (1977).

In some states that have a personal injury statute of limitations, the statute has been applied to a claim for personal injury pleaded on a contract theory.[148] Such rulings are based upon an interpretation of the legislative intent that the statute applies to all actions for personal injury.[149] The crucial issue is whether the claim pleaded is one to redress personal injury, a difficult proposition in a wrongful discharge case in which both economic and emotional distress damages are sought. This problem arises more generally in bad faith cases and is discussed below.

In the absence of an all-inclusive personal injury limitations period, a contract statute should be chosen over a tort statute for several reasons. First, the obligation assumed by the employer results from words and conduct of the employer in raising certain reasonable expectations in the employee. Second, to the extent that the tort statute imposed would provide a shorter limitations period, a shorter period is not necessary to preserve evidence. Although the memories of supervisors and co-workers may fade or the witnesses may become unavailable,[150] the requirement of longevity means that evidence will by definition be old. Also, because the accrual of the cause of action most probably occurs at the time the employee learns that he or she is to be fired, rather than at the time of termination,[151] the problem of stale evidence regarding damages is somewhat alleviated. The availability of emotional distress damages does present a problem, insofar as the legislature intended the shorter tort statute to apply to wrongful discharge cases because of the evidentiary problems involved in proving such damages. Nonetheless, there is no reason to treat the discharged employee any differently from other contract plaintiffs, considering the willingness of courts to award noneconomic damages in true breach of contract cases.

148. *See, e.g.*, Taylor v. General Motors Corp., 588 F. Supp. 562, 567 (E.D. Mich. 1984) (discussing breach of implied contract for failure to promote); Cobb v. Mid-Continent Tel. Serv. Corp., 90 Mich. App. 349, 282 N.W.2d 317 (1979) (discussing a statute applying to suits for injury to person or property). *See also* statutes cited *supra* note 75.

149. *See* statutes cited *supra* note 75.

150. *See* De Malherbe v. International Union of Elevator Constrs., 449 F. Supp. 1335, 1349 (N.D. Cal. 1978) (describing employment discrimination lawsuit). The *De Malherbe* court, however, stated that a shorter statute should apply to offset the dangers of fading memories.

151. *See, e.g.*, Chardon v. Fernandez, 454 U.S. 6 (1981); Daniels v. Fesco Div. of Cities Serv., Inc., 733 F.2d 622 (9th Cir. 1984); Prouty v. National R.R. Passenger Corp., 572 F. Supp. 200 (D.D.C. 1983).

Discharge as a Breach of the Implied Covenant of Good Faith and Fair Dealing

Substantive Law and Underlying Policies

An implied covenant of good faith and fair dealing exists in every contract.[152] However, treating an act of bad faith in contract performance is a step courts are hesitant to take. Such torts have been recognized in the insurance context.[153] But because implying such a covenant in an at-will relationship would radically restructure the employment relationship, and perhaps vitiate the at-will doctrine entirely, the courts have thus far been quite wary of recognizing this as a separate exception to the at-will doctrine.[154] The fear is that restricting employers to good faith in firing would undermine commerce.[155]

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152. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958). Nonetheless, in Seaman's Direct Buying Serv. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984), the California Supreme Court stopped short of providing a plaintiff in every case with the tort remedy of the implied covenant. *See infra* notes 164-65 and accompanying text. *See generally* RESTATEMENT (SECOND) CONTRACTS § 205 (1981); Uniform Commercial Code § 1-203 (1976); Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1840 (1980).

153. *See, e.g.*, Gates v. Life of Mont. Ins. Co., 668 P.2d 213 (Mont. 1983); Lipinski v. Title Ins. Co., 202 Mont. 1, 655 P.2d 970 (1982) (relied upon by the *Gates* court).

154. Cases accepting the doctrine include: Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (applying Arizona law); Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); Rulon-Miller v. International Business Machs., Inc., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984). Some jurisdictions initially accepting the doctrine have since limited it to violations of public policy. *See infra* notes 160-64.

Cases rejecting the doctrine include: Kempe v. Prince Gardner, Inc., 569 F. Supp. 779 (E.D. Mo. 1983) (applying Missouri law); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ariz. Ct. App. 1980); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 377, 652 P.2d 625, 629 (1982); Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982); Ising v. Barnes Hosp., 674 S.W. 2d 623 (Mo. Ct. App. 1984); Murphy v. American Home Prods., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S. 2d 232 (1983); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *cf.* Shaitelman v. Phoenix Mut. Life Ins. Co., 517 F. Supp. 21 (S.D.N.Y. 1980) (under New York law, termination in bad faith not a violation of public policy).

The Wyoming Supreme Court reserved the issue of approval of the doctrine in Rompf v. John Q. Hammons Hotels, Inc., 685 P.2d 25 (Wyo. 1984), holding that the discharge of a six-week employee ahead of later hires would not in any event violate the covenant of good faith if it was necessitated by business concerns.

155. *See* Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699, 703 (Ariz. Ct. App. 1980); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 228, 685 P.2d 1081, 1086-87 (1984); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 569, 335

Few jurisdictions embrace the doctrine wholesale.[156] The New Hampshire Supreme Court, which produced the first "good faith" case, *Monge v. Beebe Rubber Co.*,[157] since has interpreted the good faith covenant to apply only in discharge situations violating public policy.[158] Similar restrictions have been imposed in Massachusetts,[159] Connecticut,[160] and Illinois,[161] but have been rejected in Montana.[162]

Although the California Supreme Court has yet to rule directly on the applicability of the implied covenant of good faith to the at-will employment relationship,[163] several indications appear that the court would not take a restrictive view. In *Seaman's Direct Buying Service v. Standard Oil Co.*,[164] the court established a new tort of wrongful denial of the existence of a contract. While refusing to extend the concept of tortious bad faith breach to a commercial setting, the court did mention that the characteristics of insurance contracts which had precipitated the recognition of the tort in that area also were present in the employment relationship.[165]

In California the first employment "good faith" case was *Cleary v. American Airlines, Inc.*,[166] decided prior to *Seaman's*. In *Cleary*, an eighteen-year employee was terminated allegedly in violation of the procedures in the employer's personnel manual. Although the court discussed the applicability of the implied covenant of good faith and fair dealing, the opinion also refers to the implied-in-fact contract exception to the at-will doctrine, and in fact the facts of the case fell within the latter theory.[167]

N.W.2d 834, 838 (1983); *see also* Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984) (Morrison, J., concurring specially).

156. *See* cases cited *supra* note 154.

157. 114 N.H. 130, 316 A.2d 549 (1974).

158. *See* Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981).

159. *Compare* Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982), *with* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). A discharge for the purpose of depriving the employee of earned benefits also is actionable. *See* Maddaloni v. Western Mass. Bus Lines, 386 Mass. 877, 438 N.E.2d 351 (1982).

160. Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 479 A.2d 781 (1984).

161. Dykstra v. Crestwood Bank, 117 Ill. App. 3d 821, 454 N.E.2d 51 (1983).

162. Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984). *But see* Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984) (the covenant of good faith and fair dealing arises upon a showing of objective manifestations of the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly).

163. The issue was reserved in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12, 164 Cal. Rptr. 839, 846 n.12 (1980).

164. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

165. *Id.* at 769 n.6, 686 P.2d at 1166 n.6, 206 Cal. Rptr. at 362 n.6. The Chief Justice would go further and recognize a cause of action in tort for breach of the covenant of good faith and fair dealing. *Id.* at 776, 686 P.2d at 1171, 206 Cal. Rptr. at 367 (Bird, C.J., dissenting).

166. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

167. This was recognized in Comerio v. Beatrice Foods Co., 600 F. Supp. 765, 769

Cases decided after *Seaman's* attempt to refine an analysis in which the tort of bad faith in the employment relationship should be recognized. In *Wallis v. Superior Court*,[168] a former employee brought suit after his employer terminated retirement benefits. The court developed an analysis designed to determine which types of contractual relationships generate actions in tort for bad faith breaches. Five factors were enumerated: inherently unequal bargaining power between the parties; a motivation for entering into the contract animated by an attempt to secure peace of mind and security; inadequacy of ordinary contract damages to compensate the injured party or make the breaching party accountable; special vulnerability of one party to harm; and awareness by the breaching party of this vulnerability.[169] The court held that these factors were present in the employment relationship in question. Nonetheless, applicability of this concept of tortious bad faith breach in the commercial setting was rejected in *Quigley v. Pet, Inc.*[170]

In *Rulon-Miller v. International Business Machines, Inc.*,[171] the court fused the *Cleary* discussion of the good faith covenant with the unanswered questions left by *Seaman's*. IBM terminated the plaintiff after twelve years of employment, ostensibly because she had violated conflict of interest rules by dating a former IBM employee who worked for a competitor. IBM's personnel policies gave the company the right to terminate an employee on the grounds of conflict of interest. The court, however, ruled that IBM acted in bad faith because no actual conflict of interest was present, and the reason therefore was a "pretext."[172] The termination was held to be in bad

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(E.D. Mo. 1985) (applying California law); *see also* Crozier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 1137, 198 Cal. Rptr. 361, 364 (1983); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir. 1982).

168. 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984).

169. *Id.* at 1118, 207 Cal. Rptr. at 129.

170. 162 Cal. App. 3d 223, 208 Cal. Rptr. 394 (1984).

171. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

172. *Id.* at 253, 208 Cal. Rptr. at 533; *see also* Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984). *But cf.* Lampe v. Presbyterian Medical Center, 40 Colo. App. 465, 590 P.2d 513 (1978) (no cause of action despite allegations of false reason for discharge; good faith theory not discussed).

Under principles established in Texas Dep't of Community Affairs v. Burdine, 450 U.S 248, 252-53 (1981), in an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, the plaintiff bears the initial burden of establishing membership in a protected class, an adverse employment decision, and his or her qualifications. The defendant then must introduce evidence of a legitimate nondiscriminatory reason for the employment decision. The burden then shifts back to the plaintiff to establish that the defendant's purported reason is pretextual. Likewise, these principles have been applied in wrongful discharge situations. *See, e.g.*, Taylor v. General Motors Corp., 588 F.

faith.[173] Furthermore, the court analogized the situation to *Seaman's*, conceding that IBM had acted wrongfully by denying its obligation to the plaintiff. An attempt to shield oneself from liability without "probable cause" was characterized as an act in bad faith.[174]

Rulon-Miller is instructive on the content of the "good faith" obligation. Several issues are raised by the attempt to define the obligation in the employment termination context. *Rulon-Miller* suggests that the employer must have a legitimate reason for the termination.[175] Equating "good faith" with "good cause," of course, sounds the death knell for the at-will doctrine. Other courts, however, suggest that an arbitrary termination, as opposed to one for a "bad" reason, would not be in bad faith.[176] Certainly, this is the import of cases holding that a bad faith termination is the equivalent of one in violation of public policy. It has been suggested, however, that procedural content could be given to the covenant of good faith and fair dealing.[177] Under such a theory, a private employer may have to accord due process rights akin to those conferred upon public employees.[178]

Supp. 562, 566 (E.D. Mich. 1984). In Crozier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983), the employee's suspicions regarding the employer's improper motives for the terminations were held insufficient evidence of pretext.

173. Several other jurisdictions have refused to hold that a dismissal for violation of a nonfraternization rule is wrongful. *See* Rogers v. International Business Machs., Inc., 500 F. Supp. 867 (W.D. Pa. 1980); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980).

174. *Rulon-Miller* 162 Cal. App. 3d at 252-53, 208 Cal. Rptr. at 532-33.

175. *Id.* at 252, 208 Cal. Rptr. at 532. The court approved the trial court's instructions on bad faith, which included "whether or not the employee was discharged for legitimate business and employment reasons . . . ." *Id.* at 252 n.6, 208 Cal. Rptr. at 532 n.6; *see also* Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir. 1982); Walker v. Northern San Diego County Hosp. Dist., 135 Cal. App. 3d 896, 905, 185 Cal. Rptr. 617, 622 (1982); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 927-28 (1981); Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015, 1019-20 (Mont. 1984). Good cause in the contract case of Confort & Fleming Ins. Brokers, Inc. v. Hoxsey, 26 Wash. App. 172, 613 P.2d 138 (1980), was defined as "some causes inherent in and related to the qualifications of the employee or a failure to properly perform some essential aspect of the employee's job function." *Id.* at 177, 613 P.2d at 141.

176. *See* Gram v. Liberty Mut. Life Ins. Co., 391 Mass. 333, 461 N.E.2d 796 (1984).

177. *Pugh*, 116 Cal. App. 3d at 329 n.25, 171 Cal. Rptr. at 927 n.25. *Pugh* specifically refused to reach the issue. *See* W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 385-94 (1985).

178. *See Pugh*, 116 Cal. App. 3d at 321 n.12, 171 Cal. Rptr. at 922 n.12 (1981)(terming the issue "interesting"); Simpson v. Western Graphics Corp., 293 Or. 96, 99 n.1, 643 P.2d 1276, 1278 n.1 (1982) (refusal to rule on issue); *see also* Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979). *But see* Murray v. Kaiser Aluminum & Chem. Corp., 591 F. Supp. 1550 (S.D. W. Va. 1984)(employer not required to treat employee fairly according to its promulgated rules); Ring v. R.J. Reynolds Indus., Inc., 597 F. Supp. 1277, 1281 (N.D. Ill. 1984) (applying Illinois law); Sheriff v. Revell, Inc., 165 Cal. App. 3d 297, 211 Cal.

Liability under the bad faith rubric can serve a variety of purposes: effectuating public policy if the discharge is in bad faith because it violates that policy; enforcing the agreement and expectations of the parties in the contractual context; and implementing judicially-imposed limits upon employer's dealings with employees in pursuit of greater fairness and balance in the relationship. Given the differences in bad faith cases, more than one statute of limitations should be chosen depending upon the type of case pleaded. This also makes it imperative that a plaintiff clearly allege the basis of the claim so that such determinations can be made.

Choice of a Statute of Limitations

When the employer's bad faith consists of terminating the employee in violation of public policy, the statute of limitations chosen for retaliatory discharges should apply to the purported "bad faith" lawsuit as well. Certainly the purposes for imposing liability are identical, and "bad faith," in such cases, is actually only another term in which to clothe the public policy discharge claim.[179]

In "bad faith" cases in which the employee claims that he was terminated in violation of the employer's own procedures, there should be no objection to applying the implied contract statute of limitations, for the purpose of imposing liability in such an instance is to vindicate the reasonable expectations of the employee based upon the employer's words and conduct. And the contract statute should be appropriate at a minimum for compensatory damage claims.[180]

The most difficult situations are those in which the employer seems to be treating the employee unfairly, even though no identified public policy is violated by the employer's actions. Such situations include: the arbitrary firing when the employee has not achieved the longevity needed to make an implied-in-fact contract argument; the pretextual firing when the real reason seems silly or petty but does not violate law or public policy; and the discharge motivated by dislike, disagreement, or differing views of morality.

In such situations no principled basis can exist upon which to

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Rptr. 465, 471 (1985); Crozier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 1141, 198 Cal. Rptr. 361, 367 (1983)(rejecting analogy to expulsion from professional association); Hurst v. Farmer, 40 Wash. App. 116, 697 P.2d 280 (1985)(no due process rights against private employer).

179. *See supra* text accompanying notes 164-65.

180. *See supra* text accompanying notes 70-74.

choose a contract statute of limitations over a tort statute of limitations. The claim contains elements of both, much the same as the claim for breach of an insurer's implied covenant of good faith and fair dealing. Principles assuring fairness to plaintiffs and predictability of repose of actions to defendants suggest that the limitations period be assigned by reference to the remedy desired.

Plaintiffs should be required to plead clearly the remedy sought. A claim for compensatory relief, including emotional distress damages, should be governed by the contract statute if longer than the tort statute. A claim for punitive damages may be severed from the compensatory damage allegations if the tort statute of limitations has expired.

If contract treatment is chosen, the court must decide whether the statute of limitations for written contracts or for oral contracts applies. While in the insurance context some courts have ruled that the written contract limitations period applies despite the fact that the covenant of good faith is "implied,"[181] the shorter oral contract statute will be appropriate in discharge cases because no written employment contract exists.[182]

If a tort statute is chosen over a contract statute, a further choice between a personal injury and a property damage statute may be required. The rights conferred upon an employee by virtue of his employment contract generally are considered to be property rights.[183] With the authorization of emotional distress and punitive damage awards for violation of the covenant of good faith and fair dealing, however, the tort takes on the character of an action redressing personal injury.

Claims for intentional infliction of emotional distress have been held to be governed by the personal injury statute of limitations.[184] In *Richardson v. Allstate Insurance Co.*,[185] a passenger injured in an automobile accident brought suit against the insurer for violation of

181. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

182. *See supra* text accompanying note 147.

183. Carter v. Seaboard Coast Line R.R. Co., 392 F. Supp. 494, 497 (S.D. Ga. 1974) (applying Georgia law); *cf.* James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944) (closed union and shop affect the "fundamental right to work for a living"). In Edwards v. Fresno Community Hosp., 38 Cal. App. 3d 702, 113 Cal. Rptr. 579 (1974), the court held that a physician's interest in maintaining hospital privileges was in the nature of a property interest which directly related to the pursuit of his livelihood. Affording private sector employees a property right in their employment is suggested in Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743 (1979); *see also* Glendon & Lev, *supra* note 99. The United States Supreme Court has stated that an at-will employee has no property right in his or her employment. Bishop v. Wood, 426 U.S. 341, 345 n.8 (1976).

184. *See supra* note 135.

185. 117 Cal. App. 3d 8, 172 Cal. Rptr. 423 (1981).

the covenant of good faith and fair dealing. The trial court sustained demurrers to plaintiff's causes of action for breach of the covenant of good faith and fair dealing and conspiracy, ruling that the one-year personal injury tort statute of limitations barred the claims. The appellate court reversed, ruling that the two-year property damage statute applied. Analogizing the claim to one for interference with contractual relations, the court reasoned that the presence of allegations of emotional distress damages did not undermine the fact that it was financial loss, or risk of financial loss, which defined the cause of action.[186]

The claim for wrongful discharge generally involves both an invasion of a personal interest and a property interest, both personal injury damages and the economic loss involved in the loss of a job. While one solution could be an indulgence in comparisons of the magnitude of these respective losses, the better choice would be simple recognition of the plaintiff's right to choose. Thus, in California the one-year personal injury statute should apply to claims for emotional distress and punitive damages and the two-year property damage statute to claims for financial damage such as lost wages and benefits. Such a choice would effectuate the policy expressed in the different limitations periods contained in these statutes.

CONCLUSION

Because the appellation "wrongful discharge" covers a variety of claims, supported by different principles and motivated by different purposes, coordination of these claims with the confusing selection of statutes of limitations is an arduous process. Prospective application may be necessary.[187] When choices must be made, they should be

186. *Id.* at 13, 172 Cal. Rptr. at 426. In Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 203 Cal. Rptr. 524 (1984), the court ruled that a claim for emotional distress was not separate from a claim against an insurer for bad faith failure to settle. The court characterized the underlying claim as sounding in both tort and contract, and as a claim involving invasion of a property interest. Following *Richardson*, the two-year statute of limitations for such claims was applied despite the existence of the emotional distress allegations.

187. Prospective application of a statute of limitations to a particular cause of action is appropriate if the plaintiff, due to his or her reliance upon past precedent or due to the fact that the case is one of first impression the resolution of which was not clearly foreshadowed, reasonably could not have known which limitations period would apply. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-09 (1971). Applying a chosen statute of limitations prospectively would protect the interests of the particular plaintiff in the same way as the rule that the longer statute applies when a choice must be made. *See supra* text accompanying note 52. Nonetheless, the court would be able to make a reasoned choice of the limitations period for future cases.

made with a view towards consistency in the law, effectuation of the purposes of the substantive law and of statute of limitations policy, amenability to prediction by potential litigants, and simplicity of application. In some situations this should result in allowing plaintiff to elect to proceed with such claims as he or she may have for remedies not barred by the most applicable statutes.

Another solution is a uniform statute. For example, Indiana has adopted a two-year statute of limitations for actions relating to the terms, conditions and privileges of employment, excluding actions based upon written contract.[188] If applied to all of the theories of wrongful termination, such a statute would achieve a high measure of predictability and simplicity of application. The price, however, would be possible inconsistency in the treatment of plaintiffs' claims. For example, if the general oral contract statute is longer than the employment statute, the employee asserting a claim for breach of implied contract under the theory of *Pugh v. See's Candies, Inc.*[189] would be given a shorter period in which to file than any other party to an oral contract. Thus, any movement towards adoption of a general employment or discharge statute of limitations should include investigation and consideration of the various policies animating the different theories of wrongful discharge before a uniform period of limitations is calculated and approved.

188. IND. CODE ANN. § 34-1-2-1.5 (Burns Supp. 1985).

189. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). *See supra* notes 141-45 and accompanying text.