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

MARY E. MILLER*

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.


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 Mt. 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). 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. Depending upon the form of action, the Limitations Act provided different periods of limitation. 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.

The Limitations Act had a profound, and still apparent, influence upon American statutes of limitations. 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. This difficulty in discerning a consistent

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 freget, 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.
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

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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 order-
ing his or her affairs; inhospitality to "stale" claims for which evi-
dence has become unreliable through lapse of time, lost physical or
documentary evidence, and faded memories; and the desire to pun-
ish a plaintiff whose lack of diligence raises the suspicion of negli-
gence at a minimum, and the suspicion of false or fictitious claims
at a maximum. Sometimes cited as a reason for a short limitations
period is distaste for a particular type of claim or a de minimus
claim. In terms of public policy, a short limitations period may
have a salutary stabilizing effect on commerce by limiting the num-
ber of outstanding unsettled claims, and on the legal system itself

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,
812 (1978).

(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.
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

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.
(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. 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.

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

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. This latter period was subsequently held to apply to implied-in-fact contracts and quasi-contracts as well as to oral agreements. 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. The present code preserves those distinctions. This contrasts with systems in other jurisdictions providing for the same limitations period for actions based on both written and oral agreements.

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

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16. Id. at 665, 464 A.2d at 1026.
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).
23. CAL. CIV. PROC. CODE § 339(1) (West Supp. 1985) (four 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. § 54.05(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, 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, California and other states further have distinguished personal injury torts from torts for injury to property interests. 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. Because California’s residual statute of limitations was held to apply only to actions in equity, 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”.32 As a result, the one-year statute applies to personal in-

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5 and accompanying text.

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.\textsuperscript{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.\textsuperscript{35}

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

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

\begin{footnotesize}
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-
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).

(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.


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) (liabil-
ity 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); MICL. 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

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common-law claim.\textsuperscript{39}

California’s residual statute for all other claims provides for a relatively short four-year period.\textsuperscript{40} Because the statute initially was interpreted to apply only to equitable claims, only recently has it received extended application.\textsuperscript{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.\textsuperscript{42} In many of these cases the solution has been either to characterize the claim as “sound[ing] both in contract and tort,”\textsuperscript{43} or to award a remedy traditionally not permitted.\textsuperscript{44} Mechanical application to limitations problems of terminology developed in another context yields inconsistent and confusing results.\textsuperscript{45} Further-


\textsuperscript{40} CAL. CIV. PROC. CODE § 343 (West Supp. 1985).

\textsuperscript{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).


\textsuperscript{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 “[i]t is probably no more barren and unwarranting 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.\(^4\)

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.\(^4\) This required an examination of the pleading in order to determine the "gravamen" or "gist" of the action, as well as identification of applicable principles of substantive law.\(^5\) While the pleading itself was not determinative, the characterization of the "gist" of the matter was made by examining the pleading.\(^6\) 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.\(^7\) This

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


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.\textsuperscript{53}

\section*{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.\textsuperscript{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.\textsuperscript{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-


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. Other cases involve less determinative issues such as venue and defenses.

The cases are inconsistent; some courts characterize the claims as contractual, while others call them tortious. 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. While this test may be useful in malpractice cases, in many situations it is difficult to appreciate the difference. Moreover, such a rule makes


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. 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. 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. 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


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. 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, including the advantage of calculating with certainty the amount of damage and the desire to permit efficient


breaches. 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. In McDowell v. Union Mutual Life Insurance Co., 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”. The McDowell rationale was followed in Frazier v. Metropolitan Life Insurance Co., 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. 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-


72. Id. at 145 n.7.


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”; many statutes without such a restriction have been interpreted to apply only to tort claims. 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.

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

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”).


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, 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.

**Liability Based Upon Statute and Suit for Statutory Penalty**

Many states create specific statute of limitations for statutory actions. In California the three-year statute gives a plaintiff more time to file than do the oral contract or tort statutes. 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. Applying this principle, the "based on statute" provision has been held applicable to a claim based upon a municipal ordinance.

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. 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. 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

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from the general public.\textsuperscript{86} Generally, the "statutory penalty"\textsuperscript{87} statute of limitations is fairly short, which probably indicates a disfavor for such claims and favor for speedy resolution of "penalty" lawsuits.\textsuperscript{88} But the provision does not apply to suits seeking any form of compensatory relief.\textsuperscript{89}

Though California provides for punitive damages by statute,\textsuperscript{90}this provision alone has been held not to invoke a "statutory penalty" statute of limitations.\textsuperscript{81} The result surely is correct, for punitive damages were known at the time the statutes were enacted,\textsuperscript{92} and the legislature provided other limitations periods for substantive theories of liability which supported punitive damage allegations.\textsuperscript{83} 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.

\textbf{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

\begin{itemize}
  \item See supra note 38 and accompanying text.
  \item See Developments, supra note 3, at 1180.
  \item See supra note 3, at 1180.
  \item CAL. CIV. CODE § 3294 (West 1973).
  \item 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.
  \item This was the reasoning of the court in McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (C.D. Cal. 1975).
\end{itemize}
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-

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.
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, 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

(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 Dept' 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).

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. These discharges, often termed "retaliatory" or "abusive," have been recognized as unlawful not so much to protect the interests of individual employees as to effectuate public policy.


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*, 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. This mode of distinction may prove unworkable, 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. 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*, 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." In *Petermann*, the court

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'r's, 472 N.E.2d 213 (Ind. Ct. App. 1984); Larrabee v. Penobscot Frozen Foods, Inc, 486 A.2d 97, 100 (Me. 1984).


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. 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, and a sense that the legislature is the more appropriate body to declare public policy. Some of this hesitation flows from the fact that the at-will doctrine may be embodied in statute. 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. This has led some courts to conclude that they have no power to declare public policy in this area.

In most jurisdictions that have accepted the public policy exception, the policy itself must be embodied in a statute.\textsuperscript{116} 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.\textsuperscript{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.\textsuperscript{116}

holding in \textit{Mallard}, that an at-will employee could be terminated for serving on a jury, undoubtedly is no longer good law in light of \textit{Tameny}'s approval of \textit{Petermann}. \textit{See supra} notes 107-09 and accompanying text. In any event, the \textit{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. \textit{Mallard}, 182 Cal. App. 2d at 394, 6 Cal. Rptr. at 174-75. Such a statute subsequently was enacted. \textit{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. \textit{See, e.g.}, \textit{Altschul v. Sayble}, 83 Cal. App. 3d 153, 147 Cal. Rptr. 716 (1978).


Courts have recognized a public policy in a statute that encourages the activity for which the employee was terminated. 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.” 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.


also have found sufficient expressions of public policy in the federal constitution or laws, in state constitutions, administrative regulations, local ordinances and codes of professional conduct.

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


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. 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-


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.*, 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.

Because no contractual obligation is breached, 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. Such damages are a likely result of a wrongful discharge. Nonetheless, in cases in

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

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.

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.

Moreover, the availability of punitive damages for discharge in vi-
olation of public policy makes application of a contract statute of
limitations to such a claim unjustifiable not only as a matter of re-
medial policy but also as a matter of judicial restraint. To endow a
claim for punitive damages brought under the public policy excep-
tion with a contract statute of limitations would undermine the pre-
sumed 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 re-
quirement 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

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 Cyana-
Pennsylvania Life Ins. Co., 539 F. Supp. 879 (S.D. Iowa 1982) (applying Iowa law);
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,
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

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 limita-
tions applicable to latter applies to former as well); Purdy v. Pacific Auto. Ins. Co., 157
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.,
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. 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. 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. 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. 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.

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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
an implied-in-fact contract of continued employment. 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, 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.

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

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.


person hired pursuant to an *express* agreement of at-will employment. 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

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. McDonell 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.


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. Such rulings are based upon an interpretation of the legislative intent that the statute applies to all actions for personal injury. 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, 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, 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.


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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{154} The fear is that restricting employers to good faith in firing would undermine commerce.\textsuperscript{155}


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.

Few jurisdictions embrace the doctrine wholesale. The New Hampshire Supreme Court, which produced the first “good faith” case, Monge v. Beebe Rubber Co., since has interpreted the good faith covenant to apply only in discharge situations violating public policy. Similar restrictions have been imposed in Massachusetts, Connecticut, and Illinois, but have been rejected in Montana.

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, several indications appear that the court would not take a restrictive view. In Seaman’s Direct Buying Service v. Standard Oil Co., 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.

In California the first employment “good faith” case was Cleary v. American Airlines, Inc., 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.


156. See cases cited supra note 154.
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).
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).
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, 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. 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. In Rulon-Miller v. International Business Machines, Inc., 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." The termination was held to be in bad

(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 Dept Stores, 672 F.2d 1312, 1318 (9th Cir. 1982).

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

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.
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.

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. 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. 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. Under such a theory, a private employer may have to accord due process rights akin to those conferred upon public employees.
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.\(^\text{179}\)

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.\(^\text{180}\)

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

\(^{179}\) 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," the shorter oral contract statute will be appropriate in discharge cases because no written employment contract exists.

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. 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. In Richardson v. Allstate Insurance Co., a passenger injured in an automobile accident brought suit against the insurer for violation of

182. See supra text accompanying note 147.
184. See supra note 135.
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
appeal 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 allega-
tions 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.\textsuperscript{186}

The claim for wrongful discharge generally involves both an inva-
sion of a personal interest and a property interest, both personal in-
jury 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 sim-
ple recognition of the plaintiff's right to choose. Thus, in California
the one-year personal injury statute should apply to claims for emo-
tional distress and punitive damages and the two-year property dam-
age 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.\textsuperscript{187} When choices must be made, they should be

\textsuperscript{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 dis-
tress 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 stat-
ute of limitations for such claims was applied despite the existence of the emotional dis-
tress allegations.

\textsuperscript{187} Prospective application of a statute of limitations to a particular cause of ac-
tion 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.

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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.\textsuperscript{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 \textit{Pugh v. See's Candies, Inc.}\textsuperscript{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.

\begin{footnotes}\footnote{188. \textsc{Ind. Code Ann.} § 34-1-2-1.5 (Burns Supp. 1985).}\footnote{189. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). \textit{See supra} notes 141-45 and accompanying text.}\end{footnotes}