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Implying a Civil Remedy from 15 U.S.C. § 1674(a): *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974)

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Note

Implying a Civil Remedy From 15 U.S.C. §1674 (a)

Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974).

I. INTRODUCTION

Section 1674(a) of Title 15 of the United States Code provides: "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."¹ Section 1674(b) provides for criminal sanctions for violations of section 1674(a), and enforcement is entrusted under section 1676 to the Secretary of Labor. An employee who believes he has been dismissed in violation of section 1674(a) may think he has been twice wronged if the Secretary of Labor declines to bring an action against the employer.² However, if the employee sues the employer for private civil relief, he will face yet another dilemma—section 1674(a) does not provide a private remedy.

Provisions similar to section 1674(a) are not uncommon.³ Congress often entrusts an administrative agency with enforcement of a statutory prohibition, and frequently, only criminal sanctions are imposed for a violation of the statute. Agencies are overworked,

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1. 15 U.S.C. § 1674(a) (1970) is part of Title III of the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq. (1970). Throughout this Note reference to a particular portion of the Consumer Credit Protection Act will be by section only, e.g., § 1674(a).
 2. 15 U.S.C. § 1676 (1970), provides: "The Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter." Although the section directs that the Secretary *shall* enforce the provisions, the power of the Wage and Hour Division to investigate complaints and bring suit is discretionary. 29 U.S.C. § 211(a) (1970). See Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act*, 47 So. CAL. L. REV. 383 (1974). [Hereinafter cited as *Implication of a Private Cause of Action*].
 3. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (interpreting § 14 (a) of the Security Exchange Act, 15 U.S.C. § 78n(a) (1970)); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (interpreting 33 U.S.C. § 401 et seq. (1970)); *Burke v. Compania Mexicana De Avia-cion*, 433 F.2d 1031 (9th Cir. 1970) (interpreting § 2 of the National Railway Labor Act, 45 U.S.C. § 152 (1970)).

however, and even when the criminal penalty is imposed it frequently does nothing for the individual whose interests were supposed to be protected by the legislation. As a response to this dilemma, federal courts have developed a policy of implying a civil remedy for violations of statutory prohibitions like section 1674(a). The basis of the implication policy was stated in *Texas & Pacific Railway v. Rigsby*.⁴

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied⁵

In *Stewart v. Travelers Corp.*,⁶ the United States Court of Appeals for the Ninth Circuit held that a private remedy should be implied for a violation of section 1674(a). The court's opinion was based on the *Rigsby* principle and the line of federal cases which have developed from it.

II. THE FACTS

John Stewart was discharged by the Travelers Insurance Company on January 15, 1971.⁷ Stewart believed his dismissal violated section 1674(a). Because the Labor Department refused to act on his claim, Stewart filed a complaint in the District Court for the Central District of California seeking reinstatement, back pay, punitive damages, and attorney's fees. The district court dismissed the complaint on the ground that Congress did not intend to provide a private remedy for a violation of section 1674(a).

On appeal, Judge King⁸ of the Ninth Circuit framed the issue as follows: "[T]his Court must decide whether private civil remedies may be implied for § 1674(a) violations."⁹ The court acknowledged the implication principle and re-adopted the language of the Ninth Circuit in *Burke v. Compania Mexican de Aviacion*:¹⁰

In the absence of a clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose. Where the interest asserted by the plaintiff is within the class that the statute was intended to protect, the harm of the type the statute was intended to forestall and the statutory criminal penalty inadequate to fully

4. 241 U.S. 33 (1916).

5. *Id.* at 39.

6. 503 F.2d 108 (9th Cir. 1974).

7. *Id.* at 109.

8. Sitting by designation, *Id.*

9. *Id.*

10. 433 F.2d 1031 (9th Cir. 1970).

protect the asserted interest, a civil action for damages arises by implication.¹¹

The parties recognized that the implication principle as formulated by the *Burke* case was determinative of the issue.¹² The question was whether section 1674(a) fit within any of the limited exceptions of that formulation. Travelers argued both that there was a clear congressional intent against implication and that the criminal sanction of section 1674(b) was adequate to protect Stewart's interest.¹³

Travelers offered three arguments to show that there was a clear congressional intent against implication. First, Travelers argued that the omission of a private remedy established the requisite intent. A New York law¹⁴ which provided a limited private remedy had been the model for the federal act; Travelers claimed that the absence of a similar private remedy in section 1674(a) was a deliberate deletion. The Ninth Circuit, however, held the omission showed "at the most that Congress did not want a *limited* civil remedy provision."¹⁵

Travelers' second argument that there was congressional intent against implication was based on the history of section 1674(a); the court summarized Travelers' position as follows:

Appellees point to a Congressional debate on whether there should be a criminal penalty for § 1674(a) violations as proof that the authors of the statute assumed no civil remedies were to be available. See 114 Cong. Rec. 1839 (Feb. 1, 1968).¹⁶

In responding to this argument, the court displayed commitment to the *Burke* requirement that intent contrary to implication must be clear before implication of a private remedy will be deemed inappropriate.

While this debate manifests that Congress regarded criminal penalties as essential to effective enforcement, it does not evince a clear congressional intent to exclude civil remedies, which are not mentioned.¹⁷

The third argument proffered by Travelers to show an intent against implication stemmed from the presence of a private civil

11. 503 F.2d at 110 (citations omitted).

12. *Id.*

13. *Id.* The court summarily concluded that the interest asserted by Stewart and the harm he sought to avoid were of the type contemplated by § 1674(a). Traveler's had made no argument to the contrary.

14. N.Y. CIV. PRAC. § 5252 (McKinney Supp. 1974).

15. 503 F.2d at 111 (emphasis original).

16. *Id.*

17. *Id.*

remedy for violations of certain other sections of the Consumer Credit Protection Act. Travelers contended that because other provisions of the act expressly included civil remedies, the absence of a civil remedy in the garnishment provisions of the act showed a congressional intent against the remedy.¹⁸ The court characterized the argument as an application of the maxim of *expressio unius est exclusion alterius*.¹⁹ It was in rejecting this third argument that the court first interjected the principle upon which the implication process is founded—that a court has a duty to discover and enforce the purpose of the statute. “[T]he tendency is to limit the *expressio unis* rule in favor of construing an act so as to effectuate its dominant purpose.”²⁰

Thus, the court rejected each of Travelers’ arguments. The court turned to Travelers’ second line of defense, which was that the criminal sanction of section 1674(b) adequately protected Stewart’s interest. Under the *Burke* formulation of the implication principle, if the criminal penalty provided in section 1674(b) and the enforcement provision of section 1676 were sufficient to safeguard the interests sought to be protected by section 1674(a), then a private civil remedy would not be implied.²¹ The test of adequacy employed by the *Stewart* court was whether the express criminal remedies in the statute “ensure the full effectiveness of the congressional purpose underlying the statute. . . . [T]he initial question is whether the statute’s protection might be enhanced by allowing private civil relief.”²² Once the issue was framed in these terms, the implication of a private remedy was not difficult. The court held that the purpose of section 1674(a) is to protect employees from the hardships and disruptions of a dismissal resulting from one garnishment. The criminal sanction of section 1674(b) is manifestly inadequate to “undo the very harm which the statute was intended to forestall.”²³ The court, noting that the Department of Labor has taken the position that a civil remedy ought to be implied from section 1674(a),²⁴ seriously questioned the adequacy of the De-

18. *Id.* Civil remedies are provided for violations of the disclosure provisions of the Consumer Credit Protection Act by 15 U.S.C. § 1640 (1970).

19. The court defined the maxim to mean “the express authorization of a remedy in one section of a statute indicates that an omission of that remedy from other sections was intended by the legislature.” 503 F.2d at 111.

20. *Id.* at 112.

21. See note 10 and accompanying text, *supra*.

22. 503 F.2d at 112 (emphasis original).

23. *Id.* at 113.

24. *Id.* at n.15.

partment's discretionary enforcement powers under section 1676.²⁵ The Ninth Circuit found no reason to believe that the implication of a civil remedy would conflict with the purpose or administration of the anti-garnishment provisions of the Consumer Credit Protection Act.

From these considerations, the court concluded that the criminal sanctions of section 1674(b) were inadequate to protect Stewart's interest. Therefore, the case was remanded for trial on the merits with the explicit holding that "the implication of private civil remedies is necessary to ensure the full effectiveness of the congressional purpose behind § 1674(a)."²⁶ The court left the determination of the nature of the civil remedy to the district court.²⁷

III. THE IMPLICATION PRINCIPLE

The implication principle stated in *Stewart* is well established in the federal courts. Its merits have been fully argued elsewhere²⁸ and this Note is not primarily concerned with furthering the debate. The objective here is not to justify the general principle but to understand it more fully and then to consider whether the Ninth Circuit applied the implication principle wisely in *Stewart*.

The implication principle has been classified as a type of remedial creativity or judicial activism.²⁹ While courts are reluctant to construct a substantive right, they have been traditionally willing to develop a remedy to vindicate a legislatively created right. The dilemma of a statutory right without a fully effective statutory remedy is not novel. There is evidence that courts were implying civil remedies from statutes as early as the fifteenth century.³⁰ *Couch v. Steel*,³¹ a nineteenth century English case, appears to have

25. The court did not make a finding on the adequacy of the enforcement powers of the Department of Labor because no evidence on that issue was presented. The court held that the § 1676 remedy was inadequate even if fully enforced. *Id.*

26. *Id.* at 114.

27. *Id.* at n.17.

28. See, e.g., Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PENN. L. REV. 1 (1968) [hereinafter cited as *Jurisprudence of Remedies*]; Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). For a consideration of the implication principle and the garnishment provisions of the Consumer Credit Protection Act see *Implication of a Private Cause of Action*, *supra* note 2.

29. *Jurisprudence of Remedies*, *supra* note 28, at 8-33.

30. See *Symond v. Hyngton*, Y.B. 1 Hen. 6 (1422), as reported in 50 *Seldon Society* 10 (1933).

31. 118 Eng. Rep. 1193 (K.B. 1854).

offered the first clear formulation of the implication principle, and the United States Supreme Court, relying in part on the *Couch* opinion, first adopted the principle in 1916.³²

Underlying the implication doctrine is a jurisprudential principle that courts have a duty to enforce the purpose of a statute.³³ The judicial conscience winces at the thought of a right without an effective remedy. Implication is not simply a form of statutory interpretation. Indeed, if the court can find a clear intent to deny the private remedy there is no basis for implication. If, however, the court can discover a congressional intent to create the private remedy, then it is the statute itself and not the court which implies the remedy. The process of implication can come into play only when there is no clear legislative intent with regard to the private remedy. The implication issue arises where a well defined statutory right has been invaded but no corresponding statutory remedy exists to make the injured party whole.

The United States Supreme Court has not provided a rule to govern all situations where the implication issue is raised. However, a review of the major Supreme Court decisions in the area suggests an outline of such a rule.

The Federal Safety Appliance Act³⁴ provided the first occasion for implication of a private civil remedy from a federal statute.³⁵ The statute, which imposed safety requirements on railroads, did not expressly provide a civil remedy for individuals who suffered injury as a result of a violation of the standards. However, since the major objective of the statute was the protection of employees and others from such injuries, the Court had little trouble implying the remedy. The decision hardly represents radical judicial activism since, as the Court noted, "the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted."³⁶

The Supreme Court has held that a private civil remedy may be implied for a violation of rights derived from the fourth and fifth amendments to the United States Constitution.³⁷ Similarly, the Court has implied a damage remedy for violations of the Securities Exchange Act³⁸ and the Voting Rights Act of 1965.³⁹ In each

32. *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916).

33. *Jurisprudence of Remedies*, *supra* note 28, at 33-39.

34. 27 Stat. 531 (1893), *as amended*, 45 U.S.C. §§ 1-16 (1970).

35. *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916).

36. *Id.* at 39.

37. *Bell v. Hood*, 327 U.S. 678 (1946); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

38. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

39. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

case the statute upon which the plaintiff relied did not provide the remedy sought, but the Court held the remedy was appropriate in order to effectuate a major statutory purpose.

Two other Supreme Court cases are useful in ascertaining the limits of the federal implication principle. The Court denied a private remedy in a case involving a violation of the Federal Power Act.⁴⁰ The plaintiff, a public utility, sought damages for activities by another utility company allegedly in violation of the statute. Damages were disallowed primarily on the ground that the act had not been violated; but the Court also indicated that the remedy sought would not enhance the statutory purpose. The Court reasoned that the plaintiff had passed its losses on to the consumer thereby obviating the need for a further remedy.

In another case the Court refused to imply a private damage remedy for abuse of subpoena power by the House Unamerican Activities Committee.⁴¹ The statute upon which the committee's subpoena power was based was no more than a grant of power. Protection of potential witnesses was not a primary statutory purpose.

Throughout the lower federal courts, the implication principle is recognized;⁴² however, there is no universal statement of a rule governing its application. One commentator derives the following general proposition from the federal cases: "[I]n the absence of contrary legislative intent an action will lie for breach of a statutory duty provided such remedy is consistent with the purpose of the legislation."⁴³

It is submitted that this language adequately describes the current implication rule of the federal courts. It is clear that the object of the federal decisions is to carry out the statutory purpose. The courts also generally agree that three conditions are necessary for implication.⁴⁴ First, the interest asserted must be one which

40. *Montana-Dakota Util. Co. v. North-Western Pub. Serv. Co.*, 341 U.S. 246 (1951).

41. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

42. *See, e.g.,* *Burke v. Compania Mexicana De Aviacion*, 433 F.2d 1031 (9th Cir. 1970); *Gomez v. Florida State Employment Serv.*, 417 F.2d 569 (5th Cir. 1969); *Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670 (D. Neb. 1972); *Common Cause v. Democratic Nat'l Comm.*, 333 F. Supp. 803 (D.D.C. 1971).

43. *Jurisprudence of Remedies*, *supra* note 28, at 31.

44. The conditions necessary for implication of a private remedy from a statute are related to the provisions of the Restatement (Second) of Torts.

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

the statute is designed to protect. Second, there must be no congressional intent against the remedy. Third, the remedy must comport with the statutory purpose. A remedy may be inconsistent with the purpose of the statute either because it disrupts the statutory scheme or because the remedies created by the statute are adequate to attain the statutory purpose. Obviously, in any application of these considerations there will be room for argument. Substantial judicial discretion is the necessary result of the implication principle. One court may find a congressional intent to prevent the remedy where another finds only silence. Similarly, courts inevitably disagree about the scope of the statutory purpose and the extent to which the remedy sought enhances or detracts from that purpose. With respect to the decision in a particular case,

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

RESTATEMENT (SECOND) OF TORTS § 286 (1965).

Some federal courts, in implying a private remedy from a statute, have attached some weight to § 286. See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967); *Greater Iowa Corp. v. Mc-Lendon*, 378 F.2d 783 (8th Cir. 1967). Such reliance is subject to the criticism that § 286 is directed only to establishing the standard of care in a negligence action. See Symposium, *Private Rights from Federal Statutes: Toward a Rational Use of Borak*, 63 *Nw. U.L. REV.* 454, 456-58 nn.20, 23, & 29 (1968). The implication principle is primarily concerned with the propriety of judicially creating a remedy regardless of the basis of liability.

Section 286 of the first Restatement of Torts (1934), although very similar to § 286 of the Second Restatement, was not by its terms limited to determining the standard of care in negligence actions. The first § 286 could therefore reasonably be relied upon by a court in implying a remedy from a statute. See *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Even under the earlier formulation, however, there are significant differences between § 286 and the implication principle applied in *Stewart*. Section 286 is primarily concerned with only the first of the three conditions necessary for implication—that the interest asserted must be one which the statute is designed to protect (i.e. that the statute was meant to protect the individual from the kind of harm to the particular interest). The adequacy of the statutory remedy and any intent of the legislature with respect to an additional remedy are only indirectly involved in § 286. More significantly, the policy of § 286 is to construct a rational relationship between a statutory standard of conduct and tort liability. The policy of the implication principle is to enforce the purpose of the statute. Hence, it is useful to distinguish § 286 from the principle involved in *Stewart*. Cf., *Implication of a Private Cause of Action*, *supra* note 2, at 411-12, n.162.

the inquiry for analysis is whether the result reached by the court seems to best comport with the statutory purpose.

IV. THE STEWART RESULT

The Ninth Circuit's reason for implying a private civil remedy for a violation of section 1674(a) was adequately stated in this brief declaration:

A primary purpose of § 1674(a) is to protect against the hardships and disruptions resulting from employee discharges due to but one garnishment of wages Whatever deterrence § 1674(b) creates, since it does not compensate the jobless and credit-stricken victim, it does not undo the very harm which the statute was intended to forestall.⁴⁵

The necessity of determining the statutory purpose provides the first opportunity for judicial creativity. It might be argued that the primary purpose of section 1674(a) is not to protect individual employees, but to provide an economic advantage for the country.⁴⁶ If this view is accepted, then to the extent the section 1676 remedy deters garnishment related dismissals the statutory purpose is satisfied. However, legislative history establishes that Title III of the Consumer Credit Protection Act ("Title III") was motivated by an interest in protecting the individual wage earner.⁴⁷ No court which has considered an implication issue arising out of Title III has decided otherwise.⁴⁸ Yet three cases which have passed on the issue

45. 503 F.2d at 113.

46. Wage garnishment and related employee discharges have a significant adverse impact on the national economy. See *Implication of a Private Cause of Action*, *supra* note 2, at 383-90. The congressional findings with respect to unrestricted wage garnishment are set forth in 15 U.S.C. § 1671(a) (1970).

47. See H.R. REP. No. 1040, 90th Cong., 2d Sess. 1, 7, 9, 20-21 (1967). Discussions of § 1674(a) have concluded with relative ease that a primary congressional purpose was to protect individual consumer-employees. See *Implication of a Private Cause of Action*, *supra* note 2, at 417; Note, *Federal Restrictions of Wage Garnishments: Title III of the Consumer Credit Protection Act*, 44 IND. L.J. 267 (1969).

48. The cases in addition to *Stewart* which have passed on whether a private remedy should be implied from Title III are: *Nunn v. City of Paducah*, 72 CCH Lab. Cas. 46,123 (W.D. Ky. 1973); *Western v. Hodgson*, 359 F. Supp. 194 (S.D.W. Va. 1973), *aff'd on other grounds*, 494 F.2d 379 (4th Cir. 1974); *Oldham v. Oldham*, 337 F. Supp. 1039 (N.D. Iowa 1972); *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972), *vacated*, 488 F.2d 450 (5th Cir. 1973). Decisions of the United States Courts of Appeals for the Fourth and Fifth Circuits have left the issue unresolved. See *Cheatham v. Virginia Alcoholic Beverage Control Bd.*, 501 F.2d 1346 (4th Cir. 1974); *Western v. Hodgson*, 494 F.2d 379 (4th Cir. 1974); *Simpson v. Sperry Rand Corp.*, 488 F.2d 450 (5th Cir. 1973).

have refused to imply a private remedy from Title III.⁴⁹

Two of these three cases actually involved a violation of section 1673(a), which restricts the percentage of wages which may be garnished, rather than section 1674(a).⁵⁰ Conceivably the two cases may be reconciled with *Stewart* on this basis. However, the opinions dealing with violations of section 1673(a) and section 1674(a) are ultimately concerned with an analysis of the purpose of Title III and the efficacy of the administrative enforcement of section 1676. The treatment of these considerations by the courts which have denied a civil remedy for a section 1673(a) violation are sufficiently broad to suggest a basic jurisprudential conflict with the *Stewart* opinion.

While the courts faced with an implication issue arising out of either section 1673(a) or section 1674(a) are in accord regarding the purpose of the garnishment provisions of the Consumer Credit Protection Act, the disagreement over the propriety of implying a civil remedy for a Title III violation arises with respect to the two remaining conditions necessary for implication. It has been argued that the statutory remedy under section 1676 is adequate and that there is a clear congressional intent against implication. It is extremely doubtful that the statutory remedy is fully adequate. The Department of Labor has acknowledged that it cannot act on every

49. *Western v. Hodgson*, 359 F. Supp. 194 (S.D.W. Va. 1973); *Oldham v. Oldham*, 337 F. Supp. 1039 (N.D. Iowa 1972); *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972). A fourth case, *Nunn v. City of Paducah*, 72 CCH Lab. Cas. 46,123 (W.D. Ky. 1973), allowed reinstatement for a § 1674(a) violation without significant discussion of the implication problem. The *Nunn* case involved a series of perplexing developments. First the district court granted summary judgment for the defendant on the ground that the plaintiff had failed to show that the discharge had been motivated by a garnishment. *Nunn v. City of Paducah*, 71 CCH Lab. Cas. 45,937 (W.D. Ky. 1972). The Sixth Circuit, without addressing the implication issue, remanded the case for a further factual determination. *Nunn v. City of Paducah*, 71 CCH Lab. Cas. 45,938 (6th Cir. 1972). After an evidentiary hearing the district court concluded that the dismissal had been motivated by a garnishment and the court ordered the plaintiff reinstated. *Nunn v. City of Paducah*, 72 CCH Lab. Cas. 46,123 (W.D. Ky. 1973). The defendant's motion to dismiss on the ground that a private action could not be brought for a § 1674(a) violation was denied in a brief and unenlightening order at the end of the opinion. *Id.* at 46,127. Finally, in the only officially reported opinion of the case, the district court refused to determine whether money damages could be available for a § 1674(a) violation because the plaintiff had failed to seek that relief originally. *Nunn v. City of Paducah*, 367 F. Supp. 957 (W.D. Ky. 1973).

50. *Western v. Hodgson*, 359 F. Supp. 194 (S.D.W. Va. 1973); *Oldham v. Oldham*, 337 F. Supp. 1039 (N.D. Iowa 1972).

Title III complaint.⁵¹ Indeed no court which has refused to imply a remedy for a Title III violation has rested its decision on faith in the complete adequacy of the statutory remedy. The single most important consideration for these courts is that Congress, in failing to provide a civil remedy within Title III, omitted what it easily could have included. One of the courts held that administrative enforcement under section 1676 was adequate;⁵² but it is clear that by this the court did not mean that the private remedy would fail to enhance the statutory goals, but rather that Congress, by including one remedy and omitting the other, had manifested a decision that administrative enforcement was sufficient.

The *Stewart* opinion acknowledged that a congressional intent against the private remedy or an adequate statutory remedy would necessarily defeat implication. The Ninth Circuit, however, characterized implication as the rule and not the exception. To the *Stewart* court, inferences or possibilities could not constitute a sufficient intent against a remedy which manifestly serves a major statutory purpose; nor would the statutory remedy be held adequate if it failed to safeguard fully an interest which the statute was designed to protect. The Ninth Circuit declined to accept the assumption made by the courts which refused to imply a civil remedy for Title III that congressional silence was a clear indication of an affirmative intention to prohibit a civil remedy.⁵³

The reasons underlying the decisions which have refused to imply a private civil remedy from Title III may be other than the ones stated by those courts. Indeed, there is no basis in the statutory language or in the history of Title III from which it can safely be inferred that Congress wished to exclude a private remedy.⁵⁴ It is suggested that the true basis for the decisions running contrary to *Stewart* is a reluctance to exercise judicial creativity and activism. Such a reluctance is founded upon the dubious proposition that to deny implication of a remedy is to restrain judicial discre-

51. See notes 23 & 24 and accompanying text *supra*. A further discussion of the inadequacy of exclusive enforcement of § 1674(a) by the Department of Labor appears in *Implication of a Private Cause of Action*, *supra* note 2, at 395-403.

52. *Western v. Hodgson*, 359 F. Supp. 194, 200-01 (S.D.W. Va. 1973).

53. Indeed this is an assumption directly opposed to the implication principle. See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

54. The difficulty encountered in applying a traditional statutory interpretation analysis to § 1674(a) is that there is an absence of any manifest congressional intent with respect to the availability of a private remedy. See *Implication of a Private Cause of Action*, *supra* note 2, at 404-10.

tion. Once the issue has been presented, however, the court is powerless to restrain itself. It is true that to imply a remedy is to create it. But to decline implication is to limit judicially the scope of a statutory right. The court must recognize that to the extent that the section 1674(b) sanctions are inadequate, employees will continue to face the possibility of a discharge in violation of section 1674(a) and will be without a remedy for the injury suffered. Thus, the decision to exercise the power in one way or the other ought not be viewed in terms of judicial activism versus conservatism. Rather, the goal must be to reach the result which best serves the purpose of the statute as determined by the court.

A major purpose of section 1674(a) is to protect individual employees from hasty dismissal practices. The possibility of a criminal sanction under section 1674(b) is not so immediate that it eliminates the threat of such dismissals. When a wrongful dismissal occurs, section 1674(b) is manifestly inadequate to protect the injured party. Thus, the statutory purpose is served by implication of a private remedy, and conversely the statutory purpose is defeated by denial of the remedy. Since no *clear* congressional intent controls, the court must take full responsibility for either result. It is submitted that the *Stewart* result represents the wiser choice.

V. CONCLUSION

The *Stewart* court was willing to create a remedy to enhance a statutorily created right. If that remedy will have the desired result, then a different decision would have improperly restricted the statutory right. The court fulfilled its obligation to enforce the purpose of section 1674(a).

The *Stewart* decision left the scope of the implied remedy to be determined by the district court on remand. It would seem that the statutory purpose must also be the primary consideration in this regard. Limiting the remedy to reinstatement will fail to protect fully the relevant statutory interest. The employee will be sufficiently compensated only if actual damages are awarded. Punitive damages would reasonably be limited under the prevailing tort theories to situations where the wrongful dismissal was with malice or purpose.⁵⁵

Carl J. Circo, '76

55. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-14 (4th ed. 1971).