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## North Star Steel Company v. Thomas: Time for Warning

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# **NORTH STAR STEEL COMPANY V. THOMAS: TIME FOR A WARNING**

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## I. INTRODUCTION

The devastating impact of a plant closing or mass layoff is painfully felt in families and communities alike. Recovery from the economic and emotional upheaval is, at best, difficult. Congress addressed these concerns in 1988 with the Worker Adjustment and Retraining Notification Act (WARN).<sup>1</sup> WARN was created to relieve some of the pressures of short-notice layoffs and plant closings by providing workers time to train for and find new jobs.<sup>2</sup> WARN requires employers to give sixty days notice of plant closings or mass layoffs.<sup>3</sup> When employers fail to give the requisite notice, WARN provides a remedy in

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1. 29 U.S.C. §§ 2101-2109 (1994).  
2. 20 C.F.R. § 639.1(a) (1994).  
3. 29 U.S.C. § 2102(a) (1994).

federal district court.<sup>4</sup> Unfortunately, WARN does not specify a time within which the suit must be brought. As a result, much litigation under WARN concerns what statute of limitation should be used to supplement WARN.<sup>5</sup>

In addressing the statute of limitation issue, courts across the nation have used limitation periods from both state and federal statutes, which range from six months<sup>6</sup> to six years.<sup>7</sup> Recently in *North Star Steel Co. v. Thomas*,<sup>8</sup> the United States Supreme Court gave guidance on the appropriate statute of limitation to apply in WARN claims. In *Thomas*, the majority held the limitation period should be borrowed from an analogous state law that is not at odds with the purpose of WARN, rather than from federal law.<sup>9</sup> This decision raises several issues that will be discussed in this Note. First, this Note briefly discusses the background of WARN, the history of how courts supply statutes of limitation to needy federal acts, and the cases preceding the *Thomas* decision. Second, the *Thomas* decision itself is discussed. Third, the potential problem of forum shopping<sup>10</sup> under *Thomas* is

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4. 29 U.S.C. § 2104(a)(5) (1994).

5. *Accord* United Mine Workers of Am. v. Peabody Coal Co., 38 F.3d 850 (6th Cir. 1994) (holding that the six-month statute of limitations from the NLRA applied to WARN claims); *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994) (holding the NLRA's six-month limitations period applied to WARN claims); *United Steelworkers of Am. v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994) (holding that the most analogous state statute of limitations should apply to WARN claims); *United Paperworkers Int'l Union Local 340 v. Specialty Paperboard Inc.*, 999 F.2d 51 (2d Cir. 1993) (holding that Vermont's six-year civil action statute of limitations applied to WARN claims); *Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Servs.*, 830 F. Supp. 432 (N.D. Ill. 1993) (holding that the NLRA's six-month limitations period did not apply to WARN claims); *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Servs.*, 826 F. Supp. 326 (C.D. Cal. 1993) (holding that the three-year California Code of Civil Procedure Section 338 statute of limitations applied to WARN claims); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (holding that Michigan's six-year statute of limitations for breach of contract applied to WARN claims); *Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (holding that the six-month NLRA limitations period applied to WARN claims).

6. *E.g.*, *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994).

7. *United Paperworkers Int'l Union Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993).

8. 838 F. Supp. 970 (M.D. Pa. 1993), *rev'd*, 35 F.3d 53 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1927 (1995).

9. *Thomas*, 115 S. Ct. at 1931.

10. Forum shopping "occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or

discussed. Finally, this Note proposes an appropriate statute of limitation for West Virginia district courts to apply in WARN cases.

## II. BACKGROUND

In 1988, Congress enacted WARN to protect workers, their families, and communities from the economic and emotional stress that accompanies unexpected plant closings and mass layoffs.<sup>11</sup> To fully understand the impact of this legislation, it is necessary to discuss WARN in detail. To fully appreciate the effect of the *Thomas* decision, this Note discusses the jurisprudence concerning the extra-legislative supply of a statute of limitation to a federal act. Finally, the case law preceding the United States Supreme Court decision in *Thomas* will be briefly summarized.

### A. *The Worker Adjustment and Retraining Notification Act*

With some exceptions,<sup>12</sup> WARN prohibits employers<sup>13</sup> of 100 or more employees from ordering a plant closing<sup>14</sup> or mass layoff<sup>15</sup> un-

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verdict." BLACK'S LAW DICTIONARY 452 (6th ed. 1991).

11. 20 C.F.R. § 639.1(a) (1994).

12. 29 U.S.C. § 2102(b)(1994). An employer may order a plant closing or mass layoff without the 60-day notice if: (1) it gives notice as soon as practicable and (2) the delay was caused by: the inability to obtain needed capital or business, unforeseeable business circumstances, or any form of natural disaster. *Id.*

13. 29 U.S.C. § 2101(a)(1)(1994) (defining employer as:

"[A]ny business enterprise that employs—

- (A) 100 or more employees, excluding part-time employees; or
- (B) 100 or more employees, who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime.")).

14. "[T]he term 'plant closing' means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. § 2101(a)(2)(1994).

15. 29 U.S.C. § 2101(a)(3) (1994) (defining mass layoff as:

"[A] reduction in force which—

- (A) is not the result of a plant closing; and
- (B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

til sixty days after the employer gives written notice of the order<sup>16</sup> to all affected employees<sup>17</sup> or their representative.<sup>18</sup> Employers violating this mandate may be penalized in a civil action brought "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business."<sup>19</sup> Prevailing employees may be awarded back pay for each day of the violation up to sixty days total.<sup>20</sup> In certain circumstances, the employer may also be liable to the local government for a WARN violation.<sup>21</sup>

There are several reasons for WARN's notification period. First, the prescribed sixty days notice provides a transitional period in which the affected parties can adjust to the prospective loss of employment.<sup>22</sup> Thus, workers have time to find substitute employment, relieving some of the tension associated with income loss.<sup>23</sup> Additionally, workers have time to enter skill training which would enable them to successfully compete in the job market.<sup>24</sup> Finally, WARN ensures that relief assistance will be promptly provided to the dislocated workers.<sup>25</sup>

A shortcoming of WARN which has resulted in substantial litigation across the United States is the lack of a statute of limitation. The

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(ii) at least 500 employees (excluding any part-time employees.")).

16. "An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee."

29 U.S.C. § 2102(a) (1994).

17. "[T]he term 'affected employees' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5) (1994).

18. 29 U.S.C. § 2102(a)(1) (1994).

19. 29 U.S.C. § 2104(a)(5) (1994).

20. 29 U.S.C. § 2104(a) (1994).

21. 29 U.S.C. § 2104(a)(3) (providing that:

Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than \$500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.).

22. *Id.*

23. *Id.*

24. 29 U.S.C. § 2104(a)(3) (1994).

25. 20 C.F.R. § 639.1(a) (1994).

resulting controversy surrounds whether state or federal law may supply the limitation period and how long it should be.

*B. Filling the Gap: How Courts Select a Statute of Limitation*

Prior to 1990, courts had to independently determine the appropriate statute of limitation for federal statutes that lacked their own.<sup>26</sup> Traditionally, courts have looked to analogous state statutes to fill the limitation period gaps in federal laws.<sup>27</sup> The Supreme Court has cited the Rules of Decision Act (RDA) as the original source of this doctrine.<sup>28</sup> While the rationale has changed over the years, the doctrine remains firmly entrenched.<sup>29</sup>

In *DelCostello v. International Brotherhood of Teamsters*,<sup>30</sup> the Court created an exception which abrogated the traditional practice of borrowing from state law first. The *DelCostello* Court held that federal law may supply the limitation period when two conditions are met: (1) "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes,"<sup>31</sup> and (2) "the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."<sup>32</sup> When examining the "practicalities of litigation," the Court will consider the hazards of forum shopping and multiple characterizations of the claim.<sup>33</sup> The Court then evaluates whether a uniform statute of limitation would be

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26. In 1990, Congress enacted a mandatory residual four-year statute of limitations for any civil action arising under an Act of Congress that did not have its own limitations period. 28 U.S.C. § 1658 (1990). Because WARN was enacted in 1988, this provision does not apply.

27. *E.g.*, *Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966).

28. 28 U.S.C. § 1652 (1988) ("The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.").

29. Peter J. Mignone, Note, *What Statute of Limitations Should Apply to the Worker Adjustment and Retraining Notification Act?*, 63 FORDHAM L. REV. 1419, 1434 n.119 (1995).

30. 462 U.S. 151 (1983).

31. *Id.* at 172.

32. *Id.*

33. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 357 (1991).

more beneficial.<sup>34</sup> Thus, when filling a statute of limitation gap in a federal law, courts may undergo the two-part *DelCostello* analysis or resort to state law under the RDA. This disparity resulted in copious litigation which the Supreme Court resolved in the *Thomas* decision.<sup>35</sup>

*C. A Difference of Opinion: Circuits Split on WARN's Limitation Period*

WARN's lack of a statute of limitation has spawned litigation in District and Circuit courts across the United States.<sup>36</sup> The Second Circuit Court of Appeals was the first appellate court to address the issue. In *United Paperworkers International Union v. Specialty Paperboard, Inc.*,<sup>37</sup> the court held that WARN's statute of limitation should be borrowed from Vermont's six year civil action statute rather than from Section 10(b) of the National Labor Relations Act (NLRA).<sup>38</sup>

This case arose out of a mass layoff at Specialty Paperboard Incorporated (SPI). On March 15, 1991, SPI sold a paper mill to defendant Rock-Tenn Company (RTC).<sup>39</sup> On that day, SPI fired all 232 mill workers while RTC rehired 141 of these employees.<sup>40</sup> On March 13, 1992, the union brought a class action under WARN against SPI and RTC on behalf of the terminated employees.<sup>41</sup> In its brief discussion of WARN, the court noted that a mass layoff must last more than six months to qualify as an employment loss.<sup>42</sup> Then, the court went on to analyze the parties' proffered statute of limitation under the *DelCostello* paradigm.

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34. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 147 (1987).

35. 115 S. Ct. 1927 (1995).

36. *See, e.g., United Paperworkers Int'l Union 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993); *United Steelworkers of Am. v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994); *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994); *United Mine Workers of Am. v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994); *Automobile Mechanics' Local 701 v. Santa Fe Terminal Serv., Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993); *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Servs.*, 826 F. Supp. 326 (C.D. Cal. 1993); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993).

37. 999 F.2d 51 (2d Cir. 1993).

38. 29 U.S.C. § 160(b) (1994).

39. *United Paperworkers*, 999 F.2d at 52.

40. *Id.*

41. *Id.*

42. *United Paperworkers*, 999 F.2d at 52.

For several reasons, the court found Vermont's civil action statute of limitation more closely analogous to WARN than the NLRA limitation period proposed by SPI. First, "[t]he purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live."<sup>43</sup> The NLRA is not concerned with the effects on the community, just the stability of bargaining relationships.<sup>44</sup> Second, the court found WARN's effect on collective bargaining to be "tangential," thus making it a weak comparison to the NLRA.<sup>45</sup> WARN claims generally evolve after the employment relationship has ended, thus having little to do with collective bargaining.<sup>46</sup> Finally, due to the NLRA's extensive administrative structure, the court considered six months to be sufficient time for that type of claim to be brought.<sup>47</sup> Under the NLRA, unions typically handle the claims.<sup>48</sup> The National Labor Relations Board prosecutes the claims and could not operate efficiently under differing statutes of limitation.<sup>49</sup> WARN claims, on the other hand, may be brought by non-unionized employees on their own.<sup>50</sup> WARN does not have an administrative structure that protects displaced workers, as the claims are civil in nature.<sup>51</sup> Thus, the court held that the six-month NLRA limitation period was not closely analogous to WARN to justify borrowing from federal law.<sup>52</sup>

The Second Circuit went on to hold that Vermont's civil action statute of limitation was closely analogous for three reasons. First, this limitation period is used in wrongful discharge and workers compensation benefits suits.<sup>53</sup> These actions "share . . . with a WARN claim an interest in protecting workers from unexpected joblessness or loss of hours."<sup>54</sup> Second, WARN, like promissory estoppel, alters at-will employment contracts by compensating workers for their reliance interests

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43. *Id.* at 54.

44. *Id.*

45. *Id.* at 55.

46. *United Paperworkers*, 999 F.2d at 55.

47. *Id.*

48. *Id.*

49. *Id.*

50. *United Paperworkers*, 999 F.2d at 55.

51. *Id.*

52. *Id.* at 57.

53. *Id.*

54. *United Paperworkers*, 999 F.2d at 57.



when they are unexpectedly discharged.<sup>55</sup> Thus, the court held the Vermont statute was more closely analogous to WARN than to the NLRA. Continuing under the *DelCostello* analysis, the Second Circuit found two reasons why WARN does not require a uniform federal limitation period.<sup>56</sup> First, WARN is not subject to multiple characterizations.<sup>57</sup> It gives rise to only one type of claim, failure to give statutorily mandated notification for set monetary damages.<sup>58</sup> Second, WARN claims are not multi-state in nature because they typically deal with a single plant site.<sup>59</sup> According to the court the venue is limited to either the district where the violation allegedly occurred or where the employer does business.<sup>60</sup> Thus, unless the plant straddles two states, the opportunity to forum shop for a longer limitation period is minimal.<sup>61</sup> For these reasons, the Second Circuit found Vermont's statute of limitation appropriate for WARN claims.

Following the Second Circuit's decision in *Specialty Paperboard*, WARN statute of limitation issues began filtering into other circuits. The Third Circuit, in *United Steelworkers of America v. Crown Cork & Seal Co.*,<sup>62</sup> was the next circuit court to render a decision on this issue. This case was subsequently consolidated with *Thomas v. North Star Steel Co.*<sup>63</sup> and appealed to the Supreme Court. *Thomas* will be discussed in Part III.

In close succession, the Fifth Circuit<sup>64</sup> also considered the appropriate statute of limitation for WARN claims. In *Halkias*, a consolidated Fifth Circuit case, the court held that the six-month NLRA statute of limitation was appropriate for WARN claims.<sup>65</sup> General Dynamics instituted a three-state mass layoff on January 8, 1991.<sup>66</sup> On November 24, 1992, the workers in Texas and Oklahoma filed a WARN

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55. *Id.*

56. *Id.* at 56.

57. *Id.*

58. *United Paperworkers*, 999 F.2d at 56.

59. *Id.*

60. *Id.*

61. *Id.*

62. 32 F.3d 53 (3d Cir. 1994).

63. 838 F. Supp. 970 (M.D. Pa. 1993).

64. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994).

65. *Id.* at 226.

66. *Id.* at 227.

claim.<sup>67</sup> Similarly, workers laid off by Glastron, Inc. between October and December 1990 filed their WARN suit on December 17, 1992.<sup>68</sup> After a brief discussion of WARN, the Fifth Circuit applied the *DelCostello* analysis.

The *Halkias* court found that the six-month NLRA limitation period was more closely analogous to WARN than any state law.<sup>69</sup> First, the court noted a trend of using federal limitation periods to supplement federal acts.<sup>70</sup> This rule affords increased predictability and minimization of litigation.<sup>71</sup> The court also found WARN and the NLRA closely analogous in purpose. When promulgating WARN, the Department of Labor borrowed heavily from the NLRA.<sup>72</sup> Additionally, courts have used NLRA case law to interpret WARN's provisions.<sup>73</sup> Furthermore WARN and the NLRA are inextricably interrelated. The NLRA has been interpreted to require employers to give notice to employees of plant closings and layoffs.<sup>74</sup> The Fifth Circuit reasoned that WARN sets the time limits for the NLRA's notice requirements.<sup>75</sup> Thus, a failure to give WARN's notice could create a concurrent claim under the NLRA.<sup>76</sup> The court reasoned that because NLRA claims must be brought within a six-month time frame the same should apply to WARN. Finally, the six-month statute of limitation "is consistent with federal law's preference for rapidity in resolving labor disputes."<sup>77</sup>

The Fifth Circuit held that none of the proffered state statutes of limitation provided a "closer fit" to WARN than the NLRA.<sup>78</sup> The court compared WARN to a tort for conversion of an employee's right

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67. Workers from the third state, Missouri, had filed their WARN claim within ten days of the layoff. *Id.*

68. *Id.* at 227.

69. *Halkias*, 31 F.3d at 234.

70. *Id.* at 229.

71. *Id.*

72. *Id.* at 231.

73. *Halkias*, 31 F.3d at 232.

74. *See, e.g.*, Metropolitan Teletronics Corp., 279 N.L.R.B. 957, 958-59 & n.14 (1986) (finding a NLRA violation for the employer's failure to notify the union of its decision to close and relocate plant).

75. *Halkias*, 31 F.3d at 232.

76. *Id.* at 233.

77. *Halkias*, 31 F.3d at 234.

78. *Id.*

to continued employment.<sup>79</sup> But because Texas is an at-will employment state, the two-year tort statute would be inappropriate.<sup>80</sup> Also, Texas' four-year residual statute was not more closely analogous simply because it was a "fallback position."<sup>81</sup> The court also found the four-year breach of contract statute of limitation, while acceptable to the Second Circuit in *Specialty Paperboard*,<sup>82</sup> was not workable in Texas under that court's reasoning.<sup>83</sup> This period worked in the Second Circuit because it governed both workers' compensation claims and wrongful discharge claims in Vermont.<sup>84</sup> The court noted that these claims in Texas are governed by two different limitation periods, so this option fails too.<sup>85</sup>

The Fifth Circuit went on to apply the second part of the *DelCostello* analysis. Initially, the court found that WARN's venue provision, Section 2104(a)(5), created forum shopping.<sup>86</sup> Because WARN raises a federal question, the district courts must use federal choice of law rules.<sup>87</sup> Thus, if a claim is brought in a forum other than where the injury occurred, that court may utilize its own state's statute of limitation, as a surrogate for the federal common law.<sup>88</sup> The result is that litigants may forum shop for a more beneficial limitation period.<sup>89</sup> The court went on to note that judicial resources could be preserved by using a uniform period.<sup>90</sup>

Next, the court found that "federal labor policy has long favored the rapid settlement of disputes between an employer and an employee."<sup>91</sup> An extended limitation period may create problems of evidence availability, especially if the plant has permanently closed.<sup>92</sup> The court also noted that the six-month period had been successfully met by

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79. *Id.* at 235.

80. *Id.*

81. *Halkias*, 31 F.3d at 235.

82. 999 F.2d 51 (1993).

83. *Halkias*, 31 F.3d at 235.

84. *Id.*

85. *Id.*

86. *Halkias*, 31 F.3d at 236.

87. *Id.*

88. *Id.* at 237.

89. *Id.*

90. *Halkias*, 31 F.3d at 237.

91. *Id.* at 238.

92. *Id.*

workers in the past.<sup>93</sup> Further, the court felt the simplicity of the WARN claim allowed for the lack of a complex administrative structure.<sup>94</sup>

Finally, the court found that a longer statute of limitation went against WARN's purpose.<sup>95</sup> WARN provides notice so that workers may quickly enter job training and find new jobs.<sup>96</sup> "Obviously, providing funds to workers several years after their termination does not serve that objective."<sup>97</sup> For these reasons, the Fifth Circuit applied the six-month NLRA limitation period.

The Sixth Circuit considered the WARN statute of limitation question in *United Mineworkers of America v. Peabody Coal Co.*<sup>98</sup> The Sixth Circuit, like the Fifth, held that the six-month limitation period from Section 10(b) of the NLRA should apply to WARN claims.<sup>99</sup> After examining the case law on the issue, the court found that the NLRA provided a closer analogy to WARN than any state statutes of limitation.<sup>100</sup> Both acts have provisions covering employer's failure to give notice of plant closings and mass layoffs.<sup>101</sup> Both offer protection to workers as well as their communities.<sup>102</sup> Additionally, the court held that the six-month period advanced WARN's policies more than the proffered five year catch-all provision.<sup>103</sup> The court found the congressional intent of WARN to be the provision of *short-term* relief to the workers, their families, and their communities.<sup>104</sup> Prolonging the period would not start "employees on the road to retraining and reemployment before unemployment becomes a problem."<sup>105</sup> Furthermore, the court noted the concern for forum shopping. A single

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93. For example, the Missouri workers laid off by General Dynamics brought suit within ten days of the violation. *Id.*

94. *Halkias*, 31 F.3d at 238.

95. *Id.* at 239.

96. *Id.*

97. *Id.*

98. 38 F.3d 850 (6th Cir. 1994).

99. *Id.* at 851.

100. *Id.* at 855.

101. *Id.* at 856.

102. For example, the NLRA proscribes practices "which affect commerce and are inimical to the general welfare." *Peabody Coal*, 38 F.3d at 856.

103. *Id.*

104. *Id.*

105. *Id.*

violation of WARN, resulting in plant closings or mass layoffs in several states, would permit workers to shop forums for the longest limitation period.<sup>106</sup> Additionally, the sheer volume of possible analogous state statutes would seriously burden the judicial system with extraneous litigation.<sup>107</sup> Thus, the Sixth Circuit held that the six-month NLRA limitation period applied to WARN claims.<sup>108</sup>

### III. STATEMENT OF THE CASE

*North Star Steel Co. v. Thomas*<sup>109</sup> was a consolidated case from the Third Circuit.<sup>110</sup> In the first case, the United Steelworkers of America brought a WARN claim against Crown Cork & Seal Company, Inc.<sup>111</sup> Ordering a reduction-in-force and shutdown of one of its plants, the company terminated eighty-five employees without notice.<sup>112</sup> One year later, the Steelworkers sought relief under WARN in the Federal District Court for the Eastern District Court of Pennsylvania.<sup>113</sup> Urging the court to apply the six-month limitation period from the NLRA, Crown Cork made a motion for summary judgment, claiming the statute of limitation had run.<sup>114</sup> The district court held that state law controlled and thus the Steelworkers had met all of the arguably applicable limitation periods borrowed from analogous Pennsylvania state law.<sup>115</sup>

In the second case, non-unionized employees of North Star brought a WARN claim in the Federal District Court for the Middle District of Pennsylvania.<sup>116</sup> Applying the six-month limitation period from the NLRA, the district court granted North Star's motion for summary judgment, because the limitation period had lapsed by approximately

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106. *Peabody Coal*, 38 F.3d at 855.

107. *Id.*

108. *Id.* at 856.

109. 115 S. Ct. 1927 (1995).

110. *United Steelworkers of Am. v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994).

111. *United Steelworkers of Am. v. Crown Cork & Seal Co.*, 833 F. Supp. 467 (E.D. Pa. 1993).

112. *Id.* at 467-68.

113. *Id.*

114. *Id.* at 468.

115. *Crown Cork*, 833 F. Supp. at 469.

116. *North Star Steel Co. v. Thomas*, 838 F. Supp. 970 (M.D. Pa. 1993).

two weeks.<sup>117</sup> The district court reasoned that the NLRA was more analogous to WARN than anything in Pennsylvania law; therefore, its limitation period should apply.<sup>118</sup>

Consolidating these two cases, the Third Circuit Court of Appeals held that the WARN limitation period should be borrowed from state law, not federal.<sup>119</sup> The Third Circuit utilized the two-part *DelCostello* analysis.<sup>120</sup> Applying part one, the court held that the NLRA was not so closely analogous to WARN that the traditional policy of borrowing from state law first could be overridden.<sup>121</sup> For instance, the acts differed in their purpose.<sup>122</sup> The NLRA focuses on the importance and integrity of the collective bargaining process.<sup>123</sup> WARN, however, has little to do with collective bargaining.<sup>124</sup> Further, WARN applies to unionized and non-unionized workers alike.<sup>125</sup> In addition, the remedies afforded under the two acts differ widely.<sup>126</sup> The NLRA offers equitable relief, like reinstatement,<sup>127</sup> while WARN offers only back pay and benefits.<sup>128</sup>

Under the second part of the *DelCostello* analysis the court concluded that the NLRA six-month limitation period was inappropriate.<sup>129</sup> A uniform federal limitation period was unnecessary because WARN does not contain multiple claims and legal theories.<sup>130</sup> "WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries."<sup>131</sup> Moreover, WARN does not implicate geographic concerns because the ven-

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117. *Id.* at 975.

118. *Id.* at 974.

119. *United Steelworkers of Am. v. Crown Cork & Seal Co.*, 32 F.3d 53, 61 (3d Cir. 1994).

120. *Id.* at 57.

121. *Id.* at 59.

122. *Id.* at 58.

123. *Crown Cork*, 32 F.3d at 57.

124. *Id.* at 58.

125. *Id.* at 58.

126. *Id.* at 59.

127. *See Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451 (3d Cir. 1992).

128. 29 U.S.C. § 2104(a)(1) (1994).

129. *Crown Cork*, 32 F.3d at 61.

130. *Id.* at 60.

131. *Id.*

ue is strictly limited.<sup>132</sup> The court concluded that the six-month limitation period was too short given the lack of administrative structure under WARN.<sup>133</sup> On the other hand, the suggested state statutes were not "so short as to interfere with a worker's potential for seeking or gaining relief."<sup>134</sup> Thus, the court affirmed the decision in *Crown Cork* and reversed *North Star*, while refusing to pick the particular Pennsylvania statute to apply.<sup>135</sup>

#### IV. THE DECISION

In *Thomas*, the issue before the Supreme Court was whether WARN should be supplemented with a state limitation period or with one borrowed from the NLRA.<sup>136</sup> The *Thomas* Court held the statute of limitation for WARN should be borrowed from the most analogous state law that does not frustrate WARN's purpose, thus affirming the Third Circuit's judgment.<sup>137</sup> Justice Souter delivered the opinion of the Court, joined by Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, Justice Kennedy, Justice Thomas, Justice Ginsberg, and Justice Breyer. Justice Scalia filed a brief concurrence in the judgment.

##### A. Closing the Gap: The Majority Opinion

The majority opinion first delved into the Court's historical practice for federal statutes which fail to prescribe a limitation period. Broadly stated, state law is always "the lender of first resort."<sup>138</sup> Because this rule was longstanding, the Court reasoned Congress would know of this practice and expect the Court to interpret WARN accordingly.<sup>139</sup> Additionally, the majority recognized a narrow exception to the general rule: Congress would not want a limitation period that

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132. *Crown Cork*, 32 F.3d at 60.

133. *Id.* at 60-61.

134. Possible state limitation periods include the two-year period for enforcing civil remedies, the three-year period from the Pennsylvania Wage Payment and Collection Act, the four-year period for breach of an implied contract, and the six-year residual statute of limitation. *Id.* at 61.

135. *Id.*

136. 115 S. Ct. 1927 (1995).

137. *Id.* at 1931-32.

138. *Id.* at 1930.

139. *Id.* at 1930.

would be "at odds with the purpose or operation of federal substantive law."<sup>140</sup> Therefore, in limited circumstances, federal law should be the statute of limitation source.<sup>141</sup> Specifically, state law will not supply the limitation period "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'"<sup>142</sup>

The Supreme Court held that WARN fell within the traditional state law borrowing doctrine.<sup>143</sup> Looking at the four state statutes of limitation identified by the Third Circuit Court of Appeals,<sup>144</sup> the majority determined that any of them could apply.<sup>145</sup> The Court concluded that none of these statutes would frustrate WARN's purpose and the complaints were timely under any of these statutes.<sup>146</sup> According to the majority, the shortest of these periods, two years, was not so brief as to hinder an employee from bringing a claim.<sup>147</sup> Comparatively, the longest of these periods, six years, was not so long as to frustrate the legislature's interest in the rapid disposition of labor disputes.<sup>148</sup>

The Court went on to dismiss the petitioners' arguments that utilizing state law would encourage forum shopping.<sup>149</sup> The petitioners urged the Court to adopt the NLRA's six-month statute of limitation as the uniform rule for the country.<sup>150</sup> Otherwise, it argued, employees would search for the district with the longest limitation period in which the employer transacts business.<sup>151</sup> The Court brushed this argument aside stating, "these are just the costs of the rule itself, and nothing about WARN makes them exorbitant."<sup>152</sup> The Court further deemed

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140. *Thomas*, 115 S. Ct. at 1930.

141. *Id.* at 1931.

142. *Id.* (citing *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983)).

143. *Id.*

144. See *supra* note 133 and accompanying text.

145. *Thomas*, 115 S. Ct. at 1931.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Thomas*, 115 S. Ct. at 1931.

150. *Id.*

151. *Id.*

152. *Id.* at 1932.



a uniform rule unnecessary because WARN claims commonly relate to a single site.<sup>153</sup> In conclusion, the Court affirmed the Third Circuit Court of Appeals.<sup>154</sup>

*B. Justice Scalia's Concurrence*

Justice Scalia agreed with the majority's view that state law is the lender of first choice.<sup>155</sup> He disagreed, however, with the majority's position on the *DelCostello* exception to the rule.<sup>156</sup> Justice Scalia asserted that when a state statute of limitation "would frustrate the purposes of the federal enactment, no limitation period at all [should be applied]."<sup>157</sup>

Justice Scalia found the *DelCostello* analysis unworkable for two reasons.<sup>158</sup> First, the "closer analogy" element results in federal law applying in some states but not in others.<sup>159</sup> Thus, some states would have statutes so closely analogous to WARN that they could apply; while others would have to resort to federal law as a supplement.<sup>160</sup> Second, the "significantly more appropriate [vehicle for interstitial lawmaking]" test is meaningless because a uniform limitation period for a federal statute would always be significantly more appropriate.<sup>161</sup> Despite this, Justice Scalia concurred in the judgment. He concluded that the statutes of limitation under consideration were not at odds with WARN's purpose, and the complaints were timely under all of them.<sup>162</sup> If the statutes had frustrated WARN's purpose, he would not apply a limitation period to the claim.<sup>163</sup>

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153. *Thomas*, 115 S. Ct. at 1932; see also 29 U.S.C. § 2101(a)(2)-(3) (1994).

154. *Thomas*, 115 S. Ct. at 1932.

155. *Id.*

156. *Id.*

157. *Thomas*, 115 S. Ct. at 1932 (Scalia, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Thomas*, 115 S. Ct. at 1932 (Scalia, J., concurring).

162. *Id.*

163. *Id.*

## V. ANALYSIS OF THE CASE

As a result of the *Thomas* decision, courts will face new questions. The first question concerns the magnitude of the risk of forum shopping. Courts have disagreed on how much leeway WARN's venue provision gives plaintiffs when selecting their forum. The second question courts will face is which state law should apply. A few courts have reached decisions on this issue.<sup>164</sup> Neither of the federal district courts in West Virginia nor the Fourth Circuit Court of Appeals has addressed this issue.<sup>165</sup> The final part of this Note sets forth the proposition that the federal district courts in West Virginia should select the five-year contract statute of limitation from the Wage Payment and Collection Act<sup>166</sup>(WPCA) to apply in West Virginia WARN cases.

*A. Born to Shop: Forum Shopping Under Thomas*

According to the Supreme Court in *Thomas*, WARN's statute of limitation should be supplied by the most analogous state law that is not at odds with WARN's purpose.<sup>167</sup> *Thomas* requires a two-step analytical process for determining what limitation period applies. First, as many employers do business in several states, the court must determine which state will supply the law.<sup>168</sup> Second, the court must determine the most analogous state law in consonance with WARN's legislative purpose.<sup>169</sup> Applying the first step may result in forum shopping. Regardless, multi-state employers should understand the significance of these risks even if they cannot be guarded against.

WARN provides that claims may be brought "in any district court of the United States for any district in which the violation is alleged to

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164. States with multiple districts may face an additional problem. For example, courts in the northern and western districts of Texas are grappling over which Texas law should supply WARN's limitation period. The northern district has selected the four-year period for debt actions. The western district selected the six-month Wage Payment Law statute of limitation. *Individual Employment Rights Newsletter*, Vol. 11, No. 1, Nov. 7, 1995, p.1.

165. Prior to publication, the Northern District of West Virginia decided this issue in *Bell v. Philips Elecs.*, 897 F. Supp. 938 (N.D. W. Va. 1995). This case is discussed in subsection B.

166. W. VA. CODE § 21-5-1 to -18 (1989).

167. *Thomas*, 115 S. Ct. at 1931.

168. *See id.* at 1931.

169. *See id.*

have occurred, or in which the employer transacts business.”<sup>170</sup> As previously mentioned, this opens up the possibility of forum shopping. Some district courts believe the advantages of forum shopping are minimal.<sup>171</sup> These courts assert that WARN claims are not multi-state in nature because they relate to a single site. The fact that claimants are not limited to suing in the district court where the site is located is irrelevant, because choice of law rules would require the law of the site be used.<sup>172</sup> Other courts and commentators have found holes in this line of reasoning. When a federal court determines which state’s law should apply, it may use one of three methods:<sup>173</sup>

- 1) Borrow a statute of limitation from the state in which the court sits.<sup>174</sup>
- 2) Follow the forum state’s conflict of laws rules, if the case is based upon diversity.<sup>175</sup>
- 3) Follow the federal common law choice of law rules, if the case is a federal question case.<sup>176</sup>

The Fifth Circuit noted that any one of these methods may be employed, with varying results.<sup>177</sup> Because WARN is a federal question, some courts may apply federal common law choice of law rules.<sup>178</sup> Other courts, however, may decide to use their state’s choice of law principles as a “surrogate” for the federal common law because they consider statute of limitation considerations to be procedural.<sup>179</sup> While state law is used to supplement WARN under each approach, the law

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170. 29 U.S.C. § 2104(a)(5) (1994).

171. See, e.g., *United Paperworkers Int’l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56 (2d Cir. 1993) (noting that forum shopping advantages are minimal because WARN claims are limited to a single site); *Automobile Mechanics’ Local v. Santa Fe Terminal Serv., Inc.*, 830 F. Supp. 432, 436 (N.D. Ill. 1993) (stating that WARN claims are limited to a single site and choice of law rules would require the law of the site be borrowed).

172. See *supra* note 170. For example, the Second Circuit stated that unless the site straddled state boundaries, there would be no doubt as to which state’s laws to use.

173. Peter J. Mignone, Note, *What Statute of Limitations Should Apply to the Worker Adjustment and Retraining Notification Act?*, 63 *FORDHAM L. REV.* 1419, 1430 (1995).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 237 (5th Cir. 1994).

178. *Id.* at 236.

179. *Id.* at 237.

the court applies depends on where the plaintiff brings the claim.<sup>180</sup> As a result, federal courts may apply different limitation periods to different claims arising from a single WARN violation.<sup>181</sup>

Additionally, the Sixth Circuit enumerated the potential number of forums that may hear claims from a single WARN violation, stating:

First, . . . a single decision can result in plant closings in several states, any one of which could provide the forum for suit. The state in which the closing decision was made can provide yet another forum. Second, the company that closes several plants in several states can be sued in those several states and thus be subject to several different statutes of limitation for the same, single federal violation. Third, the parties and the courts could face potentially daunting choice of law problems arising from claims brought in several different states as a result of forum shopping. Finally, given the authorization in WARN to bring suit in any federal district 'in which the employer transacts business,' 29 U.S.C. Section 2104(a)(5), including districts other than where a plant is closed or the plant closing decision was made, the opportunity for forum shopping in today's national and international corporate environment appears limitless.<sup>182</sup>

As plaintiffs are not required to sue as a class, multi-state employers may face several limitation periods for one WARN violation. Thus, courts should be sensitive to the employer's vulnerability resulting from the *Thomas* decision. One helpful way to achieve greater predictability is for courts to apply a common state statute of limitation to all WARN claims.

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180. *See id.*

181. For example, the *Halkias* case involved workers from three different states suing on the same mass layoff. Each state may choose its own statute to supply the limitations period, creating substantial hardship on the employer. Thus, under this premise, results will vary within each district. 31 F.3d at 237.

182. *United Mine Workers of Am. v. Peabody Coal Co.*, 38 F.3d 850, 855 (6th Cir. 1994).

*B. A WARNING to West Virginia Employers: Which Law Should Apply*

Neither the northern<sup>183</sup> nor the southern district courts of West Virginia have considered which state law is most analogous to WARN. This Note proposes that the district courts should select the five-year contract statute of limitation<sup>184</sup> used by the WPCA.<sup>185</sup>

The WPCA is the West Virginia statute most analogous to WARN. It sets out when payments must be made to employees who are discharged<sup>186</sup> or laid off.<sup>187</sup> These are the same employees protected under WARN.<sup>188</sup> Additionally, if payments are not made within the prescribed time periods, workers may bring an action to recover wages,<sup>189</sup> benefits,<sup>190</sup> liquidated damages,<sup>191</sup> and reasonable attorney fees.<sup>192</sup> This recovery package is much like WARN's provisions pro-

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183. Prior to publication, the Northern District rendered an opinion on this issue in *Bell v. Philips Elecs.*, 897 F. Supp. 938 (N.D. W. Va. 1995). This case will be addressed at the end of part VI.

184. W. VA. CODE § 55-2-6 (1994).

185. W. VA. CODE § 21-5-1 to -18 (1989).

186. W. VA. CODE § 21-5-4(b) ("[W]henever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours").

187. W. VA. CODE § 21-5-4(d) (providing that:

When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.)

188. 29 U.S.C. § 2101(a)(5).

189. W. VA. CODE § 21-5C-8(d) ("In any such action the amount recoverable shall be limited to such unpaid wages as should have been paid by the employer within two years next preceding the commencement of such action.").

190. W. VA. CODE § 21-5-1(c) ("The term 'wages' means compensation for labor or services rendered by an employee, . . . [and] shall also include then accrued fringe benefits capable of calculation and payable directly to an employee.").

191. W. VA. CODE § 21-5-4(e) (providing that:

If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any service therefor.)

192. W. VA. CODE § 21-5C-8(c) ("The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant.").

viding aggrieved employees with backpay,<sup>193</sup> benefits<sup>194</sup>, and reasonable attorney fees.<sup>195</sup>

Initially, the West Virginia Legislature did not supply the WPCA with a statute of limitation. The West Virginia Supreme Court addressed this omission in *Lucas v. Moore*.<sup>196</sup> The court premised its application of the five-year contract statute of limitation to the WPCA on an implied employment contract.<sup>197</sup> The court held that the effect of the WPCA is to make a "fictitious" additional thirty days of employment.<sup>198</sup> Thus, application of the five-year contract limitation period from Section 55-2-6 of the West Virginia Code was appropriate.<sup>199</sup> Similarly, WARN creates a "fictitious" additional sixty days of employment upon which the worker may collect backpay and benefits.<sup>200</sup> These wages are computed based upon the original employment contract.<sup>201</sup> The West Virginia Supreme Court found the inextricable relationship between the WPCA and the employment contract particularly relevant when considering which statute of limitation should apply to the WPCA.<sup>202</sup> The District Courts may use this reasoning when determining which West Virginia law should supplement WARN.

Other courts have found contract statute of limitation appropriate supplements for WARN.<sup>203</sup> In *Wallace*, the Federal District Court for

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193. 29 U.S.C. § 2104(a)(1)(A) (1994).

194. 29 U.S.C. § 2104(a)(1)(B) (1994).

195. 29 U.S.C. § 2104(a)(6) (1994) ("In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.").

196. 303 S.E.2d 739 (W. Va. 1983).

197. *Western v. Buffalo Mining Co.*, 251 S.E.2d 501, 503 (W. Va. 1979).

198. *Lucas*, 303 S.E.2d at 741.

199. *Id.*

200. 29 U.S.C. § 2104(a) (1994).

201. 29 U.S.C. § 2104(a) (1994) (providing that:

Any employer who orders a plant closing or mass layoff in violation of § 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee.).

202. *Lucas*, 303 S.E.2d at 741.

203. See, e.g., *Frymire v. Ampex Corp.*, 61 F.3d 757, 764 (10th Cir. 1995) (holding

the Eastern District of Michigan concluded that Michigan's six-year breach of contract statute of limitation applied in WARN actions.<sup>204</sup> The court's "focal point" in deciding this issue was the type of interest harmed.<sup>205</sup>

The type of interest harmed in the instant suits is contractual. When an employer unilaterally and radically changes an employee's terms of employment without notice and the employee is suddenly discharged from employment, he essentially is breaching that worker's employment contract. Furthermore, the damages under the Act [WARN] are the pay and benefits for each day of violation up to a maximum of 60 days. 29 U.S.C. § 2104(a). Obviously, such damages will be calculated by looking to the collective bargaining agreements for union workers and to the explicit and implied employment contracts for non-union employees.<sup>206</sup>

The Tenth Circuit also held that borrowing a contract statute of limitation for WARN was a sound decision.<sup>207</sup> The Frymire court supported this conclusion for several reasons. First, the court felt that uniformity was enhanced when a nationally recognized claim, like one in contract, supplied the limitation period.<sup>208</sup> Second, the court believed WARN imposed "a federal mandate upon employers that effectively obligates them as if bound by the terms of an employment contract."<sup>209</sup> Third, WARN's remedy of back pay is very similar to the remedy for breach of an implied contract.<sup>210</sup> Finally, the court found a contract limitation period appropriate because other courts had used it as well.<sup>211</sup>

The final reason West Virginia should adopt the five-year contract limitation period from the WPCA is that it is well within the two- to

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Colorado's three-year contract statute of limitations applied in WARN claims); *United Paperworkers Int'l Union Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56-57 (2d Cir. 1993) (holding Vermont's six-year contract statute of limitations applied in WARN claims); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 196 (E.D. Mich. 1993).

204. *Wallace*, 818 F. Supp. at 196.

205. *Id.*

206. *Id.* at 196-97.

207. *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995).

208. *Id.* at 764.

209. *Id.*

210. *Id.*

211. *Frymire*, 61 F.3d at 764 (noting that the Second Circuit in *Specialty Paperboard* applied a contract limitations period and the Supreme Court in *Thomas* found Pennsylvania's contract statute of limitations acceptable).

six-year range deemed acceptable by the Supreme Court in *Thomas*.<sup>212</sup> For these reasons, the West Virginia district courts should apply the five-year contract statute of limitation used by the WPCA.

Prior to the publication of this note, the Northern District of West Virginia decided which state statute should supply WARN's limitation period in *Bell v. Philips Electronics*.<sup>213</sup> The defendant company laid off seventy-two workers at its Fairmont, West Virginia plant on October 22, 1990.<sup>214</sup> The plaintiffs brought suit over two years later. Arguing the two-year personal injury limitation period should apply, the defendant moved to dismiss the claim as time-barred.<sup>215</sup> Plaintiffs, however, argued that the five-year contract limitation period used by the WPCA should apply to WARN actions; and thus, the claim was timely.<sup>216</sup>

The court held that the reasoning in *Lucas v. Moore*<sup>217</sup> applied to WARN claims for several reasons. First, both WARN and the WPCA create "fictitious additional periods of employment" and offer the same remedies and wages.<sup>218</sup> Second, the court found that both created rights that would not exist unless the employer violated the "legislatively determined standards to ease the financial burden on terminated employees."<sup>219</sup> Finally, the court found that this determination was consistent with the practices in other jurisdictions, as this Note also stated.<sup>220</sup> Based on these reasons, the northern district held that the five-year contract limitation period from the WPCA was applicable to WARN actions.<sup>221</sup>

## VI. CONCLUSION

In *Thomas*, the Supreme Court held that WARN's statute of limitation should be supplied by the most analogous state law, not at odds

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212. 115 S. Ct. at 1931.

213. 897 F. Supp. 938 (N.D. W. Va. 1995).

214. *Id.* at 939.

215. *Id.*

216. *Id.*

217. *See supra* note 197 and accompanying text.

218. *Bell*, 897 F. Supp. at 940.

219. *Id.*

220. *Id.*

221. *Id.*



with WARN's purpose, rather than federal law. This decision requires courts to approach WARN claims with a two-step analysis. First, the court must determine which state's law should apply. This question may implicate some complex choice of law decisions for the district courts. As a result, forum shopping by aggrieved workers becomes a potential problem for abuse. Second, the court must sift through numerous state statutes to find one closely analogous to WARN. This substantial chore may result in generic catchall periods being used, rather than truly analogous laws. Thus, if the court could pick a common state statute to apply, like a contract statute of limitation, predictability would be enhanced and excessive litigation could be avoided when courts address WARN claims.

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