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# Consumer Protection--Implied Civil Remedy under the Federal Consumer Credit Protection Act

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# CONSUMER PROTECTION—IMPLIED CIVIL REMEDY UNDER THE FEDERAL CONSUMER CREDIT PROTECTION ACT

John H. Stewart, an employee of The Travelers Insurance Company, was discharged from his job following the garnishment of his wages for a single indebtedness. Stewart alleged that he was wrongfully discharged by Travelers in violation of section 1674 of the Consumer Credit Protection Act of 1968[1] which forbids the discharge of an employee for garnishment of wages resulting from a single indebtedness.[2] After the Department of Labor's refusal to take action on the claim,[3] Stewart brought a private action in the United States District Court for the Central District of California seeking reinstatement, backpay, punitive damages, and attorney fees. The district court dismissed the complaint, finding that Congress did not intend that such private action be available under Subchapter II of the Consumer Credit Protection Act. The ruling was appealed to the United States Court of Appeals, Ninth Circuit. *Held,* reversed and remanded. Where the express remedies in Subchapter II of the Act fail to ensure the full effectiveness of the congressional purpose underlying the statute, the implication of a private remedy is necessary. *Stewart v. Travelers Corp.,* 503 F.2d 108 (9th Cir. 1974).

The central issue in *Stewart* was whether, in the absence of express statutory provisions, a private civil remedy can be implied

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[1] 15 U.S.C. §§ 1601-81 (1970) [hereinafter referred to as the Act].

[2] *Id.* § 1674(a) provides: "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness." *Id.* § 1674(b) provides: "Whoever wilfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year or both."

[3] *Id.* § 1676 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 section 1676 contains language making enforcement by the Secretary of Labor mandatory, it also provides that the Act will be enforced by the Secretary acting through the Wage and Hour Division. This Division, however, is subject to regulation under the Fair Labor Standards Act that provides for *discretionary* investigation and prosecution under 29 U.S.C. § 211(a). As a result of the ambiguous provisions, overlapping regulatory statutes and agencies, and a shortage of manpower in the Department of Labor, not all claims have been acted on by the Secretary of Labor as would appear to be required under section 1676 of the Consumer Credit Protection Act. Note, *Federal Restrictions of Wage Garnishments: Title III of the Consumer Credit Protection Act,* 44 IND. L.J. 267, 280 (1968).

under Subchapter II of the Consumer Credit Protection Act, even though it provides only for criminal sanctions and administrative enforcement by the Department of Labor. In answering this question the court encountered a recurring problem—construing the intent of Congress in drafting a federal regulatory statute, the provisions of which are insufficient to resolve a particular case arising under it.

The defendant's assertion that Congress did not intend private civil remedies to be available under section 1674 was based essentially on the doctrine of *expressio unius est exclusio alterius,*[4] meaning that the express authorization of a remedy in one section of a statute implies the exclusion of other remedies under the same section. The defendant based this argument on the following facts: (1) the passage of section 1674 was influenced by an analogous New York statute containing a limited civil remedy, and the omission of this provision in the federal statute indicated the intent of Congress to exclude it; (2) prior to adopting the statute, Congress debated whether to include a criminal penalty and did not propose any civil remedy under Subchapter II;[5] and (3) specific civil remedies were provided in Subchapter I of the Act,[6] indicating an intent to exclude these remedies in Subchapter II.

The court responded to each of these assertions. First, the New York statute contained only a limited civil remedy not included in the federal statute, indicating "at most that Congress did not want a *limited* civil remedy provision."[7] Second, the congressional debate over criminal penalties did not suggest a clear intent to exclude civil remedies, and, third, the doctrine of *expressio unius* should be limited "in favor of construing an act so as to effectuate its dominant purpose."[8]

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[4] The doctrine of *expressio unius est exclusio alterius* is a primary rule of statutory construction and means generally that the enumeration of specific things in a statute excludes those things not mentioned. It is a rule of construction, not of substantive law, and is used to determine the legislative intent of statutes, ordinances, and, to a lesser extent, constitutions. *See* Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1939); Whitehead v. Cape Henry Syndicate, 105 Va. 463, 54 S.E. 306 (1906); State *ex rel.* Battle v. Hereford, 148 W. Va. 97, 133 S.E.2d 86 (1963).

[5] 114 CONG. REC. 1839 (1968) (Remarks of Congressman Rogers).

[6] Section 1640 of the Act provides for a civil remedy against any creditor who fails to disclose to the debtor any information required under the disclosure provisions of Subchapter I of the Act.

[7] 503 F.2d at 111.

[8] *Id.* at 112.

The court found that the purpose of the Act was to protect the individual employee from hardships resulting from wrongful discharge,[9] the predicament of being unable to pay a debt while unemployed and unemployment resulting from the inability to pay a debt.[10] The Ninth Circuit determined that the administrative and criminal remedies of Subchapter II did not provide maximum enforcement of the Act. Although a deterrent effect was present, the express remedies neither gave full effectiveness to the congressional purpose nor corrected the harm the statute was intended to prevent. Using the rationale expressed in *Burke v. Compania Mexicana de Aviacion,*[11] the court determined that it was free to imply a civil remedy to effectuate the congressional purpose. It recognized that a civil action for damages could arise by implication when a statutory criminal penalty is inadequate to protect the interests of a member of the class the statute intended to protect.[12]

Several factors led the *Stewart* court to conclude that a private civil action should be implied in a claim arising under section 1674. First, under this section no action can commence until an alleged violation has occurred, that is, until an employee has suffered damage from a wrongful discharge. If a violation of section 1674 could have been considered by the authorized federal agency before damages were incurred, the need for a private civil remedy would be diminished. Furthermore, any action taken by the Secretary of Labor under section 1674 is discretionary[13] as well as being subject to the inherent deficiencies of a large bureaucratic agency. Second, compliance with the provisions of section 1674 would not be unduly harsh on employers since an employee could be discharged for subsequent garnishments of wages. Third, compliance with section 1674 would serve the best interest of both employer and employee since a credit-stricken employee would be given a chance to relieve the debt and the employer would be saved the time and expense of training a replacement. Finally, the provisions of section 1674 do not require special knowledge of economics or complexities of a particular industry; they are simple, clear, and applicable to all employers and employees with little danger of misinterpretation or unfair administration.

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[9] *Id.* at 113.

[10] *See* Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act,* 47 S. CAL. L. REV. 383, 387 (1947).

[11] 433 F.2d 1031 (9th Cir. 1970).

[12] *Id.* at 1033-34.

[13] See note 3 *supra.*

The manner in which the *Stewart* court interpreted these factors removed the traditional reasons[14] for not implying a civil remedy in the absence of express remedies. More importantly, the court laid the foundation on which to apply, in effect, the "social policy approach" to statutory interpretation as adopted in *J.I. Case v. Borak.*[15] Under the *Borak* analysis, the question whether Congress intended to provide a private remedy was unimportant, absent a clear mandate. The court's inquiry turns on whether a private remedy should exist as a matter of social policy and, if so, whether a remedy necessary to effectuate the congressional purpose should be provided. Although the *Borak* analysis has been criticized,[16] the *Stewart* court recognized that this approach was necessary to obtain a satisfactory result and to give full effectiveness to congressional purpose. The court was required to extend the scope of the statutory provisions in order to imply a private cause of action. To accomplish this, the court first had to overcome traditional reasons for not implying a private remedy and then use a method of statutory interpretation that has been labeled "judicial activism" and improper judicial legislation.[17] In order to pursue his cause of action, the plaintiff was required to individually challenge a complex structure of interwoven federal agencies re-

[14] 503 F.2d at 112. When alternative remedies exist in a state statute, or under the same federal statute, or where enforcement of a federal statute rests with an administrative agency, the argument for implying a private cause of action is weakened. The court determined, however, that the need for a private cause of action in a section 1674(a) violation overcame the reasons for not implying a private remedy.

[15] 377 U.S. 426 (1964). Plaintiff, owner of common stock in defendant company, sought to enjoin the proposed merger of Case and American Tractor Corp. under section 27 of the Securities Exchange Act which did not specifically provide for such private actions. The Court determined that since the purpose of the Securities Exchange Act was to provide broad remedial relief and to protect investors, the availability of judicial relief in an individual private action should certainly be implied to achieve that result. The Court upheld the plaintiff's right to bring a private action and stated that it is the duty of the judicial system to provide such remedies as are necessary to effectuate the congressional purpose.

[16] The *Borak* rationale has been criticized under the primary jurisdiction doctrine which provides that when an administrative agency is created to regulate a general area, and a cause of action arises in that area, the courts lack jurisdiction to grant relief until the appropriate regulatory agency has determined the issues involved. *See,* T.I.M.E., Inc. v. United States, 359 U.S. 464, 472-74 (1959); Note, *Implying Civil Remedies From Federal Regulatory Statutes,* 77 HARV. L. REV. 285, 295 (1963).

[17] Note, *supra* note 10, at 414.

sponsible for enforcing a statute with provisions that were inadequate to resolve the dispute arising under it.

Well-drafted state consumer credit statutes could provide an alternate solution to the problems encountered by the plaintiff and the court in *Stewart*. If a state statute contains provisions on garnishment that are "substantially similar"[18] to those in the federal act, the state statute will not be superseded. A plaintiff could then bring his action under the state statute and have equal or better remedies available than under the federal Act.

The West Virginia Consumer Credit and Protection Act[19] is an example of a state statute with garnishment provisions that meet the "substantially similar" test.[20] It contains express provisions for civil remedies following discharge of an employee for garnishment of wages.[21] A West Virginia employee discharged in violation of this statute may bring a private action for damages without involving the federal statute or any federal agency. This affords the employee a local forum and the likelihood that his claim will be more quickly resolved. Although the West Virginia statute limits the amount of damages recoverable,[22] it is a significant alternative to a wrongfully discharged plaintiff in a jurisdiction that does not imply a civil remedy under section 1674 of the federal act.[23]

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[18] 15 U.S.C. § 1675 (1970) provides:

> The Secretary of Labor may by regulation exempt from provisions of section 1673(a) of this title garnishments issued under the laws of any state if he determines that the laws of that state provide restrictions on garnishment which are substantially similar to those provided in section 1673(a) of this title.

[19] W. VA. CODE ANN. §§ 46A-1-101 to -8-102 (1974 Replacement Volume).

[20] Eleven jurisdictions have statutes that comply with the uniformity required under section 1675 of the Act—Connecticut, District of Columbia, Georgia, Hawaii, Louisiana, Maine, Massachusetts, New York, Texas, Vermont, and West Virginia. Note, *Federal Restrictions of Wage Garnishments: Title III of the Consumer Credit Protection Act,* 44 IND. L.J. 267, 289 & n.116 (1968).

[21] W. VA. CODE ANN. § 46A-5-101(6) provides:

> If an employer discharges an employee in violation of the provisions prohibiting discharge (§ 46A-2-131), the employee may within ninety days bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for six weeks.

[22] *Id.*

[23] Three jurisdictions have not allowed a private civil action under section 1674 of the Consumer Credit Protection Act. Western v. Hodgson, 359 F. Supp. 194 (S.D.W. Va. 1973); Simpson v. Sperry Rand Corp., 350 F. Supp. 1057 (W.D. La. 1972), *vacated and remanded,* 488 F.2d 450 (5th Cir. 1973); Oldham v. Oldham,

By implying a private cause of action under section 1674 of the Consumer Credit Protection Act, *Stewart* afforded the wrongfully discharged employee a greater opportunity for relief. Whether this interpretation of section 1674 will be followed by other jurisdictions is uncertain in light of other methods of statutory interpretation including the *expressio unius* doctrine. The ultimate question regarding the intent of Congress in drafting section 1674, however, must be determined by Congress itself. *Stewart* may prompt legislative action to specify the remedies available under Subchapter II of the Act. Until then, a wrongfully discharged employee must rely on state statutes, if available, or attempt to persuade local federal courts to follow *Stewart*.

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337 F. Supp. 1039 (N.D. Iowa 1972). *But see,* Nunn v. City of Paducah, 367 F. Supp. 957 (W.D. Ky. 1973).