WARNING: THIS CLAIM WILL NOT SELF-DESTRUCT IN SIX MONTHS—THE SECOND CIRCUIT APPLIES A STATE STATUTE OF LIMITATIONS TO CLAIMS ARISING UNDER THE 1988 WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993).

In *United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc.*,[1] the United States Court of Appeals for the Second Circuit concluded that state law,[2] rather than the National Labor Relations Act (NLRA),[3] provides the appropriate statute of limitations[4] for actions arising under the Worker Adjustment and Retraining Notification Act of 1988 (WARN).[5]

Defendant Specialty Paperboard, Inc. (SPI) sold its paper mill to co-defendant Rock-Tenn. Co. (RTC).[6] Upon the sale, SPI fired all 232 of the mill's employees.[7] RTC, however, immediately rehired 141 of these terminated employees.[8]

The United Paperworkers International Union and Local 340 subsequently filed suit[9] in the United States District Court for the District of Vermont

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1. 999 F.2d 51 (2d Cir. 1993).

2. The issue of which state statute a court should utilize, in the event that state law is applicable, is beyond the scope of this Case Comment. For a brief discussion of how courts have analyzed this issue, see generally Kimberly Jade Norwood, *Falling Back to the Future with 28 U.S.C. § 1658: A Limitations Period with Real Limitations*, 69 IND. L. REV. 477 (1994).

3. Section 10(b) of the NLRA, 29 U.S.C. § 160(b) (1988), provides in relevant part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than *six months* prior to the filing of the charge with the [National Labor Relations] Board and the service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b) (1988) (emphasis added).

4. "As often happens, Congress failed to provide WARN with a statute of limitations, leaving it to the courts to find an appropriate period." *United Paperworkers*, 999 F.2d at 52-53. For a thorough discussion of other instances in which Congress has omitted specific statutes of limitations from federal laws and how courts have addressed the resulting confusion, see generally Norwood, *supra* note 2.

5. 29 U.S.C. §§ 2101-2109 (1988). Generally, WARN requires that an employer notify employees sixty days prior to closing a plant or effecting a mass layoff. *Id.* § 2102. *See also infra* notes 21-30 and accompanying text.

6. *United Paperworkers*, 999 F.2d at 52. The sale took place on March 15, 1991. *Id.*

7. *Id.*

8. *Id.*

9. The complaint was a class action under 29 U.S.C § 2104(a)(5) (1988). *United Paperworkers*, 999 F.2d at 52.

on behalf of the workers whom RTC did not rehire.[10] The union[11] asserted that the defendants[12] had failed to give notice to employees as required by WARN. The district court denied the defendants' motion to dismiss the claim as time-barred under the NLRA statute of limitations.[13] The court found that the appropriate statute of limitations was not the NLRA's six month statute of limitations but Vermont's civil actions statute of limitations.[14] On appeal, the Second Circuit affirmed[15] and held that because the NLRA is not closely analogous to WARN[16] and because using a state statue of limitations would not undermine the federal policy behind WARN,[17] courts should borrow from state law when determining the statute of limitations for WARN claims.[18]

Congress passed WARN on August 4, 1988,[19] after fifteen years of debate over national plant closing notification legislation.[20] WARN requires that employers with 100 or more employees notify workers at least sixty days[21] before closing a plant[22] or initiating a mass layoff.[23]

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10. *United Paperworkers*, 999 F.2d at 52. WARN specifically provides for a civil action for damages in federal court for aggrieved employees. *See infra* note 27 and accompanying text.

11. WARN allows either individual employees or their representative to bring suit against the employer. However, WARN does not require the aggrieved employees to be union members. *See* 29 U.S.C. § 2104(a)(5) (1988).

12. WARN contains specific provisions allocating notification responsibility among the parties involved in the sale of a corporation or individual plant. *See id.* § 2101(b)(1). The Second Circuit did not address this issue, however. For a brief discussion of this provision, see John O'Connor, *Employers Be Forewarned: An Employer's Guide to Plant Closings and Layoff Decisions After the Enactment of the Worker Adjustment and Retraining Notification Act*, 16 OHIO N.U. L. REV. 19, 48 (1989).

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

14. The statute of limitations for civil actions in Vermont is six years. *Id.*

15. *Id.* at 56.

16. *Id.* at 52.

17. *Id.* at 54-55.

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

19. WARN became effective six months later on February 4, 1989. *See* O'Connor, *supra* note 12, at 19-20.

For a discussion of potential constitutional challenges to WARN, see Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247 (Me. 1974) (rejecting Due Process and Equal Protection Clause challenges to Maine's plant-closing notification law) and O'Connor, *supra* note 12, at 50-55 (concluding that WARN will survive any constitutional attacks). *See also* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19-22 (1987) (rejecting an employer's claim that Maine's plant-closing law was pre-empted by the NLRA).

20. *See* O'Connor, *supra* note 12, at 43 ("National plant closing notification legislation was so controversial that it took fifteen years before such a bill could make it through both the House and Senate.").

21. Section 2102 provides in pertinent part:

> [A]n 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—

Congress adopted WARN to address the perceived national problem of worker displacement, which had arisen because an increasing number of businesses had scaled back on production and employment.[24] Under WARN, an employer who fails to provide the prescribed notice is liable for back pay and lost benefits to those workers suffering an employment loss.[25] The infringing employer must account for each day of violation, up to sixty days.[26] WARN specifically provides aggrieved employees with a civil action for damages in federal court.[27] The remedies provided are exclusive under WARN,[28] and the specific language of the statute reflects that WARN's congressional sponsors did not intend to alter the balance of pre-existing federal labor law.[29] Congress did not, however,

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(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)(1) (1988).

22. "Plant closing" is defined as:

[T]he 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) (1988).

23. "Mass layoff" is defined 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

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

29 U.S.C. § 2101(a)(3) (1988).

24. *See* 133 CONG. REC. 3725 (1987) (statement of Sen. Metzenbaum); H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 1045 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2078 ("[T]he Conferees reaffirm that advance notice is an essential component of a successful worker readjustment program."). *See also* 134 CONG. REC. 15,518 (1988) (statement of Sen. Gore); S. REP. NO. 62, 100th Cong., 1st Sess. 4 (1987); O'Connor, *supra* note 12, at 44-45.

25. "Employment loss" is defined, in part, as "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6) (1988).

26. Section 2104(a)(1) provides that an employer who violates § 2102 shall be liable for back pay and benefits, including certain medical expenses. *Id.* § 2104(a)(1).

27. *Id.* § 2104(a)(5).

28. *Id.* § 2104(b).

29. *See* 134 CONG. REC. S16,098 (daily ed., June 28, 1988) (statements of Sens. Metzenbaum, Specter, Hatch). Section 2105 reads as follows: "The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies . . . ." 29 U.S.C. § 2105 (1988).

include an express statute of limitations in the text of WARN.[30]

Congress' failure to include a statute of limitations in WARN leaves the question of the appropriate limitations period to the judiciary. In *UAW v. Hoosier Cardinal Corp.*,[31] the Supreme Court enunciated a general rule for "borrowing" a statute of limitations. The Court cited precedent[32] which indicated that when a federal statute lacks an express statute of limitations, courts should look to state law to supply the limitations period.[33] The Court then applied a state statute of limitations to an action brought by terminated employees under the Labor Management Relations Act.[34] While acknowledging that federal labor policy is an arena that "peculiarly calls for uniform law,"[35] the Court declined to stray from the general rule of borrowing from state law, absent evidence that using the state statute would frustrate the goals of federal labor policy.[36]

Later, in *DelCostello v. International Brotherhood of Teamsters*,[37] the Supreme Court clarified and ultimately relied upon the potential frustration

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30. *See supra* note 4.

31. 383 U.S. 696 (1966).

32. *Id.* at 704 (citing Campbell v. City of Haverhill, 155 U.S. 610 (1895); McCluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830)).

33. *Id.* The *Hoosier* Court interpreted these prior decisions as requiring courts to apply state limitations periods as a matter of federal law when Congress does not provide a statute of limitations. *Id.* at 704-05. This proposition was later rejected in DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). *See infra* notes 38, 40 and accompanying text; *see also* Norwood, *supra* note 2, at 482-83 n.34.

34. *Hoosier*, 383 U.S. at 707. The employees were seeking recovery of accumulated vacation pay. *Id.* at 698. Section 301 of the Labor Management Relations Act of 1947 provides the mechanism for filing "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a) (1988).

35. *Hoosier*, 383 U.S. at 701 (quoting Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962)). The *Hoosier* Court agreed with the reasoning in *Lucas Flour* that uniformity of laws is necessary to encourage the *formation* of collective bargaining agreements, which are considered the chief instruments of federal labor policy. *Id.* at 702. However, the Court was not entirely persuaded that uniformity was a necessary component of all aspects of the collective bargaining process. *Id.* at 703. *See infra* note 36.

For a strong argument in favor of federal borrowing for uniformity purposes, see generally Norwood, *supra* note 2.

36. The Court noted that statute of limitations issues are implicated only after the collective bargaining process breaks down. *Hoosier*, 383 U.S. at 702. Accordingly, the Court opined that "lack of uniformity in this area is therefore unlikely to frustrate in any way the achievement of any significant goal of labor policy." *Id.* Though the Court apparently interpreted prior decisions to require it to apply a state limitations period, *see supra* note 35, its discussion of the uniformity considerations seems to suggest that under different circumstances, the Court would have considered borrowing federal law. *See infra* note 38 and accompanying text.

37. 462 U.S. 151 (1983).

of federal labor policy exception to the use of state limitations periods suggested in *Hoosier*.[38] The *DelCostello* Court applied the NLRA's six-month time limitation to a "hybrid" section 301/duty of fair representation claim[39] filed by an employee against both his employer and the union.[40] Although the Court conceded that the usual procedure was to borrow statutes of limitations from state law, it did not believe courts must do so as a matter of law.[41] The Court stated that "when [1] a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and [2] the federal policies at stake[42] and the practicalities of litigation[43] make that rule a [better] vehicle for interstitial law-making," the federal statute of limitations should be borrowed.[44] Citing the close analogy between the NLRA's purpose of protecting collective bargaining[45]

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38. Citing Holmberg v. Armbrecht, 327 U.S. 392 (1946), the *DelCostello* Court held:

> [N]either [the] Erie [doctrine] nor the Rules of Decision Act can now be taken as establishing a mandatory rule that we apply state law in federal interstices. Indeed, the contrary view urged by respondents cannot be reconciled . . . with our suggestion in *Hoosier* that we might not apply state limitations periods in a different case.

DelCostello, 462 U.S. at 160.

39. In contrast to the straightforward § 301 claim present in *Hoosier*, *see supra* note 34, the lawsuit filed in *DelCostello* combined a § 301 claim against the employer with a claim against the union under the NLRA for failure to provide adequate representation. *DelCostello*, 462 U.S. at 164. The Court determined that because the hybrid claim directly affects the collective bargaining process, it differed from a straight § 301 claim, which is more analogous to a breach of contract action. *Id.* at 165. *See also* Norwood, *supra* note 2, at 501. The Court found the hybrid claim analogous to an unfair labor practice claim under the NLRA. 462 U.S. at 169.

40. *DelCostello*, 462 U.S. at 172. The plaintiff worked as a truck driver and was a member of Teamsters Local 557. *Id.* at 155. He quit or was discharged from his job after refusing to drive an allegedly unsafe truck. *Id.* After unsuccessfully following the union grievance procedure, he filed suit in the District of Maryland against both his employer and the union. *Id.*

41. *Id.* at 171-72. *See supra* note 38; *DelCostello*, 462 U.S. at 161 ("In some circumstances, however, state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.").

42. The Court gave particular weight to the federal interests in uniformity and the rapid resolution of labor disputes. *DelCostello*, 462 U.S. at 165, 171.

43. In analyzing the "practicalities of litigation" for a hybrid claim, the Court examined filing requirements and the effect on the parties of varying time limitations. *Id.* at 165-69.

44. *Id.* at 172.

45. 29 U.S.C. § 141(b) (1988). The NLRA's declaration of purpose and policy states in pertinent part:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are

and the dispute in the claim at issue, the Court found the exception satisfied and dismissed a claim filed more than ten months after accrual was time-barred.[46]

The Supreme Court clarified the scope of the federal borrowing exception in *Reed v. United Transportation Union.*[47] The plaintiff, a union officer, filed suit against the union under section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959[48] alleging a violation of his right to free speech concerning union matters.[49] The Fourth Circuit, construing *DelCostello*, had applied the NLRA's six month statute of limitations and had dismissed the claim as time-barred.[50] The Supreme Court, reversing the decision of the Fourth Circuit, held that section 101(a)(2) claims are governed by limitations periods found in state personal injury statutes.[51] The *Reed* Court characterized the federal borrowing exception as "closely circumscribed"[52] and counseled that resort to federal borrowing will be "unusual."[53] In light of the mere "tangential and remote"[54] effects of section 101(a)(2) litigation on the collective bargaining relationship[55] and the practical aspects of such litigation which

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inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b) (1988).

46. *DelCostello*, 462 U.S. at 172. The Court found that the NLRA was designed to balance the same interests, those of employee, union, and employer, at stake in the case before it. *Id.* at 171. Thus, the Court concluded that the NLRA was clearly more analogous than either the state limitations period for vacating an arbitration award, *id.* at 165-167, or the limitations period for legal malpractice, *id.* at 167-68.

47. 488 U.S. 319 (1989).

48. 29 U.S.C. § 411(a)(2) (1988). The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) generally protects a union member's rights of freedom of speech and assembly in the labor organization context. *Id.*

49. Local 1715 of the United Transportation Union reimbursed Reed, Secretary and Treasurer of Local 1715, for time spent on union duties. *Id.* at 321-22. After an audit, the union disallowed Reed's reimbursement, yet continued, over Reed's protests, to reimburse other officers. *Id.* at 322. Reed eventually filed suit alleging that the disallowance of payments amounted to harassment for views he had expressed on union matters. *Id.*

50. Reed v. United Transp. Union, 828 F.2d 1066, 1070 (4th Cir. 1987), *aff'd*, 488 U.S. 319 (1989).

51. "Because § 101(a)(2) protects rights of free speech and assembly, and was patterned after the First Amendment, it is readily analogized for the purpose of borrowing a statute of limitations to state personal injury actions." *Reed*, 488 U.S. at 326.

52. *Id.* at 324.

53. *Id.*

54. *Id.* at 330.

55. While acknowledging that a § 101(a)(2) claim might indirectly affect collective bargaining relationships, the Court characterized the claim as essentially an "internal union dispute." *Id.* Thus,

necessitate uniformity,[56] the Court refused to depart from the general rule of borrowing from state law.[57]

Finally, in *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*,[58] its most recent decision on the subject, the Supreme Court applied a federal statute of limitations to a claim[59] that arose under section 10(b) of the Securities Exchange Act of 1934.[60] While reaffirming the general rule of state borrowing,[61] the Court extracted from prior cases a three-part test for determining whether the federal borrowing exception should apply.[62] First, a court must evaluate the cause of action to determine whether it requires a uniform statute of limitations.[63] Second, assuming a uniform limitations period is appropriate, the court must decide, giving particular weight to the geographic character of the claim,[64] whether the appropriate statute of limitations is to come from state or federal law.[65] Third, even if the second consideration is satisfied, a court must still find that the federal source provides a closer analogy to the claim than any applicable state law.[66]

Subsequently, the district courts that have addressed the issue of

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it was outside the scope of the typical collective bargaining processes contemplated by the NLRA. *Id.* at 331.

56. The Court determined that practical problems of litigation present in a hybrid suit, *see supra* note 43, were simply not present in an individual claim under § 101(a)(2). *Reed*, 488 U.S. at 328. The Court explained that "state personal injury statutes are of sufficient length to accommodate the practical difficulties faced by § 101(a)(2) plaintiffs, which include identifying the injury, deciding in the first place to bring suit against and thereby antagonize union leadership, and finding an attorney." *Id.* at 327 (citations omitted).

57. *Reed*, 488 U.S. at 334.

58. 111 S. Ct. 2773 (1991).

59. The plaintiffs-respondents were investors in a failed computer hardware leasing partnership. *Id.* at 2776. They brought suit against a law firm that had aided in setting up the partnership, alleging fraud and misrepresentation. *Id.* at 2776-77.

60. 15 U.S.C. § 78j(b) (1988).

61. "Rooted as it is in the expectations of Congress, the 'state-borrowing doctrine' may not be lightly abandoned." *Lampf*, 111 S. Ct. at 2778.

62. *Id.* at 2778-79.

63. The Court stated that when a cause of action is so varied or complex that a single state limitations period cannot consistently be applied within a jurisdiction, courts should adopt one source, or class of sources, for borrowing purposes to encourage predictability and judicial economy. *Id.* at 2779 (citing Wilson v. Garcia, 471 U.S. 261, 273 (1985)).

64. Generally, multistate litigation presents a greater risk of forum shopping if state statutes are borrowed. *Id.* at 2779.

65. *Id.*

66. *Lampf*, 111 S. Ct. at 2779. The Court noted that this determination will obviously vary based upon the statutes available for comparison, but factors such as "commonality of purpose" and "similarity of elements" are important. *Id.*

borrowing a statute of limitations for WARN have diverged sharply in their application of the *Lampf* and *DelCostello* tests.[67] In *Newspaper and Mail Deliverers' Union v. United Magazine Co.*,[68] the United States District Court for the Eastern District of New York became the first court to decide whether state or federal law should provide the limitations period for WARN claims. After loosely applying the *DelCostello* inquiry, the court held that the NLRA's six month limitation should apply to WARN claims and dismissed the plaintiff's suit as time-barred.[69] The *United Magazine* court relied heavily on the Second Circuit's reasoning in *Phelan v. Local 305*,[70] which addressed the borrowing issue in a labor law context other than WARN.[71] The district court interpreted *Phelan* as directing courts to apply the *DelCostello* exception literally[72] and to borrow the NLRA limitations period whenever the substantive claim would have an effect on the collective bargaining relationship.[73]

Though a WARN claim is not within the direct purview of the NLRA,[74] the *United Magazine* court reasoned that because a WARN suit is a dispute between a union, on behalf of employees, and an employer, it closely parallels the type of conflict the NLRA was designed to resolve.[75] The court also noted that the term "representative" in WARN is defined by

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67. The *Lampf* Court used a three-step test to decide whether to borrow federal statutes of limitations, while the *DelCostello* Court used only two steps. However, the tests are essentially interchangeable. The second step in the *DelCostello* test, an inquiry into the federal policies at stake and the practicalities of litigation accompanying a particular cause of action, *see supra* notes 42-43 and accompanying text, essentially encompasses the first and third steps of the *Lampf* inquiry, *see supra* notes 63-66 and accompanying text. Courts have used both tests. *See e.g.*, Automobile Mechanics' Local 701 v. Santa Fe Terminal Servs., 830 F. Supp. 432 (N.D. Ill. 1993) (applying the *Lampf* three-step inquiry); *United Paperworkers*, 999 F.2d 51 (2d Cir. 1993) (utilizing the *DelCostello* test); Wallace v. Detroit Coke Corp., 818 F. Supp. 192 (E.D. Mich. 1993) (applying *DelCostello* test).

68. 809 F. Supp. 185 (E.D.N.Y. 1992). Upon reconsideration, the court granted a motion for entry of judgment in favor of the defendant-employer on the statute of limitations issue. Newspaper and Mail Deliverers' Union v. United Magazine Co., 829 F. Supp. 561, 566 (E.D.N.Y. 1993).

69. *United Magazine*, 809 F. Supp. at 191-193.

70. 973 F.2d 1050 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993).

71. The claim at issue in *Phelan* was filed by union members against a sister local for alleged violations of the LMRDA. *Id.* at 1054-55.

72. *United Magazine*, 809 F. Supp. at 190 ("[C]ourts should not limit the *DelCostello* reasoning to its specific facts.") (citing *Phelan*, 973 F.2d at 1060).

73. *Id.* at 190. The *United Magazine* court read *Phelan* as advocating the continued use of state limitations periods for claims involving internal union disputes. *Id.* at 191.

74. *See* O'Connor, *supra* note 12, at 48.

75. *United Magazine*, 809 F. Supp. at 191 ("The policy behind the NLRA is to alleviate turmoil in the relationship between management and labor so that disputes do not limit the flow of interstate commerce."). *See also supra* note 45.

reference to provisions of the NLRA.[76] As a final justification for applying the NLRA statute of limitations, the court stated that WARN's limited compensatory remedy of sixty-days salary favored applying the shorter six-month limitation period.[77]

Recently, two other district courts applied the NLRA statute of limitations to suits filed under WARN. In *Staudt v. Glastron, Inc.*,[78] the United States District Court for the Western District of Texas closely followed the reasoning employed in *United Magazine* and noted that no Texas statute provided a closer analogy to WARN than the NLRA.[79] Similarly, the United States District Court for the Northern District of Texas, in *Halkias v. General Dynamics*,[80] concurred with *Staudt* and *United Magazine*, stating that the NLRA limitations period better promotes the dual federal policies of uniformity and rapid resolution of labor disputes.[81]

However, another group of district courts has instead opted to borrow state statutes of limitations for claims arising under WARN. In *Wallace v. Detroit Coke Corp.*,[82] the United States District Court for the Eastern District of Michigan refused to apply the six-month limitations period of the NLRA to a WARN cause of action.[83] The court emphasized that *DelCostello* was a limited exception to the general rule that courts should borrow state limitations and was not meant to make the NLRA's limitations period apply to all labor cases.[84] The court noted that Congress did not intend WARN to affect existing legislation.[85] According to the court, because WARN rights have no direct relationship to collective bargaining

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76. *United Magazine*, 809 F. Supp. at 191. WARN defines "representative" as "an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title [NLRA]" 29 U.S.C. § 2101(4) (1988).

77. *United Magazine*, 809 F. Supp. at 192. The court considered WARN's limited damage remedy as an indication that WARN's underlying goal was to provide immediate, temporary aid to dislocated workers. Such an assumption supports the adoption of a shorter limitations period. *Id.*

78. No. SA-92-CA-1174, 1993 WL 85356 (W.D. Tex. Feb. 23, 1993).

79. *Id.* at *2. The court further relied on WARN's limited remedy and its incorporation of NLRA definitions. *Id.*

80. 825 F. Supp. 123 (N.D. Tex. 1993).

81. *Id.* at 125. The court was particularly concerned with achieving uniformity, as the same employer had laid off workers in three different states. *Id.*

82. 818 F. Supp. 192 (E.D. Mich. 1993).

83. *Id.* at 195.

84. *Id.* at 196 ("*DelCostello* is not a 'green light' to apply [Section 10(b)'s limitations period] to all actions in which federal labor law is implicated.") (quoting Carruthers Ready-Mix, Inc. v. Cement Masons Local Union, 779 F.2d 320, 327 (6th Cir. 1985)).

85. *Id.* at 196 (citing S. REP. NO. 62, 100th Cong., 1st Sess. 4 (1987)).

procedures and WARN plaintiffs are not required to be union members,[86] the NLRA is not closely analogous to WARN.[87]

In *Automobile Mechanics' Local 701 v. Santa Fe Terminal Services*,[88] the United States District Court for the Northern District of Illinois utilized the *Lampf* three-step inquiry[89] to determine that courts should not apply the NLRA statute of limitations to WARN claims. Initially, the court reasoned that because WARN gives rise to only one type of claim,[90] it is not a cause of action that would likely engender inconsistent applications of limitations periods within a single state.[91] Second, a WARN claim is inherently limited to the specific plant closing or layoff about which the employee was not told,[92] indicating that geographic concerns do not warrant adopting a federal statute.[93] Finally, the court distinguished WARN from the NLRA by noting the employer-employee relationship may have terminated before a WARN claim is filed.[94] By contrast, NLRA claims arise from continuing relationships.[95] Because the *Lampf* standard for federal borrowing was not satisfied, the court declined to adopt the

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86. *See supra* notes 5, 11 and accompanying text. The court determined that because WARN includes non-union members in its notice requirement, it falls outside the scope of the collective bargaining process. *Wallace*, 818 F. Supp. at 196.

87. *Wallace*, 818 F. Supp. at 196. Accordingly, the court applied Michigan's six year statute of limitations for breach of contract. *Id.* at 197.

In *Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D. Col. 1993), the United States District Court for the District of Colorado fully adopted the rationale of the *Wallace* court and also refused to apply the NLRA limitations period to a WARN cause of action. *Id.* at 654 ("[T]his court concludes that the WARN Act is separate in scope and purpose from other aspects of federal labor law, and therefore the assertion that the NLRA's § 10(b) limitations period should apply is rejected.").

88. 830 F. Supp. 432 (N.D. Ill. 1993).

89. *See supra* notes 62-66 and accompanying text.

90. *See supra* notes 27-28 and accompanying text.

91. *Santa Fe Terminal*, 830 F. Supp. at 435-36.

92. *See supra* notes 22-23.

93. *Santa Fe Terminal*, 830 F. Supp. at 436. The court recognized that WARN's venue provision, *see supra* note 27, allows an aggrieved employee to file suit in the state where the site is located or in any state where the employer transacts business. *Santa Fe Terminal*, 830 F. Supp. at 436. However, the court reasoned that choice of law rules would likely require a court to adopt the law of the state where the site was located. *Id.* Thus, forum shopping was not a valid concern, as the law of the site location would probably be used regardless of where the suit was filed. *Id.*

94. *Santa Fe Terminal*, 830 F. Supp. at 436. The court recognized the important distinction between a continuing employer-employee relationship and one that has been severed. *Id.* The court also agreed with the *Wallace* court, *see supra* notes 84-86 and accompanying text, that WARN claims are completely unrelated to collective bargaining procedures. *Id.* at 437.

95. *Santa Fe Terminal*, 830 F. Supp. at 436.

NLRA limitations period.[96]

In *United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc.*,[97] the Second Circuit ruled that a WARN cause of action is not one of the limited instances in which a court should borrow a federal statute of limitations.[98] Initially, the court reviewed Supreme Court precedent and acknowledged the general rule that state limitations should apply.[99] The Second Circuit also agreed with courts that had been reluctant to invoke a federal limitations period in every suit involving a union.[100] Surveying its prior decisions, the Second Circuit noted that it has borrowed the NLRA limitations period when claims "have directly implicated the collective bargaining relationship."[101]

The *United Paperworkers* court next applied the two-part test originally formulated in *DelCostello*[102] and previously utilized by the Second Circuit in *Phelan*.[103] The court examined the relationship between WARN and the NLRA to evaluate whether the NLRA clearly constituted a closer analogy than available state law.[104] The court noted that Congress had designed WARN to alleviate the distress of displaced workers and emphasized WARN's simple complaint process.[105] The court then contrasted these important aspects of WARN with the NLRA's goal of achieving labor peace through the collective bargaining process and the NLRA's complex enforcement structure.[106] The court also acknowledged

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96. *Id.* As none of the potentially analogous state statutes of limitations would have barred the plaintiff's claim, the court found it unnecessary to choose a specific period. *Id.* Recently, in Wholesale Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., 826 F. Supp. 326 (C.D. Cal. 1993), the United States District Court for the Central District of California also declined to apply the NLRA limitations period to a claim arising under WARN. However, the court based its decision on the defendants' failure to properly raise the statute of limitations defense and did not reach the merits of the issue. *Id.* at 330.

97. 999 F.2d 51 (2d Cir. 1993).

98. *Id.* at 56.

99. "[W]hen a federal statute contains no limitations period, courts should 'borrow or absorb the local time limitation most analogous to the case at hand.'" *Id.* at 53 (quoting Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson, 111 S. Ct. 2773, 2778 (1991)).

100. The court approvingly cited *Hoosier*, *DelCostello*, and *Reed* as examples of courts that applied state statutes of limitations to labor related claims. *Id.*

101. *Id.* at 54 (quoting Phelan v. Local 305, 973 F.2d 1050, 1060 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993)).

102. *See supra* notes 42-44 and accompanying text.

103. *Phelan*, 973 F.2d at 1058-1061.

104. *United Paperworkers*, 999 F.2d at 54-55. The available state law was Vermont's six year statute of limitations for breach of contract actions. *Id.* at 52.

105. *Id.* at 54.

106. *Id.* at 54-55.

that because the aggrieved employees have already been terminated, a WARN claim typically does not involve a continuing employer-employee relationship.[107] Finally, the court noted that Congress specifically declared that it did not intend for WARN to affect any other labor laws.[108] In light of these differences, the court concluded that the NLRA was not closely analogous to WARN[109] and declined to apply the NLRA's six month statute of limitations to the plaintiffs' claim.[110]

Though the court had effectively decided the issue by holding that the NLRA was not analogous to WARN,[111] the court went on to consider the second part of the *DelCostello* test[112]—whether federal policy or the practicalities of litigation make the application of state statutes problematic.[113] Noting that WARN gives rise to only one type of claim, the court concluded that predictability does not mandate adopting a federal limitations period.[114] Additionally, because WARN claims are limited to a single site, the court reasoned that the advantages of forum shopping would be minimal because courts would most likely apply the law of the state where the injury took place.[115] Accordingly, the court determined that the second part of the *DelCostello* test also militated against borrowing the NLRA limitations period.[116]

The Second Circuit correctly applied Supreme Court precedent in its

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107. *Id.* at 55. The court noted that the process of filing a complaint under the NLRA is handled by a National Labor Relations Board attorney. *Id.* Accordingly, there is comparatively less burden on the plaintiff than in a WARN action. *Id.* Also, because the Board hears all claims, conflicting statutes of limitations might cause the Board undue hardship and confusion not normally present in a WARN action. *Id.*

108. *Id.* at 55 (citing 21 U.S.C. § 2105 (1988)). *See supra* note 29.

109. *United Paperworkers*, 999 F.2d at 55. ("WARN, therefore, neither 'encourages nor discourages' collective bargaining, thus differing in purpose from the NLRA.") (citations omitted).

110. *Id.* at 56.

111. *Id.* at 55. The court also declined to apply the statute of limitations from the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1988 & Supp. 1992). *Id.*

112. 999 F.2d at 56. "In discussing the second part of the *Phelan/DelCostello* test, we do not mean to imply that both parts need not be met. We only seek to be thorough in our discussion of WARN." *Id.* at 56 n.8.

113. *See supra* notes 42-44 and accompanying text.

114. *United Paperworkers*, 999 F.2d at 56. The court contrasted WARN with RICO, which requires a uniform limitations period because it encompasses many different potential predicate acts. *Id. See also* Norwood, *supra* note 2, at 483-86.

115. *United Paperworkers*, 999 F.2d at 56. The injury would occur at the plant. *Id. See supra* note 93.

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

decision.[117] Both the legislative history[118] and the language of the statute itself[119] show that Congress intended WARN to operate independently from all pre-existing labor laws, including the NLRA.[120] Thus, under the first prong of *DelCostello*,[121] the NLRA is not more analogous than state laws. Applying either the *Lampf* or *DelCostello* tests,[122] the lack of a close analogy properly negates borrowing a federal statute of limitations.[123]

However, because WARN was intended to aid displaced workers by giving them time to seek other employment or training before being terminated,[124] applying a state statute of limitations of several years or more does not serve the policy underlying WARN. Recovering damages several years after being laid off will not help a terminated employee search for immediate training or employment. Rather, these damages would merely ameliorate the employee's general living conditions, a remedy beyond the scope of WARN.[125] Consequently, Congress should either amend WARN to provide an appropriate statute of limitations in line with its underlying purpose or courts should focus on the intended goals of WARN when determining the proper state statute to apply.

A. Kent Mayo

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117. The Second Circuit's well-reasoned opinion in *United Paperworkers* will likely influence future WARN statute of limitations cases at the district court level. In United Steelworkers of Am. v. Crown Cork & Seal Co., No. Civ. A. 92-5968, 1993 WL 374152 (E.D. Pa. Aug. 25, 1993), the first district court case decided after *United Paperworkers*, the court fully adopted the reasoning of the Second Circuit, ruling that Pennsylvania law provided the appropriate limitations period for civil suits under the WARN Act. *Id.* at *3.

118. *See supra* notes 20, 26 and accompanying text.

119. *See supra* note 29 and accompanying text.

120. *See supra* note 29 and accompanying text.

121. *See supra* notes 42-44 and accompanying text.

122. *See supra* note 67.

123. Each test is conjunctive such that if a case fails one prong, the court will not borrow the federal limitation. *See supra* notes 61-66 and accompanying text.

124. *See supra* note 25 and accompanying text; O'Connor *supra* note 12, at 43-44.

125. *See* O'Connor, *supra* note 12, at 43; *supra* note 20 and accompanying text; S. REP. NO. 62, 100th Cong., 1st Sess. 2 (1987) ("The bill establishes a comprehensive system for providing prompt adjustment and training services to dislocated workers.").