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South Carolina Employers' Contractual Liability to Atwill Employees: The Present State and Future Course of the Small Cause of Action

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SOUTH CAROLINA EMPLOYERS' CONTRACTUAL LIABILITY TO AT-WILL EMPLOYEES: THE PRESENT STATE AND FUTURE COURSE OF THE *SMALL* CAUSE OF ACTION

In 1987 the South Carolina Supreme Court announced in *Small v. Springs Industries, Inc.*[1] (*Small I*) that employers' policies and representations are admissible to determine whether the employer and employee modified an employment-at-will contract. Since that time the extent to which contract law will impose liability on employers remains uncertain. Although other jurisdictions have addressed the issues that *Small I* left unanswered, those cases often reached different results and employed different methods of analysis.[2] This Note will analyze *Small I* and subsequent South Carolina cases to determine the current scope of an employer's liability under a contractual analysis. This Note will then draw upon views of commentators and cases from other jurisdictions to examine other contractual theories of liability that may be available in South Carolina.

I. EMPLOYMENT-AT-WILL DOCTRINE

The employment-at-will doctrine is based on the common-law rule of employment followed in most American jurisdictions. "[T]he rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will . . . ."[3] The presumption created by the rule is that the relationship may be terminated by either party, at any time, for any reason.[4] South Carolina formally recognized the employment-at-will doctrine in 1936.[5]

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1. 292 S.C. 481, 357 S.E.2d 452 (1987). The court addressed damages issues in the case three years after the original decision. *See* Small v. Springs Indus., Inc., 300 S.C. 481, 388 S.E.2d 808 (1990).

2. The questions that *Small* left unanswered are addressed in Parts III-VI. Part VII deals with causes of action that would require an expansion of *Small*.

3. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.4, at 9 (2d ed. 1987) (quoting HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877)).

4. For a comprehensive discussion on the doctrine and its erosion, see PERRITT, *supra* note 3, §§ 1.1-.17.

5. Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936); *see* Ludwick v. This Minute

Employees who seek damages arising out of the employee's discharge from an employer may defeat their at-will status in two ways: The employee may rely on judicially-created exceptions to the at-will doctrine, or the employee may rebut the at-will presumption and hold the employer liable for breach of contract. The California Court of Appeals was the first court to recognize an exception to the employment-at-will doctrine. In *Petermann v. International Brotherhood of Teamsters*[6] the court recognized a cause of action in tort for wrongful discharge as an exception to the at-will rule.[7] The employer discharged the plaintiff for failure to commit perjury before a state legislative committee. The *Petermann* court reasoned that, under the facts of the case, the public policy interest in prohibiting perjury could be furthered only by limiting the employer's absolute right to terminate an employee.[8] The *Petermann* court created the first exception to the at-will doctrine: the public policy exception.[9]

South Carolina first recognized the public policy exception to the at-will doctrine in *Ludwick v. This Minute of Carolina, Inc.*[10] The employer in *Ludwick* discharged the plaintiff for honoring the subpoena of a state administrative board. The South Carolina Supreme Court recognized the tort of wrongful discharge in violation of public policy and allowed the plaintiff to recover damages.[11]

In contrast to the public policy exception cases, other cases have addressed the at-will presumption of the employment-at-will doctrine and found the employer liable in contract. These cases protect the employee without creating an exception to the at-will doctrine. Courts that use this analysis describe the employment-at-will doctrine as a presumption that can be rebutted by sufficient evidence.[12]

The Alabama Supreme Court used this analysis in *Hoffman-La Roche, Inc. v. Campbell.*[13] In *Campbell* the court allowed a pharmaceutical sales representative to recover damages from his employer because his discharge violated the provisions of an employee handbook. The court looked to contract law to determine the effect of the at-will

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of Carolina, Inc., 287 S.C. 219, 222, 337 S.E.2d 213, 214 (1985) (listing cases that follow *Shealy*).

6. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

7. *See id.* at 28.

8. *Id.* at 27.

9. *See id.*

10. 287 S.C. 219, 337 S.E.2d 213 (1985).

11. *Id.* at 225, 337 S.E.2d at 216.

12. *See* Thompson v. American Motor Inns, Inc., 623 F. Supp. 409, 416 (W.D. Va. 1985) (mem.) (finding that the employment-at-will doctrine is a rebuttable presumption); Panto v. Moore Business Forms, Inc., 547 A.2d 260, 267 (N.H. 1988) (finding that employment is prima facie at will).

13. 512 So. 2d 725 (Ala. 1987).

doctrine on the employee's claim. The *Campbell* court stated:

> The Court continues to adhere to the [employment-at-will doctrine]. Indeed, in this case, we are not asked to abrogate the employment-at-will doctrine. We are asked only to determine what effect certain provisions set out in an employee handbook had upon the employer's right to exercise its powers to terminate the employment relationship at will.[14]

Under this analysis the court found that the employee's discharge violated his employment contract.[15]

Liability in contract under the rebuttable presumption analysis is not limited to "handbook liability." Courts consider a variety of communications including oral representations, promulgated policies, and application forms.[16] Courts may even interpret the terms of the relationship in light of subjective evidence such as the employee's reasonable expectations.[17] Although *Small I* clearly applies to express contract terms,[18] it is unsettled in South Carolina whether subjective evidence of an employee's expectations is admissible to rebut the presumption of an at-will relationship.

II. THE *SMALL I* DECISION AND ITS INTERPRETATIONS

Kathy Small was employed at Springs Industries for five years when the company issued a handbook and bulletin to its employees. These documents set forth in detail the company's procedure for em-

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14. *Id.* at 728.

15. *Id.* at 738.

16. *E.g.*, Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445 (N.Y. 1982). The cases that address contractual liability have construed many forms of employer-employee communications. In addition to promulgated handbooks and policy statements, the list includes pre-employment negotiations, offer letters, orientation materials, and oral representations. *See* Forman v. BRI Corp., 532 F. Supp. 49 (E.D. Pa. 1982) (mem.) (denying summary judgment to the employer on the basis of oral pre-employment negotiations); Loffa v. Intel Corp., 738 P.2d 1146 (Ariz. Ct. App. 1987) (affirming the trial court's damages award on the basis of employee orientation materials); Gatins v. NCR Corp., 349 S.E.2d 818 (Ga. Ct. App. 1986) (affirming grant of summary judgment to the employer against employees who attempted to use offer letters as the basis of an employment contract); Sorenson v. Comm Tek, Inc., 799 P.2d 70 (Idaho 1990) (affirming grant of summary judgment to the employer when the employee sought to establish a contract on the basis of an oral offer to transfer); Terrio v. Millinocket Comm. Hosp., 379 A.2d 135 (Me. 1977) (denying the employer's appeal of a jury award to the employee based solely on the employer's written personnel policy).

17. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985).

18. *See Small I*, 292 S.C. 481, 357 S.E.2d 452 (1987).

ployment termination. They described a four-step process that consisted of a verbal reprimand, a written warning, a final written warning, and finally a discharge. In addition to the handbook and bulletin, Small's supervisors orally assured the employees that the four-step procedure would be uniformly applied. Nevertheless, Springs discharged Small after one written warning. The South Carolina Supreme Court affirmed the jury's finding that Springs had breached the handbook policy. The court held that "a jury can consider an employee handbook, along with other evidence, in deciding whether the employer and employee had a limiting agreement on the employee's at-will employment status."[19]

Two points of view exist on the impact of *Small I*. The first point of view is that *Small I* creates a new right to recover despite the employment-at-will doctrine,[20] or that it greatly expands liability under the existing cause of action for breach of contract.[21] Although neither *Small I* nor authority from other jurisdictions would support the statement that the decision creates a new cause of action or an exception to the at-will doctrine,[22] it is difficult to contest the position that the decision greatly extends contractual liability.[23]

The second view of *Small I*, which commands a slight majority of the court, is that the case did not create a new cause of action. Instead, *Small I* merely "allowed the introduction of . . . handbooks as evidence of a contract" in a breach of contract action.[24] By adopting the second view of *Small I*, the South Carolina Supreme Court in *Toth v. Square D Co.*[25] clarified that a *Small I* action is a breach of contract

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19. *Id.* at 486, 357 S.E.2d at 455.

20. Toth v. Square D Co., 298 S.C. 6, 11, 377 S.E.2d 584, 587 (1989) (per curiam) (Gregory, C.J., dissenting); *see id.* at 12, 377 S.E.2d at 587 (Finney, J., dissenting); *see also* Bankey v. Storer Broadcasting Co., 443 N.W.2d 112, 116 & n.12 (Mich. 1989) (stating that *Small I* "recognize[s] some type of 'handbook exception' to the employment-at-will doctrine"); *see generally* Matthew J. Norton, *Annual Survey of South Carolina Law, Implied Contract Exception to Employment at Will Doctrine Applied Retroactively*, 42 S.C. L. REV. 133 (1990).

21. *Toth*, 298 S.C. at 12, 377 S.E.2d at 587-88 (Finney, J., dissenting).

22. *Cf.* Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) ("Where the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises.").

23. *See* Adams v. Square D Co., 6 Indiv. Empl. Rts. Cas. (BNA) 1364, 1366 (D.S.C. 1991) ("The South Carolina Supreme Court changed . . . employment law . . . with Small.").

24. *Toth*, 298 S.C. at 9, 377 S.E.2d at 586; *accord* Blankenship v. South Carolina Elec. & Gas Co., 5 Indiv. Empl. Rts. Cas. (BNA) 930, 932 (S.C. Ct. C.P. Richland 1990) ("The holding in *Small*, therefore, does not abrogate the doctrine of employment at will in South Carolina.").

25. 298 S.C. 6, 377 S.E.2d 584 (1989) (per curiam). Justice Finney and Chief Jus-

action.[26] Therefore, *Small I* fits into the category of cases in which evidence is admitted to rebut the prima facie at-will status of the employee.

III. CONSTRUCTION OF APPLICABLE CONTRACT LAW

It is well established that employment contracts are unilateral contracts.[27] "A contract is unilateral when one party who makes a promise has received a consideration other than a promise to make the contract binding. A unilateral contract is also . . . one in which there is a promise on one side only, the consideration therefor being an act . . . ."[28] In bilateral contracts "there are promises on the part of both parties to the contract [that are] mutual promises to do some future act in which the consideration of the promise of one party is a promise on the part of the other."[29] The promise in a bilateral contract is binding when the reciprocating promise is made, not when both promises are performed.[30] The promise in a unilateral contract is not binding until performance begins[31]; therefore, an employer's offer becomes binding when the offeree accepts and begins performing the duties set by the employer.

Two views exist on how courts may find the existence of an offer and define its scope. One view is that an employer's promises may be gleaned from either express oral or written statements, or from the employee's legitimate expectations.[32] The second and narrower approach is that the parties' intentions must be determined from their outward manifestations.[33] South Carolina adheres to the outward manifesta-

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tice Gregory wrote separate dissenting opinions.

26. *Id.* at 9, 377 S.E.2d at 586.

27. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 900 (Mich. 1980) (Ryan, J., concurring); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1267 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985); *Small I*, 292 S.C. 481, 484, 357 S.E.2d 452, 454 (1987).

28. 17A AM. JUR. 2D *Contracts* § 5, at 27-28 (1991) (footnote omitted).

29. 17A *id.* at 28. The unilateral framework eliminates the requirement of mutuality of obligation. The South Carolina rule is consistent with the majority rule: mutuality is not required in employment contracts. *See Small I*, 292 S.C. at 484-85, 357 S.E.2d at 454; *see also Toussaint*, 292 N.W.2d at 885; Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 444 (N.Y. 1982); Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1194 (Pa. Super. Ct.), *allocatur denied*, 536 A.2d 1331 (Pa. 1987). As one commentator pointed out, a requirement of mutuality would bind employees as well as employers to the contractual terms. *See* PERRITT, *supra* note 3, § 4.13, at 201.

30. *See* 17A AM. JUR. 2D *Contracts* § 5 (1991).

31. *See* 17A *id.*

32. *See* cases cited in *supra* note 17.

33. *E.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983) (citing Cederstrand v. Lutheran Bhd., 117 N.W.2d 213, 221 (Minn. 1962)). However, the gap

tions approach.[34] Under this approach courts may admit all oral or written outward manifestations to prove the existence and scope of an offer.[35] The *Small I* court rejected the reasonable expectations theory. The court objected, however, to the notion that an employer could "couch a handbook, bulletin or other similar material in *mandatory* terms and then . . . ignore these very policies as 'a gratuitous, nonbinding statement of general policy' whenever it works to [the employer's] disadvantage."[36]

Under the outward manifestations approach, courts must address two issues. First, how may the terms of the offer be couched? Second, where is the line between a mandatory term and a gratuitous and nonbinding statement of general policy?

The employer must publish the offer to the employee.[37] The terms also must be definite or specific enough for a court to enforce.[38] Although the *Small I* court warned employers not to state their policies in mandatory terms and then treat them as " 'gratuitous, nonbinding statement[s] of general policy,' "[39] South Carolina cases provide little guidance on what constitutes a mandatory term, as opposed to gratuitous policy, speculation, hype, or "statements of wishes, hopes, or desires."[40]

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between the reasonable expectations theory and the outward manifestations theory is narrowing in practice. In an effort to contain the reasonable expectations theory, the Michigan Supreme Court, which first promulgated the theory, declared that "whether employee expectations are legitimate is a question of law for the court." Dumas v. Auto Club Ins. Ass'n, 6 Indiv. Empl. Rts. Cas. (BNA) 1249, 1251 n.4 (Mich. 1991) (plurality) (citing Bullock v. Automobile Club, 444 N.W.2d 114, 128-29 (Mich. 1989) (Levin, J., separate opinion), *cert. denied*, 493 U.S. 1072 (1990)). This development is significant because it may signal the emergence of the outward manifestations approach as the predominant theory. This could foreclose the possibility that subjective evidence is admissible. *See supra* note 18 and accompanying text.

34. *See Small I*, 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987). *But cf.* Allan v. Sunbelt Coca-Cola Bottling Co., 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1456 (S.C. Ct. C.P. Dorchester 1989) (noting that *Small I* is based upon *Toussaint*, which employs a reasonable expectations theory).

35. *See Small I*, 292 S.C. at 483, 357 S.E.2d at 454.

36. *Id.* at 485, 357 S.E.2d at 455 (emphasis added).

37. *See* Bethea v. Levi Strauss & Co., 827 F.2d 355, 360 n.3 (8th Cir. 1987) (affirming summary judgment for the employer because the employer did not distribute the company policy to its employees). This does not mean that the publication must be in writing. Publication is defined as "[a]n advising . . . a making known of something . . . for a purpose. It implies the means of conveying knowledge or notice." BLACK'S LAW DICTIONARY 1227 (6th ed. 1990).

38. McLaurin v. Hamer, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1979); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-9, at 53 (3d ed. 1987).

39. *Small I*, 292 S.C at 485, 357 S.E.2d at 455.

40. CALAMARI & PERILLO, *supra* note 38, § 2-6(c), at 35 (citing Bowman v. Hill, 262

Courts must be sensitive to the reality that employers often make positive representations of company practices and philosophies, usually with neither the intent to bind themselves nor to act in an illusory fashion. Many courts recognize a distinction between speculation or hype and an offer or promise. A mere statement of policy, philosophy, or expectation is usually insufficient to constitute an offer or promise.[41] Courts have held that assurances of certain treatment in disciplinary matters, such as vague statements that employees will be treated in a "fair, just and equitable manner,"[42] or that there will be a standard of " 'fair play and just and equitable dealings,' "[43] are too general or vague to constitute a just cause standard for discharge. Another court has similarly held unenforceable an assurance that efforts " 'should be made' to accommodate employees with more than 15 years seniority prior to their discharge" because the assurance lacked specificity.[44]

However, other factors of the employment relationship may give substance to an otherwise vague policy statement. For example, the Arizona Court of Appeals has held that, in the context of a union avoidance program in which the employer often attempted to make employees feel they had the security provided by a collective bargaining agreement, a greater inference arises that there is substance to a statement in a policy manual.[45]

Some courts have stated that an employer should not escape liability merely because its policies are vague. In *Woolley v. Hoffmann-La Roche, Inc.*,[46] for example, the New Jersey Supreme Court stated that the employer should not profit by avoiding enforcement after

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S.E.2d 376 (N.C. Ct. App. 1980); 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 15 (1963)). Part of the confusion stems from the fact that both *Small I* and Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980), the primary case on which the *Small I* court relied, involved express representations that conferred specific rights. *See* Allan v. Sunbelt Coca-Cola Bottling Co., 4 Indiv. Empl. Rts. Cas. (BNA) 1453 (S.C. Ct. C.P. Dorchester 1989). For an interesting example in which vague promises were nonbinding in the absence of any written provision or disclaimer, see Reitmeier v. Converse College, 7 Indiv. Empl. Rts. Cas. (BNA) 137 (S.C. Ct. C.P. 1991).

41. Hillsman v. Sutter Community Hosps., 200 Cal. Rptr. 605, 609 (Ct. App. 1984); MacGill v. Blue Cross of Maryland, Inc., 551 A.2d 501, 503-04 (Md. Ct. Spec. App.), *cert. denied*, 556 A.2d 673 (Md. 1989); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983).

42. Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1085 (Wash. 1984) (en banc).

43. Bauer v. American Freight Sys. Inc., 422 N.W.2d 435, 438 (S.D. 1988) (quoting personnel handbook).

44. Poklitar v. CBS, Inc., 652 F. Supp. 1023, 1029-30 (S.D.N.Y. 1987).

45. Jeski v. American Express Co., 708 P.2d 110, 111 (Ariz. Ct. App. 1985) (holding that the question of whether the employment-at-will relationship was altered was a question for the trier of fact and summary judgment was therefore inappropriate).

46. 491 A.2d 1257 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985).

promulgating the policy.[47] This rationale is consistent with the rule that because "the language of the instrument is the employer's, the court must construe it, if its meaning is ambiguous, against the drafter."[48]

Because *Small I* involved a clear statement, the approach that the South Carolina courts will take in defining the existence and terms of an offer when there is no clear statement by the employer remains an open question. These issues are fact-specific and will necessarily be resolved on a case-by-case basis. As a guide, courts should consider all of the surrounding circumstances including context, intent, and materiality of the alleged term.[49] The appropriate standard in contract law is reasonable certainty.[50] The terms usually need not be detailed.[51]

Once an employer has made a offer, acceptance by the offeree must be established. Two primary issues arise when establishing acceptance. First, does the offeree need to know the content or substance of each term of employment in order to accept it? Second, what actions or inactions on the part of the offeree constitute acceptance?

Under the majority view an employee does not need to know all terms or conditions of employment in order to enforce them against the employer.[52] In many cases the employee is unaware of the terms or conditions when accepting the offer of employment or when the provision becomes effective as to that employee.[53] Under either an estoppel or contract theory no requirement exists that the employee show knowledge of the policy at the time it becomes effective. One rationale for not requiring knowledge is that it would result in inequities between those employees who are aware of the policy and those who are

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47. *Id.* at 1269 ("If there is a problem arising from indefiniteness, in any event, it is one caused by the employer."); *see* Panto v. Moore Business Forms, Inc., 547 A.2d 260, 268 (N.H. 1988).

48. Moody v. McLellan, 295 S.C. 157, 160, 367 S.E.2d 449, 451 (Ct. App. 1988) (citing Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 208 S.E.2d 31 (1974)).

49. *See* Laseter v. Pet Dairy Prods. Co., 246 F.2d 747 (4th Cir. 1957) (finding that assurance to take care of injured employee without specific terms is too indefinite).

50. RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979).

51. *See* Travelers Ins. Co. v. Workmen's Compensation Appeals Bd., 434 P.2d 992, 998 (Cal. 1967).

52. *See* Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984) (en banc); *cf.* Bankey v. Storer Broadcasting Co., 443 N.W.2d 112, 119 (Mich. 1989) (quoting *Toussaint*, 292 N.W.2d at 892, for the proposition that it is irrelevant whether the employee knows that the employer can unilaterally modify its policies and practices). *But see* Spero v. Lockwood, Inc., 721 P.2d 174 (Idaho 1986).

53. *See* 1 LEX K. LARSON & PHILIP BOROWSKY, UNJUST DISMISSAL § 8.03 (1989).

not.[54] In *Hoffman-La Roche, Inc. v. Campbell*[55] the Alabama Supreme Court held that knowledge is unimportant at the time of acceptance as long as the employee continues working after acquiring knowledge of the term.[56]

The final and most important element of a unilateral contract that must be established is consideration. In a unilateral contract the need for a bargained-for exchange is eliminated. Acceptance of or continuation of work is adequate consideration.[57] Detrimental reliance also may serve as consideration.[58] Furthermore, courts generally are reluctant to refute employment contract claims on the ground that a lack of adequate or independent consideration exists.[59] The authorities use both policy arguments and rules of construction to avoid examining the adequacy or independence of consideration.[60]

IV. THE EMPLOYER'S ABILITY TO CONTROL THE TERMS OF THE EMPLOYMENT RELATIONSHIP

After it is determined that the employer is bound, the question of whether the employer is limited in its ability to modify existing policy remains.[61] In *Toth v. Square D Co.*[62] the United States District Court

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54. *See Woolley*, 491 A.2d at 1268 n.10.

55. 512 So. 2d 725 (Ala. 1987).

56. *See id.* at 737.

57. *See supra* notes 27-31 and accompanying text.

58. Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 444-45 (N.Y. 1982).

59. The *Small I* court also refused to inquire into the mutuality of obligations under the employment contract. *See supra* note 29 and accompanying text.

60. *Compare* WILLIAM J. HOLLOWAY & MICHAEL J. LEACH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 45 (1985) (noting that there is a general policy of not questioning the adequacy of consideration when intent to create an agreement is established) *with* Bankey v. Storer Broadcasting Co., 443 N.W.2d 112, 119 (Mich. 1989) ("The benefit to the employer of promoting [a collectively productive] environment, rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance, gives rise to a situation 'instinct with an obligation.' ").

However, some courts may require independent consideration to rebut the presumption of at-will employment. *See* Gries v. Zimmer, Inc., 709 F. Supp. 1374 (W.D.N.C. 1989) (applying Indiana law); Murray Tabb, *Employee Innocence and the Privileges of Power: Reappraisal of Implied Contract Rights*, 52 Mo. L. REV. 803, 815-16 (1987). In jurisdictions in which this requirement is recognized, the employee's performance of the duties imposed by the employment contract is not independent consideration. *See id.* at 816. The requirement of independent consideration serves an evidentiary function and is not inconsistent with the rule that the courts will not inquire into the adequacy of consideration. *See id.* at 816-17. However, several courts have taken the view that an inquiry into the independence of consideration is unnecessary because the same consideration can bind multiple promises. *Id.* at 816; *see* RESTATEMENT (SECOND) OF CONTRACTS § 80 cmt. a (1979).

61. *See generally* Thomas G. Fischer, Annotation, *Sufficiency of Notice of Modifi-*

for the District of South Carolina indicated that once bound it would be difficult for employers to unilaterally change provisions in their policies. The court rejected the employer's assertion that revisions to its handbook limited or eliminated the plaintiff's claim under *Small I*. The court stated: "The principles set forth in *Small* require that the Court reject the [employer's claim]. If an employer were permitted to extinguish an employee's rights under an existing handbook through the simple expedient of a revised handbook, employees could suffer the very inequities the *Small* court sought to prevent."[63] The court further reasoned that unilateral modification is "contrary to established principles of contract formation"[64] and that "[o]nce the contract has been created, the employer is legally bound by the terms of its promise which are enforceable by the employee."[65]

The *Small I* court noted that once a policy is promulgated, an employer may not treat it as illusory.[66] A vast difference exists, however, between prohibiting an employer from treating its policies as illusory and limiting an employer's ability to alter its policies. As the Michigan Supreme Court has stated: "It is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved."[67] The Michigan Supreme Court recently held that the employer need not explicitly reserve the right to modify its policies, but that in order to change a policy, the employer must uniformly give reasonable notice of the change.[68]

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cation in Terms of Compensation of At-Will Employee Who Continues Performance to Bind Employee, 69 A.L.R.4TH 1145 (1989).

62. 712 F. Supp. 1231 (D.S.C. 1989). The *Toth* cases challenged the employer's layoff policy as a breach of the employer's handbook. The suit was brought by a number of employees who lost their jobs in the reduction. *Id.* at 1233.

63. *Id.* at 1235. In Adams v. Square D Co., 6 Indiv. Empl. Rts. Cas. (BNA) 1364 (D.S.C. 1991), Judge Anderson subsequently rejected this view. *See infra* note 71 and accompanying text.

64. *Toth*, 712 F. Supp. at 1235.

65. *Id.* (citing *Small I*, 292 S.C. 481, 484, 357 S.E.2d 452, 454 (1987)).

66. *Small I*, 292 S.C. at 485, 357 S.E.2d at 454 (quoting Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 895 (Mich. 1980)).

67. Bankey v. Storer Broadcasting Co., 443 N.W.2d 112, 120 (Mich. 1989) (relying on Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980)).

68. *Id.*; *see also* Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 734-35 (Ala. 1987) (reaching a similar result). Even the reasonable expectations approach of Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980), will not prevent an employer from modifying policies or terms and conditions of employment. The Michigan Supreme Court recently affirmed an employer's unilateral modification of a commission rate, stating:

[P]olicy considerations weigh in favor of containing *Toussaint* to the wrongful-

Although South Carolina appellate courts have not yet defined the parameters of an employer's right to unilaterally modify the terms and conditions of employment, two South Carolina trial courts have, however, indicated that they will employ a similarly lenient rule for determining when employers may modify contract terms.[69]

In *Adams v. Square D Co.*[70] Judge Anderson of the United States District Court for the District of South Carolina examined these two South Carolina trial court decisions, rejected Judge Henderson's earlier view in *Toth v. Square D Co.* on employer modifications, and required only that an employer provide reasonable notice of the change.[71] Therefore, a divergence of views exists at the federal district court level between Judge Henderson's narrow approach in *Toth*, and Judge Anderson's more liberal approach in *Adams*. Although there are no state appellate court decisions on the subject, it is likely that the state appellate courts will adopt the *Adams* approach because it is best supported by the leading authorities and by two well-reasoned state trial court opinions.

Other courts are more explicit in defining the requirements for the modification of employer policies.[72] Generally, as long as employees are

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> discharge scenario. Were we to extend the legitimate-expectations claim to every area governed by company policy, then each time a policy change took place contract rights would be called into question. The fear of courting litigation would result in a substantial impairment of a company's operations and its ability to formulate policy.

Dumas v. Auto Club Ins. Ass'n, 6 Indiv. Empl. Rts. Cas. (BNA) 1249, 1251 (Mich. 1991) (plurality).

69. *See* Allan v. Sunbelt Coca-Cola Bottling Co., 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1457 (S.C. Ct. C.P. Dorchester 1989) ("[T]he employees' [sic] returning to work the next day constitutes his acceptance of and consideration for the employer's modification of existing policies.") (citing Brookshaw v. South St. Paul Feed, Inc., 381 N.W.2d 33, 36 (Minn. Ct. App. 1986)); *see also* Blankenship v. South Carolina Elec. & Gas Co., 5 Indiv. Empl. Rts. Cas. (BNA) 930, 932 (S.C. Ct. C.P. Richland 1990) (following the *Allan* court's view).

70. 6 Indiv. Empl. Rts. Cas. (BNA) 1364 (D.S.C. 1991).

71. *Id.* at 1366-67 (citing *Blankenship*, 5 Indiv. Empl. Rts. Cas. at 932; *Allan*, 4 Indiv. Empl. Rts. Cas. at 1457).

72. *See* Thompson v. Kings Entertainment Co., 674 F. Supp. 1194, 1198 (E.D. Va. 1987) (mem.) (stating that although there is no strict prohibition against modifying existing policies, employees must understand the change and continue to work under the new terms before the new policy is binding) (citing Thompson v. American Motor Inns, Inc., 623 F. Supp. 409, 416-17 (W.D. Va. 1985) (mem.)); National Rifle Ass'n v. Ailes, 428 A.2d 816, 822 (D.C. 1981) (holding that unless an employee expressly agrees to be bound by a change in policy, "the employer must prove that the employee's knowledge of the change was complete enough for the trier of fact to find . . . that the employee's decision to remain on the job was premised on acceptance of the new policy"); Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986) (requiring both specific and unequivocal notice of the change and acceptance of the change by continuation of employment) (cit-

given reasonable and uniform notice of the change in terms, the employer will be free to alter the terms and conditions of employment. However, the question of what role disclaimers will play in this analysis remains.[73]

The *Small I* court also noted that an employer could prevent a policy statement from becoming binding at all, thereby eliminating the concern that a future modification would be effective. The court stated:

> If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document.[74]

Often courts use effective disclaimers as support for denying relief.[75] This is especially true under the outward manifestations approach when the asserted term is couched in nonmandatory language. Whether a disclaimer is effective often turns on the interrelated elements of potency, context, and distinction.

The degree of potency of the disclaimer is established by balancing the purported disclaimer against the alleged contract term. If the alleged term or provision is specific and in writing, courts examine the disclaimer more closely. In *Allan v. Sunbelt Coca-Cola Bottling Co.*[76] the court examined two express disclaimers.[77] The court used the disclaimers to deny the enforcement of the employer's " 'operating philos-

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ing L.G. Balfour Co. v. Brown, 110 S.W.2d 104, 107 (Tex. Civ. App. 1937)).

73. *See generally* Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365 (1989).

74. *Small I*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). It is unclear whether there is any substantive meaning to the *Small I* court's reference to "or provision" after the word "disclaimer." None of the cases from other jurisdictions deal with the renunciation of any rights outside of the disclaimer context. The Michigan Supreme Court has held, however, that a clear disclaimer limits an employee's ability to rely on the reasonable expectations theory of enforcement. *See* Rowe v. Montgomery Ward, 6 Indiv. Empl. Rts. Cas. (BNA) 1185, 1192 (Mich. 1991) (plurality).

75. For a complete list of South Carolina cases in which courts have granted summary judgment or a directed verdict by pointing to the disclaimer in the employer's handbook, see *infra* note 102.

76. 4 Indiv. Empl. Rts. Cas. (BNA) 1453 (S.C. Ct. C.P. Dorchester 1989).

77. The first disclaimer stated: "FURTHER, I UNDERSTAND AND AGREE THAT MY EMPLOYMENT IS FOR NO DEFINITE PERIOD AND MAY, REGARDLESS OF THE DATE OF PAYMENT OF MY WAGES AND SALARY, BE TERMINATED AT ANY TIME WITHOUT PREVIOUS NOTICE." *Id.* at 1454. The second disclaimer stated: "*These policies are NOT a contract of employment.* The provisions of our personnel policies are subject to change at any time . . . . Notwithstanding any of the provisions of any personnel policy, all employees . . . are 'employees-at-will' . . . ." *Id.*

ophy . . . that each employee be treated with individual dignity' " and its principles " '[t]hat employees shall be promoted on the basis of demonstrated ability and loyalty [and] [t]hat the Company will try insofar as possible to provide permanent, steady work to all employees subject to its normal business conditions.' "[78]

In discussing the clear wording of the disclaimers and the employer's policy statement, the court impliedly employed a balancing test.[79] The Arizona Supreme Court has previously described the test as resting on an interpretation of the manual as a whole in addition to an examination of the parties' statements and actions.[80] When an alleged term is stronger or more concretely set out, the court is more likely to deny summary judgment for the employer and submit the issue to the jury.[81]

Courts also consider the context of a disclaimer. The *Small I* court declared that a disclaimer may become effective by inserting it into the written document.[82] This declaration implies that any disclaimer of a written provision must itself be in writing. This implication raises questions about the practical effect of placing the disclaimer in various documents.[83]

The *Allan* court noted that the first disclaimer[84] was placed directly over the signature line on the employment application.[85] The court found this, along with the second disclaimer, to be persuasive evidence of a lack of intent on the part of the employer to form a contract.[86]

What if the only disclaimer was the one contained in the application? This issue arose in *Stone v. Mission Bay Mortgage Co.*,[87] in

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78. *Id.* (quoting handbook).

79. *But cf.* Ballenger v. Jackson Mills, Inc., 7 Indiv. Empl. Rts. Cas. (BNA) 126 (S.C. Ct. C.P. Spartanburg 1991) (holding that a clear disclaimer discharged the employer's obligation to fire only in accordance with its absence policy).

80. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1037-38 (Ariz. 1985) (en banc).

81. *See id. But cf.* Ballenger v. Jackson Mills, Inc., 7 Indiv. Empl. Rts. Cas. (BNA) 126 (S.C. Ct. C.P. Spartanburg 1991) (denying relief notwithstanding a policy on discharge when the disclaimer was conspicuous).

82. *Small I*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987).

83. In Johnson v. First Carolina Financial Corp., 409 S.E.2d 804 (S.C. Ct. App. 1991), the court noted that the employee's failure to sign a disclaimer in an employment manual was irrelevant because the employee asserted that the manual was part of the employment contract. *Id.* at 805 & n.1 (citing Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975)).

84. *See supra* note 77.

85. Allan v. Sunbelt Coca-Cola Bottling Co., 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1454 (S.C. Ct. C.P. Dorchester 1989).

86. *Id.* at 1457.

87. 672 P.2d 629 (Nev. 1983) (per curiam).

which the Nevada Supreme Court ruled that a material issue of fact existed about whether the applicant intended the completion of the application, including a signature immediately below the disclaimer, to be anything more than informational.[88] The court remanded the case on the issue of intent of the employee to contract under the disclaimer.[89] The Supreme Court of Appeals of West Virginia also held that a disclaimer in an employment application was effective even though it was not reinforced in subsequent documents.[90] In dicta the court "recognize[d], however, that a disclaimer may lose its effectiveness due to changed circumstances" and stated:

> [I]f an employee signed an employment application containing a valid disclaimer, but ten years later the employer issued an employee handbook containing definite promises of job security, the handbook could supersede the employment application and form the basis of a new agreement. Hence, the wisest course for an employer . . . would be to place a . . . disclaimer in the employee handbook.[91]

It is therefore unclear whether a disclaimer in the application adds anything to the analysis.

In determining whether a disclaimer is distinct, the more frequently litigated issue is the role of the disclaimer within the policy manual. Within the handbook two issues of primary importance exist. First, as to notice, is the disclaimer "conspicuous?" Second, as to effectiveness, is the disclaimer specific enough itself to warrant enforcement?

Since *Small I* the United States District Court for the District of South Carolina has addressed the conspicuousness issue twice. In *Nettles v. Techplan Corp.*[92] the district court borrowed from the Uniform Commercial Code's definition of the term conspicuous[93] and stated that the standard was comprised of three elements: The type size, the print color, and the location.[94] Although the disclaimer was neither set in a different type nor in a different color from the rest of the handbook, the court held that the disclaimer was sufficiently conspicuous.[95] In reaching its decision the court gave great weight to the fact that the disclaimer was located in a separate paragraph on the first page of the

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88. *Id.* at 630.

89. *Id.* (citing Smith v. Recrion Corp., 541 P.2d 663 (Nev. 1975)).

90. Suter v. Harsco Corp., 403 S.E.2d 751 (W. Va. 1991).

91. *Id.* at 755.

92. 704 F. Supp. 95 (D.S.C. 1988).

93. S.C. CODE ANN. § 36-1-201(10) (Law. Co-op. 1976) ("A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.").

94. *Nettles*, 704 F. Supp. at 98.

95. *Id.*

manual.[96]

In *Prezzy v. Food Lion Inc.*[97] the court relied heavily on *Nettles*. In *Prezzy* the disclaimer also was set out in a separate paragraph on the first page of the handbook. The court ruled that the disclaimer was "sufficiently conspicuous that a reasonable reader of the handbook would have noticed it."[98] Because placement is an extremely important factor when determining whether a disclaimer is conspicuous, it could be said that the standard is almost one of prominence rather than conspicuousness.[99]

The issue of specificity relates to the disclaimer's clarity[100] or concreteness.[101] A finding that the clause is potent is not sufficient to establish that a disclaimer is effective. An employer also must establish that the disclaimer is both conspicuous and specific enough to be operative. Because no South Carolina case has independently addressed specificity, employers should consider the disclaimers in the cases that have been decided to date.[102]

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96. *Id.*

97. 4 Indiv. Empl. Rts. Cas. (BNA) 996 (D.S.C. 1989).

98. *Id.* at 997.

99. *See* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1271 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985); *see also* Chagares, *supra* note 73, at 385-86 (noting that courts have held that disclaimers are conspicuous when placed on the front page, the inside cover page, the second page, or on the last page).

100. *See Woolley*, 491 A.2d at 1269.

101. *See* Reid v. Sears, Roebuck & Co., 790 F.2d 453, 461 (6th Cir. 1986).

102. Adams v. Square D Co., 6 Indiv. Empl. Rts. Cas. (BNA) 1364 (D.S.C. 1991); Prezzy v. Food Lion, Inc., 4 Indiv. Empl. Rts. Cas. (BNA) 996 (D.S.C. 1989); Nettles v. Techplan Corp., 704 F. Supp. 95 (D.S.C. 1988); Johnson v. First Carolina Fin. Corp., 409 S.E.2d 804 (S.C. Ct. App. 1991); Lamond v. City of Myrtle Beach, 7 Indiv. Empl. Rts. Cas. (BNA) 128 (S.C. Ct. C.P. 1991); Ballenger v. Jackson Mills, Inc., 7 Indiv. Empl. Rts. Cas. (BNA) 126 (S.C. Ct. C.P. Spartanburg 1991); Allan v. Sunbelt Coca-Cola Bottling Co., 4 Indiv. Empl. Rts. Cas. (BNA) 1453 (S.C. Ct. C.P. Dorchester 1989). The court in Blankenship v. South Carolina Electric & Gas Co., 5 Indiv. Empl. Rts. Cas. (BNA) 930 (S.C. Ct. C.P. Richland 1990), granted summary judgment to the employer based in part on the existence of a handbook disclaimer. The court did not, however, reproduce the language of the disclaimer in its opinion.

There also are divergent views on the effectiveness of disclaimers. *Compare* Stinson v. American Sterilizer Co., 570 So. 2d 618 (Ala. 1990) (affirming grant of summary judgment when the disclaimer was not conspicuous but the asserted term reserved discretion to the employer) *with* Morriss v. Coleman Co., 738 P.2d 841 (Kan. 1987) (reversing the trial court's grant of summary judgment to the employer because the disclaimer appeared only in a supervisor's manual and may not have been published to the employees); Stone v. Mission Bay Mortgage Co., 672 P.2d 629 (Nev. 1983) (per curiam) (reversing the trial court's grant of summary judgment to the employer because the disclaimer appeared only above the signature line on the employment application and because whether the parties intended the employment application to be a contract is an issue of material fact).

V. Causation and Remedies

Employers who breach employment contracts occasionally attempt to draw distinctions between substantive and procedural breaches and argue that they can rightfully fire the employee despite a procedural breach of contract. This argument assumes that the employer would have fired the plaintiff even if it had followed the procedures. However, the causation argument does not always fare well, especially when the employer has breached a progressive discipline scheme. *Small I* illustrates this result. In *Small I* the employer breached the contract by failing to adhere to a progressive discipline schedule. The court found that the employer denied Small a contractual right to warnings prior to discharge.[103]

Some courts recognize a substantive right to the warnings in a progressive discipline scheme. In *Woolley v. Hoffman-La Roche*[104] the employer argued that it should be allowed to show that the plaintiff would have been fired even if the company had complied with its procedures. The New Jersey Supreme Court disagreed. "If the court or jury concludes that the manual's job security provisions are binding, then, according to those provisions, even if good cause existed, an employee could not be fired unless the employer went through the various procedures set forth in the manual, steps designed to rehabilitate that employee in order to *avoid* termination."[105] Some courts justify this result by implying that when procedures exist, employers can terminate employees only for cause.[106]

An employer's causation argument is more effective if the plaintiff's culpability is unquestioned. In *Kohler v. Ericsson, Inc.*[107] the plaintiff admitted her performance was unsatisfactory. The employer failed, however, to administer performance evaluations as outlined in its policies. In holding for the employer, the court drew an analogy be-

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103. *Small I*, 292 S.C. 481, 357 S.E.2d 452 (1987).

104. 491 A.2d 1257 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985).

105. *Id.* at 1270; *accord* Thompson v. American Motor Inns, Inc., 623 F. Supp. 409, 416 (W.D. Va. 1985) (mem.). *But see* Shah v. General Elec. Co., 697 F. Supp. 946 (W.D. Ky. 1988) ("[Discharge procedure] guidelines, in the absence of a fixed term of employment, or express contractual promises on the part of the employee and the employer, cannot modify or prove an exception to the 'employment at will doctrine.' "). Although the *Woolley* court refused to consider the employer's argument in determining, on a summary judgment motion, whether Woolley was an at-will employee, it held that the employer could present its arguments at trial on the merits of the discharge only if it prevailed on the issue of procedural compliance. Woolley v. Hoffmann-La Roche, Inc., 499 A.2d 515 (N.J. 1985) (order on motion for clarification).

106. *See, e.g.*, Arnold v. B.J. Titan Servs. Co., 783 P.2d 541, 544 (Utah 1989) (per curiam).

107. 847 F.2d 499 (9th Cir. 1988).

tween the plaintiff's claim and the causation element of a cause of action in tort law. "[T]he breach resulting from [the employer's] failure would need to be sufficiently material to excuse [the employee's] failure to perform satisfactorily."[108]

Small v. Springs Industries, Inc.[109] (*Small II*) is one of few cases that has addressed the issue of the appropriate measure of damages in an employment contract case.[110] Generally, a wrongfully discharged employee suing for breach of contract is entitled to recover the amount of net loss caused by the employer's breach.[111] Damages may be "measured by (1) the plaintiff's reasonable expectations, (2) the plaintiff's reliance upon the promises or conduct of the defendant, or (3) the benefits conferred by the plaintiff upon the defendant."[112] Damages may include the value of unused leave, vacation pay, and other fringe benefits including pensions and promised bonuses.[113]

Equitable remedies in employment cases include reinstatement and injunctions and are typically disfavored by the courts.[114] The cases usually find an absence of irreparable injury because contractual damages provide appropriate relief.[115]

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108. *Id.* at 502. The *Kohler* court's materiality standard may be an attempt to distinguish a procedural breach from a substantive breach. The court in Salanger v. U.S. Air, 611 F. Supp. 427 (N.D.N.Y. 1985) (mem.), distinguished substantive breaches from procedural breaches and noted the absence of any express for-cause language in the defendant company's policies. The court also found that "[w]hile the Personnel Policy Guides and grievance procedures did provide a forum to appeal termination for cause decisions, no language in any corporate document limited defendant's authority to discharge for any reason." *Id.* at 431. In reaching this conclusion, the court distinguished Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441 (N.Y. 1982), as a case in which there was an express for-cause provision. *Salanger*, 611 F. Supp. at 431. The *Salanger* court stated that Murphy v. American Home Products Corp., 448 N.E.2d 86 (N.Y. 1983), modified *Weiner* when it held that "contractual provisions limiting the employer's right to terminate may not be implied in an employment agreement." *Salanger*, 611 F. Supp. at 431 (citing *Murphy*, 448 N.E.2d at 91).

109. 300 S.C. 481, 388 S.E.2d 808 (1990).

110. Steven M. Wynkoop & Elizabeth Scott Moise, *Employee Handbooks in South Carolina: The Employers' Dilemma*, 42 S.C. L. REV. 323, 336 (1991).

111. *Small II*, 300 S.C. at 484, 388 S.E.2d at 810 (citing RESTATEMENT (SECOND) OF AGENCY § 455 (1958); 11 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1358 (3d ed. 1968)).

112. HOLLOWAY & LEECH, *supra* note 60, at 397-98.

113. *Id.* at 404-05.

114. *See* Kurle v. Evangelical Hosp. Ass'n, 411 N.E.2d 326, 331-32 (Ill. App. Ct. 1980). *But cf.* Brockmeyer v. Dunn & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) ("[R]einstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges . . . .").

115. *See, e.g.*, Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) (stating that the court will limit recovery to reliance damages). For a forceful and eloquent argument that monetary damages do not provide an adequate remedy, see Samp-

South Carolina Code section 41-1-70 limits recovery of employees fired for honoring subpoenas.[116] The statute does not extend to other public policy cases or to *Small* causes of action. The statute may provide, however, a good public policy argument about the appropriate limitation of damages. The legislature has not directly responded to either *Small* opinion.

Small II concerned an employee's duty to mitigate damages and whether the plaintiff's damages should be tolled by her refusal to accept an unconditional offer of re-employment.[117] The *Small II* court gave a detailed framework for applying the doctrine of avoidable consequences.[118] Initially, the employer must prove that it made an offer for re-employment that was bona fide on its face.[119] To qualify as a bona fide offer, the offer must reinstate the employee to the same or a substantially similar position at the same pay.[120] The offer must not require that the employee waive a legal right to pursue a cause of action.[121]

Once the employer presents sufficient evidence of a bona fide offer, the burden shifts to the employee to show that the offer was not made in good faith or that the refusal of the offer was reasonable.[122] If "something has occurred to render further association between the parties offensive or degrading to the employee," then the employee's refusal of the offer would be reasonable.[123]

If damages are not tolled by an offer of re-employment, the court then turns to the issue of future damages. Damages cannot be speculative.[124] The *Small II* court did not address the anomalous result that a court may determine "the duration of continued employment" in a contract that is, by law, indefinite in duration. Nonetheless, unless evi-

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son v. Murray, 415 U.S. 61, 95 (1974) (Douglas, J., dissenting), *quoted in* HOLLOWAY & LEECH, *supra* note 60, at 413-14.

116. S.C. CODE ANN. § 41-1-70 (Law. Co-op. Supp. 1990). Damages are limited to one year of salary or fifty-two weeks of wages. *Id.*

117. *See Small II*, 300 S.C. 481, 484-85, 388 S.E.2d 808, 810-11 (1990). For a detailed discussion of *Small II*, see Stephen Coe, *Annual Survey of South Carolina Law, Supreme Court Discusses Damages for Breach of Contract Based on Employee Handbook*, 43 S.C. L. REV. 80 (1991).

118. *Small II*, 300 S.C. at 484-87, 388 S.E.2d at 810-11; *see* Coe, *supra* note 117, at 82-83; *see generally* HOLLOWAY & LEACH, *supra* note 60, at 407-09; William H. Danne, Jr., Annotation, *Nature of Alternative Employment Which Employee Must Accept to Minimize Damages for Wrongful Discharge*, 44 A.L.R.3D 629 (1986).

119. *Small II*, 300 S.C. at 485, 388 S.E.2d at 811.

120. *Id.* (citing Flickema v. Henry Kraker Co., 233 N.W. 362 (Mich. 1930)).

121. *Id.* (citing University of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974)).

122. *Id.* at 486, 388 S.E.2d at 811.

123. *Id.*

124. *See id.* at 488, 388 S.E.2d at 812.

dence exists that another causal factor would have terminated the relationship, a determination of future damages clearly would be speculative and inherently inconsistent with *Small II*.

VI. PROCEDURAL CONCERNS

When may a South Carolina court dispose of an employee's *Small I* claim without submitting it to the jury? The answer is not entirely clear. In *Small I* the court stated:

> Under the common law, a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference. It was for the jury to decide whether the handbook, the bulletin, and the oral assurances constituted an employment contract.[125]

However, in *Allan v. Sunbelt Coca-Cola Bottling Co.*[126] Judge Brown granted the employer's motion for a directed verdict. The handbook in *Allan* contained an express disclaimer and did not establish a progressive discipline scheme or provide that employees would be terminated only for cause. Judge Brown distinguished the handbook in *Small I*, which contained a four-step discipline scheme.[127]

The court found that the handbook did not alter Allan's at-will status. Judge Brown stated that "the evidence is not sufficient to submit the case to the jury [because] [n]o controverted issue of material fact exists on which reasonable persons could differ."[128] Therefore, it is unclear whether South Carolina courts will follow the *Small I* standard, which requires that the evidence be submitted to the jury if the

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125. 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987) (citation omitted). The New Jersey Supreme Court takes a different view. In Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985), the court held that the issue of the existence or applicability of an employment contract is submitted to the jury only "if reasonable men could differ," *id.* at 1270, and noted that the court could make all of the necessary determinations in the case, *id.* at 1270 n.13.

126. 4 Indiv. Empl. Rts. Cas. (BNA) 1453 (S.C. Ct. C.P. Dorchester 1989).

127. *Id.* at 1455-56. Even when there is a definitive scheme, the existence of an effective disclaimer probably will provide adequate grounds for summary judgment. Ballenger v. Jackson Mills, Inc., 7 Indiv. Empl. Rts. Cas. (BNA) 126 (S.C. Ct. C.P. Spartanburg 1991). For a list of cases under South Carolina law in which courts have granted summary judgment or a directed verdict on the basis of the employer's disclaimer, see *supra* note 102.

128. *Allan*, 4 Indiv. Empl. Rts. Cas. at 1457; *cf.* Johnson v. First Carolina Fin. Corp., 409 S.E.2d 804 (S.C. Ct. App. 1991) (affirming the trial court's grant of summary judgment for the employer on the basis of handbook disclaimers despite a factual dispute about the reasons for the employee's termination). Judge Brown's view is similar to the *Woolley* standard. *See supra* note 125.

evidence "is conflicting or admits of more than one inference,"[129] or the *Allan* standard, which requires that the evidence be submitted to the jury only when an "issue of material fact exists on which reasonable persons could differ."[130]

South Carolina courts also may determine that summary judgment is appropriate in cases in which the sole question is whether an employer's disclaimer is effective. In such cases the court may determine as a matter of law that the disclaimer is sufficiently "conspicuous" as required by *Small I*[131] and grant summary judgment for the employer.[132]

VII. COMING TRENDS IN LAW AND EQUITY: THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND ESTOPPEL

The *Small I* court's reliance on contract theory arguably opens the door for courts to apply other contract-based doctrines such as implied covenants of good faith and fair dealing and promissory estoppel.[133] If courts use these doctrines, employers would be exposed to greater liability, and employees could recover on a greater scope of employer acts.

The covenant of good faith and fair dealing is theoretically implied into every contract.[134] In an action for breach of a covenant of good faith and fair dealing, the plaintiff does not bear the burden of proving the covenant's existence. The covenant is implied at law, and the judge determines whether it exists. The jury then determines whether the employer breached it. Unlike implied-in-fact terms, the covenant may

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129. *Small I*, 292 S.C. at 483, 357 S.E.2d at 454.

130. *Allan*, 4 Indiv. Empl. Rts. Cas. at 1457. It appears, however, that when the employer does not make a representation, the courts will not allow an inferential question of fact to go to the jury. *See* Epps v. Clarendon County, 405 S.E.2d 386 (S.C. 1991) (per curiam); Reitmeier v. Converse College, 7 Indiv. Empl. Rts. Cas. (BNA) 137 (S.C. Ct. C.P. 1991). For a list of cases under South Carolina law in which courts have granted summary judgment or a directed verdict on the basis of the employer's disclaimer, see *supra* note 102.

131. *See Small I*, 292 S.C. at 485, 357 S.E.2d at 455.

132. Ballenger v. Jackson Mills, Inc., 7 Indiv. Empl. Rts. Cas. (BNA) 126 (S.C. Ct. C.P. Spartanburg 1991). The United States District Court for the District of South Carolina also has adopted this view. *See* Nettles v. Techplan Corp., 704 F. Supp. 95 (D.S.C. 1988); *see also* Prezzy v. Food Lion Inc., 4 Indiv. Empl. Rts. Cas. (BNA) 996 (D.S.C. 1989) (finding that a reasonable reader would notice the disclaimer and it therefore was conspicuous). For a complete list of cases under South Carolina law in which the court granted summary judgment or a directed verdict on the basis of a written disclaimer, see *supra* note 102.

133. For a list of the jurisdictions that have accepted or rejected the implied covenant of good faith and fair dealing, see LARSON & BOROWSKY, *supra* note 53, § 3.05[2].

134. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

not be waived.[135]

Recognition of the covenant would be entirely consistent with the theory of *Small I*. The covenant would not create a new cause of action; its recognition would merely create a new remedy to vindicate existing contract rights.[136] A conceptual gap exists, however, between *Small I* and the recognition of implied-at-law covenants. The *Small I* court carefully limited exposure to representations couched in mandatory terms. It may be inferred that the court was reluctant to imply any obligations, in fact or at law, beyond express representations.

The United States District Court for the District of South Carolina has twice considered and rejected the covenant.[137] However, given the particulars of each case, there is good cause to believe that the appellate courts of South Carolina may accept the covenant.

In *Satterfield v. Lockheed Missiles & Space Co.*[138] the federal district court considered the covenant for the first time and rejected it.[139] In *Satterfield* the plaintiffs alleged breach of the covenant in an employment-at-will contract. The court stated that the law of employment-at-will "is antithetical to the concept of an implied covenant of good faith and fair dealing."[140] *Satterfield* was decided two years before *Small I*. If a *Small I* plaintiff successfully overcomes the presumption of employment-at-will, *Satterfield* would be inapplicable because its premise would no longer apply.

After *Small I* the federal district court in *Nettles v. Techplan Corp.*[141] granted summary judgment for the employer on the plaintiff's breach of the covenant claim. In *Nettles*, however, the court rejected the covenant claim only after finding as a matter of law that the plaintiff did not rebut the at-will presumption.[142] *Nettles* does not explicitly reject the existence of the covenant; it ruled against the employee because there was no contract that modified the at-will relationship into

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135. Stark v. Circle K Corp., 751 P.2d 162, 166 (Mont. 1988); Tabb, *supra* note 60, at 811.

136. The covenant of good faith and fair dealing already exists in South Carolina in the commercial context. Allan v. Sunbelt Coca-Cola Bottling Co., 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1455 (S.C. Ct. C.P. Dorchester 1989) (citing Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970); Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966)).

137. Nettles v. Techplan Corp., 704 F. Supp. 95, 98 (D.S.C. 1988); Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1363-65 (D.S.C. 1985).

138. 617 F. Supp. 1359 (D.S.C. 1985).

139. *Id.* at 1363-65.

140. *Id.* at 1364 (relying on Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983)).

141. 704 F. Supp. 95 (D.S.C. 1988).

142. *Id.* at 98.

which the covenant could be implied.[143]

Finally, Judge Brown of the South Carolina Court of Common Pleas stated in *Allan v. Sunbelt Coca-Cola Bottling Co.*[144] that South Carolina has not recognized a separate cause of action for a breach of the implied covenant of good faith and fair dealing in employment-at-will contracts.[145] The *Allan* court employed a rationale similar to *Nettles* and found that because the plaintiff did not prove that a contract which altered the at-will relationship existed, no covenant could be implied and no breach occurred.[146]

Although it appears from the above cases that a cause of action for breach of the covenant of good faith and fair dealing is precluded under South Carolina law, this is not necessarily true. If a *Small I* plaintiff can establish the existence of an express or implied-in-fact contractual obligation that modifies the at-will relationship, the courts may be willing to imply a covenant.

If South Carolina courts were to imply a covenant of good faith and fair dealing into employment contracts, several issues arise. First, would an action for breach be grounded in tort or contract? Second, what would the covenant mean in the employment context? Third, what would it add to the *Small* analysis in terms of actionable conduct by the employer?

If the covenant of good faith and fair dealing is recognized in South Carolina, the courts would likely view it in contract rather than tort.[147] Recognition in contract is consistent with the "no new cause of

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143. *Id.*

144. 4 Indiv. Empl. Rts. Cas. (BNA) 1453 (S.C. Ct. C.P. Dorchester 1989).

145. *Id.* at 1455.

146. *Id.* The plaintiff in *Allan* was discharged pursuant to a specific handbook provision.

147. The *Allan* court did not state whether it viewed the cause of action as one in tort or contract. The court's reliance on Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985), as well as its reference to commercial contracts, strongly suggests that the *Allan* court viewed the cause of action as one in contract. The leading case that supports this view is Foley v. Interactive Data Corp., 765 P.2d 373, 389-96 (Cal. 1988) (en banc). *Foley* is very important because California was the first state to find that the cause of action was in tort. *See* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (Ct. App. 1980), *overruled by* Foley v. Interactive Data Corp., 765 P.2d 373, 395 (Cal. 1988) (en banc). *But cf.* Carter v. Catamore Co., 571 F. Supp. 94, 97 (N.D. Ill. 1983) (stating that the duty of good faith and fair dealing sounds in both tort and contract, and punitive damages therefore may be awarded for a breach); Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984) (holding that the existence of an employment handbook is not required for a court to imply a covenant of good faith and fair dealing); K Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987) (finding that in exceptional circumstances a breach of the covenant of good faith and fair dealing can give rise to the tort of bad faith discharge and affirming the jury's award of punitive damages in addition to contract damages).

action" rationale of *Toth v. Square D Co.*[148]

The meaning of the covenant of good faith and fair dealing in the employment context may present some interesting interpretational problems. The Uniform Commercial Code's definitions of good faith and fair dealing are inapplicable to the employment relationship. Section 1-201 of the Uniform Commercial Code uses the phrase "honesty in fact."[149] This definition is not useful if honesty is not at issue. Section 2-103 uses the phrase "reasonable commercial standards of fair dealing."[150] The use of such an objective standard, however, may lead to a reliance on the closest standardized body of employment law and doctrine—collective bargaining. Although the law of collective bargaining is not inherently offensive, imposing its standards on an employer in the unilateral contract context offends well-established principles of contract law.[151]

Professor Corbin's approach to the definition of the covenant is more useful in the employment context. He defines the concept of good faith and fair dealing as, "[t]he obligation to preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form."[152] Corbin's definition effectively incorporates the parties' intent and is intuitively simple:

> The spirit of the bargain usually contemplates that a contracting party shall not try to deprive the other of the consideration for which he bargained . . . . Besides forbidding attempts to prevent the other party from getting the consideration for which he bargained . . . this principle of justice forbids attempts by the actor to get more for himself than the other party reasonably contemplated giving him at the time the contractual relationship was entered into, absent good cause. Either kind of motive to evade the spirit of the bargain is condemned . . . .[153]

Corbin's reasoning is based on equitable considerations and should lead to predictable results for both parties.[154]

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148. 298 S.C. 6, 377 S.E.2d 584 (1989) (per curiam).

149. S.C. CODE ANN. § 36-1-201(19) (Law. Co-op. 1976).

150. *Id.* § 36-2-103(1)(b).

151. "[A] law Court sits to ascertain the rights of the parties, according as they have fixed them: it has no power to declare what, in good conscience, they ought to be, and to compel the parties to accordingly acknowledge, and allow them to have effect." Baynard v. Eddings, 33 S.C.L. (2 Strob.) 374, 377 (1848).

152. 3A CORBIN, *supra* note 40, § 654a(A) (citations omitted).

153. 3A *id.* § 654e(A).

154. The court in Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987), adopted Corbin's rationale. *Campbell* involved an express contract for certain terms of employment. These express terms altered the employment-at-will status. However, the employment was otherwise terminable at-will.

If recognized, the covenant of good faith and fair dealing would be invaluable for plaintiffs because it limits the employer's ability to affect an employee's tenure. The covenant places tenure beyond the exclusive control of the employer.[155] This tenure-limiting effect is logical when viewed in light of the facts of *Small I*. In *Small I* the employee sued the employer for failure to follow the promulgated discharge procedure. Because the discharge would violate the covenant, the bad faith failure to accord the plaintiff due process would itself be actionable. Therefore, a plaintiff may be able to attain desired results even if a breach of an express or implied-in-fact term does not exist.[156]

Additionally, the covenant widens the spectrum of employer activity upon which the employee could bring an action. The facts of *Hoffman-La Roche, Inc. v. Campbell*[157] illustrate this point. The plaintiff, an award-winning pharmaceutical salesman, was unable to work on a full time basis because of his deteriorating health. Nonetheless, his supervisors encouraged him to continue working and to keep them apprised. The employee handbook explicitly reserved management's right to discharge for failure to perform if it considered the salesperson unable to meet the requirements of the job. The plaintiff was discharged under this section of the handbook. The court did not specifically address other language in the handbook in reaching the covenant issue.[158] The *Campbell* court implied the covenant and affirmed the jury award for the plaintiff employee.[159] If the court had not imposed a duty of good faith and fair dealing, the plaintiff in *Campbell* would not have recovered because the employer did not violate any express contract right.[160]

The *Small I* court's analysis also may result in the South Carolina courts' application of promissory estoppel in the employment context. Promissory estoppel is an equitable method by which a court can make a promise binding when a contract has not been formed.[161] "[T]he doc-

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155. *See* PERRITT, *supra* note 3, § 4.11, at 191.

156. *Small II*, 300 S.C. 481, 388 S.E.2d 808 (1990).

157. 512 So. 2d 725 (Ala. 1987).

158. The handbook contained a clause which stated that the policies would be "applied fairly." The court avoided this clause for the purpose of the covenant of good faith and fair dealing analysis. The court later noted in dicta that "[e]ven if such an obligation of good faith and fair dealing was not necessarily implied by law . . . the language of the handbook expressly stated that the policies . . . would be 'applied fairly.'" *Id.* at 739.

159. *Id.* at 738-39.

160. The covenant is often used as a catch-all " 'safety' valve to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language.' " Foley v. Interactive Data Corp., 765 P.2d 373, 389 (Cal. 1988) (en banc) (quoting Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 812 (1982)).

161. 28 AM. JUR. 2D *Estoppel and Waiver* § 48 (1966); *see* RESTATEMENT (SECOND) OF

trine of promissory estoppel . . . has the consequence that principles of estoppel may be applied to one making a promise or assurance concerning the future . . . ."[162] Promissory estoppel applies if the employer intended the promise to be relied upon, the employee relied upon it, and the court's refusal to enforce the promise would be unjust.[163]

Promissory estoppel would be appropriate in cases in which the employer promises to offer employment to an individual and that individual detrimentally relies on the promise. In *Grouse v. Group Health Plan, Inc.*[164] the defendant offered the plaintiff a job as a pharmacist. The plaintiff accepted the offer, quit his existing job, and declined other offers of employment. The defendant then withdrew its offer. The Supreme Court of Minnesota held that under promissory estoppel the plaintiff was entitled to his reliance damages.[165]

A different situation would arise in cases in which the plaintiff was unemployed at the time of the employer's promise. Arguably, such a plaintiff would suffer no detriment if the promise was revoked. However, one court has stated that there is "no rational basis for distinguishing [between] promises for new employment and promises for continued job security."[166] If this view is accepted, there would be no basis for distinguishing between pre-employment offers to currently employed persons and offers to unemployed persons.

The South Carolina courts have neither expressly accepted nor rejected the doctrine of promissory estoppel in the employment context. Although the South Carolina Supreme Court has clarified that a *Small* action is an action at law,[167] an action based on equity principles still may be viable. In *Link v. School District*[168] the supreme court impliedly recognized that a separate claim for promissory estoppel is viable in a *Small I* case. In *Link* a discharged teacher brought separate

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CONTRACTS § 90 (1979).

162. 28 AM. JUR. 2D *Estoppel and Waiver* § 48, at 658 (1966).

163. Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985) (citing Higgins Constr. Co. v. Southern Bell Tel. & Tel. Co., 276 S.C. 663, 281 S.E.2d 469 (1981)); *see* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

164. 306 N.W.2d 114 (Minn. 1981).

165. *Id.* at 116. The employer argued that a promissory estoppel cause of action for failure to hire would lead to anomalous results. The employer pointed out that a plaintiff who had not started work would have a cause of action but an employee who worked one day and was fired would have no recourse. The court responded by stating that a cause of action for promissory estoppel is viable even after the plaintiff commences work. *Id.*

166. Morishige v. Spencecliff Corp., 720 F. Supp. 829, 836 (D. Hawaii 1989).

167. *Small II*, 300 S.C. 481, 487, 388 S.E.2d 808, 812 (1990); *cf.* Wilie v. Price, 26 S.C. Eq. (5 Rich. Eq.) 91 (1852) (dismissing a suit in equity for breach of an employment contract and stating that if a remedy did exist, it was one at law).

168. 302 S.C. 1, 393 S.E.2d 176 (1990).

actions for breach of contract and promissory estoppel. The supreme court held that "[p]romissory estoppel and contract are separate and distinct causes of action. Accordingly, the . . . argument that a general verdict on the promissory estoppel cause of action precludes the contract action is without merit."[169] The court did not decide whether a promissory estoppel action can validly be asserted in a *Small I* case. However, the implied recognition of the doctrine may expand the theories of recovery available to plaintiffs and open up various avenues of equitable relief.

The use of promissory estoppel to rebut the at-will presumption would not contradict the underlying theory of *Small I*. According to the court in *Toth v. Square D Co.*,[170] *Small I* did not intend to create a new cause of action.[171] Allowing the admission of handbooks, policies, and oral statements as evidence in a promissory estoppel case is consistent with *Small I* because promissory estoppel is a recognized cause of action in South Carolina.[172]

VIII. CONCLUSION

At first glance the rules of law set forth in the *Small* decisions appear unremarkable. However, two views that would lead to much different results exist on the theory and impact of *Small I*.

Small I may actually be as limited as it first appears. The employer's exposure may be limited to outward manifestations of policy that have the appearance of a binding obligation. If true, employers have the adequate means to protect themselves by using effective disclaimers. If courts continue to read *Small I* narrowly, then very few cases should arise.

Alternatively, the *Small I* court's contractual analysis can be viewed as a springboard that may be used to imply additional contractual theories of recovery. Promissory estoppel and breach of the covenant of good faith and fair dealing are established causes of action in South Carolina and would neatly fit into the *Small I* framework. A close examination of activity in other jurisdictions supports this view. The potential for increased employer exposure therefore exists.

Acceptance of promissory estoppel and breach of the covenant of

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169. *Id.* at 7, 393 S.E.2d at 179 (citing Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985)). However, the court implied that its reasoning was based on the employer's failure to argue that a cause of action for promissory estoppel in the employment context does not exist.

170. 298 S.C. 6, 377 S.E.2d 584 (1989) (per curiam).

171. *Id.* at 9, 377 S.E.2d at 586.

172. Higgins Constr. Co. v. Southern Bell Tel. & Tel. Co., 276 S.C. 663, 281 S.E.2d 469 (1981).

good faith and fair dealing would increase the employer's exposure to litigation because the range of activity that a disgruntled employee could challenge would be greatly expanded. Additionally, predictability of outcome would be reduced because the courts would abandon established rules of employment law. Thus, more litigation would result.

These concerns are counterbalanced, however, by the policy behind *Small I*. The *Small I* court was concerned that illusory manifestations of policy would result in the increased chance of unfair surprise for employees. The application of established contract law should prevent this from occurring or at least provide employees with a remedy. However, this same policy concern also could defeat the expansion of recovery theories to include estoppel and implied covenants because those outcomes are equally unpredictable.

Brian Murphy