Fordham Urban Law Journal

Volume 20 | Number 2 Article 5

1993

Can You Have Your Cake And Eat It Too? Ratification of Releases of ADEA Claims

Lisa M. Imbrogno
Fordham University School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

 Part of the Labor and Employment Law Commons

Recommended Citation
Lisa M. Imbrogno, *Can You Have Your Cake And Eat It Too? Ratification of Releases of ADEA Claims*, 20 Fordham Urb. L.J. 311 (1993).
Available at: https://ir.lawnet.fordham.edu/ulj/vol20/iss2/5

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CAN YOU HAVE YOUR CAKE AND EAT IT TOO? RATIFICATION OF RELEASES OF ADEA CLAIMS

I. Introduction

Suppose a sixty-year-old employee is terminated after more than twenty-five years of service and is given two options by his or her employer upon termination: accept the standard severance plan traditionally offered to departing employees, or obtain a substantially larger severance package, which includes additional weeks of severance pay, insurance benefits, accrued vacation pay and several other benefits not included in the standard plan. In exchange for the more extensive plan, however, the employee would be required to sign an agreement releasing the employer from all claims existing prior to the release, specifically age discrimination claims. If the employee takes the more attractive financial package and subsequently determines that he or she was the victim of age discrimination, questions arise as to whether the release was binding and whether, if not initially binding, the release becomes binding if the employee retains the benefits of the contract.[1]

This scenario is familiar to many older American workers. The recent economic recession, combined with an aging workforce, has created a serious problem for both employers and their graying workforce. It has been predicted that by the year 2000, the number of Americans over age fifty-five will increase by 15%.[2] Nearly fifty million workers aged forty and older were employed in 1991, and this number is expected to rise as the older population increases.[3] Troubled economic conditions exacerbate the problem, as acts of employment discrimination occur more frequently in a sluggish economy.[4] With more and more people being laid off and terminated, the pool of available workers grows, giving corporations the opportunity to "pick and choose" in compiling their workforce, firing the employees they have and replacing them with people who are more desirable for sev-

1. These facts are based on Grillet v. Sears, Roebuck & Co., 927 F.2d 217, 218 (5th Cir. 1991).

2. *See* David Pryor, *New Law Battles Age Discrimination*, TRIAL, Apr. 1991, at 30 n.1.

3. Randall Samborn, *Age Suits Allowed to Proceed; Keeping Severance OK'd*, NAT'L L. J., Sept. 21, 1992, at 3.

4. Diane E. Lewis, *As Economy Sours, Work Bias Complaints are Reported to Soar*, BOSTON GLOBE, May 27, 1991, at 8.

eral reasons, some of which are discriminatory.[5] A common example occurs when employers replace their older, more expensive workers with younger employees who will work at lower salaries.

As acts of employment discrimination become more frequent, charges of such discrimination substantially increase.[6] Workers are more likely to file employment discrimination complaints when jobs are lost during an economic slump.[7] The Equal Employment Opportunity Commission ("EEOC") reported that the number of age bias claims rose 20% to 17,449 in 1991, after having dropped the previous four years.[8] Increased litigiousness may result in part from the anger and frustration experienced by terminated employees as they search unsuccessfully for employment in a sluggish job market. An employee who has since found new employment is more likely to put past discrimination behind him or her than a person who remains unemployed.[9]

The Age Discrimination in Employment Act ("ADEA")[10] was enacted by Congress to combat age discrimination against workers forty years of age and over.[11] Since its enactment, the ADEA has undergone a continuous process of evolution, in which several issues have emerged to define the Act and its provisions. This Note focuses on one issue that has arisen out of the ADEA — employers' use of waivers through which employees agree to release employers from any age discrimination claims in exchange for additional severance pay and benefits.[12] Specifically, this Note analyzes the most recent contro-

---

5. *Id.*

6. Lewis, *supra* note 4, at 8 (employment discrimination cases rise ten times faster than all other federal lawsuits during an economic downturn).

7. *Id.*

8. Linda Grant, *Fired at Fifty; Older Workers Feeling the Sting of Recession*, L.A. TIMES, Sept. 20, 1992, at D1.

9. Deborah L. Jacobs, *You're Outta Here; When Employees Have to be Cut, Pulling the Switch Gently and Properly Will Keep Costly Litigation at Bay*, ADVERTISING AGE, Apr. 29, 1991, at 26. Litigation against one's prior employer can appear quite appealing when one hears stories of successful age bias plaintiffs winning six-figure judgments against their employers. *See* Jamie Beckett, *Jump in Job Bias Suits Expected*, S.F. CHRON., Aug. 10, 1992, at C1 (Jury awards $27 million to a 65-year-old man who charged a subsidiary of Consolidated Freightways with age discrimination, one of the largest verdicts ever in an age discrimination suit).

10. 29 U.S.C. §§ 621-634 (1988 & Supp. 1992).

11. *Id.* §§ 621, 631(a).

12. The terms "waiver" and "release" have distinct contractual definitions. A "waiver" is "the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." BLACK'S LAW DICTIONARY 1580 (6th ed. 1991). A "release," however, is "a writing or an oral statement manifesting an intention to discharge another from an existing or an asserted duty." *Id.* at 1289; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 284(1) (1981) ("A release is

versy concerning waivers: whether an employee who signs a release of claims against his employer in exchange for additional severance pay and benefits ratifies an otherwise invalid release by retaining the severance pay and benefits.[13] Part II of this Note briefly explores the federal age discrimination law. Part III traces the issue of validity of ADEA claim waivers by examining the judicial and legislative treatment of this issue. Part IV discusses the current division among the courts over whether employee ratification of an ADEA waiver is a valid defense available to an employer. This Note concludes by proposing that an employee's failure to immediately tender back[14] the benefits received for signing an invalid release should not constitute a per se ratification of the invalid release.

II. Background: The Age Discrimination in Employment Act

The ADEA was a product of the explosion of civil rights legislation in the 1960s.[15] Although Title VII of the Civil Rights Act of 1964 ("Title VII")[16] omitted age as a class protected from discrimination, it included a provision which directed the Secretary of Labor to make a "full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and on individuals affected."[17]

Responding to Title VII's mandate, the Secretary of Labor issued a report in 1965 from which the ADEA evolved.[18] The report determined that many employers had adopted arbitrary, unfounded age

---

a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition.").

The courts and Congress fail to see any meaningful distinction between these two terms in the context of the ADEA. These terms are therefore used interchangeably to refer to an employee's forbearance of the right to bring an action under the ADEA. This Note adopts this approach.

13. Such ratification would preclude the employee from raising an ADEA claim against his employer, even if the release he signed was statutorily invalid. *See infra* notes 119-27 and accompanying text.

14. For the purposes of this Note, the "tender back requirement" refers to the concept that an employee who has received additional severance pay benefits in exchange for his release of ADEA claims should be required to tender back the additional severance pay to the employer as a condition to allowing the employee to sue the employer on an ADEA claim. *See infra* Part IV.

15. *See* JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1 (2d ed. 1990). Pertinent civil rights legislation of the era which preceded the ADEA includes the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the Voting Rights Act.

16. 42 U.S.C. § 2000e-2000e-17 (1988 & Supp. 1992).

17. Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964)(superseded by § 10 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 10, 86 Stat. 111 (1972)).

18. *See* KALET, *supra* note 15, at 3.

limits, based wholly upon stereotypes,[19] which had an adverse effect on older workers. The report described a twofold detriment to the nation from age discrimination. Financially, arbitrary age discrimination deprives the nation of the productive labor of millions of individuals and substantially increases unemployment insurance and social security benefits to be paid.[20] Socially, it inflicts economic and psychological injury upon its victims.[21]

In 1967, Congress enacted the ADEA "to promote employment of older persons based on ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age in employment."[22] The Act proscribes discrimination by employers on the basis of age against individuals over age forty and covers all stages of the employment process.[23] The ADEA's prohibitions[24] cover pri-

---

19. *See* Robert E. Boehmer, *The Age Discrimination in Employment Act — Reductions in Force as America Grays*, 28 AM. BUS. L.J., 379, 381 (1990). Some common stereotypes about older workers are that they do not want to work, cannot adapt to technological change, are less productive than their younger counterparts, miss work more frequently due to illness, and suffer an unusual incidence of memory lapse and mental problems. These stereotypes are not simply unfounded, they are generally incorrect. *See* Guy Halverson, *Older Workers Shine in Study of Performance*, CHRISTIAN SCI. MONITOR, May 24, 1991, at 9. The Commonwealth Fund, a private national philanthropy, performed a study reviewing the work habits of older employees. The study found that older workers have very flexible work habits, are easy to train, are more successful in attracting business, and have lower turnover and absenteeism rates than their younger counterparts. *Id.*

20. KALET, *supra* note 15, at 2; *see* Boehmer, *supra* note 19, at 387.

21. KALET, *supra* note 15, at 2.

22. 29 U.S.C. § 621(b) (1988 & Supp. 1992). The Act provides, in relevant part:

§ 621. Congressional statement of findings and purpose.

(a) The Congress hereby finds and declares that

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relevant to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age in employment.

23. 29 U.S.C. § 623(a)(1), 631(a) (1988 & Supp. 1992); *see also* 29 C.F.R. § 1625.2

vate sector employers, labor organizations, employment agencies, and government employers.[25]

The ADEA developed as a "hybrid" of two previously enacted Acts — Title VII of the Civil Rights Act of 1964[26] and the Fair Labor Standards Act of 1938 ("FLSA").[27] Title VII provided the enforcement scheme for the ADEA; the FLSA added the remedial devices.[28] The EEOC is the federal agency responsible for the administrative supervision and enforcement of the ADEA.[29]

To state an ADEA claim, the ADEA plaintiff must establish a prima facie case of age discrimination.[30] The employer can then as-

---

(1992) ("It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over.").

24. The ADEA's prohibitions are contained in § 623(a), which provides:

> It shall be unlawful for an employer —
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1988 & Supp. 1992). The Act also prohibits "retaliation," discrimination against an employee because the employee "has opposed any practice made unlawful" by the ADEA, or because the employee has filed a charge or "participated in any manner" in an investigation, proceeding, or litigation involving the ADEA. *Id.* § 623(d).

25. 29 U.S.C. § 623 (1988 & Supp. 1992). When the ADEA was first enacted, its protections extended exclusively to individuals between 40 and 65 years old who were employed in the private sector. Subsequent amendments have extended the coverage to government employees, and have removed the upper age limit. *See* KALET, *supra* note 15, at 3; 3A ARTHUR LARSON AND LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 98-10, at 21-1 (1992). Although the ADEA covers federal employees, there are certain procedural and substantive differences in the ADEA's application to members of this group. 29 U.S.C. § 633a.

26. 42 U.S.C. § 2000e-2000e-17 (1988 & Supp. 1992).

27. 29 U.S.C. §§ 201-219 (1988).

28. KALET, *supra* note 15, at 2-3.

29. 29 U.S.C. § 626(a) (1988 & Supp. 1992). The ADEA was originally supervised and enforced by the Wage and Hour Administration of the United States Department of Labor. In 1978, President Carter submitted a plan pursuant to the Reorganization Act of 1977, Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), which transferred this authority from the Department of Labor to the EEOC. The EEOC's Regulations on Enforcement of the ADEA are codified at 29 C.F.R. §§ 1625-1627 (1992).

30. *See* KALET, *supra* note 15, at 67, 74-77; DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 98-103 (1989). The Supreme Court set forth requirements for establishing a prima facie case of employment discrimination in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (racial discrimination). The Court held that the plaintiff must initially establish a prima facie case of discrimination by showing (1) that he is a member of a minority group; (2) that he applied and was qualified for a job for which the employer

sert one of four defenses[31] against the charge.[32] Section 4(f) of the Act states that it is not unlawful for any employer to take any action otherwise prohibited: (1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; (2) where the differentiation is based on reasonable factors other than age; (3) where such practices involve an employee in a workplace in a foreign country, and compliance with the Act would cause the employer to violate the laws of the country in which such workplace is located; (4) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of the Act; or (5) to discharge or otherwise discipline an individual for good cause.[33]

III. The First Hurdle: Validity of ADEA Releases and the "Knowing and Voluntary" Standard[34]

In addition to the defenses listed above, employers have attempted to shield themselves from ADEA liability through use of the waiver and release defense.[35] This section describes the manner in which ADEA claim waivers are used and discusses the validity of these waivers as determined under current law.

In order to avoid the expense and inconvenience of ADEA litigation, an employer may choose to offer an employee additional severance pay and benefits during the employee's exit interview, provided that the employee agrees to sign a waiver of all ADEA claims he might have against the employer. Employers have consistently relied on these waivers as an affirmative defense to an employee's charges of age discrimination.

---

was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that the employer kept the position open and actively sought applicants with plaintiff's qualifications subsequent to rejecting the plaintiff. *Id.* at 802. If the plaintiff is successful in proving a prima facie case, the burden shifts to the employer to show "some legitimate, nondiscriminatory reason" for his actions against the plaintiff. *Id.* The plaintiff is then allowed the opportunity to show that the employer's articulated reason for his actions was mere pretext for discrimination. *Id.* at 804; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

31. 29 U.S.C. § 623(f) (1988 & Supp. 1992).

32. *See* KALET, *supra* note 15, at 78-80.

33. 29 U.S.C. § 623(f) (1988 & Supp. 1992). *See* KALET, *supra* note 15, at 88-104. Business or economic necessity may also be a defense available to employers, though it is not specifically provided for in the text of the ADEA. *Id.* at 79-80. This defense should not be confused with the "Reasonable Factors Other than Age" (RFOA) defense which is provided for in the Act at 29 U.S.C. § 623(f)(1) (1988 & Supp. 1992).

34. For a thorough discussion of the validity of ADEA waivers, see Mary Elizabeth Metz, Note, *Waivers Under the Age Discrimination in Employment Act*, 59 U.M.K.C. L. Rev. 351 (1991).

35. *See infra* notes 65-84 and accompanying text.

The text of the ADEA does not give any guidance as to the use or validity of ADEA claim waivers and releases. In general, a release of an employment discrimination claim is valid only if it is "knowing" and "voluntary."[36] Since the ADEA's enactment in 1967, courts have been confronted with questions concerning the application of this standard to releases of ADEA claims. In response, there has been a great deal of activity in the legislative and judicial branches of government to attempt to determine whether an employee can waive his claims under the ADEA and, if so, under what conditions.

A. Title VII, FLSA and the EEOC — Setting the Stage for ADEA Waivers

Since the ADEA is silent on the waiver issue, courts have frequently turned to the Fair Labor Standards Act ("FLSA")[37] and Title VII of the Civil Rights Act of 1964[38] for guidance.

The Supreme Court dealt with the waiver validity issue in the context of Title VII rights in *Alexander v. Gardner-Denver Co.*[39] Title VII prohibits discrimination in employment with respect to race, color, religion, sex or national origin.[40] In *Alexander*, the Court held that a waiver given as part of a settlement of an actual claim under the civil rights statute would be valid, provided that the employee's consent to the waiver of rights as settlement was knowing and voluntary.[41] The Court held that this ruling did not apply, however, to waivers of *prospective* Title VII claims, ruling that such waivers would be per se invalid.[42] Courts have consistently used *Alexander*'s reasoning to uphold waivers of accrued Title VII claims.[43]

The Supreme Court has taken a different view in dealing with waivers of rights under the FLSA.[44] The FLSA established a federal mini-

36. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974) (waiver of Title VII claims).

37. 29 U.S.C. §§ 201-219 (1988).

38. 42 U.S.C. § 2000e-2000e-17 (1988 & Supp. 1992).

39. 415 U.S. 36 (1974).

40. 42 U.S.C. § 2000e-2(a)(1) (1988).

41. *Alexander*, 415 U.S. at 51-52 & n.15.

42. *Id.* at 51.

43. *See, e.g.*, Stroman v. West Coast Grocery Co., 884 F.2d 458 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990) (employee's work experience and education level, coupled with the unambiguous language of releases of "all claims" was sufficient to constitute a knowing and voluntary release of Title VII rights; employee was sophisticated enough to know that "all claims" included all legal claims); Pilon v. University of Minn., 710 F.2d 466 (8th Cir. 1983) (waiver of claims under Title VII satisfied the knowing and voluntary standard because employee was represented by an attorney throughout negotiations).

44. 29 U.S.C. §§ 201-219 (1988).

mum wage,[45] mandated overtime pay,[46] and established maximum hour requirements for businesses engaged in interstate commerce.[47] Violations of the statute entitle the aggrieved employee to back pay and overtime pay.[48] The text of the FLSA is silent, however, on the issue of waivers of FLSA claims.

The Supreme Court addressed the issue of validity of FLSA waivers in *Brooklyn Savings Bank v. O'Neil*[49] and *D.A. Schulte, Inc. v. Gangi*.[50] In *O'Neil*, the Court considered the fundamental policy behind the FLSA and the legislative history of the Act and held that, in the absence of a bona fide dispute between the parties over liability, an employee's written waiver of his right to liquidated damages under the FLSA was unenforceable.[51] The Court found that the purpose of the FLSA was to "aid the unprotected, unorganized and lowest paid of the nation's working population"[52] and to remedy the inequality of bargaining power between employers and employees by providing standards of minimum wages and maximum hours. In light of this policy, the Court held that "to allow waiver of statutory wages by agreement would nullify the purposes of the [FLSA]."[53]

Approximately one year later, the Court supplemented the *O'Neil* holding with its decision in *D.A. Schulte, Inc. v. Gangi*.[54] In *Gangi*, the Court held that waivers of liquidated damages given in settlement of a bona fide legal dispute were also invalid under the FLSA.[55] In reaching its conclusion, the Court reiterated the public policy and legislative intent of the FLSA which it had relied upon in *O'Neil*.[56] Specifically, the Court stated: "We think the purpose of the [FLSA], which . . . was to secure for the lowest paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages

45. *Id.* § 206.
46. *Id.* § 207(e)(5).
47. *Id.* § 207(a).
48. *Id.* § 216(b).
49. 324 U.S. 697 (1945).
50. 328 U.S. 108 (1946).
51. *O'Neil*, 324 U.S. at 713.
52. *Id.* at 706 n.18.
53. *Id.* at 707.
54. 328 U.S. 108 (1946).
55. *Id.* at 115. The Court limited its holding in *Gangi* to bona fide *legal* disputes. The Court did not discuss whether the decision also applied to cases involving bona fide *factual* disputes; however, it did cite a district court case that permitted the use of unsupervised waivers in the presence of a bona fide factual dispute. *Id.* at 115 n.10 (citing Strand v. Garden Valley Tel. Co., 51 F. Supp. 898, 904-05 (D. Minn. 1943)); *but see* Lynn's Food Stores v. United States, 679 F.2d 1350 (11th Cir. 1982) (waivers of bona fide factual disputes invalid under the FLSA).
56. *Gangi*, 328 U.S. at 116.

nor the damages for withholding them are capable of reduction by compromise. . . . Such a compromise thwarts the public policy of minimum wage, promptly paid, embodied in the Wage-Hour Act, by reducing the sum selected by Congress as proper compensation for withholding wages."[57]

Whether unsupervised waivers of ADEA claims should be treated in the same manner as Title VII waivers, and therefore upheld,[58] or as FLSA waivers, thus being invalid,[59] has been a source of great dissension among the courts. Some courts have held that the correspondence between the policies and purposes of the ADEA and Title VII required a finding that waivers are enforceable;[60] other courts have reasoned that in light of *O'Neil* and *Gangi*, Congress' specific incorporation of the FLSA into § 7(b) of the ADEA[61] evidenced its intent to invalidate all unsupervised waivers of ADEA claims.[62]

In 1987, the EEOC attempted to shed light on the issue by promulgating its own rule concerning unsupervised ADEA waivers.[63] The EEOC's policy stated that a release of ADEA rights was enforceable absent EEOC supervision provided that the waiver was knowing and voluntary.[64] Unfortunately, confusion has clouded courts' interpreta-

57. *Id.* The Court did not discuss its prior opinions in *O'Neil* or *Gangi*, however, in its decision that knowing and voluntary Title VII waivers *were* enforceable. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

58. *See supra* notes 39-43 and accompanying text.

59. *See supra* notes 44-57 and accompanying text.

60. *See* Metz, *supra* note 34, at 362 n.90 (citing Vaughn v. Mobil Oil Corp., 708 F. Supp. 595, 602 (S.D.N.Y. 1989) ("employees may release, waive, or discharge their rights under an employment discrimination statute provided that they do so knowingly and voluntarily"); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1045 n.11 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986) ("[the policy of the ADEA] is similar to the policy encouraging settlement of cases concerning rights under Title VII")).

61. 29 U.S.C. § 626(b) (1988 & Supp. 1992).

62. *See* Lorillard v. Pons, 434 U.S. 575 (1978) (Congress, by referring to the FLSA enforcement provisions in enacting the ADEA, was aware of the judicial interpretation of the FLSA); *but see* Bormann v. AT&T Communications, Inc., 875 F.2d 399, 402 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1043 (6th Cir.)(en banc), *cert. denied*, 479 U.S. 850 (1986) (purposes behind ADEA and FLSA are obviously different).

63. 29 C.F.R. §§ 1627.16(c)(1) - (3) (1990).

64. The text of the EEOC's rule in 29 C.F.R. § 1627.16(c) (1990) provided:

> (c)(1) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in section 1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.
>
> (2) When assessing the validity of a waiver agreement, the Commission will

tions of ADEA waivers, despite the EEOC's ruling.

B. Judicial Intervention and the Knowing and Voluntary Standard

In the late 1980s, several courts addressed the issue of whether an unsupervised waiver of ADEA rights was permitted under the Act. Despite the fact that the FLSA, from which the ADEA derives its enforcement powers,[65] has been held to proscribe the use of unsupervised waivers,[66] every circuit court which has examined unsupervised ADEA waivers has held that the waivers are enforceable provided that the employee's consent to the waiver was knowing and voluntary.[67] In analyzing this issue, courts have generally taken one of two approaches[68] in determining whether the knowing and volun-

---

look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

(i) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA; (ii) A reasonable period of time was provided for employee deliberation; (iii) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to be valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to determine whether there was fraud or duress.

(3) No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge to participate in a Commission investigation.

65. 29 U.S.C. § 626(b) (1988 & Supp. 1992).

66. *See supra* notes 44-57 and accompanying text.

67. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *aff'd*, 111 S. Ct. 1647 (1991) (employees may settle ADEA claims against employers without EEOC involvement); *see also* O'Hare v. Global Natural Resources, Inc., 898 F.2d 1015, 1016 (5th Cir. 1990); Bormann v. AT&T Communications, Inc., 875 F.2d 399, 401-02 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); Coventry v. United States Steel Corp., 856 F.2d 514, 517-18 (3d Cir. 1988); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1044 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

68. A third approach is worth mention. The view that waivers of ADEA claims were per se invalid was set forth in Gormin v. Brown-Forman Corp., 744 F. Supp. 1100 (M.D. Fla. 1990). In *Gormin*, the court held that to permit an unsupervised waiver of rights under the ADEA would be contrary to the intent of the Congress that enacted the ADEA. *Id.* at 1107. The court stated that the ADEA "clearly incorporates the FLSA" and since waivers under the FLSA were impermissible, waivers of ADEA claims were also impermissible. *Id.* On appeal, however, the Eleventh Circuit reversed, holding that unsupervised waivers were not per se invalid and would be permitted provided that the waivers were knowing and voluntary. The court remanded the case to the district court to determine whether the totality of the circumstances indicated that the waiver was knowing and voluntary. 963 F.2d 323 (11th Cir. 1992). *See also O'Hare*, 898 F.2d 1016-17 (waivers of ADEA causes of action not void as against public policy); EEOC v. Cos-

tary standard had been satisfied. Some circuits based their decisions on basic principles of contract enforceability.[69] A majority of courts, however, sought to determine the document's validity in light of the totality of the circumstances surrounding its execution.[70]

1. Contract Principles

A number of courts have applied basic contract principles in determining whether an ADEA waiver was knowing and voluntary. The case that best exemplifies this approach is *Runyan v. NCR*.[71] In *Runyan*, the plaintiff was an "experienced labor lawyer"[72] who had read the ADEA release prior to signing it and who knew of the possibility of a discrimination claim.[73] The court held that the waiver was knowing and voluntary, and therefore valid and enforceable. The court based its decision on the plaintiff's prior experience and education, as well as its finding that the language of the release was "clear and concise."[74] The court stated that according to contract principles, if the language of a written agreement is unambiguous, the court should look solely at its plain meaning in interpreting the document.[75] The Sixth Circuit affirmed and upheld the application of "ordinary contract principles" in evaluating ADEA waivers.[76]

This approach was adopted by the Eighth Circuit in *Lancaster v. Buerkle Buick Honda Co.*[77] In *Lancaster*, the court held that since the release agreement was less than two typewritten pages in length,

---

mair, Inc., 821 F.2d 1085, 1090-91 (5th Cir. 1987) (although waiver of right to file a charge with the EEOC would interfere with the public interest and thus be void as against public policy, waiver of individual's ADEA claims was permissible).

69. *See infra* notes 71-78 and accompanying text.

70. *See infra* notes 79-84 and accompanying text.

71. 573 F. Supp. 1454 (S.D. Ohio 1983).

72. *Id.* at 1457.

73. *Id.*

74. *Id.* The court acknowledged that, in some instances, a release may be so broadly worded that an employee would not know he was in fact signing a release. *Id.* at 1462. However, the court clarified this by stating that "if all of the circumstances surrounding the execution of a release indicate the employee knew he had a potential claim and voluntarily settled and released his claim, the employee should not be permitted to avoid the effect of a broadly worded release or waiver over what would, in such a situation, amount to a technicality in its wording." *Id.*

75. *Runyan*, 573 F. Supp. at 1461. According to basic contract law, the plain meaning rule states that if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the "four corners of the instrument without resort to extrinsic evidence." JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 166-67 (3d ed. 1987). There is a great amount of dissention between the courts as well as legal scholars over the prudence of the plain meaning rule in light of the way context and circumstances affect the meaning of the words of a document. *Id.*

76. 787 F.2d 1039, 1044 n.10 (6th Cir.)(en banc), *cert. denied*, 479 U.S. 850 (1986).

77. 809 F.2d 539 (8th Cir. 1987).

was written in clear and simple language, and contained no ultimatums or deadlines, the release was unambiguous and enforceable.[78]

2. *Totality of Circumstances*

A majority of jurisdictions have rejected the use of contract principles in evaluating ADEA waivers in favor of the broader "totality of the circumstances" test. These courts adopted the "totality of the circumstances" test on the ground that the congressional purpose of eliminating discrimination in employment is better served by use of the broader test.[79] In applying the test, courts identify and evaluate various factors that indicate whether a waiver was "knowing" and "willful" and therefore enforceable.[80]

In *Cirillo v. Arco Chemical Co.*,[81] the Third Circuit identified seven factors to be considered in deciding whether a waiver was knowing and voluntary: (1) the clarity and specificity of the release; (2) the employee's education and work experience; (3) the amount of time the employee was given to consider the agreement; (4) whether the employee knew or should have known his rights before signing the release; (5) whether the plaintiff was encouraged to seek, or did in fact seek, the advice of an attorney; (6) whether there was any opportunity for negotiation of the terms; and (7) whether the employee received any additional compensation in consideration for the agreement.[82] The court stated that "the important interests involved" demanded closer scrutiny of ADEA waivers than that applied by the courts using ordinary contract principles.[83] In accordance with this reasoning, many courts subsequently adopted the Third Circuit's "totality of the circumstances" approach in examining ADEA waivers.[84]

---

78. *Id.* at 541. The court also noted that plaintiff admitted that he read the agreement and considered its terms before signing the waiver. *Id.*

79. *See* O'Hare v. Global Natural Resources, Inc., 898 F.2d 1015, 1017 (5th Cir. 1990); Bormann v. AT&T Communications, Inc., 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); Coventry v. United States Steel Corp., 856 F.2d 514, 522-23 (3d Cir. 1988).

80. *Coventry*, 856 F.2d at 518.

81. 862 F.2d 448 (3d Cir. 1988).

82. *Id.* at 451; *see also Coventry*, 856 F.2d at 523; Cook v. Buxton, Inc., 793 F. Supp. 622, 625 (W.D. Pa. 1992) (court also took into consideration that release only comprised four lines of text in a two page document and was not made conspicuous by defendant); EEOC v. American Express Publishing Corp., 681 F. Supp. 216, 219 (S.D.N.Y. 1988).

83. *Cirillo*, 862 F.2d at 451.

84. *See O'Hare*, 898 F.2d at 1017; *Bormann*, 875 F.2d at 403; *Cook*, 793 F. Supp. at 624; Ponzoni v. Kraft Gen. Foods, Inc., 774 F. Supp. 299 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992); Constant v. Continental Tel. Co., 745 F. Supp. 1374 (D. Ill. 1990); Mullen v. New Jersey Steel Corp., 733 F. Supp. 1534 (D.N.J. 1990); Widener v. Arco Oil & Gas Co., 717 F. Supp. 1211 (N.D. Tex. 1989).

C. An Attempt at Resolution - The Older Workers Benefit Protection Act of 1990

On October 16, 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA")[85] to provide by statute that waivers that meet certain threshold requirements, and are "knowing and voluntary" when executed, will be deemed valid and enforceable in the absence of EEOC supervision.[86] The OWBPA was passed as an amendment to the ADEA designed to clarify several of the ADEA's provisions.[87]

In enacting the OWBPA, Congress abandoned its attempts to mandate EEOC supervision of releases,[88] and allowed unsupervised releases of ADEA claims. In lieu of EEOC supervision, however, the OWBPA calls for "strict interpretation" of its threshold requirements and "careful scrutiny of the complete circumstances" in which the waiver was executed to ensure the protection of those individuals covered by the Act.[89] The OWBPA also departed from the enforcement requirements of the FLSA,[90] by stating that agency supervision of waivers was not required.[91]

The OWBPA states that an individual may not waive any ADEA right unless the waiver is knowing and voluntary.[92] In determining whether the knowing and voluntary standard has been satisfied, the

85. Pub. L. No. 101-433, Title II, 104 Stat. 978 (1990) (codified at 29 U.S.C. §§ 621-634 (Supp. 1992)).

86. S. REP. No. 263, 101st Cong., 2nd Sess. 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537 [hereinafter OWBPA Legislative History].

87. This Note deals with Title II of the OWBPA, which sets forth new requirements for effective federal ADEA waivers and releases. Although not discussed in this Note, Title I of the OWBPA is an equally important addition to age discrimination law. The OWBPA is often referred to as the "Betts bill" because a major purpose behind the enactment of the OWBPA was to overturn the U.S. Supreme Court's decision in Employment Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989), which held that the ADEA applied to employee benefits programs only in very limited circumstances. The *Betts* decision severely hindered any age discrimination challenges by employees against employee benefit programs as violative of the ADEA. Title I of the OWBPA is devoted to the issue raised in *Betts*, namely whether an employer can treat older workers differently when fashioning a severance pay package in conjunction with a reduction in force. Title I prohibits age discrimination in the provision of employee benefits.

88. The Senate Committee on Labor and Human Resources had previously presented Congress with the Age Discrimination in Employment Waiver Protection Act of 1989 in an attempt to set certain guidelines for waivers of ADEA claims and to officially charge the EEOC with supervision of such waivers. S.54, 101st Cong., 1st Sess., 135 CONG. REC. S356 (daily ed. Jan. 25, 1989); H.R. 1432, 101st Cong., 1st Sess., 135 CONG. REC., H697 (daily ed. Mar. 15, 1989).

89. OWBPA Legislative History, *supra* note 86, at 1537.

90. *Id.*

91. *Id.*; *see also supra* notes 44-57 and accompanying text.

92. 29 U.S.C. § 626(f) (Supp. 1992).

Act sets forth several criteria[93] for determining whether (1) the waiving party genuinely intended and understood the waiver, and (2) the action was taken in the absence of fraud, duress, coercion, or mistake of material fact.[94]

In the case of an individual separation agreement,[95] the OWBPA provides that the waiver will not be considered knowing and voluntary unless seven minimum requirements are satisfied. First, the waiver must be in the form of an agreement between the individual and the employer written in language calculated to be understood by the waiving party, or by "the average individual eligible to participate."[96] Second, the waiver must specifically refer to rights or claims under the ADEA.[97] Third, the waiver must not apply to any prospective claims or rights which may arise after the date on which the waiver is executed.[98] Fourth, the individual employee may "waive rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled."[99] Fifth, the

93. The drafters of the OWBPA specifically rejected the approach used in Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 482 U.S. 928 (1987), and supported the approach taken in Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988) in developing the criteria set forth as threshold requirements in the OWBPA. *See* OWBPA Legislative History, *supra* note 86, at 1537; *see also supra* notes 81-84 and accompanying text.

94. OWBPA Legislative History, *supra* note 86 at 1537. Prior case law in this area is also helpful in making this determination. *See, e.g.*, EEOC v. American Express Publishing Corp., 681 F. Supp. 216, 219 (S.D.N.Y. 1988) (plaintiff's claim that he "was in dire financial situation, since [he] was the sole support of a family of six and [he] was one month behind in [his] mortgage and car payments" did not provide grounds for avoiding the release); *accord* Reed v. SmithKline Beckman Corp., 569 F. Supp. 672, 675 (E.D. Pa. 1983) (plaintiff's claim that she was under "economic pressure to support herself and [her] son" was insufficient to support duress argument).

95. Individual separation agreements involve dealings between the employer and an individual employee. The OWBPA distinguishes such agreements from group terminations and reductions in force, which are subject to additional requirements under the OWBPA. For a more complete discussion of group termination programs and reductions in force under the OWBPA, see *infra* note 104 and accompanying text.

96. 29 U.S.C. § 626(f)(1)(A) (Supp. 1992).

97. *Id.* § 626(f)(1)(B).

98. *Id.* § 626(f)(1)(C).

99. *Id.* § 626(f)(1)(D). This requirement comports with the basic concept of consideration in the law of contracts. Generally, an agreement or contract is not binding unless there is consideration for the agreement. Consideration is found when some legal detriment has been bargained for by the promisor and exchanged by the promisee in return for the promise of the promisor. Applying this logic to the issue of agreements to waive ADEA claims, the employer (promisor) bargains with the employee (promisee) for the employee's waiver of ADEA rights (legal detriment) in exchange for the employer's promise to give the employee additional severance pay. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 189 (3d ed. 1987). Note that in order for the consideration to be valid, the promisor must promise to do something that he is not legally obligated to do. This is known in the law of contracts as the "pre-existing duty"

individual must be advised in writing to consult with an attorney prior to executing the agreement.[100] Sixth, the employee must be given a period of at least twenty-one days within which to consider the agreement.[101] Seventh, the employee must be given the right to revoke the agreement within at least seven days after signing the waiver.[102] The agreement will not become effective until the revocation period has expired.[103]

If the waiver is part of a group termination program or reduction in force,[104] the drafters of the OWBPA felt that additional protections were necessary to ensure that employees would be able to make informed decisions before waiving their ADEA rights.[105] Therefore, in group termination and reduction in force situations, waiver agreements must satisfy certain requirements in addition to those applica-

---

rule. Therefore, if the employer normally pays X amount of severance pay to exiting employees who are not asked to sign a waiver, the employer must offer the waiving employee an amount greater than X in order for there to be consideration for the waiver. *Id.* at 204-05.

100. 29 U.S.C. § 626(f)(1)(E) (Supp. 1992). This requirement does not mean that an employee must *in fact* consult a lawyer or that the employer must provide legal counsel for the employee; it simply mandates that the employee be advised to seek legal advice before executing the agreement. *See* Cirillo v. Arco Chem. Co., 862 F.2d 448, 454 (3d Cir. 1988) (most important consideration is whether consultation with a lawyer was encouraged, not whether counsel was actually obtained).

101. 29 U.S.C. § 626(f)(1)(F)(i) (Supp. 1992). The only requirement set forth in this 21-day waiting period is that the employee be given an option to consider the agreement for 21 days before signing, not that an employee may not sign until the waiting period has expired. However, it may be prudent for the employer to allow the full 21 days to pass even if the employee is willing to waive the waiting period in order to avoid later controversy concerning whether the employee knowingly and voluntarily waived the waiting period. *See* Douglas L. Williams, *The Older Worker's Benefit Protection Act of 1990*, R 176 ALI-ABA 961, at 3-4 (1990) [hereinafter *Older Workers*].

102. 29 U.S.C. § 626(f)(1)(G) (Supp.1992).

103. *Id.* The OWBPA does not give guidance as to how revocation should be handled, i.e., telephone call, written letter, etc. For now it seems that it is within the employer's discretion to determine how to handle such revocation. *See Older Workers*, *supra* note 101, at 3.

104. A reduction in force (RIF) is any reduction by an employer of a number of employees in its total workforce, usually done for economic reasons. *See* Boehmer, *supra* note 19, at 383. The definition of a "group termination program" is less clear. The OWBPA does not state a numerical guide for distinguishing an individual separation agreement from a group termination program. It has been suggested that the safest approach for employers to take is to treat any agreement in which more than one employee is involved as a group termination that should comply with the applicable additional requirements of the OWBPA. *See Older Workers*, *supra* note 101, at 3-4; Douglas L. Williams, *Reductions in Force, Early Retirement, and Releases after the OWBPA*, C 588 ALI-ABA 299, at 7 (1992) ("until the law develops and is interpreted by the courts, the conservative approach is to treat all multiple separations as a reduction in force").

105. *See* OWBPA Legislative History, *supra* note 86, at 1539.

ble to individual separation agreements.[106] The additional requirements for group terminations and reductions in force are as follows: (1) the employer must give all affected employees a period of at least forty-five days, an increase from the standard twenty-one days, within which to consider the agreement; (2) the employer is required to provide all affected employees with detailed information describing the group termination program written in a manner calculated to be understood by the average individual eligible to participate. This information must include (A) the class of individuals covered by the program, the program's eligibility requirements and any time limits applicable to the program; (B) the job titles and ages of all persons eligible or selected for the program (similar information must also be provided for those persons not eligible for the program).[107]

The OWBPA states that a waiver may be used to settle an age discrimination charge already filed with the EEOC or an ADEA claim filed with the courts, provided that the waiver satisfies the first five requirements of the OWBPA[108] and the individual is given a "reasonable period of time" to consider the waiver.[109] The OWBPA also provides that, in the event that the validity of a waiver is questioned, the burden of proving that the waiver was knowing and voluntary and that the requirements of the Act were satisfied rests with the party asserting the validity of the waiver — generally, the employer.[110]

Title II of the OWBPA became effective immediately upon President Bush's signing of the Act on October 16, 1990.[111] The framers of

106. For a listing of the minimum requirements of OWBPA, *see supra* notes 92-100 and accompanying text.

107. *See* 29 U.S.C. §§ 626(f)(1)(F), 626(f)(1)(H) (Supp. 1992). The original House version of the OWBPA included two additional requirements for group termination programs which were not included in the enacted version. First, it required that employers notify employees eligible for the program of any adverse action which might occur if the individual declined to participate in the program, and an approximate date when this adverse action would occur. Second, the House version obligated employers to pay eighty percent of the fees and costs for services provided by the employee's attorney in connection with the waiver request, not to exceed ten hours per individual employee at the attorney's regular hourly rate. OWBPA Legislative History, *supra* note 86, at 1539-40. Neither of these requirements appear in the enacted version.

108. *See supra* notes 92-100 and accompanying text.

109. 29 U.S.C. § 626(f)(2) (Supp. 1992). The Act does not allow waivers to be used to interfere with the EEOC's rights and responsibilities to enforce the ADEA, nor does it allow interference with the protected right of any employee to file a charge or participate in an investigation conducted by the EEOC. *Id.* § 626(f)(4).

110. *Id.* § 626(f)(3).

111. OWBPA Legislative History, *supra* note 86, at 1541. The provisions of Title II do not apply retroactively to any waiver signed prior to the OWBPA's effective date. Title I of the Act followed a different effective date. *Id.*

the OWBPA intended that the Act would "offer legal protections to those employees who otherwise might have been quietly and unknowingly manipulated or coerced into waiving their statutory rights."[112] The OWBPA also effectively resolved the issue of whether waivers of ADEA claims should be enforced according to the provisions of Title VII or the FLSA.[113] By adopting the "knowing and voluntary" standard, the OWBPA adopted the approach taken by Title VII and is within the enforcement provisions of Title VII.[114] One issue which remains to be resolved after the OWBPA, however, is what role, if any, the doctrine of ratification will play in the area of ADEA waivers.

IV. The New Hurdle: Ratification of Releases and the Tender-Back Requirement

In recent years, employers have turned with increasing frequency to the doctrine of ratification as a defense to charges of age discrimination filed by employees who had previously signed waivers of ADEA claims. Use of this defense has become the subject of a heated controversy between employers and employees, as well as between the Federal Courts of Appeals. If the ratification defense is successfully applied in the context of ADEA waivers, an invalid waiver can be made valid from the first instance if the employee has, by words or conduct, adopted the terms and conditions of the waiver.[115] This result would be the same whether or not the waiver complied with the requirements of the OWBPA because no investigation into whether or not the waiver met OWBPA's requirements would be necessary.[116] This defense is extremely appealing to employers who are faced with the restrictive threshold requirements of the OWBPA.

Courts have taken two approaches in dealing with the application of the ratification defense to invalid ADEA waivers. Some courts have permitted use of the ratification defense based on fundamental contractual principles.[117] Others have rejected ratification in light of public policy considerations.[118] The following sections explain the

112. *Id.* at 1544.

113. *See supra* notes 37-64 and accompanying text.

114. *See* Metz, *supra* note 34, at 373.

115. For a more complete discussion of the ratification doctrine, see *infra* notes 119-27 and accompanying text.

116. *But see* Collins v. Outboard Marine Corp., No. 91-C4313, 1992 U.S. Dist. LEXIS 12375 at *12 (N.D. Ill. Aug. 17, 1992) (OWBPA deficiencies of release may be per se bar to ratification).

117. *See infra* notes 128-46 and accompanying text.

118. *See infra* notes 147-81 and accompanying text.

underlying concepts of the ratification defense and analyze the different approaches that the courts have taken in dealing with this issue.

A. The Ratification Defense and the Tender Back Requirement

According to the law of contracts, ratification is "the act of adopting or confirming a previous act which without ratification would not be an enforceable contractual obligation."[119] If ratification occurs, the obligation becomes binding as if it was valid and enforceable from the first instance.[120] The theory of ratification is based on the premise that the ratifying party has full knowledge of any facts which would make the contract voidable, yet intentionally accepts and retains the benefits received under the contract.[121] Thus, it is said that one "cannot at the same time assail the contract and retain its fruits."[122]

To rescind a contract[123] and avoid ratification, two requirements must be met: (1) the party seeking rescission must rescind promptly after learning all of the material facts which would entitle him to rescission;[124] and (2) the party must restore to the other party any and all benefits which he received under the contract, so that the party seeking rescission does not reclaim what he has parted with, and at the same time retain what he has received in the transaction.[125] The

119. BLACK'S LAW DICTIONARY 1261-62 (6th ed. 1991); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 380 (1981).

120. BLACK'S LAW DICTIONARY 1261-62 (6th ed. 1991).

121. *See* RESTATEMENT (SECOND) OF CONTRACTS § 380 (1981); HENRY CAMPBELL BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS § 595, at 1448 (1916) [hereinafter BLACK'S TREATISE]. In order for the ratification to be valid, the party must have full knowledge of all the material facts. *Id.* § 397, at 1030; *Id.* § 610, at 1474.

122. BLACK'S TREATISE, *supra* note 121, at 1448.

123. When a contract is rescinded, each party agrees to discharge the other party from all remaining duties of performance existing under the contract. RESTATEMENT (SECOND) OF CONTRACTS § 283 (1981).

124. BLACK'S TREATISE, *supra* note 121, § 396, at 1028; *Id.* § 617, at 1486-88; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 381 (1981). The Restatement states that the party seeking to rescind the contract must manifest this intention to the other party within a "reasonable time." *Id.* § 381(2). The following circumstances are considered significant in determining what is a "reasonable time":

> (a) the extent to which the delay enabled or might have enabled the party with the power of avoidance to speculate at the other party's risk;
> (b) the extent to which the delay resulted in or might have resulted in justifiable reliance by the other party or by third persons;
> (c) the extent to the which the ground for avoidance was the result of any fault by either party; and
> (d) the extent to which the other party's conduct contributed to the delay.

Id. § 381(3).

125. *See* RESTATEMENT (SECOND) OF CONTRACTS § 384(1) cmt. a (1981); BLACK'S TREATISE, *supra* note 121, § 396, at 1028; *Id.* § 617, at 1486-88.

second of these two requirements, return to the status quo ante, is an essential factor of rescission; therefore, it is necessary that the rescinding party offer or tender the benefits received to the other party.[126] However, a failure to tender the benefits received is not necessarily fatal. When, for example, a party seeking rescission spends a large part of the consideration received before realizing that the contract under which he received the consideration was voidable, it would be unjust to preclude the party from suing on his cause of action simply because he is unable to restore the full amount.[127] The theory of ratification and the requirements of the doctrine have become a major source of controversy in the context of ADEA waivers.

B. The Contract Principles Argument

Some circuits have utilized basic contractual principles when confronted with the ratification defense in challenges to ADEA waivers. In *O'Shea v. Commercial Credit Corp.*,[128] the plaintiff was told, after twenty-seven years of employment with the company, that her position with the company had been terminated.[129] The plaintiff was handed a form that stated, in relevant part, that she released the employer from any claims which she might have against it in exchange for certain severance benefits.[130] The U.S. Court of Appeals for the Fourth Circuit analyzed the circumstances surrounding the release and determined that O'Shea's decision to sign the release was "voluntary, deliberate, and informed" and therefore valid.[131] The court went on to state that even if the release was invalid, the plaintiff's subsequent acceptance of the severance pay constituted a ratification

126. *Id.* § 616, at 1482-83. In this way, the parties are each restored to the positions which they occupied immediately before the making of the contract. *Id.*

127. BLACK'S TREATISE, *supra* note 121, § 396, at 1029-30. Black suggests that "substantial justice may be done" by allowing the party to tender back as much of the consideration as he is able provided that the balance is reduced from any judgment which he obtains through the lawsuit, or that the full amount of the consideration is credited to the defendant at trial or deducted from the judgment recovered. *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981) (if the court can assure the required return of consideration in connection with the relief it grants, it is not necessary to have a prior offer or tender).

128. 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

129. *Id.* at 359.

130. *Id.* The benefits that were offered to O'Shea under the agreement included: (1) normal base pay for twenty-eight days following her termination; (2) all unused, accrued vacation through the last day worked; (3) twenty-seven weeks severance pay; and (4) a "determination" that she would be on unpaid leave of absence until a certain date so that she could elect early retirement benefits as well as certain insurance advantages. *Id.* at 359-60.

131. *Id.* at 362.

of the agreement.[132] The court based its decision on "ordinary contract principles," which state that "retention of the benefits of a voidable contract may constitute ratification."[133] The court rejected the plaintiff's argument that she did not intend to ratify the agreement by accepting the severance pay.[134]

One month later, the Fifth Circuit took the identical position in *Grillet v. Sears Roebuck & Co.*[135] The plaintiff in *Grillet* was a sixty-year-old Sears employee who was told, after twenty-six years as a personnel representative, that her position (as well as all positions comparable to hers) was being eliminated.[136] Grillet was given an option — she could either accept ten weeks of severance pay, which totalled approximately $9,000, or she could obtain fifty weeks worth of severance pay by signing a release waiving all claims she might have had against Sears.[137] Grillet chose the $45,000 option and signed the release.[138] One week later, Grillet learned that three younger employees in her department had been offered new assignments. Grillet continued to accept the severance pay entitled her under the release and eventually filed charges of age discrimination one year after her termination, claiming that she had signed the release under duress and in reliance on a misrepresentation.[139] Sears moved for summary judgment, claiming that even if a factual issue existed as to the validity of the release, Grillet had ratified the agreement by accepting and retain-

132. *Id. Accord* Cumberland & Ohio Co. v. First Am. Nat'l Bank, 936 F.2d. 846, 850 (6th Cir.), *cert. denied*, 112 S. Ct. 878 (1992) (releasor who retains consideration after learning that waiver and release is voidable effectively ratifies the release); Widener v. Arco Oil Co., 717 F. Supp. 1211, 1217 (N.D. Tex. 1989) (plaintiffs ratified their ADEA releases by failing to tender to defendant the return of the consideration received and retaining the benefits); Seward v. B.O.C. Div. of General Motors Corp., 805 F. Supp 623, 633 (N.D. Ill. 1992) (plaintiff ratified release by failing to tender back or refuse benefits received after he became aware of alleged fraud and duress).

133. *O'Shea*, 930 F.2d at 362.

134. *Id.* The court pointed to a letter that the plaintiff had mailed to a U.S. Senator in which she stated that she "purposely avoided [filing an] age discrimination action" until she received her severance payment. The court stated that "[c]learly, O'Shea sought to have it both ways," a result which the ratification doctrine was designed to prevent. *Id.* at 363.

135. 927 F.2d 217 (5th Cir. 1991).

136. *Id.* at 218.

137. *Id.* There were two release forms from which Grillet could choose. One form stated that the employee declined the opportunity to consult with an attorney; the other indicated that the employee had obtained legal advice. Grillet ultimately signed the form indicating that she declined the opportunity of legal counsel. Grillet admitted that she was familiar with the forms because, as personnel representative, she had presented other employees facing termination with the same forms. *Id.*

138. *Id.*

139. *Id.*

ing the money she received in consideration for the release.[140] In response, Grillet offered to tender back the money she received in consideration of the release if Sears would agree to reinstate her with backpay.[141] This tender back offer was made more than two years after her termination.[142]

The Fifth Circuit held that Grillet had ratified the release by retaining the benefits under her release after learning that the release was voidable.[143] To support its decision, the court recited the contract principle that "a party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract."[144] The court also rejected Grillet's argument that her tender back offer precluded use of the ratification defense. Since Grillet had conditioned her offer upon reinstatement to her former position with backpay, and since she had not made the offer until two years after learning of the alleged misrepresentation, the court stated that the offer was "too little, too late,"[145] and ruled that Grillet should have offered unconditionally to tender back the consideration she received shortly after she learned that the younger department members had not been terminated.[146]

C. The Public Policy Argument

A number of courts have rejected the position taken by the Fourth and Fifth Circuits in *O'Shea* and *Grillet* in favor of the position that the ratification defense is contrary to the public policy of the

140. *Grillet*, 927 F.2d at 218.

141. *Id.*

142. *Id.* At the District Court level, Sears' summary judgment motion was granted on other grounds; however, the District Court held that Grillet had not ratified the release because she had tendered the full amount of the consideration plus interest. *Id.*

143. *Id.* at 221; *see* Ponzoni v. Kraft Gen. Foods, Inc., 774 F. Supp. 299, 316-17 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992) (ADEA plaintiff ratified his release by retaining the $135,000 consideration with knowledge of the bargain).

144. *Grillet*, 927 F.2d at 220 (citations omitted); *see also Widener*, 717 F. Supp. at 1217 (although employees' release of employment discrimination claims was not knowingly and voluntarily signed, defendant was entitled to summary judgment because employees had ratified the releases by keeping the benefits); Haslach v. Security Pac. Bank Or., 779 F. Supp. 489, 493 (D. Or. 1991) ("[Plaintiff] cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it").

145. *Grillet*, 927 F.2d at 220. The court based its decision on the theory that a person seeking rescission of a contract must attempt to restore the status quo ante, thus returning the parties to the positions they held just prior to the agreement. Prior to signing the release, Grillet was entitled only to ten weeks severance pay and the right to sue Sears, not to reinstatement and back pay. *Id.*

146. *Id.*

ADEA.[147] The Court of Appeals for the Eleventh Circuit adopted this approach in *Forbus v. Sears, Roebuck & Co.*[148]

In *Forbus*, three Sears employees were informed that the Retail Distribution Center at which they were employed was being converted into a Home Delivery Center and that, as a result, the number of available jobs would be substantially reduced.[149] Sears offered the employees an enhanced severance incentive package to encourage voluntary severance and early retirement.[150] The employees accepted the package despite the fact that it was conditioned upon their signing ADEA releases.[151] Thereafter, the employees discovered that Sears' restructuring plans had been changed and more jobs were available than had previously been anticipated.[152] When the employees asked for their jobs back, however, they were informed that no jobs were available.[153] The employees filed suit against Sears without tendering back the severance payments.[154] Sears invoked the ratification defense, insisting that the plaintiffs "cannot be allowed to retain the severance benefits at the same time they deny Sears the benefit of the bargain by maintaining [the] lawsuit."[155]

The Eleventh Circuit held that ADEA plaintiffs were not required to tender the consideration they had received "as a condition prerequisite to challenging these releases" and that the employees' "retention of their benefits during the pendency of this lawsuit does not constitute ratification of those releases."[156]

In its holding, the court relied substantially on the reasoning employed by an Illinois District Court in *Isaacs v. Caterpillar*.[157] In *Isaacs*, the court held that the tender back of consideration was not required of employees seeking to challenge their ADEA releases.[158]

147. *See* Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); Oberg v. Allied Van Lines, No. 91-C6576, 1992 WL 211506 (N.D. Ill. Aug. 26, 1992); Collins v. Outboard Marine Corp., No. 91-C4313, 1992 U.S. Dist. LEXIS 12375 (N.D. Ill. Aug. 17, 1992); Isaacs v. Caterpillar, 765 F. Supp. 1359 (C.D. Ill. 1991).

148. *Forbus*, 958 F.2d at 1041.

149. *Id.* at 1038.

150. *Id.*

151. *Id.*

152. *Forbus*, 958 F.2d at 1038.

153. *Id.* The court did not indicate whether younger employees had been returned to their jobs.

154. *Id.* The employees instead offered to offset any judgment awarded in the suit by the amount of benefits received. *Id.*

155. *Id.* at 1040.

156. *Id.* at 1041.

157. 765 F. Supp. 1359 (C.D. Ill. 1991).

158. *Id.* at 1371.

The *Isaacs* court compared ADEA releases to releases of claims under the Federal Employers Liability Act ("FELA").[159] The court looked to *Hogue v. Southern Ry. Co.*,[160] in which the Supreme Court held that, as a matter of federal law, tender back of consideration was not a prerequisite to the bringing of a FELA suit; rather, the court held that any sum paid by the employer to the plaintiff should be deducted from any award determined to be due to the injured employee.[161] The *Isaacs* court stated that as FELA and the ADEA were both "remedial statutes intended to protect employees," the reasoning used in *Hogue* should apply to both.[162] The court concluded that the tender requirement would interfere with the remedial purposes of the ADEA because it "will likely make it impossible for most employees to challenge ADEA releases — a result that Congress plainly does not want."[163]

The Eleventh Circuit adopted this reasoning in *Forbus*. Specifically, the court explained that:

> [t]he court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers. . . .[164]

The *Forbus* court adopted the public policy considerations outlined in *Isaacs* as support for its holding that the tender back of consideration was not a prerequisite to the maintenance of ADEA plaintiffs' lawsuits.[165] These factors were: (1) the crippling effect that a tender requirement would have on ADEA challenges; (2) recognition of

159. 45 U.S.C. § 51 (1988).

160. 390 U.S. 516 (1968).

161. *Id.* at 518.

162. *Isaacs*, 765 F. Supp. at 1366-67. The court also pointed out several court cases which had rejected the tender back requirement for challenges to releases of claims under other statutes. *Id.* at 1366 (citing Smith v. Pinell, 597 F.2d 994, 996 (5th Cir. 1979) (Jones Act); Wahsner v. American Motors Sales Corp., 597 F. Supp. 991, 998 (E.D. Pa. 1984) (Automobile Dealer's Day in Court Act); Taxin v. Food Fair Stores, Inc., 197 F. Supp 827, 830-31 (E.D. Pa. 1961) (Sherman Antitrust Act)).

163. *Isaacs*, 765 F. Supp. at 1367. The court also acknowledged that the *Grillet* and *O'Shea* decisions involved pre-OWBPA releases. The court suggested, however, that "[the] law of tender . . . is presumably the same after the OWBPA as it was before it. If there was a tender requirement before the OWBPA, then there still is one; if there was not, then there still is not." *Id.* at 1369.

164. *Forbus*, 958 F.2d at 1041.

165. *Id.*

Congress' "continuing preoccupation" with ADEA waivers, and that "a tender requirement will likely make it impossible for most employees to challenge ADEA releases — a result that Congress plainly does not want;" (3) a tender requirement would "as a practical matter undo the waiver provisions of the Older Workers Benefit Protection Act;" and (4) a tender requirement would cause "insoluble practical problems."[166]

In *Oberg v. Allied Van Lines*,[167] an Illinois District Court followed the reasoning of *Forbus* and *Isaacs*, and held that the plaintiffs' failure to tender back the consideration provided by the employer did not constitute ratification of the invalid releases.[168] The court acknowledged that it was the first court to analyze the ratification issue in light of the OWBPA's "more stringent requirements."[169] The court considered the text and legislative history of the OWBPA in holding that "a general tender requirement would interfere with both the [OWBPA]'s specific requirements and its general purpose concerning waivers of ADEA liability."[170] The court stated that if it found that an employee could ratify an OWBPA-defective release, it would be holding that the employee could waive ADEA rights by ratifying a release that was not knowing and voluntary when signed — a result which was neither provided for by the OWBPA nor contemplated by Congress.[171]

Enforcing a tender requirement would also "encourage employers to ignore the specific provisions of the [OWBPA] in hopes that by the time their former employees discover that the releases are voidable, they will be in no economic position to tender back or refuse to accept the special severance benefits afforded to them."[172] For these reasons, the court held that waiver by ratification was *precluded* by the stringent requirements of the OWBPA; alternatively, ratification could not occur unless the employer had disclosed all of the information required under the OWBPA.[173] Allied complained that the decision was unjust because plaintiffs were receiving a "double dip" by retaining both the benefits of the release agreement and the right to sue.[174] The court, however, responded that there was no "double dip" be-

166. *Id.*; *Isaacs*, 765 F. Supp. at 1367.
167. No. 91-C6576, 1992 WL 211506 (N.D. Ill. Aug. 26, 1992).
168. *Id.* at *1.
169. *Id.* at *5. *O'Shea*, *Grillet*, and *Forbus* all dealt with pre-OWBPA waivers.
170. *Id.*
171. *Id.* at *6.
172. *Oberg*, No. 91-C6576, 1992 WL 211506, at *6.
173. *Id.*
174. *Id.* at *7.

cause "Allied got what it bargained for — a faulty release for special severance benefits."[175] The court also provided that the money paid by Allied to the plaintiffs for consideration for the releases would be used to offset any damages awarded to the plaintiffs.[176]

The effect of the OWBPA on the ratification issue was also considered in *Collins v. Outboard Marine Corp.*[177] In *Collins*, the sixty year-old plaintiff signed a separation agreement releasing the employer from "all claims . . . arising out of the performance or the termination of their employment relationship" in exchange for six months severance pay, totaling $51,650.[178] The court held that since the release did not satisfy several OWBPA requirements, it could not constitute a legal waiver of an ADEA claim.[179] The court also rejected the defendant's ratification defense, stating that since the agreement did not expressly include a release of ADEA claims, there was "no evidence that the separation benefits plaintiff received were in exchange for a release of his ADEA claim."[180] Therefore, the court held that the ADEA claims were beyond the scope of the release and that even if the technical deficiencies of the release did not constitute a "*per se* bar to ratification," there was no evidence that the plaintiff "intended to relinquish any potential claim under the ADEA when he executed the release."[181]

D. What is the Solution? A Proposal for Compromise

The confusion surrounding the use of ratification as a defense to challenges to ADEA waivers is evidenced by the division in the courts that the issue has created. Whether ratification is a permissible defense to such claims is an issue in need of resolution. If it is allowed, the defense is a powerful tool for employers fighting ADEA claims. When applied in the context of ADEA waivers, the ratification defense operates harshly because it precludes any relief to plaintiffs with valid ADEA claims who are unable to tender back the enhanced benefits they received as consideration for the agreement.[182] Through ratification, employers are able to avoid compliance with the protective requirements of the OWBPA,[183] leaving many employees

175. *Id.*
176. *Id.*
177. No. 91-C4313, 1992 U.S. Dist. LEXIS 12375 (N.D. Ill. Aug. 17, 1992).
178. *Id.* at *4.
179. *Id.* at *10.
180. *Id.* at *13.
181. *Id.* at *12.
182. *See supra* Parts IV.B-C.
183. *Id.*

subject to manipulation and coercion in unknowingly waiving their ADEA rights. Congress specifically intended that the OWBPA would eliminate these injustices.[184]

However, any proposal to curb use of the ratification defense must consider the highly litigious nature of our society. Releases of potential claims are important tools used by employers to protect against burdensome litigation. Employers utilize releases mainly as a shield from the expensive attorney fees arising out of litigation, not merely as protection against the potential awards that may be levied against the employer if a plaintiff is successful in an ADEA suit. Where employers give value in return for a release and the employee retains that value, the employer's interests should not be disregarded. In light of these conflicting interests, this Note proposes that a compromise of the two approaches currently used by the federal courts should be adopted to resolve the issue of ratification of ADEA waivers.

Ratification should not operate as a per se bar to recovery for ADEA plaintiffs who have signed releases, nor should it be completely barred from use as a defense to ADEA waivers. The ratification defense should be limited to those situations where the plaintiff's intentions underlying her acceptance and retention of the benefits indicate that she truly wants "to have [her] cake and eat it too."[185] The important issues involved demand a closer look at all aspects of the waiver,[186] as well as the circumstances surrounding the employee's retention of benefits.

First, if it is clear that the plaintiff intended to ratify the agreement by accepting the benefits in spite of her knowledge that the release was voidable and waited until she had received all the benefits of the release before filing suit against the employer, ratification would be a proper defense.[187] In such a case where the plaintiff is clearly acting in bad faith and abusing her ADEA rights for monetary benefit, the

184. OWBPA Legislative History, *supra* note 86, at 1544 ("[OBWPA] offers legal protections to those employees who otherwise might have been quietly and unknowingly manipulated or coerced into waiving their statutory rights.").

185. Seward v. B.O.C. Div. of General Motors Corp., 805 F. Supp. 623, 633 (N.D. Ill. 1992).

186. *See* OWBPA Legislative History, *supra* note 86, at 1544.

187. Such a determination would require an inquiry into the subjective intent of the releasor; a task which some courts may not wish to undertake. *See Seward*, 805 F. Supp. at 630 (citation omitted) ("inquir[y] into [the plaintiff's] subjective intent at the signing of the [r]elease . . . would unduly hamper the voluntary settlement of ADEA claims by enabling a plaintiff to avoid the consequences of the plain language of a release by an examination of the plaintiff's state of mind."). The court could also look at whether the employee received the benefits in a lump-sum payment before a basis for an ADEA suit was determined or in separate installments after determining grounds for litigation existed. *See, e.g.*, Sperry v. Post Publishing Co., 773 F. Supp. 1557, 1558 (D. Conn. 1991)

employer should be allowed to prove ratification.[188] This approach is consistent with the policies underlying both the ADEA and OWBPA — protecting unknowing and outmatched employees.[189] If the employee knowingly accepts the benefits despite awareness of a potential ADEA claim, that employee should not be entitled to additional protection under the Act.

Second, there should not be a stringent tender requirement as a condition precedent to challenging an ADEA release. As stated by the court in *Isaacs*, "a judge-made [tender] requirement would eliminate the ability of most employees to challenge releases obtained in violation of the OWBPA."[190] In many situations, it will be burdensome (if not impossible) for an employee to tender back the consideration received for a waiver before filing suit.

For example, suppose a 45-year-old employee received a $30,000 lump sum benefit package in consideration for his ADEA release, which he used to support himself and his family until he found new employment. Pursuant to the tender requirement, this employee would be required to repay the $30,000 before challenging his release in court. As the court noted in *Isaacs*, "[Retired employees] are unlikely to be able to put their severance payments aside for future 'tenders', or to be able to come up with the money to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements."[191] A stringent tender requirement would have a "crippling" effect on employee challenges of ADEA waivers because it would be impossible for most employees to challenge their releases — "a result that Congress plainly does not want."[192]

Third, a stringent tender requirement would undermine both the specific requirements and the general purpose of the OWBPA. The OWBPA clearly states that "[a]n individual may not waive any right

(employee's retention of a lump sum severance payment did not constitute ratification of the voidable release).

188. *See, e.g., Seward*, 805 F. Supp. at 633 (releasor was aware of questions concerning the validity of the waiver yet continued to accept the benefits of the bargain). In this situation, the court could look at the education and experience of the plaintiff to determine whether the plaintiff intentionally ratified the release. This approach had previously been used in analyzing the validity of ADEA waivers. *See, e.g., Runyan*, 573 F. Supp. at 1457 (plaintiff was a well-educated labor lawyer with years of experience in employment discrimination); *Lancaster*, 809 F.2d at 541 (plaintiff was a management employee with experience in business and contracts).

189. *See* OWBPA Legislative History, *supra* note 86, at 1544.

190. Isaacs v. Caterpillar, 765 F. Supp. 1359, 1369 (C.D. Ill. 1991).

191. *Id.* at 1367; *see also Forbus*, 958 F.2d at 1041.

192. *Id.*

or claim under this Act unless the waiver is knowing and voluntary,"[193] and sets forth several threshold requirements to ensure this result. As stated by the court in *Oberg*, "a tender requirement would encourage employers to ignore the specific provisions of the [OWBPA] in hopes that by the time their former employees discover that the releases that they signed are voidable, they will be in no economic position to tender back or refuse to accept the special severance benefits accorded them."[194] Since enforcement of a tender requirement in light of the recent passage of the OWBPA would "as a practical matter undo the Act's waiver provisions,"[195] it seems unlikely that Congress intended such a result.[196]

Rather than impose a strict tender requirement, ADEA plaintiffs should be allowed to delay the tender back of consideration by deducting the amount of the benefits received from any judgment awarded in the ADEA lawsuit. A delayed tender back requirement would avoid the injustice of precluding an employee from challenging his ADEA waiver simply because he is unable to restore the full amount of the consideration.[197] The consideration would be returned to the employer in connection with the relief granted by the court at trial.[198]

Arguably, a delayed tender requirement is burdensome upon employers. There is no guarantee that the employee will be successful at trial; therefore, there may not be a judgment from which the consideration can be deducted. Employers can argue that it is unfair to assume that the employee will win and that a delayed tender requirement "strips" them of the consideration they paid to obtain a release defense.[199] However, the mere fact that the employee files a lawsuit and the court determines that the release is invalid does not

193. 29 U.S.C. § 626(f) (Supp. 1992).

194. *Oberg*, No. 91-C6576, 1992 WL 211506, at *6.

195. *Id.* (citing Isaacs v. Caterpillar, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991)).

196. *See Oberg*, No. 91-C6576, 1992 WL 211506 at *6 ("to conclude that an individual may waive her ADEA rights by ratifying a waiver that was not knowing and voluntary when signed because it did not fulfill the [OWBPA's] specific requirements . . . [i]s not provided for by the language of the Act and was not contemplated by Congress"); *cf.* OWBPA Legislative History, *supra* note 86, at 1537 ("[t]he Committee intends that the requirements of title II be strictly interpreted to protect those individuals covered by the [OWBPA]").

197. This theory is supported by contract law and has been adopted by many courts in dealing with ADEA waivers. *See supra* note 127 and accompanying text; *see also Isaacs*, 765 F. Supp. at 1372-73, (arguing that ordinary contract principles required this result); *Oberg*, No. 91-C6576, 1992 WL 211506, at *7.

198. *See* RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981).

199. *Isaacs*, 765 F. Supp. at 1374.

"strip" the employer of the consideration paid.[200] The employer can file a counterclaim in the employee's ADEA suit for the amount of the consideration paid to the employee.[201] There is a risk that the employee may be a judgment-proof plaintiff; however, the employer has assumed this risk by using a faulty release and by not complying with the law.

Employers may also argue that eliminating the tender requirement is unfair because it allows plaintiffs to use their severance benefits to fund their litigation.[202] Retaining a strict tender requirement, however, would make it practically impossible for plaintiffs to challenge ADEA releases, thus promoting the egregious employer conduct that the ADEA and OWBPA were intended to abolish.[203]

Adopting a delayed tender approach does not give plaintiffs a "double dip" or allow them "to have their cake and eat it too."[204] Rather, it provides the most equitable result possible for all involved in light of the strong public policy underlying the ADEA and the OWBPA.

D. Unresolved Issues

One related issue that courts will have to consider in deciding whether to recognize the ratification defense in the context of ADEA waivers is whether employers can sue their employees for breach of contract claims if the employees file ADEA suits in violation of their signed releases of such claims. This issue was presented in *Widener v. Arco Oil Co.*,[205] in which the court ordered a jury trial to determine the extent of damages that the defendant employer incurred as a result of employees' challenges to their ADEA waivers.[206] The court held that the plaintiffs had breached the express terms of the release by filing their ADEA claims, and stated that "[b]ecause the purpose of entering the release is to avoid litigation, the damages a releasor

200. *Id.*

201. *See* FED. R. CIV. P. 13(a).

202. *See* Samborn, *supra* note 3, at 3.

203. *Isaacs*, 765 F. Supp. at 1367. The court stated that under a strict tender requirement, no matter how egregiously the defendant violated the OWBPA the plaintiff would be precluded from any legal recourse unless he could somehow come up with the money he had received. *Id.*

204. The *Isaacs* court stated that to require the plaintiff to tender the consideration received would actually unjustly enrich the *employer*, because the employer would have the returned consideration as well as the termination of the plaintiff, while the plaintiff would lose both the consideration received and his employment, leaving him with nothing more than his rescinded release. *Isaacs*, 765 F. Supp. at 1367.

205. 717 F. Supp. 1211 (N.D. Tex. 1989).

206. *Id.* at 1218.

suffers when the release is breached are its costs and attorneys' fees incurred in defending against the wrongfully brought action."[207] The circuit courts have yet to deal with this issue. Employers may argue that their breach of contract suits against employees should be permitted so that employers can recover the damages incurred as a result of the employee's breach of a valid contract. Permitting such suits, however, will augment the "crippling effect" on the filing of ADEA claims.[208] An employee who challenges his ADEA waiver would risk losing his enhanced severance pay, which may be his only source of income, and would also be in danger of a breach of contract counterclaim brought by the employer to recover attorney fees. These risks will discourage employees from litigating valid age discrimination claims.

Another issue of concern to the courts is what position the parties should be returned to in order to restore the status quo ante. If the waiver is held invalid, the parties should be returned to the position they would have been in but for the invalid waiver.[209] It is unclear, however, what exactly the status quo ante is. Should the parties be returned to a stage in which the employee has been terminated and has an unencumbered right to sue the employer for age discrimination? Such a restoration may not be comforting to an employee who is left jobless, without substantial severance pay, and armed only with the right to sue on an ADEA claim that has no guarantee of success. In the alternative, should the employee be reinstated with backpay to the position held prior to signing the release? Such a remedy would operate harshly on employers who may have acted in good faith in using releases as part of the termination process. Moreover, this remedy would constitute a *de facto* adjudication of the ADEA claim in the employee's favor, even though the court has merely found the *waiver* of the claim invalid. The implications for the parties under either alternative are clear.

V. Conclusion

> Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination . . . .

207. *Id.* at 1217; *but see* Haslach v. Security Pac. Bank Or., 779 F. Supp. 489, 494 (D. Or. 1991) (citing Gruver v. Midas Int'l Corp., 925 F.2d 280, 284 (9th Cir. 1991) (majority view under American rule is that "attorney's fees are not awardable when there has been a breach of a release . . . unless attorneys' fees were provided for in that release;" ADEA release did not provide for attorneys' fees)).

208. *See supra* note 164 and accompanying text.

209. *See supra* notes 125-26 and accompanying text.

> [T]his is a serious — and senseless — loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families. Opportunity must be opened to the many Americans over 45 who are qualified and willing to work. We must end arbitrary age limits on hiring.[210]

Although nearly thirty years have passed since President Lyndon B. Johnson recited those words and triggered the drafting of the ADEA, age discrimination in employment continues to be a pervasive evil in this nation. As more and more members of the "baby boom generation" enter their forties and become part of the ADEA's protected age group, and as employees become more aware of their rights and more willing to sue their employers, the ADEA promises to play an even larger role in employment law in the United States.[211]

The issue of ratification of ADEA waivers is an important one which is in dire need of resolution. Until the controversy is settled, courts will continue to clash over whether ratification is an acceptable defense to employees' challenges of ADEA waivers. In resolving this issue, the most important consideration should be achieving a result which serves the interests of justice and fairness in light of the rights and obligations on both sides. This Note has proposed that the ratification defense should continue to be available to employers, but should be limited to those situations where the employee knowingly and voluntarily waives his ADEA rights, yet seeks to "have his cake and eat it too" by keeping the added severance benefits while retaining the right to sue his employer. In other cases, retention by the plaintiff of severance benefits would not ratify an invalid release and thus would not be a bar to an age discrimination lawsuit.

Until the situation is resolved by the courts or the legislature, however, employers and employees must each do their part to comply with the laws and avail themselves of the protections afforded them. Employers should practice strict compliance with the requirements of the OWBPA, and should consider offering additional services to exiting employees to aid them in their job search.[212] Employees, on the other hand, should seek counsel before signing a waiver, and should ensure that they are fully aware of their rights under the ADEA. If each side works at becoming more responsible in their actions, waiv-

210. 113 CONG. REC. 34743-44 (1967) (Representative Kelly quoting President Lyndon B. Johnson, Older Americans Message to Congress (Jan. 23, 1967)).

211. *See* O'MEARA, *supra* note 30, at 3.

212. *See, e.g.*, Jacobs, *supra* note 9, at 26 (employer offered in-house counseling on job hunting for laid off staff members).

ers can continue to be used as a welcome alternative to litigation under the ADEA.

Lisa M. Imbrogno