

## POST-OWBPA DEVELOPMENTS IN THE LAW REGARDING WAIVERS TO ADEA CLAIMS

Litigation involving age discrimination in employment is currently on the rise.<sup>1</sup> Individuals over age forty who have been denied promotions or discharged from their jobs<sup>2</sup> are reacting by filing suits against their employers<sup>3</sup> under the Age Discrimination in Employment Act of 1967 (ADEA).<sup>4</sup> To avoid the expense and burden of ADEA litigation,<sup>5</sup> employers often encourage departing employees to release their prospective ADEA

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1. See, e.g., John F. Dickinson & F. Damon Kitchen, *Employment Discrimination, Annual Eleventh Circuit Survey*, 43 MERCER L. REV. 1125, 1125 (1992). The increased litigation involving age discrimination will arguably continue at least into the next decade as "baby boomers" reach age 40, the minimum age covered by the ADEA. In 1986, 37.8% of the American work force was over the age 40. By the year 2010, individuals over the age 40 will likely make up over half of the work force. BUREAU OF NATIONAL AFFAIRS, *OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS* 6 (1987) [hereinafter *OLDER AMERICANS*]. In 1991, almost 50 million people over age 40 were employed in the United States. Randall Samborn, *Age Suits Allowed to Proceed*, NAT'L L.J., Sept. 21, 1992, at 3, 30 (citing statistics from the U.S. Bureau of Labor Statistics).

2. According to the U.S. Bureau of Labor Statistics, 4 million employees over the age 35 and with at least 3 years experience at their jobs were displaced between 1987 and 1992. *Id.* This statistic does not include employees who chose early retirement. *Id.*

3. For a good discussion of general employee trends regarding the filing of age discrimination suits, see Robert G. Haas, Note, *Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act Criteria to Rest*, 55 GEO. WASH. L. REV. 382, 382 (1987); Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64, 64 (1984).

4. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992). The ADEA, which covers individuals over the age of 40, *id.* § 631, prohibits discrimination on account of age in several terms and conditions of employment, including hiring, job retention, and compensation. *Id.* § 623.

5. The Equal Employment Opportunity Commission (EEOC) statistics show that, independent of settled claims, employers paid a total of \$89.6 million between the years 1983 and 1986 as a result of litigation. *OLDER AMERICANS*, *supra* note 1, at 123. In addition, employers spent approximately \$83.2 million on settlements during that time period. *Id.*

claims in exchange for increased benefits.<sup>6</sup> These benefits are attractive to many older workers, who often have inadequate financial resources to cover their rising expenses.<sup>7</sup>

Because neither the ADEA nor its legislative history address the issue of waivers,<sup>8</sup> courts struggled to find a standard to apply in determining the validity of unsupervised waivers. Most courts held that waivers were valid if their execution met the common-law "knowing and voluntary" standard.<sup>9</sup> In 1990, Congress settled the debate over the validity of releases by amending the ADEA with the Older Workers Benefit Protection Act (OWBPA).<sup>10</sup> In Title II of the OWBPA, Congress recognized the validity of waivers and established strict guidelines for employers to follow in executing waivers.<sup>11</sup>

In the midst of the debate over the validity of waivers, employers developed an argument that would prevent employees from bringing ADEA claims even if the executed release was invalid. Under the "tender/ratification" argument, employers claim that an employee ratifies an otherwise invalid release when the employee brings an ADEA claim without tendering the consideration to the employer.<sup>12</sup> The Fourth and Fifth Circuit

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6. This Note uses the terms "release" and "waiver" interchangeably, consistent with treatment by courts and Congress. Waivers are a common means of resolving potential and actual legal claims. Waivers are commonly used in the employment context to release Title VII and other claims. See Robert J. Aalberts & Eileen P. Kelly, *Waivers Under the ADEA: An Analysis of the Age Discrimination in Employment Waiver Protection Act of 1989*, 40 LAB. L.J. 739, 739 (1989).

According to a 1989 Government Accounting Office (GAO) study, 80 "Fortune 100" companies utilized some sort of exit incentive program between 1979 and 1988, and approximately 28% of them utilized waivers in conjunction with their exit incentive programs. *Id.* at 739-40 (citing U.S. GENERAL ACCOUNTING OFFICE, AGE DISCRIMINATION: USE OF WAIVERS BY LARGE COMPANIES OFFERING EXIT INCENTIVES TO EMPLOYEES (1989)). This figure was a significant increase from the 1984 statistics, which found that 13% of the same companies utilized waivers. *Id.* at 740 (citing *Downsizing Continues Unabated as Worries About the Economy Grow*, WALL ST. J., Aug. 15, 1989, at 1).

7. Amy Wax, Note, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067, 1090 (1986) (discussing the pressure on older workers to accept financial settlements offered by their employers).

8. See *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1041-43 (6th Cir.) (en banc), cert. denied, 479 U.S. 850 (1986).

9. See *infra* notes 22-32 and accompanying text for a discussion of the common-law approach to waivers under the ADEA.

10. Pub. L. No. 101-433, 104 Stat. 978 (1990). Title II of the OWBPA, which governs the validity of waivers, is codified at 29 U.S.C. § 626(f) (Supp. IV 1992).

11. *Id.*; see also *infra* notes 33-49 and accompanying text.

12. See *infra* part II for a discussion of the tender/ratification argument and the relevant cases.

Courts of Appeals were the first to address this argument in the context of age discrimination. Both courts, in decisions prior to the application of the OWBPA, agreed with the employers and precluded the employees from proceeding with their ADEA claims based on the contract doctrine of ratification.<sup>13</sup> The Fifth Circuit in *Wamsley v. Champlin Refining & Chemicals, Inc.*<sup>14</sup> recently affirmed its position, this time in a post-OWBPA decision that discussed why the OWBPA does not effect the court's rejection of a tender requirement.

Other courts have allowed employees to proceed with ADEA claims despite their retention of the consideration. Pre-OWBPA courts that allowed employees to continue with their ADEA claims without tendering the consideration, including the Eleventh Circuit, relied on the policy of the ADEA and its amendments; namely, to protect older workers.<sup>15</sup> Most recently, the Seventh Circuit in *Oberg v. Allied Van Lines*<sup>16</sup> rejected the tender/ratification argument based on the language of the OWBPA.<sup>17</sup>

This Note examines the two approaches courts have taken to the tender/ratification argument. In addition, this Note suggests practical methods to cope with and avoid the tender/ratification issue. Part I examines the historical use of waivers under the ADEA. Part II discusses the federal cases that address the tender/ratification argument. Part III evaluates these approaches and concludes that, although neither argument is entirely persuasive, policy and congressional intent dictate rejection of the tender requirement. Part IV focuses on methods for practitioners to avoid the tender/ratification issue, including adherence to the OWBPA and a suggestion for Congress to allow employers to use an escrow account to maintain the consideration until the statute of limitations expires. Part V discusses other trends in the law regarding age discrimination releases, focusing on the use of covenants not to sue in conjunction with ADEA releases.

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13. See *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), cert. denied, 112 S. Ct. 177 (1991); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). See also *infra* notes 54-69 and accompanying text.

14. 11 F.3d 534 (5th Cir. 1993). See *infra* notes 91-115 and accompanying text for a full discussion of *Wamsley*.

15. See *infra* notes 54-90 and accompanying text for a discussion of these pre-OWBPA cases.

16. 11 F.3d 639 (7th Cir. 1993).

17. According to the court in *Oberg*, Congress has spoken on the issue, and the language of the OWBPA precludes any ratification of an invalid waiver. *Id.* at 683. See *infra* notes 116-23 and accompanying text for a full discussion of *Oberg*.

## I. HISTORY OF ADEA WAIVERS

### A. *Federal Common Law Approach*

Employers often request departing employees to sign releases in exchange for enhanced severance benefits. Releases are used both when individual employees are terminated<sup>18</sup> and when groups of employees are terminated by an employer, usually as part of a reduction in force (RIF) commenced for economic reasons.<sup>19</sup> Regardless of the context in which releases are used, the goal of employers is to avoid the costly litigation of age discrimination claims, whether meritorious or frivolous.<sup>20</sup>

Prior to Congress' 1990 response to the issue,<sup>21</sup> courts questioned whether releases to ADEA claims could be valid without supervision by the Equal Employment Opportunity Commission (EEOC).<sup>22</sup> Courts and scholars held two competing theories regarding the validity of unsupervised waivers. First, advocates of the incorporation theory argued that unsupervised waivers were per se prohibited.<sup>23</sup> These theorists assumed that incorporation by Congress of certain enforcement provisions of the Fair Labor Standards Act (FLSA)<sup>24</sup> into the ADEA indicated that

18. See S. REP. NO. 101-263, 101st Cong., 2d Sess. (1990) (minority views), reprinted in 1990 U.S.C.C.A.N. 1509, 1564 (describing some situations in which releases are used in conjunction with individual termination).

19. See generally *id.* at 1565 (discussing various options for employers faced with a workforce reduction, including involuntary RIFs and voluntary early-out incentive programs).

20. It is important to note that employers may ask departing employees to release ADEA claims regardless of whether the employer violated the ADEA. In other words, the presence of a release should not imply a violation of the law.

For any number of reasons, not all companies require releases, at least in the context of early-out incentive programs. But does that mean, as some have suggested, that employers who seek releases do so because they know they are violating the law? Certainly not. It is not unrealistic, in our view, for a company to at least try to avoid litigation. Even meritless claims, as we all know, can represent a substantial financial burden.

*Id.* at 1565-66.

21. Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. § 626(f) (Supp. IV 1992)).

22. The EEOC oversees compliance with the ADEA. 29 U.S.C. § 626(a) (1988).

23. Advocates of this theory argued that older workers need the same protection from their employers as do those workers covered by the FLSA. See Haas, *supra* note 3, at 391.

24. 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992). The FLSA mandates minimum wages and limits the number of hours employees have to work without overtime compensation.

Congress intended to interpret the two statutes consistently.<sup>25</sup> The FLSA case law consistently holds that wages owed under the FLSA cannot be waived.<sup>26</sup>

Advocates of the second theory argued that unsupervised waivers to ADEA claims were valid if they were “knowing and voluntary,” the standard used to determine the validity of waivers to Title VII claims.<sup>27</sup> Proponents of this theory argued that the goals and the structure of the two statutes — Title VII and the ADEA — are so similar that they should be construed consistently.<sup>28</sup> Because the Supreme Court has upheld waivers under Title VII as long as they are “knowing and voluntary,”<sup>29</sup> consistency requires that the same standard control ADEA waivers.

The Sixth Circuit was the first court of appeals to provide an answer to the question regarding congressional intent and unsupervised ADEA waivers. In *Runyan v. NCR Corp.*,<sup>30</sup> the Sixth Circuit adopted the Title VII approach and upheld an unsupervised release to an ADEA claim. Several courts subsequently adopted the approach taken by the Sixth Circuit.<sup>31</sup> In addition,

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25. The portion of the ADEA giving rise to this argument reads: “The provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures in [FLSA].” 29 U.S.C. § 626(b) (1988).

26. *See, e.g., D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946) (holding that unsupervised releases under the FLSA are only valid when they involve a good faith settlement of bona fide factual disputes, such as the number of hours worked by an employee).

27. Title VII is part of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e (1988 & Supp. IV 1992).

28. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (stating that the ADEA and the Civil Rights Act of 1964 share similar “aims” and “prohibitions”); *see also Aalberts & Kelly, supra* note 6, at 741.

29. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (upholding the use of waivers under Title VII if such waivers were knowing and voluntary).

30. 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986). The *Runyan* decision upholding the release was made by the court *en banc*, and reversed a previous decision by a panel of Sixth Circuit judges in which the court decided that the principles of the FLSA should govern releases under the ADEA. *Runyan v. National Cash Register Corp.*, 759 F.2d 1253 (6th Cir. 1985).

31. *See, e.g., Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 401-02 (2d Cir.), *cert. denied*, 110 S. Ct. 292 (1989); *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988).

In determining whether a release was “knowing and voluntary,” courts considered a variety of factors. Most adopted the “totality of circumstances” standard. The most frequently cited case regarding the appropriate factors to consider is *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989), in which the court articulated seven non-exhaustive factors: (1) the

the EEOC adopted a final regulation in August 1987 that was consistent with *Runyan* in upholding the use of unsupervised waivers to ADEA claims.<sup>32</sup> The *Runyan* case and the EEOC regulation, which both ignored the FLSA incorporation argument, prompted a response by Congress on the issue of ADEA waivers.

### B. Congressional Response: The Older Workers Benefit Protection Act of 1990

In 1990, Congress amended the ADEA with the OWBPA.<sup>33</sup> Title II<sup>34</sup> of the OWBPA codifies *Runyan*<sup>35</sup> by allowing un-

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plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement prior to signing it; (3) the role of the plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; (6) whether the consideration involved exceeded benefits normally received by the plaintiff; and (7) whether an employer encourages or discourages an employee to consult with an attorney, and whether the employee had a fair opportunity to do so. *Id.* at 403; *see also* Coventry v. United States Steel Corp., 856 F.2d 514, 524 (3d Cir. 1988).

The Sixth and the Eighth Circuits, however, elected to apply "ordinary contract principles" to make this determination. *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); *Runyan*, 787 F.2d at 1044 n.10.

32. 52 Fed. Reg. 32,293 (1987) (codified at 29 C.F.R. § 1627). The EEOC decided to address waivers shortly after *Runyan* because that decision did not sufficiently address the issue, and there was a fear that "courts may return to a per se rule against waivers." Aalberts & Kelly, *supra* note 6, at 741-42. However, Congress suspended this regulation in various appropriations bills. *See infra* note 126 and accompanying text.

33. Pub. L. No. 101-433, 104 Stat. 978 (1990). The OWBPA applies to all waivers signed after October 16, 1990. The Act is not retroactive, so those waivers signed prior to the effective date are subject to pre-OWBPA common law. One commentator noted that the OWBPA "can be hailed as further proof of a national consensus against age discrimination." Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1271 (1993).

34. Title II of the OWBPA is codified at 29 U.S.C. § 626(f) (Supp. IV 1992). Title I of the OWBPA requires employers that reduce employee benefits based on age to provide older employees with benefits at least equal to those offered to younger employees. Pub. L. No. 101-433, §§ 101-105, 104 Stat. 978 (1990) (codified at 29 U.S.C. §§ 623, 630(l) (Supp. IV 1992)). This portion of the OWBPA overrules the Supreme Court's decision in *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), which exempted employee benefit plans from ADEA coverage. *See generally* Paul T. Shultz & Douglas J. Tormey, *Congress Response to Betts: the Older Workers Benefit Protection Act of 1990*, 16 EMP. REL. L.J. 533, 533-39 (1991). *See also* Niall A. Paul, *The Older Workers Benefit Protection Act: Forcing a New Look at Early Retirement Incentives and Waivers*, 17 EMP. REL. L.J. 29, 34 (1991).

35. 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986). For a discussion of *Runyan*, *see supra* notes 30-31 and accompanying text.

pervised waivers as long as they are "knowing and voluntary." However, the OWBPA includes numerous restrictions on the use of waivers, which arguably reveal the intent of Congress to make their use unattractive to employers.<sup>36</sup>

The OWBPA established seven basic criteria that employers must meet to make waivers to ADEA claims valid in individual termination situations.<sup>37</sup> First, the waiver must be written in language that an average employee would understand.<sup>38</sup> Second, the waiver must include a specific reference to waiver of claims arising under the ADEA.<sup>39</sup> Third, the waiver cannot include claims that arise after the date the waiver is signed.<sup>40</sup> Fourth,

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36. See Paul, *supra* note 34, at 31. After analyzing the various restrictions and requirements of Title II, Paul concluded that "the waiver provisions are apparently an attempt by Congress to persuade employers not to use them." *Id.* at 30. Another commentator described the effect of Title II of the OWBPA as providing "significant new hoops for [e]mployers to jump through before [ADEA] releases and waivers will be deemed valid." Peter M. Panken, *Older Workers Benefit Protection Act*, ALI-ABA COURSE OF STUDY MATERIALS: EMPLOYEE BENEFITS LITIG. 551 (1991).

The OWBPA placed requirements on waivers to age discrimination claims that are stricter than the common-law requirements regarding waiver of Title VII claims:

Title II of the OWBPA reflects further legislative and executive intent that the release or waiver of age discrimination claims under the ADEA be subject to special standards and scrutiny beyond those judicially developed for race and sex discrimination claims under Title VII.

Harper, *supra* note 33, at 1272.

37. See *infra* note 46 for the necessary elements of waivers used in conjunction with group termination plans.

38. 29 U.S.C. § 626(f)(1)(A) (Supp. IV 1992). Although this criteria appears to be straightforward, there are possible complications involved in interpreting this section. Employers may have difficulty in determining what language an average employee would understand. Paul, *supra* note 34, at 30. In addition, the language of this provision implies that an individual employee who actually understood the waiver may argue that they are not bound by the waiver because an average person would not have understood it. *Id.* at 30-31.

39. 29 U.S.C. § 626(f)(1)(B).

40. *Id.* § 626(f)(1)(C). This is another section that suggests Congress intended to discourage the use of waivers by employers. One commentator suggested that employees can bring subsequent ADEA claims by signing the waiver, accepting an early retirement package, leaving the company, and then reapplying to the same company. Paul, *supra* note 34, at 32. The employer would most likely not rehire the employee, and "the employee would be well on his or her way to creating a prima facie case of age discrimination for being denied a position of employment for which he or she is qualified." *Id.*

Another commentator noted that this section "is somewhat ambiguous, and suggests that waivers signed under the OWBPA may be less comprehensive and less effective than pre-OWBPA waivers." Douglas L. Williams, *RIF's, Early Retirement, and Releases After the OWBPA*, 16 ALI-ABA COURSE MATERIALS J. 87 (Dec. 1991).

the employer must provide consideration in addition to any normal retirement benefit package.<sup>41</sup> Fifth, the employer must advise the employee in writing to consult with an attorney before signing the waiver.<sup>42</sup> Sixth, the employee must be given at least twenty-one days to decide whether to sign the waiver.<sup>43</sup> Seventh, the employee must have the opportunity to revoke the agreement within seven days of its execution.<sup>44</sup>

The OWBPA contains additional restrictions regarding the validity of certain waiver agreements. For example, waivers can be signed in order to settle EEOC charges or suits already filed by the employee.<sup>45</sup> Waivers can be used in connection with group or class early retirement or exit incentive programs, but employers must comply with rigorous criteria in addition to the first seven requirements.<sup>46</sup> The OWBPA specifies that waivers

41. 29 U.S.C. § 626(f)(1)(D).

42. *Id.* § 626(f)(1)(E).

43. *Id.* § 626(f)(1)(F). This 21-day period appears to be optional rather than required. Williams, *supra* note 40, at 97. If the waiver is offered to a group of employees, as in an exit incentive program, then the employer must allow the employees to consider the offer for 45 days. 29 U.S.C. § 626(f)(1)(F)(ii).

One ambiguity in this section is the meaning of "group," which becomes important because the time to consider the waiver for an offer to a group is much longer than for an offer made to an individual. The OWBPA provides no information as to how many employees make up a group, and thus courts could interpret it to mean that an employer must give 45 days to consider anytime the agreement is offered to more than 1 employee. Paul, *supra* note 34, at 31.

44. 29 U.S.C. § 626(f)(1)(G). Because of this requirement, the consideration should not be paid to the employee until the seven-day period has passed. Williams, *supra* note 40, at 97. In addition, the Act is silent on how the revocation is to occur, so employers should work this out with the employee at the time the waiver is signed. *Id.* at 97-98.

45. 29 U.S.C. § 626(f)(2). In order for a waiver of this type to be effective, the employer must comply with the first five criteria required for a normal waiver, and must also give the employee a "reasonable period of time" to consider the settlement. *Id.* § 626(f)(2)(B). Although Congress did not indicate what constitutes a reasonable time period, 21 days is clearly acceptable, while less than 21 days may be sufficient if the employee has an attorney. Panken, *supra* note 36, at 2.

46. The section of the OWBPA regarding waivers used in group plans provides:

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer, (at the commencement of the period specified in subparagraph F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to,

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time

cannot be used to interfere in any way with an employee's right to file a charge with the EEOC.<sup>47</sup> Finally, the OWBPA specifies that the burden of proof is on the employer when asserting the validity of a waiver.<sup>48</sup>

In addition to the restrictions placed on employers in the text of the OWBPA, the legislative history reflects the intent of Congress to limit employers' use of ADEA waivers. Congress believed that the use of waivers without supervision or other regulation could lead to manipulation and coercion of older workers by their employers.<sup>49</sup>

## II. THE TENDER/RATIFICATION ARGUMENT

Congress attempted to answer many of the questions involving waivers of ADEA claims by passing the OWBPA.<sup>50</sup> One issue that was not addressed in the OWBPA involves waivers that are invalid by either common-law or OWBPA standards. Employers have argued that the invalid release is voidable rather than void, and that the employee ratifies the voidable contract by retaining the consideration received in exchange for the release.<sup>51</sup> This argument is not new in contract law,<sup>52</sup> but has just recently been

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limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C. § 626(f)(1)(H).

47. *Id.* § 626(f)(4). Although employees cannot waive their right to file a charge with the EEOC or to participate in an EEOC investigation, a valid waiver prohibits the employee from receiving financial gain from the EEOC action. Williams, *supra* note 40, at 98.

48. 29 U.S.C. § 626(f)(3).

49. The legislative history of the OWBPA states that a "major concern . . . is that early retirees or employees being offered the chance to participate in exit incentive or other group termination programs can effectively be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver." S. REP. No. 79, 101st Cong., 1st Sess. 9 (1989).

50. 29 U.S.C. § 626(f) (Supp. IV 1992). See *infra* part I.B.

51. For a general discussion of the tender/ratification argument and an analysis of the relevant case law, see John P. Furfaro & Maury B. Josephson, *Revocation of Releases*, N.Y. L.J., Aug. 1991, at 3; B. Scott Silverman, *Enforceability of Releases and Arbitration Agreements in Individual Employment Discrimination*, ALI-ABA COURSE OF STUDY MATERIALS: EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS (1992).

52. See, e.g., *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417 (8th Cir. 1985) (finding that plaintiff waived state law claims for fraudulent misrepresentation and breach of contract by refusing to tender benefits received in exchange for signing the release). See also 76 C.J.S. *Release* § 37 ("[A]

applied to claims under the ADEA.<sup>53</sup> Prior to the OWBPA, courts disagreed on how to approach the tender/ratification argument, and the enactment of the OWBPA has not put an end to the controversy.

### A. *Pre-OWBPA Decisions*

Both the Fourth and Fifth Circuits accepted the tender/ratification argument in pre-OWBPA decisions. In *Grillet v. Sears, Roebuck & Co.*,<sup>54</sup> the plaintiff (Grillet) sued her employer (Sears) after discovering that she may have been the victim of age discrimination, although she had released potential ADEA claims in exchange for a financial bonus.<sup>55</sup> Grillet offered to return the bonus if Sears would reinstate her and provide back pay, which Sears refused.<sup>56</sup> The district court found for Grillet.<sup>57</sup> On a motion for reconsideration, Sears asserted the tender/ratification argument, and the issue reached the Fifth Circuit.<sup>58</sup> The court relied on the basic contract principle of ratification and agreed with Sears.<sup>59</sup> The court focused on the need to return

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person who executes a release and afterward seeks to avoid its effect on any ground which will entitle him to avoid it, must ordinarily first restore the status quo by restoring, tendering, or offering to restore what he has received in return for the release.”).

53. Silverman, *supra* note 51, at 1109. *Widener v. ARCO Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989) was apparently the first federal case to consider the tender requirement with respect to ADEA waivers.

54. 927 F.2d 217 (5th Cir. 1991).

55. Sears informed Grillet, age 60 at the time, that the company was eliminating her position due to reorganization. Sears gave Grillet the option of \$9000 severance pay with no release or \$45,000 if she signed a release. Grillet signed the release and took the \$45,000 without consulting an attorney. In signing the release and accepting the consideration, Grillet was aware of her opportunity to meet with an attorney, and declined. Grillet thereafter discovered that Sears had offered to relocate younger employees in her department. Despite this knowledge, Grillet retained and continued to accept her severance pay. *Id.* at 218.

56. Grillet made this offer approximately seven months after she filed suit. This offer was made in conjunction with Grillet's opposition to Sears' motion for summary judgment. *Id.*

57. The district court did not think that the waiver was knowing and voluntary, and held that the refusal to tender did not ratify the waiver. *Id.*

58. *Id.* at 220.

59. The court directed entry of the employer's motion for summary judgment. *Grillet*, 927 F.2d at 220-21. The court noted 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.” *Id.* at 220 (citing *Widener v. ARCO Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989) (citing *Rachesky v. Finklea*, 329 F.2d 606 (4th Cir. 1964))). In addition to *Widener*, the court relied on several non-ADEA cases involving the alleged ratification of a release. *Grillet*, 927 F.2d at 220 (citing *Commonwealth Mortgage Corp.*

both parties to their pre-agreement status<sup>60</sup> and rejected Grillet's tender back offer as "too little, too late."<sup>61</sup> The court concluded that Grillet should have returned the bonus immediately upon learning of possible discrimination<sup>62</sup> and without additional demands.<sup>63</sup>

The Fourth Circuit adopted this same position in *O'Shea v. Commercial Credit Corp.*<sup>64</sup> Although the court determined that the release was valid,<sup>65</sup> the court addressed the tender/ratification

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v. First Nationwide Bank, 873 F.2d 859, 865-66 (5th Cir. 1989) (concerning the sale of a construction loan for a condominium project)); *see also* *Morta v. Korea Ins. Corp. v. First Nationwide Bank*, 840 F.2d 1452 (9th Cir. 1988) (involving a release of claims against an automobile insurer); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417 (8th Cir. 1985) (involving common-law claims of breach of contract, prima facie tort, and fraudulent misrepresentation resulting from a termination of employment); *DiRose v. PK Management Corp.*, 691 F.2d 628 (2d Cir. 1982) (involving a claim by a lessor against a lessee for fraud), *cert. denied*, 461 U.S. 915 (1983).

60. *Grillet*, 927 F.2d at 220. The court said that "[a] party seeking rescission must attempt to restore the *status quo ante* — that is, to return the parties to the positions they held before they entered into the agreement." (citing *United States v. Texarkana Trawlers*, 846 F.2d 297, 304 (5th Cir.), *cert. denied*, 488 U.S. 943 (1988)).

61. *Grillet*, 927 F.2d at 220.

62. *Id.* at 221. The court relied on *Texarkana Trawlers*, 846 F.2d at 305 n.20., which noted that the American common law of contracts requires a party seeking rescission to do so "shortly after discovering the misrepresentation." *Id.* (citing *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178 (5th Cir. 1985)).

63. *Grillet*, 927 F.2d at 221. The court found that Grillet's offer of tender conditioned on her reinstatement violated the principle of *status quo ante* because she was not entitled to reinstatement prior to signing the waiver agreement. Rather, Grillet would have to bring an age discrimination claim first in order to be entitled to her old job. *Id.* (citing *Thorstenson v. ARCO Alaska, Inc.*, 780 P.2d 371, 375 (Alaska 1989) (holding that conditional tender offer does not satisfy tender back requirement)).

64. 930 F.2d 358 (4th Cir. 1991). The plaintiff in *O'Shea* was terminated and offered certain severance benefits in exchange for a release. *Id.* at 360. The employer (Commercial Credit) offered O'Shea normal base salary for an additional month, all unused vacation through the last day worked, 27 weeks of severance pay, and a "determination" that plaintiff would be on an unpaid leave of absence for the first 11 weeks of her absence. *Id.* at 359-60. The final benefit would "bridge" plaintiff until her 55th birthday, and allow her to receive early retirement benefits. *Id.* at 360. According to the court, these additional benefits amounted to \$23,000 worth of consideration in exchange for waiving ADEA claims. *Id.* at 362 n.3. After consulting two attorneys, O'Shea signed the agreement. Both attorneys with whom O'Shea consulted examined the release and told her "that they weren't sure it was legal." According to the court, O'Shea signed the release because she saw no alternatives and could not afford to live without the benefits offered as part of the release. O'Shea thereafter discovered that her age may have been a factor in her termination. *Id.* at 360.

65. *Id.* at 361-62. The court stated that there was no dispute among courts

argument in the alternative and held that the plaintiff's retention of the consideration reflected an intent to ratify the agreement.<sup>66</sup> The court's analysis discussed only basic contract law regarding ratification.<sup>67</sup> The court reprimanded O'Shea, the former employee, as attempting to "have it both ways."<sup>68</sup> In addition to the Fourth and Fifth Circuit Courts of Appeals, several district courts have relied on contractual principles to allow ratification.<sup>69</sup>

Other courts, however, rejected the tender/ratification argument in pre-OWBPA decisions. In a lengthy opinion focusing

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that waivers to ADEA claims would be valid if knowing and voluntary. *Id.* at 361 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (holding that Title VII rights may be waived if the agreement was knowing and voluntary)). The court found that the release was valid under ordinary Maryland contract law because it was "voluntary, deliberate, and informed." *Id.* at 362.

66. *Id.* at 362. The court noted that Commercial Credit would have prevailed on the tender/ratification argument even if the release had been invalid. *Id.*

67. *Id.* at 362. "It is a well-established proposition that the retention of benefits of a voidable contract may constitute ratification." *Id.* (citing *In re Boston Shipyard*, 886 F.2d 451, 455 (1st Cir. 1989); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985)).

68. *O'Shea*, 930 F.2d at 363. O'Shea argued that she accepted the benefits only because she thought that she was entitled to all of those benefits. *Id.* at 362-63. The court dismissed this argument, referring to a letter from O'Shea to Senator Barbara Mikulski, in which O'Shea admitted that she had delayed bringing an ADEA claim until after the receipt of her severance payment. *Id.* at 363. The doctrine of ratification, the court said, was not designed to allow people like O'Shea to "have it both ways." *Id.*

69. *See Seward v. B.O.C. Div. of General Motors Corp.*, 805 F. Supp. 623, 633-34 (N.D. Ill. 1992) (noting that plaintiff "attempted to have his cake and eat it too" by continuing to receive the consideration after he discovered the alleged invalidity of the release); *Haslach v. Security Pacific Bank, Oregon*, 779 F. Supp. 489, 493-94 (D. Or. 1991) (relying on Oregon contract law to decide that a plaintiff who has signed a release must promptly return the consideration before breaking the release) (citing *Amort v. Tupper*, 282 P.2d 660, 663 (Or. 1955)); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075, 1079 (E.D.N.C. 1991) (granting employer's motion for summary judgment based on North Carolina contract law that requires benefits of a release to be tendered prior to avoiding the release) (citing *Presnell v. Liner*, 10 S.E.2d 639, 640 (N.C. 1940)); *Ponzoni v. Kraft General Foods*, 774 F. Supp. 299, 316-17 (D.N.J. 1991) (holding that plaintiff ratified the release by retaining the \$135,000 consideration); *Constant v. Continental Tel. Co. of Ill.*, 745 F. Supp. 1374, 1385 (C.D. Ill. 1990) (noting that although the release in this case was valid, a finding "that the Plaintiff ratified the agreement in this case only provides an additional basis for dismissing Plaintiff's allegations of duress"); *Widener v. ARCO Oil & Gas Co.*, 717 F. Supp. 1211, 1217 (N.D. Tex. 1989) (holding that a party cannot seek to avoid their end of the bargain and at the same time retain the benefits received from the other party) (citing *Rachelsky v. Finklea*, 329 F.2d 606 (4th Cir. 1964)).

on policy concerns, an Illinois district court in *Isaacs v. Caterpillar, Inc.*<sup>70</sup> declined to follow the Fourth and Fifth Circuits.<sup>71</sup> The court instead relied heavily on the Supreme Court's decision in *Hogue v. Southern Railroad Company*.<sup>72</sup> *Hogue* held that a release to a FELA claim signed based on mutual mistake could not bar the employee's subsequent lawsuit on that claim.<sup>73</sup> The *Isaacs* court relied on *Hogue* for the proposition that a tender requirement is a federal question that requires examination of the policy underlying the statute.<sup>74</sup>

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70. 765 F. Supp. 1359 (C.D. Ill. 1991). Other district courts have rejected the tender/ratification argument. See *Pierce v. Atchison, Topeka & Santa Fe Railway Co.*, No. 91-C3776, 1992 WL 368044 (N.D. Ill. Nov. 30, 1992) (distinguishing *Grillet* and *O'Shea* from the facts of this case because the plaintiff here did not learn of the obligation to tender until after filing suit, and because of the plaintiff's inadequate education and sophistication); *Sperry v. Post Publishing Co.*, 773 F. Supp. 1557, 1558 (D. Conn. 1991) (holding that an employee did not ratify a voidable release by keeping the consideration where the employee received all consideration before the ADEA claims were recognized).

In addition, the Eleventh Circuit followed the *Isaacs* court approach in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), cert. denied, 113 S. Ct. 412 (1992). The *Forbus* court found *Hogue* applicable because it could find no reason to restrict its application to FELA claims. *Id.* at 1041. The court found *Isaac's* policy rationale persuasive, noting that a tender back rule would encourage "egregious" behavior by employers. *Id.*

71. *Isaacs* involved a group of 70 former employees of Caterpillar who each signed releases in exchange for extra benefits after electing an early retirement plan. *Isaacs*, 765 F. Supp. at 1362. The benefits included: an additional \$400 per month for a certain period of time or that same sum in lump sum form; full life insurance during the time the \$400 monthly payments were made; increased pension payments intended to reduce the penalty for electing early retirement; and additional payments for plaintiffs who were part of the Marketing Reorganization equal to three times their monthly base salary minus tax. *Id.* at 1363-64. The plaintiffs filed suit under the ADEA and claimed that the releases were not knowing and voluntary. *Id.* at 1364. The plaintiffs never offered to return the consideration received in exchange for signing the release. The employers sought summary judgment, relying on the tender/ratification argument and the decisions in *O'Shea* and *Grillet*. *Id.*

72. 390 U.S. 516 (1968) (per curiam). In *Hogue*, the plaintiff suffered a knee injury while working and signed a release agreement in exchange for \$105. *Id.* at 517. At the time of the release, both parties thought that the knee injury was merely a bruise. *Id.* Subsequent examination revealed more injuries and plaintiff had two operations, one that resulted in the loss of a kneecap. Plaintiff tried to avoid the release on the theory that it had been signed under "mistake of fact of both parties as to the extent of his injuries." *Id.*

73. *Id.* FELA provides a tort compensation system that governs the liability of railroads whose negligence causes injuries to their employees. 45 U.S.C. §§ 51-60 (1988). See generally Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49 (1988).

74. *Isaacs*, 765 F. Supp. at 1366 (citing *Hogue*, 390 U.S. at 517 ("The

The *Isaacs* court found four reasons why a tender requirement is inconsistent with the ADEA's policy.<sup>75</sup> First, a tender requirement would deter meritorious claims.<sup>76</sup> According to the court, *Hogue's* finding of a deterrent effect under FELA applies equally to the ADEA.<sup>77</sup> The court recognized that it would be difficult for retired persons to live without severance payments, and more difficult for employees to return the money as time passed from the point of receipt.<sup>78</sup> Second, the court evaluated congressional intent.<sup>79</sup> According to the court, Congress had been preoccupied with ADEA releases.<sup>80</sup> After suspending the EEOC rule allowing unsupervised releases,<sup>81</sup> Congress severely restricted the use of releases in the OWBPA.<sup>82</sup> The chilling effect on lawsuits that a tender requirement would create is not a result that Congress would want.<sup>83</sup>

Third, the court found that a tender requirement would render the OWBPA useless.<sup>84</sup> An employee could be precluded from bringing a lawsuit under the ADEA despite a release that was executed in gross violation of the OWBPA.<sup>85</sup> Finally, the court

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question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law." (citing *Dice v. Akron, C.&Y.R. Co.*, 342 U.S. 359, 361 (1951)).

75. *Id.* at 1366-67. The court noted generally that both FELA and the ADEA are remedial statutes and both serve to protect employees. *Id.*

76. *Id.* at 1367.

77. *Id.*

78. *Id.* The court noted that Congress has taken statutory measures such as ERISA to protect retired employees, recognizing that they "need all the security they can get." *Id.*

79. The court noted that the "[c]ongressional history is relevant to the tender issue, because *Hogue* instructs federal courts to consider whether a tender requirement would interfere with the remedial purposes of the statute." *Isaacs*, 765 F. Supp. at 1367. Because the tender requirement would severely restrict an employee's access to the remedies under the ADEA, congressional history is relevant in this context. *Id.*

80. *Id.*

81. *Id.* See *infra* note 126 for further discussion of the EEOC's regulation and its subsequent suspension by Congress.

82. *Isaacs*, 765 F. Supp. at 1367. Caterpillar argued that the OWBPA did not apply in this case because the releases were executed before the Act became law. *Id.* at 1369. The court found that argument unpersuasive, finding that the law of tender agreements was the same before and after the OWBPA. *Id.* See *supra* notes 33-49 and the accompanying text for a discussion of the OWBPA and its effect on the use of waivers to ADEA claims.

83. *Isaacs*, 765 F. Supp. at 1367.

84. *Id.*

85. *Id.* According to the court, "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded from challenging them unless they somehow could come up with the money they were given when allegedly forced into retirement." *Id.*

discussed the problems in determining the consideration to be tendered to achieve the status quo.<sup>86</sup> Employers generally do not distinguish between consideration and ordinary retirement benefits.<sup>87</sup> Moreover, the court was concerned with unjustly enriching employers.<sup>88</sup> Part of the employer's economic benefit of the waiver is early release of the employee.<sup>89</sup> Therefore, a tender requirement would allow the employer to avoid paying the employee's salary *and* to retrieve the consideration provided for this benefit.<sup>90</sup>

### B. *Post-OWBPA Cases*

Although *Grillet*, *O'Shea*, and *Isaacs* provide insightful background into tender/ratification, the decisions are indeterminative after the enactment of the OWBPA. The Fifth Circuit affirmed its decision in *Grillet* to accept the employer's tender argument in a case where the OWBPA was applicable to the relevant releases. In *Wamsley v. Champlin Refining & Chemicals, Inc.*,<sup>91</sup>

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86. *Id.* The courts in *O'Shea* and *Grillet* erroneously assumed that this would be a "clearcut" decision, according to the court. *Id.*

87. *Id.* at 1368.

88. *Isaacs*, 765 F. Supp. at 1367.

89. The court viewed the exchange involved when an employee releases ADEA claims quite differently than the Fourth and Fifth Circuits. The latter assumed that the money or other consideration given by the employer is paid in exchange for a promise not to file an ADEA claim. *Furfaro & Josephson, supra* note 51, at 38 (discussing varying judicial viewpoints as to whether a release is ratified and whether an employee must tender consideration after a release).

The *Isaacs* court viewed the exchange as follows: the employer receives the economic benefit of removing an older employee, while the employee receives the economic benefit of the consideration. 765 F. Supp. at 1367. This approach is not persuasive because the employer receives the economic benefit of releasing an older employee from the minute that employee is terminated, regardless of whether a release is signed. What the employer is really paying for is the employee's promise not to bring a lawsuit. *See Aalberts & Kelly, supra* note 6, at 739 ("An older worker is given severance benefits *if* he waives forever any rights he may have to sue for damages under federal, state, or local law." (emphasis added)).

90. *Isaacs*, 765 F. Supp. at 1367. The employee, however, would not have her job. *Id.* In explaining why the status quo would not be restored, the court stated that "[t]he employee is deprived of money paid to induce him to retire, yet he or she is not restored to employment; all he or she gets is the rescission of his or her release." *Id.*

91. 11 F.3d 534 (5th Cir. 1993). *Wamsley* involved an office closing in which the employer (Champlin) was forced to eliminate several jobs. *Id.* at 536. A group of employees released claims against Champlin in exchange for added benefits. *Id.* at 536-37. The consideration included lump sum cash payments; outplacement services; and medical, dental, and life insurance benefits. *Id.* at 537 n.4. Several employees subsequently filed suit alleging age

the court held that the OWBPA does not prohibit an employee from ratifying an invalid release by retaining, *i.e.*, failing to tender back, the money received as consideration.<sup>92</sup>

In *Wamsley*, the court addressed the "knowing and voluntary" standard under the OWBPA.<sup>93</sup> The court rejected the plaintiffs' argument that this language per se prohibits enforcement of invalid waivers.<sup>94</sup> Again, the court relied on the doctrine of contractual ratification,<sup>95</sup> and placed particular emphasis on its conclusion that an invalid release was voidable rather than void.<sup>96</sup> According to the court, the Act was designed to protect employees from "fraud, duress, coercion, or mistake of material facts,"<sup>97</sup> evils that historically have rendered a contract voidable rather than void under general contract law.<sup>98</sup>

In addition, the court noted that the legislative history does not mention that non-compliance with the OWBPA renders a release void.<sup>99</sup> The court also reasoned that the Act's mandatory seven-day revocation period<sup>100</sup> would not be necessary if non-compliance rendered the waiver automatically void.<sup>101</sup> Finally, the court noted that automatically void waivers would be inconsistent with the ADEA's goal of encouraging settlement<sup>102</sup> because employers would be less likely to offer settlements if

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discrimination, yet retained the consideration for their waivers. *Id.* at 537. When the case reached the Fifth Circuit, the court could not decide whether the releases complied with the OWBPA. The court considered the knowing and voluntary issue "immaterial in light of our conclusion that [the employees] have ratified their releases as a matter of law." *Id.* at 538.

92. "[W]e hold that neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Id.* at 539-40. For a description of the OWBPA requirements, see *supra* part II.B.

93. 29 U.S.C. § 626(f)(1) (Supp. IV 1992).

94. *Wamsley*, 11 F.3d at 539.

95. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981)).

96. *Id.* at 539.

97. S. REP. No. 101-263, 101st Cong., 2d Sess. 31-32 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537.

98. *Wamsley*, 11 F.3d at 539 n.8 ("That the Committee enumerated several of the traditional grounds of avoidance is significant.").

99. *Id.* "Also significant is the absence of any language in the statute and any statement in the legislative history indicating that a waiver executed in contravention of the OWBPA requirements is void of legal effect and cannot be ratified by an employee." *Id.*

100. 29 U.S.C. § 626(f)(1)(G) (Supp. IV 1992).

101. *Wamsley*, 11 F.3d at 539.

102. *Id.* The ADEA states as one of its purposes "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988) (congressional statement of findings and purpose).

OWBPA problems would automatically void the agreements.<sup>103</sup> Thus, because defective releases are merely voidable, the *Wamsley* court concluded that employees can make new promises to reaffirm their obligations under the release.<sup>104</sup> The court noted that it “will enforce [the employees’] new conduct based promises as it legally and equitably should.”<sup>105</sup>

The court next addressed whether *Hogue v. Southern Railroad Company*<sup>106</sup> is contrary to a tender back requirement.<sup>107</sup> The *Wamsley* court identified three differences between FELA, the statute at issue in *Hogue*, and the ADEA.<sup>108</sup> First, the purpose of FELA is to facilitate liberal recovery for employees,<sup>109</sup> a purpose not recognized in the ADEA.<sup>110</sup> Second, *Wamsley* recognized a timing difference between settling FELA claims, which are for physical injuries, and ADEA violations.<sup>111</sup> Under FELA, the injury has already occurred,<sup>112</sup> as opposed to an ADEA case in which the release is a compromise of potential or future injuries.<sup>113</sup> Third, there is an “inference of liability” imputed

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103. *Wamsley*, 11 F.3d at 539. The court noted that employers would be unlikely to provide enhanced severance packages if faced with “continued litigation with opponents who could use . . . to finance their suit, the very funds [the employer] paid as consideration to avoid litigation.” *Id.* at 539 n.9.

104. The court defined “promise” for the purposes of this discussion as “a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.” *Id.* at 540 n.10 (citing RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981)).

According to the court, employees who sue yet retain the consideration make a new promise to be bound by the defective release. “Here the conduct giving rise to Appellants’ promise to perform under their waivers was their retention of the consideration for their waivers.” *Id.* The court noted that for the purposes of evaluating the employees’ conduct, an “objective theory of contracts” applies rather than subjective intent. *Id.* (citing 1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 98 (1957)). Because the court enforced the new promise, it is irrelevant that the original release did not comply with the OWBPA. *Id.* at 540 n.11. The new promise, according to the court, is not subject to the requirements of the OWBPA. *Id.*

105. *Id.* at 540.

106. 390 U.S. 516 (1968) (per curiam). For a discussion of *Hogue*, see *supra* notes 72-74 and accompanying text.

107. The *Wamsley* court concluded that other courts had “improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that *Hogue* precludes a ‘tender back’ requirement in suits brought under the ADEA.” 11 F.3d at 541 n.13.

108. *Id.* at 541-42.

109. *Id.* at 541.

110. *Id.* Although both statutes are remedial, they are “fundamentally different in congressional purpose and intent.” *Id.* at 541 n.13.

111. *Id.* at 542.

112. *Wamsley*, 11 F.3d at 542.

113. *Id.*

on the employer in FELA cases, whereas no such inference exists in ADEA claims.<sup>114</sup> These distinctions in the purpose and procedures of FELA and the ADEA convinced the *Wamsley* court that *Hogue* does not control ADEA waivers.<sup>115</sup>

On the other hand, the Seventh Circuit in *Oberg v. Allied Van Lines, Inc.*<sup>116</sup> found itself constrained by the plain language of the OWBPA and rejected the employer's tender/ratification argument.<sup>117</sup> The Seventh Circuit analyzed the tender/ratification argument as two distinct components: ratification and tender.<sup>118</sup>

114. *Id.* The court noted that ADEA claimants have the burden of proving their employers' threshold liability. See 29 U.S.C. § 626(f)(3).

115. The *Wamsley* court stated that the Seventh Circuit in *Oberg* improperly analogized FELA to the ADEA and thus arrived at "the erroneous conclusion that *Hogue* precludes a 'tender back' requirement in suits brought under the ADEA." *Id.* at 541 n.13.

116. 11 F.3d 679 (7th Cir. 1993). In another post-OWBPA Case, the district court in *Collins v. Outboard Marine Corp.*, 808 F. Supp. 590 (N.D. Ill. 1992), took an interesting approach in rejecting the ratification argument. In *Collins*, the release was voidable, in part because it did not make specific reference to waiver of ADEA claims as required by the OWBPA. *Id.* at 594. In rejecting the employer's ratification argument because there was no legal obligation to ratify, the court found that "the benefits plaintiff received could not have been in exchange for the relinquishment of his rights under the ADEA, because federal law now provides that those rights cannot be relinquished without a specific reference to the ADEA in the written release." *Id.* at 595.

117. *Oberg* involved a reduction in force (RIF) involving approximately 60 employees of Allied Van Lines, Inc (Allied). 11 F.3d at 680. In conjunction with the RIF, Allied offered the departing employees a choice between the normal severance package and an enhanced package. The normal package included 2 weeks salary and the enhanced package included approximately 20 weeks of pay in addition to the normal 2 weeks, as well as health benefits and pension contributions for the duration of the severance payments. *Id.* at 681. In exchange for the enhanced package, the employees were required to sign a release of all claims against the employer, including ADEA claims. *Id.* In addition to the release, the severance agreement included a provision stating that if the employees breached, they were required to return to Allied the additional benefits received. *Id.* at 681 n.2.

The plaintiffs in *Oberg* accepted the enhanced package and signed the release. *Id.* at 681. After receiving their last payments under the severance packages, they filed a class action against Allied alleging violations of the ADEA. The plaintiffs admitted that they never rejected nor returned any of the enhanced severance benefits that they received from Allied. Upon reaching the Seventh Circuit, the court quickly dismissed Allied's argument that the waivers were valid. *Id.*

118. *Id.* at 682-85. The separation of ratification and tender into two separate arguments is illogical. Other courts have properly treated employers' tender/ratification arguments as one issue, assuming that the two concepts analytically work together. See, e.g., *Wamsley v. Champlin Refining & Chem., Inc.*, 11 F.3d 534, 539-40 (5th Cir. 1993); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036, 1040-41 (11th Cir.), cert. denied, 113 S. Ct. 412 (1992); *Grillet*

The court first rejected the ratification argument. According to the court, a waiver that does not meet the conditions imposed by the OWBPA is not "knowing and voluntary" and cannot be a waiver under any conditions, including subsequent ratification.<sup>119</sup> The court noted that it would have been inclined to follow the *Grillet* and *O'Shea* opinions in the absence of this plain language of the OWBPA.<sup>120</sup> Next, while the court approved of a tender requirement under "notions of fairness,"<sup>121</sup> it rejected the requirement because of *Hogue*.<sup>122</sup> Following *Isaacs* and *Forbus*, the court found that the policies of the ADEA and FELA are analogous.<sup>123</sup>

### III. EVALUATION OF THE TWO APPROACHES TO TENDER/ RATIFICATION

Both approaches to the tender/ratification issue are problematic. In jurisdictions that have adopted a tender requirement,<sup>124</sup> the employee must decide whether to risk the waiver consideration in an attempt to receive more money from damages awarded in a lawsuit. This approach ignores the intent of Congress regarding waivers to ADEA claims, discourages compliance with the OWBPA, and poses a difficult practical problem. Congress is concerned with the abuse of waivers.<sup>125</sup> After the EEOC passed a regulation upholding the use of unsupervised waivers, Congress suspended this rule via appropriations bills for almost three years.<sup>126</sup> In suspending this rule, Congress

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v. *Sears, Roebuck & Co.*, 927 F.2d 217, 221 (5th Cir. 1991).

*But see* N. Jansen Calamita, *The Older Worker's Benefit Protection Act of 1990: The End of Ratification and Tender Back in ADEA Waiver Cases*, 73 B.U. L. REV. 639, 663 (1993) ("When assessing the impact of the OWBPA, it is useful to consider [tender and ratification] separately.").

119. *Oberg*, 11 F.3d at 683. The court noted, "Under OWBPA, unless a waiver contract takes the form required by the statute, an employer and an employee cannot contract to waive the ADEA provisions." *Id.* In support, the court curiously relied on *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992), and *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991), both of which involved pre-OWBPA waivers.

120. *Oberg*, 11 F.3d at 683. "Had Congress not spoken this court may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements through general principles of contract law." *Id.*

121. *Id.*

122. *Id.* at 683-84.

123. *Id.* at 684.

124. See *supra* part II for a discussion of the tender/ratification cases.

125. In *Isaacs v. Caterpillar, Inc.*, the court referred to this as a "continuing preoccupation with ADEA releases." 765 F. Supp. at 1359 (C.D. Ill. 1991).

126. The EEOC rule, 52 Fed. Reg. 32,293, was suspended by the Senate

expressed concern for the rights of older American workers<sup>127</sup> and chastised the EEOC for abandoning the requirements of the FLSA.<sup>128</sup> When Congress finally passed the OWBPA, the stated purpose of the legislation was to prohibit the coercion<sup>129</sup> of older workers into waiving their rights.<sup>130</sup> As the court noted in *Isaacs v. Caterpillar*,<sup>131</sup> a tender requirement would hinder the ability of employees to bring ADEA suits, a result inconsistent with Congress' desires.<sup>132</sup> Moreover, the tender/ratification

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for one year in October 1987, 133 CONG. REC. 28,105-06 (1987), and that decision was approved by the House of Representatives in December 1987, 133 CONG. REC. 37,241 (1987). Both the Senate and House extended the suspension for an additional year in 1988 following hearings on the issue of waivers to ADEA claims in the spring of 1988. 134 CONG. REC. S7885 (daily ed. July 26, 1988) (Senate); 134 CONG. REC. H1251 (daily ed. March 29, 1988). See generally S. REP. NO. 101-79, 101st Cong., 1st Sess. 6-9 (1989) (outlining history of congressional response to EEOC rulemaking).

127. Congress "expressed grave concern that the [EEOC] rule was without legal foundation and contrary to public policy." H.R. REP. NO. 664, 101st Cong., 2d Sess. 20 (1990). One group of Senators commented that "serious questions have been raised about the degree to which the EEOC rule adversely affects the important rights of older workers to be free from age-based employment discrimination." *Id.* (quoting a letter from Senators Sasser, Leahy, Grassley, Mikulski, DeConcini, Weicker, Reid, Chiles, and Lautenberg).

128. Senators Metzenbaum and Melcher "criticized the EEOC for abandoning the 'supervised waiver' requirements of the FLSA." S. REP. NO. 79, 101st Cong., 2d Sess. 7 (1989).

129. Congress relied on statistics showing how easily older employees can be coerced into accepting a waiver by their employers. For example, age discrimination victims earn an average of \$15,000 per year. In addition, older Americans that are out of work have less than a 50% chance of finding new employment. Finally, older workers often do not have the luxury of savings, and may not yet be eligible for Social Security. *Id.* at 9.

130. According to the legislative history of the OWBPA, "The bill also amends the ADEA to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the [ADEA]." H.R. REP. NO. 664, 101st Cong., 2d Sess. 7 (1990). In addition, Congress said that the OWBPA "is designed to protect older workers' rights and not to take them away." *Id.* at 54. The OWBPA places many restrictions on the use of waivers. See *supra* notes 34-49 and accompanying text for a discussion of the restrictions on waivers included in the OWBPA.

131. 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).

132. The district court noted that

retired employees need all the security they can get; Congress has passed ERISA and other laws based on this assumption. Such workers 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.

*Id.* at 1367.

Moreover, the legislative history of the ADEA exhibits a general purpose of protecting older American workers. H.R. REP. NO. 805, 90th Cong., 1st

argument discourages employers from complying with the OWBPA.<sup>133</sup> Employers are apt to gamble with invalid releases if employees must return the money as a precedent to filing suit.<sup>134</sup> In light of congressional interest in employees' rights, it is unlikely that Congress would allow employers to circumvent the OWBPA and not suffer economically for doing so.

The tender requirement also presents a practical problem regarding the amount of money employees would have to tender.<sup>135</sup> The OWBPA does not require employers to distinguish between normal benefits and those offered in exchange for waivers.<sup>136</sup> This problem occurred in *O'Shea v. Commercial Credit Corp.*,<sup>137</sup> in which the employee received \$23,371.20 in severance pay and claimed that it was an entitlement rather than consideration for the waiver.<sup>138</sup> The court settled on an approximate figure representing consideration for the waiver.<sup>139</sup> Allow-

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Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2214. The stated purpose of the ADEA is: "[T]o promote employment of older persons based on their 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 on employment." 29 U.S.C. § 621(b) (1988). See also Samborn, supra note 1, at 30. Samborn quoted Paul H. Tobias, a plaintiffs' employment lawyer, who noted that tender/ratification cases are "very important because people that are fired are desperate and need the money to live on." George F. Galland Jr., another employees' attorney, commented that "if there's one thing [Congress] didn't have in mind . . . it's giving the money back. It's insane. It's literally insane." *Id.*

133. The court in *Isaacs* adopted this reasoning. "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded from challenging them unless they somehow could come up with the money they were given when allegedly forced into retirement." 765 F. Supp. at 1367.

134. The district court in *Oberg v. Allied Van Lines, Inc.* relied on this reasoning in rejecting a tender requirement. No. 91-C6576, 1992 WL 186098 (N.D. Ill. 1992). The court stated:

[W]e believe that a tender requirement would encourage employers to ignore the specific provisions of the Act 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.

*Id.* at \*6.

135. The court in *Isaacs* noted that an employer generally does not indicate how much of the consideration is normal retirement benefits and how much is in exchange for the waiver. 765 F. Supp. at 1368.

136. The OWBPA requires only "consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D) (Supp. IV 1992).

137. 930 F.2d 358 (4th Cir. 1991).

138. *Id.* at 362 n.3.

139. "In sum, O'Shea received approximately \$23,000 (not including notice

ing the court to estimate the amount of tender presents the possibility that employees will be forced to tender money that was actually an entitlement.

Rejection of the tender requirement is also susceptible to policy-based criticism. This approach fails when the employee loses their ADEA case but gets to retain the waiver consideration.<sup>140</sup> The employer gets nothing in return for the consideration it paid,<sup>141</sup> and is burdened by the lawsuit that it paid to avoid.<sup>142</sup> Contract law accepts that a party to a voidable contract may ratify it by retaining the consideration.<sup>143</sup> This analysis presumes that a contract executed under illegal circumstances is voidable, rather than automatically void.<sup>144</sup> When the complaining party

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pay and unused, accrued vacation pay) and a 'bridging' arrangement, which saved her some pension losses, in consideration for her agreement to waive any ADEA claims that she might have had." *Id.*

140. If the employee wins and receives a monetary judgment, that judgment would be offset by the amount received for the waiver. *See Hogue v. Southern Railway Co.*, 390 U.S. 516, 518 (1967) ("The sum paid shall be deducted from any award determined to be due to the injured employee."); *see also Oberg*, 11 F.3d at 685 ("Defendants may only obtain a set-off of the severance benefits paid from any award determined to be due Plaintiffs.").

141. The easy response is that it is the employer's fault if the waiver was invalid. *See, e.g., Calamita*, *supra* note 118, at 670. However, the OWBPA did not take the subjectivity out of determining whether a release is valid. *See infra* notes 38-41 for a discussion of some of the ambiguities in the requirements of the OWBPA. Brian W. Bulger, an attorney representing employers, stated that there will be much litigation concerning the OWBPA requirements "[u]ntil the parameters on OWBPA are explained in much clearer fashion." Samborn, *supra* note 1, at 30.

142. This is where the discussion of the *Isaacs* approach, 765 F. Supp. at 1366-76, to waivers becomes important. *See supra* note 89. If the court's approach is correct in viewing the exchange as providing the employer the economic benefit of releasing an older employee, then the employer is not stripped of its consideration when a lawsuit is brought by the employee. If this were correct, rejection of the tender requirement would be more logical. However, as discussed *supra* note 89, this concept of the exchange is illogical.

143. *See, e.g., RESTATEMENT (SECOND) OF CONTRACTS* § 380 cmt. a (1981) ("A party who has the power of avoidance may lose it by action that manifests a willingness to go on with the contract. Such action is known as 'affirmance' and has the effect of ratifying the contract."); 76 C.J.S. *Release* § 37 (1952) (stating that a party seeking to avoid a release "must ordinarily first restore the status quo by restoring, tendering, or offering to restore what he has received in return for the release"); M.C. Dransfield, Annotation, *Ratification of Contract Voidable for Duress*, 77 A.L.R. 2d 426, 439 (1961) ("Acceptance and retention of benefits growing out of a contract executed under duress, after the influence of the duress has been removed, were held . . . as showing a ratification of the contract . . .").

144. *See, e.g., In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (holding that a construction contract was voidable when induced by duress) (citing *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2d Cir. 1982), *cert. denied*, 461 U.S. 915 (1983)).

realizes that the contract was not legally executed, the party is obligated to promptly contest the contract.<sup>145</sup> If the party fails, they may ratify the contract in a variety of ways,<sup>146</sup> including retention of the consideration.<sup>147</sup> Abandoning this contract principle may unfairly punish employers, especially "innocent" employers that unintentionally violate the OWBPA.<sup>148</sup> Such concerns may also make employers less willing to rely on waivers,<sup>149</sup> or lead employers to decrease consideration for such agreements.<sup>150</sup> Both possibilities would financially harm older workers.

In an attempt to determine whether to impose a tender requirement, litigators, courts, and commentators have invoked a litany of allegedly persuasive materials, including the language of the OWBPA, the purpose of the OWBPA and of the ADEA, the common law of contracts, and Supreme Court precedent. Application of these legal tools has resulted in a draw. The approach taken by the Seventh and Eleventh Circuits, which

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145. *Id.*

146. *See, e.g.,* United States v. McBride, 571 F. Supp. 596, 613 (S.D. Tex. 1983). *McBride* recognized that a party may ratify a voidable contract by intentionally accepting benefits under the contract, by acknowledging its validity, and by remaining silent for a period of time after realizing the opportunity to avoid it. *Id.*

147. *Id.* at 613. *See also* Reed v. SmithKline Beckman Corp., 569 F. Supp. 672, 676 (E.D. Pa. 1983) (employee's acceptance of salary and other benefits constitutes ratification of a release to all claims arising from termination of the employee following her arrest).

148. *See supra* notes 34-49 and accompanying text for a discussion of the OWBPA and some of its ambiguous provisions.

149. Discouraging use of releases does not promote Congress' interest in voluntary settlement. The legislative history of the ADEA supports private settlement of potential claims. 123 CONG. REC. 34,296 (1977) (quoting Senator Williams, "[T]he ADEA should allow the employee to resolve the dispute himself or work out a compromise with an employer."). In particular, Congress recognized the delays that are inherent in the dockets of most federal agencies, and suggested that older Americans have a special interest in avoiding these delays. *Age Discrimination in Employment Hearing Before the Subcomm. on Labor of the Senate Comm. on Public Welfare*, 90th Cong., 1st Sess. 24-25 (1967) (statement of Senator Javits).

150. Prior to the passage of the OWBPA, several large corporations wrote letters to Congress expressing their concern with the limitations on releases being proposed. The corporations indicated that the limitations would decrease the amount of incentives offered to older employees. For example, General Mills wrote that "the legislation will have a prejudicial effect on the class of individuals sought to be protected by severely restricting the opportunities for companies to make these gratuitous payments." H.R. REP. No. 664, 101st Cong., 2d Sess. 87 (1990) (letter from General Mills Corporation). If the proposed limitations were going to decrease the incentives offered by employers, it is likely that a rejection of the tender requirement would have the same effect.

rejected a tender requirement, is most consistent with Congress' purpose in passing the ADEA and the OWBPA.<sup>151</sup> While Congress' intent with respect to a tender requirement in enacting the OWBPA is not clear,<sup>152</sup> it is illogical to rely on common-law contract principles that conflict with the policies of the Act, especially when the Act imposes requirements for waivers that are stricter than those under the common law. Moreover, employers should bear the financial risk associated with waivers. Employers are more able to pay the costs, and also can take effective steps to avoid the tender/ratification issue through compliance with the OWBPA.<sup>153</sup>

#### IV. AVOIDING THE RATIFICATION ISSUE

##### A. *Adherence to the OWBPA*

Until the Supreme Court resolves the tender/ratification issue,<sup>154</sup> employees and employers should continue to attempt to effectively settle potential age discrimination claims.<sup>155</sup> Obviously, it is important for employers to comply with the OWBPA. Although employers with invalid releases may assert the tender/ratification argument, that argument is now at the mercy of an unsettled judiciary. In addition, courts may be, and arguably should be, less sympathetic to counterclaims<sup>156</sup> and defenses asserted by employers who failed to follow the OWBPA.<sup>157</sup>

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151. Calamita, *supra* note 118, at 664-65. Calamita noted: "The clear implication of the OWBPA's language and history is that any continued use of the ratification doctrine to rescue invalid waivers of ADEA claims would do violence to the Act's provisions and its aims." *Id.*

152. Neither the OWBPA nor its legislative history expressly discuss a tender requirement.

153. See *infra* part IV.A. for the suggestion that employers adhere to the OWBPA to avoid the ratification issue.

154. The Supreme Court has denied certiorari in two of the cases involving the tender/ratification argument. See *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

155. 29 U.S.C. § 626(b) (1988). See also S. REP. NO. 101-263, 101st Cong., 2d Sess. 61, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1566 (noting "bipartisan Congressional support for the informal resolution of ADEA claims . . .").

156. See *infra* part V for a discussion of counterclaims by employers for breach of covenant not to sue or unjust enrichment.

157. The district court in *Oberg v. Allied Van Lines, Inc.* exhibited little sympathy in response to the employer's argument that "it is unfair to permit the Plaintiffs to retain the special consideration that they received for executing the releases and then 'double dip' by filing an ADEA lawsuit." 1992 WL 211506, at \*7 (N.D. Ill. 1992), *aff'd*, 11 F.3d 679 (7th Cir. 1993). The court

Nevertheless, by adhering to the OWBPA, employers provide information that may reveal age discrimination.<sup>158</sup> Employers that violate the OWBPA in order to conceal harmful information must realize the risk they take and be prepared to defend against ADEA claims.

Post-OWBPA cases reveal that employers both ignore straightforward OWBPA requirements<sup>159</sup> and are confused about OWBPA requirements.<sup>160</sup> As an example of the latter, in *Oberg v. Allied Van Lines, Inc.*,<sup>161</sup> the employer, noting that Congress did not define the word "group" in the OWBPA, argued that its termination program did not involve a group of employees.<sup>162</sup>

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noted that "Allied had an opportunity to present its employees with a written waiver that met all of the OWBPA requirements." *Id.*

Similarly, in *Collins v. Outboard Marine Corp.*, the district court was skeptical of the employer's argument that the plaintiff was estopped from pursuing his ADEA claim despite a release that was invalid under the OWBPA. 808 F. Supp. 590 (N.D. Ill. 1992). In response to the estoppel argument, the court stated "unfortunately for defendant, the agreement as executed does not include a release from an ADEA claim." *Id.* at 595. See generally Lisa M. Imborgno, *Can You Have Your Cake and Eat it Too? Ratification of Releases to ADEA Claims*, 20 *FORD. URB. L.J.* 311, 339 (1993) (suggesting that employers may file counterclaims against employees for the consideration, but commenting that "[t]here 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.").

158. The legislative history of the OWBPA states:

The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

S. REP. NO. 101-263, 101st Cong., 2d Sess. 61, reprinted in 1990 U.S.C.C.A.N. 1509, 1539. See also Williams, *supra* note 25, at 99-100.

159. In *Carr v. Armstrong Air Conditioning, Inc.*, 817 F. Supp. 54, 57 (N.D. Ohio 1993), the court found that the release was invalid because it failed to specifically refer to claims under the ADEA (29 U.S.C. § 626(f)(1)(B) (Supp. IV 1992)); the employee was never notified in writing to consult an attorney (§ 626(f)(1)(E)); the employee received 5 days rather than 21 days to consider the release (§ 626(f)(1)(F)(i)); and the employee did not have 7 days to revoke the release (§ 626(f)(1)(G)). Similarly, in *Collins v. Outboard Marine Corp.*, 808 F. Supp. 590, 594 (N.D. Ill. 1992), the release was invalid because it did not specifically mention rights under the ADEA (§ 626(f)(1)(B)); the plaintiff did not get 21 days to consider the release (§ 626(f)(1)(F)(i)); and the plaintiff was not advised in writing to seek an attorney's advice (§ 626(f)(1)(E)).

160. See *supra* notes 38-48 and accompanying text for a discussion of the OWBPA requirements regarding waivers and some of the possible ambiguities of the provisions.

161. 11 F.3d 679 (7th Cir. 1993). See *supra* notes 116-23 and accompanying text for further discussion of *Oberg*.

162. *Id.* at 682.

The Seventh Circuit disagreed, stating that "sixty plus employees terminated at one time satisfies OWBPA's definition of group termination. . . ." <sup>163</sup> In *Wamsley v. Champlin Refining & Chemicals, Inc.*,<sup>164</sup> the release covering a group termination properly mandated in writing a forty-five day waiting period.<sup>165</sup> However, employees challenged the release, claiming that certain employer personnel "orally countermanded" the written forty-five day period.<sup>166</sup> The Fifth Circuit considered the issue immaterial because it concluded the plaintiffs had ratified the release via tender/ratification.<sup>167</sup>

Because of the ambiguities in the OWBPA, employers can never be certain that a release will provide a valid defense to an ADEA lawsuit. Employers, however, should assess their goals, and if desired, maximize the possibility of a valid defense by adhering to the requirements of the OWBPA. This step in itself would decrease litigation and avoid some uncertainty caused by the ratification argument.

### B. *Placement of the Consideration in Escrow*

To avoid the tender/ratification problem, Congress should consider amending the OWBPA to allow employers to put the consideration in escrow<sup>168</sup> until the statute of limitations for filing an ADEA suit has passed. After the limitations period has expired,<sup>169</sup> the employee would receive the consideration with

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163. *Id.*

164. 11 F.3d 534 (5th Cir. 1993). See *supra* notes 91-115 and accompanying text for further discussion of *Wamsley*.

165. *Id.* at 538. The OWBPA requires a 45-day waiting period before employees have to sign group releases. 29 U.S.C. § 626(f)(1)(F)(ii) (Supp. IV 1992).

166. *Wamsley*, 11 F.3d at 538.

167. *Id.*

168. *Black's Law Dictionary* defines an escrow account as "[a] bank account generally held in the name of the depositor and an escrow agent which is returnable to depositor or paid to third person on the fulfillment of an escrow condition . . ." BLACK'S LAW DICTIONARY 545 (6th ed. 1990). The "escrow condition" in this situation would be the expiration of the statute of limitations period. For consideration paid in installments rather than in a lump sum, the employer would withhold the extra benefits until the limitations period had expired, and then pay a lump sum to the employee to compensate for all missed payments.

169. Admittedly, this option faces problems because the limitations period under the ADEA depends on the EEOC's investigation. Prior to filing a lawsuit under the ADEA, employees have either 180 or 300 days to file a charge with the EEOC. 29 U.S.C. § 626(d) (1988). This deadline varies by state. According to EEOC regulations, if a state has its own age discrimination law and authority administering the law, the deadline is 300 days. If not, the deadline is 180 days. 29 C.F.R. § 1626.7(b) (1993). Moreover, the EEOC is

interest. Under this system, employers could not require employees to waive their right to file a charge with the EEOC or to participate in an EEOC investigation during this time.<sup>170</sup> Employers would have to inform employees (1) that these rights exist and (2) that exercise of the rights would not jeopardize the status of the money in escrow. However, if the employee filed a lawsuit in addition to an EEOC charge while the money was in escrow, the employer would retain the money with interest. Therefore, an employer would never be forced to defend ADEA litigation funded by the waiver consideration.<sup>171</sup>

The escrow option would arguably harm employees because it would force them to wait a potentially long period of time before gaining access to the money.<sup>172</sup> However, with the uncertainty regarding the tender/ratification argument, attorneys for employees should be encouraging employees to place severance money in a separate account until they decide not to pursue an ADEA lawsuit, thus creating a de facto escrow account.<sup>173</sup> Furthermore, employees would not face undue hardship because they receive normal retirement benefits aside from the waiver consideration.<sup>174</sup> In addition, employees who refrain from suing

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required to notify the charging party upon completion of the investigation or other termination of the charge. 29 U.S.C. § 626(e) (Supp. IV 1992) (as amended by Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991)). Pursuant to the Civil Rights Act of 1991, the charging party then has 90 days from the date notice is received from the EEOC to file an ADEA lawsuit. *Id.*; see, e.g., *Rich v. Zeneca, Inc.*, 845 F. Supp. 162, 166-67 (D. Del. 1994) (applying the Civil Rights Act of 1991 amendments regarding the time limits under the ADEA). The variable that renders the ADEA limitations period uncertain is the length of time it takes the EEOC between the time the charge is filed and the time the charging party is notified.

170. The OWBPA states: "No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 U.S.C. § 626(f)(4) (Supp. IV 1992).

171. S. REP. NO. 101-263, 101st Cong., 2d Sess. 61, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1564 ("[I]t is not unreasonable for employers . . . to seek some assurance that an employee will not accept a generous benefit and then sue the employer the next day.").

172. Although discussed in the context of tender rather than withholding benefits, the court in *Isaacs v. Caterpillar, Inc.* noted the financial constraints placed on many older workers, particularly in the situation of early retirement programs: "In general, retired employees need all the security they can get; Congress has passed ERISA and other laws based on this assumption." 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).

173. The OWBPA requires employers to advise employees to consult with an attorney before signing the release. 29 U.S.C. § 626(f)(1)(E) (Supp. IV 1992).

174. Statistics show that over one-half of the income of individuals over

would eventually receive additional money from the accrued interest after the statute of limitations had expired. Finally, it is less devastating to departing employees to delay payment than it is to require them to return money already received.<sup>175</sup> In the former situation, the employees have notice and can budget accordingly.

## V. BEYOND TENDER/RATIFICATION

Waiver litigation currently exists beyond the issue of tender/ratification. Employers often include covenants not to sue in severance agreements, and employers can sue employees who bring ADEA suits for breach of contract or unjust enrichment.<sup>176</sup> Employers that are serious about avoiding litigation of age discrimination issues should include a covenant not to sue *in addition to* the standard release.<sup>177</sup> A covenant not to sue (covenant) is different than a release in both theory and practice.<sup>178</sup> A covenant prohibits an employee who has a right or claim

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the age of 65 is attributed to Social Security and assets. U.S. SEN. SPECIAL COMM. ON AGING ET AL., *AGING AMERICA: TRENDS AND PROJECTIONS* 62-64 (1991). The same statistics indicate that earnings are declining as a source of income, while Social Security is on the rise. *Id.* at 64. In 1988, the income sources of individuals 65 and over was as follows: 38% Social Security, 25% assets, 18% pensions, 17% earnings, and 3% other. *Id.* at 63 (pie graph).

175. The cases noting a "crippling effect" on employees did so in reference to the tender requirement, which would involve taking money *already* paid to the employees. *See, e.g.,* *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir.), *cert. denied*, 113 S. Ct. 412; *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).

176. Although these actions could be brought as original causes of action, *Curtis v. Belden Elect. Co.*, 760 S.W.2d 97, 98 (Ky. App. 1988), many employers file counterclaims in response to employee's ADEA lawsuits. Procedures for counterclaims in federal court are governed by the Federal Rules of Civil Procedure. FED. R. CIV. P. 13. Some employers may not like the idea of taking or threatening to take affirmative steps to recover from past employees simply because it is not good for public relations or employee morale. In this case, employers should ensure that their release meets the OWBPA requirements.

177. *See infra* notes 220-24 and accompanying text for a discussion of the grounds on which employees can defend against actions brought by employers based on a covenant not to sue.

178. *See, e.g.,* *Isaacs v. Caterpillar, Inc.*, 702 F. Supp. 711 (C.D. Ill. 1988) (addressing motion to dismiss). In this first *Isaacs* opinion, the court distinguished covenants not to sue from releases as follows:

[The agreement at issue in this case] does not contain any provision specifically promising not to file a lawsuit, or providing for damages if a lawsuit is filed that is found to be barred by the release, or providing for attorney's fees and costs. A release of this type, which merely states that claims are discharged and released, will hereinafter be referred to as a "defensive release."

*Id.* at 713.

from enforcing that right or claim.<sup>179</sup> Because the covenant does not make the right go away, a person holding the right always maintains a cause of action.<sup>180</sup> If the person seeks to enforce the right, however, they may have to respond to a breach of contract claim.<sup>181</sup> In contrast, a release is the relinquishment or abandonment of a right.<sup>182</sup> A valid release prohibits the person originally holding the right from enforcing the right because it no longer exists.<sup>183</sup>

Courts do not void on public policy grounds the use of covenants not to sue with respect to employment claims.<sup>184</sup> Covenants are treated like contracts, and thus are generally governed by state law.<sup>185</sup> Accordingly, in most jurisdictions, the covenants must comply with the common-law knowing and voluntary standard.<sup>186</sup> Because the OWBPA deals only with defensive releases and does not refer to covenants not to sue,<sup>187</sup> these covenants arguably do not have to comply with the requirements of the OWBPA. However, employers should use OWBPA as a standard for how to execute a knowing and voluntary contract.<sup>188</sup>

*Astor v. International Business Machines Corp.*<sup>189</sup> illustrates the use of covenants in conjunction with the release of employ-

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179. "[A] covenant not to sue is an agreement by one having a present right of action against another not to sue to enforce such right." *Colton v. New York Hospital*, 385 N.Y.S.2d 65, 66 (N.Y. App. Div. 1976). See also 66 AM. JUR. 2D *Release* § 2 (1973); 76 C.J.S. *Release* § 3 (1952).

180. *Colton*, 385 N.Y.S.2d at 66 ("Thus, the party possessing the right of action is not precluded thereby from thereafter bringing suit.").

181. *Id.*

182. *Id.* See also 66 AM. JUR. 2D *Release* § 1 (1973); 76 C.J.S. *Release* § 1 (1952).

183. *Colton*, 385 N.Y.S.2d at 66.

184. See, e.g., *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (citing *Monyei v. Dresser Indus.*, 701 F.2d 171 (5th Cir. 1983)).

185. Such covenants are governed by state law "except to the extent that such law may be inconsistent with the ADEA." *Isaacs*, 702 F. Supp. at 713 (citing *Air Line Stewards v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983)). See also Philip M. Halpern, *Age Discrimination in Employment: Releases Protect Employers Too!*, 8 LAB. LAWYER 949, 956 (1992) ("The covenant not to sue is a simple contract and should be construed as nothing more.").

186. See *supra* notes 18-32 and accompanying text for a discussion of the common-law knowing and voluntary standard for releases to employment claims.

187. 29 U.S.C. § 626(f) (Supp. IV 1992).

188. See, e.g., Paul, *supra* note 34, at 33 (advising employers with respect to the use of covenants not to reapply, and noting that employers "should probably attempt to follow the 'knowing and voluntary' guidelines established by the OWBPA").

189. 7 F.3d 533 (6th Cir. 1993).

ment claims. In *Astor*, a group of employees voluntarily resigned from IBM as part of a RIF.<sup>190</sup> Each of the employees signed a "General Release and Covenant Not to Sue" in exchange for which they received consideration from IBM.<sup>191</sup> The employees brought an ERISA action<sup>192</sup> alleging that IBM made misrepresentations and threats that caused the employees to accept the early retirement program earlier than required,<sup>193</sup> thereby causing loss of salary, benefits, and other compensation.<sup>194</sup> IBM counterclaimed, relying in part on the covenant not to sue<sup>195</sup> and seeking attorneys' fees and costs.<sup>196</sup> The Sixth Circuit found that the employees had breached the covenants not to sue and awarded attorneys' fees to IBM pursuant to the covenants.<sup>197</sup>

Employers that use severance agreements should include a clause making the covenant severable from the release so that the covenant remains valid even if the release is invalid for failure to comply with the OWBPA.<sup>198</sup> The employer should provide consideration for both the release and the covenant.<sup>199</sup>

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190. *Id.* at 534.

191. *Id.* at 535-36.

192. IBM conceded that the benefit program at issue in *Astor* was subject to ERISA. *Id.* at 536.

193. *Id.*

194. *Astor*, 7 F.3d at 536.

195. IBM also relied on ERISA, 29 U.S.C. § 1132(g)(1) (1988), in advancing its counterclaim. *Id.* at 540. The ERISA claims involved in *Astor* are beyond the scope of this Note.

196. *Id.*

197. *Id.* The Sixth Circuit cited the following passage from *Artvale, Inc. v. Rugby Fabric Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966):

Certainly it is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all — defendant's litigation expense.

See generally Halpern, *supra* note 185, at 951-53 (discussing the *Artvale* decision as the "genesis" of subsequent holdings regarding covenants not to sue).

198. A sample severability clause is as follows:

It is understood and agreed by the parties that if any part, term, or provision of this contract is held by the courts to be illegal or in conflict with any law of the state where made, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular part, term, or provision held to be invalid.

AM. JUR. FORMS 2D, *Severability* § 68:166 (1988).

199. See Paul, *supra* note 34, at 33 (noting in the context of covenants not to reapply that "consideration should be offered separate from any exit incentive or consideration for a waiver signed by the employee"). Cf. *Riley v. American Family Mut. Ins. Co.*, 881 F.2d 368 (7th Cir. 1989). In *Riley*, the plaintiff filed administrative charges and state claims against her employer

Although courts generally do not examine the adequacy of consideration,<sup>200</sup> a valid contract requires some consideration.<sup>201</sup> Accordingly, employers should expressly apportion the consideration between the release and covenant because this will alert both the employees and the courts that there was independent consideration provided in exchange for the covenant.<sup>202</sup>

Separating consideration, however, creates concerns, especially with group plans. Employers may value ADEA waivers, covenants not to sue, and other items differently depending on the individual employee's job position, age, or other characteristics. However, it is possible that an employer may violate the ADEA,<sup>203</sup>

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alleging sex and other discrimination. *Id.* at 369. Because she feared potential court costs if the claims were dismissed by the court, the plaintiff's counsel dismissed the state and some administrative claims, and released the plaintiff's right to all other claims except her right to pursue one of the administrative claims. *Id.* When the plaintiff subsequently attempted to bring a Title VII action in federal court, the defendant invoked the release as grounds for dismissing the suit. *Id.* at 370. In support of her argument to maintain the Title VII suit, the plaintiff argued that the release was invalid due to lack of consideration because the consideration was given only in exchange for her dismissal of state claims. *Id.* at 375. The court noted the following in rejecting the plaintiff's argument:

The release, however, does not assign individual consideration to each claim waived by the plaintiff. Given that the release as a whole was supported by some consideration, plaintiff cannot attack the validity of her release based on the retrospective inadequacy of the settlement.

*Id.* (citing *Glass v. Rock Island Refining Corp.*, 788 F.2d 450 (7th Cir. 1986)).

200. See generally *Black Indus. v. Bush*, 110 F. Supp. 801, 805 (D.N.J. 1953); RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c ("Ordinarily, therefore, courts do not inquire into the adequacy of consideration."). But see *Dibiase v. SmithKline Beecham Corp.*, 834 F. Supp. 143 (E.D. Pa. 1993). The district court in *Dibiase*, addressing a motion to dismiss, held that the employer could violate the ADEA by offering more consideration to employees under 40 years old than those over 40 in exchange for their surrender of all claims against the employer. *Id.* at 145-47. Although all employees received the same consideration, the plaintiffs successfully argued that employees over 40 may have received less for their money because their releases included ADEA claims. *Id.* at 146. The court in *Dibiase* arguably acted improperly in examining the adequacy of the consideration involved in the transaction.

201. *Riley*, 881 F.2d at 375 (noting the "proposition that releases of federal rights must be supported by consideration").

202. There may presumably be other items that the employee is "selling" to the employer in the same separation agreement, including covenants not to compete, not to disclose trade secrets and other confidential information, and not to reapply, see Paul, *supra* note 34, at 33-34. In addition, there are the normal retirement benefits to which employees are often entitled. It is not clear whether the employer must apportion specific amounts to these items or only with respect to the release and covenant. Arguably, the agreement can only be knowing and voluntary if the employee knows exactly how much money she is receiving in exchange for the various rights she is foregoing.

203. See, e.g., *Dibiase*, 834 F. Supp. at 145, discussed *supra* note 200, for

ERISA,<sup>204</sup> or Title I of the OWBPA<sup>205</sup> by expressly providing greater benefits to younger employees. Therefore, apportioning may subject employers to additional liability. In addition, employers may disfavor apportionment of damages for each separate release or covenant because such treatment of damages essentially amounts to liquidated damages, which limit the employers recovery.<sup>206</sup>

To recover attorneys' fees for breach of a covenant not to sue, employers should expressly provide for those damages in the written agreement.<sup>207</sup> Payment of attorneys' fees in federal court is governed by the American rule, which requires each party to pay their own attorneys' fees.<sup>208</sup> Prevailing parties in federal court do not recover attorneys' fees from the other party absent contractual or statutory authorization.

Even when attorneys' fees are not contractually provided for, some courts allow the employer to recover attorneys' fees when

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an example of an argument that different amounts of consideration offered to different employees may violate the ADEA.

204. The ERISA implications of the apportionment of consideration in separation agreements are beyond the scope of this Note.

205. Title I of the OWBPA requires employers making aged-based reductions to provide equal benefits to older and younger employees unless it is significantly more costly to provide the benefit to older employees. Pub. L. No. 101-433, §§ 103, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 623 (Supp. IV 1992)). An argument similar to the one in *Dibiase* could presumably be made under Title I of the OWBPA. See *supra* note 200 for a discussion of *Dibiase*.

206. Although liquidated damages are no longer generally disfavored, courts will examine such damages with some degree of scrutiny to ensure fairness. See, e.g., *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947) (stating in government contract case that liquidated damages are no longer disfavored and will be enforced when they represent "fair and reasonable attempts to fix just compensation . . ."); *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991) (applying South Dakota law and noting that liquidated damages are not generally disfavored but will be invalid when construed as a penalty); *Parkhurst v. Armstrong Steel Erectors, Inc.*, 901 F.2d 796, 798 (9th Cir. 1990) ("Without some indication that the liquidated damages provision is a good faith attempt to set an amount reflective of anticipated damages, we will find the provision void as a penalty."). See generally RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) (damages may be liquidated only if certain conditions are met).

207. See, e.g., *Astor v. International Business Machines Corp.*, 7 F.3d 533, 540 (6th Cir. 1993); *Haslach v. Security Pac. Bank Oregon*, 779 F. Supp. 489, 494 (D. Or. 1991); *Isaacs v. Caterpillar*, 702 F. Supp. 711, 713 (C.D. Ill. 1988); *Bunnet v. Smallwood*, 793 P.2d 157, 161 (Colo. 1990). See generally Sonja A. Soehnel, Annotation, *Recovery of Attorneys' Fees and Costs of Litigation Incurred as Result of Breach of Agreement Not to Sue*, 9 A.L.R. 5th 933 (1993).

208. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (stating the American rule).

the breach involved a covenant not to sue. This is because the employer who succeeds on a breach of covenant not to sue claim is not simply a "prevailing party" seeking attorneys' fees.<sup>209</sup> Instead, such an employer is seeking actual damages for the breach, and actual damages in this case are attorneys' fees because the employer was forced to defend litigation it was not required to defend but for the employee's breach.<sup>210</sup> By expressly indicating in the agreement that damages for breach of the covenant include attorneys' fees,<sup>211</sup> employers can avoid the uncertainty of recovery.<sup>212</sup>

In addition to a breach of contract claim, employers should consider an unjust enrichment action based on the covenant not to sue. Under this theory, the employer argues that equity and

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209. *Widener*, 717 F. Supp. at 1217-18 n.2. In *Widener*, the court stated: The Court is not awarding Defendant its attorney's fees for prevailing on the dismissal of Plaintiff's claims, rather the Court finds that Defendants damages for Plaintiffs' breach of contract is the amount of costs and attorneys' fees expended by the Defendant in defending this lawsuit.

*Id.*

210. *Id.* at 1217. See also *Anchor Motor Freight v. Int'l Bhd. of Teamsters*, 700 F.2d 1067, 1072 (6th Cir. 1983) (holding that damages suffered as a result of the breach of a covenant not to sue are the costs spent in defending the litigation, including attorneys' fees).

211. Absent such express damage provision, employers may have a claim that they should recover attorneys' fees because the employee's breach was an "obvious breach" or because the employee brought the claim in "bad faith." See, e.g., *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527 (2d Cir. 1985); *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966); cf. *Noise Reduction, Inc. v. Nordham Corp.*, 1991 U.S. Dist. LEXIS 17830, at \*23 n.11 (N.D. Ill. Dec. 6, 1991) (stating that the "obvious breach" and "bad faith" standards are duplicative of the sanctions in Rule 11 of the Federal Rules of Civil Procedure). See generally *Soehnel*, *supra* note 207 (discussing cases that applied the "obvious breach" or "bad faith" standards).

212. Employers may also consider expressly identifying return of the consideration as damage for the breach of a covenant not to sue. This option is not recommended, however, because the return of such damages in one breach of covenant action would invalidate the covenant with respect to future actions by the employee against the employer. To maintain the effect of the covenant, employers should not seek repayment of the consideration.

However, Halpern argued that counterclaims brought by employers in response to employees' breach of covenants not to sue are valid if the employer seeks "a return only of the *additional* compensation." Halpern, *supra* note 185, at 955. Halpern distinguished the "additional compensation," which he sees as appropriate recovery, from litigation expenses or all severance paid to the employees, both of which are forms of recovery that may violate public policy. *Id.* As support for his position, Halpern stated: "It is only the excess, the very essence of the now-failed bargains and exchange, which the employer should be able to recover with its counterclaim for breach of contract." *Id.* at 955-56.

justice require the employee that violates a covenant not to sue and retains the benefit to return the parties to the positions they were in before the bargain.<sup>213</sup> Because the goal is to achieve status quo, the proper damages for an employer to seek under an unjust enrichment theory are the benefits paid to the employee in exchange for the covenant.<sup>214</sup> Repayment of consideration under unjust enrichment differs from the tender requirement in that employees in the former situation have to return the consideration only *after* the lawsuit and *only* if the employer won. This approach, therefore, avoids the "crippling effect" of the tender requirement on an employee's efforts to bring a lawsuit noted by some courts.<sup>215</sup>

Unjust enrichment claims, although having a sound basis in common law,<sup>216</sup> present problems in the present context. First, the damages being sought — return of the consideration —

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213. For cases dealing generally with the elements of unjust enrichment, see, e.g., *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 222 (6th Cir. 1992) (party retains money or benefit that in equity or justice belongs to another); *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987) (under Pennsylvania law, a wrongfully secured or passively received benefit that would be unconscionable for a party to retain without compensating the provider); *Cleland v. Stadt*, 670 F. Supp. 814, 816 (N.D. Ill. 1987) (when a party received benefits which, under the circumstances, would be unjust to retain). See also RESTATEMENT OF THE LAW OF RESTITUTION § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

214. There are apparently few published cases that address the doctrine of unjust enrichment in the context of ADEA waivers or covenants not to sue. In *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), Allied attempted to make an equitable argument that the employees "should not keep all of the severance benefits if the waiver contract fails." *Id.* at 685. The court held that this argument was not raised before the trial court and was therefore waived, but indicated that "the idea has appeal." *Id.* Similarly, in *Noise Reduction v. Nordham Corp.*, 1991 U.S. Dist. LEXIS 17830 (N.D. Ill. Dec. 6, 1991), the court rejected the employer's breach of contract claim because damages were not spelled out in the contract, but the court refused to dismiss the counterclaim because the employer may be able to prove damages that could be awarded under their counterclaim prayer for relief seeking recovery of "such further legal or equitable relief as this Court may deem just and proper." *Id.* at \*24 n.12.

Nevertheless, the court in *Isaacs v. Caterpillar, Inc.*, 702 F. Supp. 711 (C.D. Ill. 1988) rejected the employer's (Caterpillar) unjust enrichment argument, noting that no cases support Caterpillar's argument. *Id.* at 714. However, Caterpillar was attempting to apply such argument to a *defensive release* rather than a covenant not to sue. *Id.* For a discussion of the difference between these types of releases, see *supra* notes 177-83 and accompanying text.

215. See, e.g., *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).

216. See *supra* note 213 for a discussion of the common-law elements of unjust enrichment.

resemble liquidated damages and may be disfavored by courts.<sup>217</sup> Second, employers that lose the ADEA case on the merits cannot succeed on an unjust enrichment theory because of "unclean hands."<sup>218</sup> Despite the unanswered questions, employers should consider unjust enrichment actions. An unjust enrichment action is arguably the type of claim that the Seventh Circuit alluded to in *Oberg* when it stated that the employer's equitable argument had appeal, but rejected it because the employer failed to plead the argument.<sup>219</sup>

Finally, employees and their attorneys facing counterclaims based on breach of contract or unjust enrichment should be aware of the means of attacking these claims. First, employees could argue that these actions, particularly the unjust enrichment claims, are void as a matter of public policy.<sup>220</sup> Second, employer counterclaims may be subject to a claim of retaliation by employees under the ADEA.<sup>221</sup> Third, employees could attack unapportioned consideration by arguing either that all of the money

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217. See *supra* note 206 for a discussion of liquidated damages.

218. Essentially, it is not unjust for an employer that violates federal law to lose their consideration paid in an attempt to avoid liability. The "unclean hands" doctrine prohibits a party from obtaining equitable relief if they have engaged in misconduct. See, e.g., *Precision Instr. Mfg. Co. v. Automobile Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945); *Hocker v. New Hampshire Ins. Co.*, 922 F.2d 1476, 1485-86 (10th Cir. 1991); *Tarasi v. Pittsburgh Nat'l. Bank*, 555 F.2d 1152, n.9 (3d Cir. 1977). See also *In re Omegas Group, Inc.*, 16 F.3d 1443, 1450 n.7. (6th Cir. 1994) (noting the common-law notion that unclean hands is an absolute bar to claims in equity).

219. The employer argued that the employee should not be able to keep all of the severance benefits if the waiver fails. *Oberg*, 11 F.3d at 685.

220. Employees might argue that return of the consideration via an unjust enrichment theory is indistinguishable from a tender requirement rejected by several courts. A counterargument is that a tender requirement would force employees to return the consideration before filing a lawsuit, unlike a successful unjust enrichment claim which would require tender only upon a resolution of the suit in favor of the employer.

Halpern disagreed with the notion that employer recovery on counterclaim violates public policy. Halpern, *supra* note 185, at 953-56. Halpern concluded his article:

The purposes for which ADEA was written include the correction of a wrong, not the creation of a windfall for employees who make a deal in writing and then renege. Counterclaims for breach of contracts not to sue may be the only vehicle by which a more balanced interpretation of ADEA will come to pass. Current case law has failed to recognize that employers have rights too!

*Id.* at 969.

221. The ADEA prevents retaliation against employees who exercise their rights under the Act. 29 U.S.C. § 623(d) (1988). Halpern discussed but rejected the theory, which presently appears to be untested in the federal courts, that counterclaims by the employer may violate the ADEA's prohibition on retaliation against employers. Halpern, *supra* note 185, at 959-68.

was for the invalid release<sup>222</sup> or that the covenant not to sue was not knowing and voluntary because the employee did not know how much money was received in exchange for the covenant.<sup>223</sup> In addition, if the employer filed an unjust enrichment claim and the consideration was not apportioned, the employees could argue that the employer received other benefits in exchange for the consideration, such as improving the employer's reputation and employee morale. Finally, if the employer apportioned the consideration, employees could argue in some cases that the employer discriminated in the distribution of benefits in violation of the ADEA, ERISA, or the OWBPA.<sup>224</sup>

### CONCLUSION

The tender/ratification issue will affect many employees in the United States as the number of older employees increases and employers continue to use releases. There is presently no uniformity in the federal courts. However, a tender requirement should be rejected in order to protect older employees, the clear policy behind both the ADEA and the OWBPA. In the meantime, there are other means for employers to protect themselves, such as strict adherence to the OWBPA and use of covenants not to sue. These recommendations consider the rights of employees, yet ensure protection of employers. The effective use of waiver agreements by employers is essential to further the ADEA's goal of private settlement.

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222. See *supra* notes 202-06 and accompanying text for a discussion of apportionment of consideration.

223. *Cf. Seward v. B.O.C. Div. of Gen. Motors Corp.*, 805 F. Supp. 623, 630 (N.D. Ill. 1992). In *Seward*, the plaintiff argued that he "could not have knowingly signed the waiver if he did not know that he was receiving anything of value in exchange for his right to bring an action." *Id.* at 629-30. The court rejected this argument, stating that it would not look into the subjective intent of the plaintiff in signing the release. *Id.* at 630. The court noted that the plaintiff's "alleged mistaken belief that the Release lacked consideration did not interfere with his comprehension of the Release's legal significance, or consequently, his ability to knowingly sign the waiver." *Id.*

224. See *supra* notes 203-05 and accompanying text discussing such potential arguments.

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