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NOTES

The Retention of Severance Benefits During Challenges of Waivers Under the Age Discrimination in Employment Act

Patrick Joseph Preston*

Introduction

The establishment of minimum standards for valid unsupervised waivers of age discrimination claims by the Older Workers Benefit Protection Act of 1990[1] followed a history of controversy[2] involving the courts, the Equal Employment Opportunity Commission (EEOC) and Congress over the validity of such waivers under the Age Discrimination

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* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis; B.A., 1989, Indiana University.

1. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (Supp. 1993)) [hereinafter the OWBPA]. This Note is concerned only with Title II of the OWBPA, dealing with waivers of rights or claims. Title I of the OWBPA overruled the Supreme Court's decision in Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989), *cert. denied*, 498 U.S. 963 (1990), to restore ADEA coverage of employee benefits. In *Betts*, the Court held for the first time that the ADEA applied to only a narrow range of employee benefit programs, which effectively allowed employers to discriminate on the basis of age with regard to other employee benefits. Title III of the OWBPA consists of a severability clause, stating that if any provision of the OWBPA is held to be invalid, the remainder of the Act will not be affected.

2. *See generally* Senate Comm. On Labor and Human Resources, 102d Cong., 1st Sess., Legislative History of the Older Workers Benefit Protection Act (Comm. Print 1991).

in Employment Act of 1967.[3] An unsupervised waiver[4] under the OWBPA refers to a waiver of rights or claims arising under the ADEA which an individual has executed without the supervision of a court or the EEOC.[5] Although Congress resolved the primary controversy regarding the enforceability of private ADEA waivers by amending the ADEA with the OWBPA to codify the elements of a valid unsupervised waiver,[6] neither Act addresses the following issues: (1) whether retention of severance benefits constitutes ratification of an otherwise voidable unsupervised waiver under the ADEA unless the individual tenders back the benefits to the employer within a reasonable period of time following execution, or (2) whether retention categorically precludes a subsequent suit. As a result of the statutory omission, a split of authority has developed between the Eleventh Circuit Court of Appeals[7] and the Fourth[8] and Fifth[9] Circuits that threatens to thwart the specific requirements and general purposes of the OWBPA, making the enforceability of waivers of age discrimination claims uncertain.

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3. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988) [hereinafter the ADEA]. All references to sections of the ADEA in this Note are to Title 29 of the current United States Code.

4. The scope of this Note with regard to the law of waivers is limited to unsupervised waivers of claims arising under the ADEA as described in Title II of the OWBPA. The term "waiver" will be used synonymously with "release" for the purposes of this Note. Although the common law of contracts allocates different meanings to "waiver" and "release," the courts, Congress and the administrative agencies have used interchangeably the words "waiver" and "release." According to BLACK'S LAW DICTIONARY, a waiver is the "intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it." BLACK'S LAW DICTIONARY 1580 (6th ed. 1990). A release is a "writing or an oral statement manifesting an intention to discharge another from an existing or asserted duty." *Id.* at 1289. In Farnsworth's treatise on contracts, a waiver is defined as the "excuse of the nonoccurrence of or delay in the occurrence of a condition of a duty." E.A. FARNSWORTH, CONTRACTS § 8.5 (1982). Farnsworth defines a release as a "formal written statement reciting that the obligor's duty is immediately discharged; although, it has sometimes been used more loosely to refer to any consensual discharge." *Id.* § 4.25.

5. In 1978, President Carter's Reorganization Plan transferred the authority for administering and enforcing the ADEA from the Secretary of Labor to the EEOC. Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1978).

6. Minimum standards for valid unsupervised waivers of ADEA claims are codified by Title II of the OWBPA at 29 U.S.C. § 626(f) (Supp. 1993).

7. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).

8. O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991).

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

The sharp division in a trail of district court opinions manifests the immediate judicial impact of the appellate split.[10] A number of district courts cited the Fourth and Fifth Circuit decisions to hold that retention of severance benefits constituted ratification of waivers to preclude subsequent suits. However, as soon as the Eleventh Circuit announced a contrary decision, district courts began to adhere to the holding that retention of severance benefits did not bar subsequent suits under the ADEA. The Supreme Court has declined to consider the issue in appeals on both sides of the appellate split by denying writ of certiorari from the Fourth Circuit decision in 1991,[11] and from the Eleventh Circuit in 1992.[12] Neither Congress nor the EEOC[13] has yet addressed the issue.

The use of unsupervised waivers may be viewed as mutually beneficial to employers and employees. When Congress amended the ADEA in 1990 with the OWBPA, employers gained a statutory checklist for obtaining enforceable waivers of age discrimination claims from employees. Employers use waivers of claims to achieve settlements in a number of contexts that involve the discharge of employees.[14] An employee may be offered a sum of money or other valuable consideration in exchange for the execution of a waiver that resolves potential claims resulting from a discharge for cause.[15] Employers who need to reduce the size of operations often implement an involuntary reduction in workforce that involves an attempt to mitigate hardship and reduce the risk of

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10. In the following cases, the courts rejected the ratification theory: Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993); Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991); Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill. Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992). In the remaining cases, the courts upheld the ratification theory: Seward v. B.O.C. Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1992); Frumkin v. International Business Machines Corp., 801 F. Supp. 1029 (S.D.N.Y. 1992); Alphonse v. Northern Telecom, Inc., 776 F. Supp. 1075 (E.D.N.C. 1991); Ponzoni v. Kraft General Foods, Inc., 774 F. Supp. 299 (D.N.J. 1991); Haslach v. Security Pacific Bank Oregon, 779 F. Supp. 489 (D. Or. 1991).

11. O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

12. Forbus v. Sears Roebuck & Co., 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992).

13. On March 27, 1992, the EEOC made an appeal to the public for comments regarding the implementation of the OWBPA. 57 Fed. Reg. 10626 (1992). Although the EEOC's request regarded various aspects of OWBPA procedure and enforcement, the issues of ratification or tender back were not directly addressed. The comment period ended on July 27, 1992. *Id.*

14. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, THE OLDER WORKERS BENEFIT PROTECTION ACT, S. REP. No. 263, 102d Cong., 2d Sess. 60 (1990).

15. *Id.*

costly litigation by offering enhanced severance benefits in exchange for waivers from employees.[16] In a variation involving the reduction of operations, employers may offer voluntary early retirement incentives in exchange for the execution of waivers.[17] In each scenario, the threshold requirements for an enforceable waiver under the OWBPA likewise benefit employees by ensuring that the employee's decision to execute a waiver is informed, free from coercion, and in exchange for enhanced severance benefits beyond preexisting entitlement.[18]

In light of the advantages that waivers provide to employers and employees, the appellate split could adversely affect significant numbers of workers and their employers in a number of ways by bringing into question the enforceability of such waivers. First, the split provides uncertain precedent for thousands of claims involving waivers filed under the ADEA. Second, employers will lack the assurance that executed waivers will prevent costly litigation because some federal courts have indicated that a timely tender back of benefits might not preclude a subsequent suit.[19] Finally, in the circumstances most egregious to employees, the split provides the incentive for certain employers to circumvent the requirements of the OWBPA through the use of any methods imaginable to induce the execution of waivers.[20] This last problem represents the specific harm that Congress sought to remedy with the OWBPA: "The problem initially addressed . . . [by the OWBPA] . . . involved older workers being coerced or manipulated into waiving their rights under [the ADEA]."[21]

The foregoing problems could cripple the effectiveness of the OWBPA, which potentially affects the rights and claims of the millions of persons at least forty years old who work for employers of more than twenty employees.[22] In 1991, the Bureau of Labor Statistics (BLS) estimated that nearly fifty million workers age forty or older were employed in the United States.[23] Reports from BLS also reveal that between 1987 and 1992, almost four million workers age thirty-five or older with at least

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16. *Id.*

17. *See, e.g.*, Julia Lawlor, *Buyout Game Throws Many, Some Offers Aren't So Voluntary*, USA TODAY, Oct. 29, 1992, at 1B.

18. 29 U.S.C. § 626(f) (Supp. 1993).

19. Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991); Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991).

20. *See, e.g.*, Lawlor, *supra* note 17, at 1B.

21. LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, *supra* note 2, at 1.

22. The OWBPA applies to all employees and employers covered by the ADEA as amended. 29 U.S.C. §§ 630-31 (1988).

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

three years' tenure were displaced from their employment, not including those who chose early retirement.[24]

Recent studies of large companies in the United States have shown that the use of unsupervised waivers in corporate downsizing schemes involving early retirement incentives increased significantly during the past decade.[25] For example, the American Management Association recently surveyed 836 members and found that thirty-four percent offered early retirement in 1991 compared to nineteen percent in 1989, while twenty-nine percent offered voluntary severance incentives in 1991 compared to nineteen and a half percent in 1989.[26] Reports also indicate a corresponding increase in the number of employees opting for early retirement.[27] Another survey indicates that sixty percent of employers require employees accepting voluntary retirement programs to execute waivers, which reflects a ten percent increase since 1986.[28] Such statistics illuminate the necessity for timely and permanent resolution of issues arising from the appellate split. Resolution of these issues lies in the restoration of benefits and protections that Congress sought to provide to employers and employees through valid unsupervised waivers under the OWBPA.

This Note offers a model amendment to the ADEA to restore the mandatory statutory protections provided by the OWBPA. The purpose of the amendment is to provide certainty to employers and employees as to what constitutes an enforceable unsupervised waiver. The amendment essentially would codify the holding of the Eleventh Circuit decision in *Forbus v. Sears, Roebuck & Company*[29] by providing a statutory right to challenge the validity of a waiver under the ADEA without the requirement of tender back. Such an amendment ultimately would prevent employers from circumventing the statutory safeguards of the OWBPA, while also providing the certainty to employees signing waivers that a

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24. *Id.*

25. *See, e.g.*, Lawlor, *supra* note 17, at 1B (reviews surveys conducted by the American Management Association and the benefits consulting firm of Wyatt and Drake Beam Morin); *see also* CHIC. TRIB., Apr. 22, 1990, at 12-14B (survey of 145 Fortune 500 companies conducted by Towers, Perrin, Forster & Crosby, Inc. found 44% of the companies offered early retirement packages during a six-year period ending in 1989 with nearly 66% of those early retirement incentives offered in 1988 and 1989).

26. Lawlor, *supra* note 17, at 1B.

27. USA TODAY reported that IBM received 40,000 acceptances of early retirement, although only 20,000 had been expected. At General Motors, 6,300 salaried employees accepted early retirement offers, which was 2,300 more than expected. Kodak had nearly three times the expected number of individuals opting for early retirement with 8,354 acceptances. *Id.*

28. *Id.*

29. Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).

violation of their federal statutory rights will not be waived unless by an express agreement in full compliance with the requirements of the OWBPA and the ADEA. The net result should help reduce age discrimination and allow implementation of more efficient and effective severance initiatives by employers.

Part I of this Note discusses the waiver provisions of the OWBPA. Part II outlines and summarizes the case history of the appellate split. Part III contains a proposed model amendment to the ADEA. Finally, Part IV concludes by emphasizing the importance of such an amendment.

I. Title II of the Older Workers Benefit Protection Act

On October 16, 1990, the minimum standards under Title II of the OWBPA became effective regarding waivers of ADEA rights and claims.[30] Title II sets forth mandatory threshold criteria for valid unsupervised waivers of rights and claims under the ADEA, as well as for settlements of actions filed with the courts or with the EEOC. The Act does not apply to waivers that occurred before the effective date.[31]

A. Background on the OWBPA

Prior to the enactment of the OWBPA, the courts conflicted in the application of standards to determine whether a waiver had been executed under circumstances consistent with ADEA purposes and protections.[32] The majority of courts favored application of a "knowing and voluntary" standard, which had been announced by the Supreme Court in a 1974 decision involving a waiver of employment discrimination claims under Title VII of the Civil Rights Act of 1964.[33] An unsupervised waiver was valid if "the employee's consent to the settlement was voluntary and knowing."[34] The criteria required for a waiver to be knowing and voluntary under the ADEA that were set forth in 1988 by the Third

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30. 29 U.S.C. § 626(f) (Supp. 1993). Title I of the OWBPA, which clarifies ADEA coverage of employee benefits as well as wages, hirings and discharge, has a different effective date. *Id.* § 623.

31. *Id.* § 626(f) (Supp. 1993).

32. *See, e.g.*, Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986) (knowing and voluntary standard); Coventry v. United States Steel Corp., 856 F.2d 514 (3d Cir. 1988) (totality of circumstances standard); O'Shea v. Commercial Credit Corp., 734 F. Supp. 218 (D. Md. 1990), *cert. denied*, 112 S. Ct. 177 (1991) (totality of circumstances test and application of ordinary contract principles); EEOC v. Cosmair, Inc. L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987) (waivers of the right to file a charge with the EEOC void as a matter of public policy).

33. Alexander v. Gardner-Denver, 415 U.S. 36, 52 n.15 (1974).

34. *Id.*

Circuit Court of Appeals in *Cirillo v. Arco Chemical Company* [35] provided the model for most of the minimum standards codified later in Title II of the OWBPA. In *Cirillo*, the court determined whether the waiver was knowing and voluntary by considering such factors as the clarity and specificity of the release, the amount of time that the employee was given to consider the agreement, and whether the employee was encouraged to seek the advice of an attorney.[36]

In 1987, the EEOC promulgated a rule that adopted the knowing and voluntary standard for unsupervised waivers of rights and claims under the ADEA.[37] The EEOC justified the regulation by stating that "it has been found necessary and proper and in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval . . . ."[38] In assessing a waiver under the rule, indicia supporting validity based on the knowing and voluntary standard included a written agreement, clear and unambiguous language, specific reference to claims under the ADEA, a reasonable time given to review the agreement, and the opportunity for the employee to consult with an attorney.[39]

After deciding that the EEOC's rule provided an unsatisfactory guide for unsupervised ADEA waivers, Congress immediately suspended funding for its enforcement during fiscal year 1988, and undertook similar measures in 1989 and 1990.[40] The rule was criticized in the Congressional Record as being without legal foundation and contrary to public policy,[41] and strong bipartisan support continued for its suspension. Congress concluded that evidence existed of unfair and abusive practices by employers in obtaining waivers of rights and claims under the ADEA,[42] indicating the need for remedial legislation that would protect older workers more adequately than the EEOC's rule.

Senate Bill 54, the Age Discrimination in Employment Waiver Protection Act of 1989, was introduced in the 101st Congress to allow

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35. Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988).

36. *Id.* at 451.

37. 29 C.F.R. §§ 1627.16 (c)(1)-(3) (1990).

38. *Id.* § (c)(1).

39. *Id.* § (c)(2).

40. Pub. L. No. 100-202, 1987 U.S.C.C.A.N. (101 Stat.) 1329-31; Pub. L. No. 100-459, 1988 U.S.C.C.A.N. (102 Stat.) 2216; Pub. L. No. 101-162, 1990 U.S.C.C.A.N. (103 Stat.) 1020.

41. 134 CONG. REC. S14,509, 14,511 (daily ed. Oct. 4, 1988) (statement of Sen. Metzenbaum).

42. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989, S. REP. NO. 79, 101st Cong., 1st Sess. 9-12 (1989); HOUSE COMM. ON EDUCATION AND LABOR, REPORT ON THE OLDER WORKERS BENEFIT PROTECTION ACT (H.R. 3200), H. REP. NO. 664, 101st Cong., 1st Sess. 22-23 (1990).

voluntary and knowing waivers given for valuable consideration, but only in settlement of a bona fide claim alleging age discrimination.[43] The drafters of the original bill specifically sought to prohibit the use of unsupervised waivers in the absence of a bona fide claim.[44] Subsequently, Senate Bill 1511, the Older Workers Benefit Protection Act, was introduced to overturn the Supreme Court's decision in the case of *Public Employees Retirement System of Ohio v. Betts*.[45] The Senate Committee on Labor and Human Resources amended Senate Bill 1511 to create a second title within the Act, which incorporated the basic protections proposed under Senate Bill 54.[46] After substantial compromise[47] and further amendment that included adding provisions to allow unsupervised waivers under the ADEA, Congress approved Senate Bill 1511, and the President signed the OWBPA into law. The final Act reflects the concerns of the EEOC in promoting the voluntary and expeditious private settlement of disputes under the ADEA,[48] a synthesis of case precedent with respect to waivers under the ADEA, and Congressional intent to ensure that older workers are not coerced or manipulated into waiving their statutory protections under the ADEA.

B. Minimum Standards for Unsupervised Waivers Under the OWBPA

Title II of the OWBPA covers the following three types of unsupervised waivers under the ADEA and provides virtually the same minimum standards for each: (1) waivers of individual rights or claims, (2) waivers of rights or claims in connection with group layoffs, reductions in force or exit incentive programs, and (3) waivers in settlement of actions filed in court or claims filed with the EEOC.[49]

Compliance with the minimum standards set forth in the OWBPA constitutes a knowing and voluntary execution of a waiver that may be

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43. S. 54, 101st Cong., 1st Sess. (1989), 135 CONG. REC. S357 (daily ed. Jan. 25, 1989). Under S. 54, a bona fide claim was defined as a charge filed with the EEOC, an action filed by an individual in a court alleging age discrimination, or a specific communication to the employer by the employee in writing and in good faith. *Id.*

44. THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989 (Report of the Senate Committee on Labor and Human Resources), *supra* note 42, at 3.

45. 492 U.S. 158 (1989), *cert. denied*, 498 U.S. 963 (1990). *See supra* note 1.

46. LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, *supra* note 2, at 1.

47. *See* 136 CONG. REC. S13,594, 13,596 (daily ed. Sept. 24, 1990) (statement of Sen. Metzenbaum).

48. *See* Draft EEOC Rules Outline Support for Private Waivers Under Age Bias Act, *reprinted in* DAILY LAB. REP. (BNA) No. 141, at A-6, A-7 (July 23, 1985).

49. 29 U.S.C. § 626(f)(1)-(2) (Supp. 1993).

enforced by the courts.[50] A waiver of individual rights or claims under the ADEA must meet the following criteria prescribed in the OWBPA: (1) the waiver must be part of a written agreement in language calculated to be understood by the person who is waiving rights or claims, or by the average individual eligible to participate; (2) the waiver must refer specifically to rights and claims under the ADEA; (3) the individual cannot prospectively waive rights that arise after the execution of the waiver; (4) the waiver must be in exchange for something of value in addition to whatever the individual is already entitled to receive; (5) the individual must be advised in writing to consult with an attorney prior to executing the waiver; (6) the individual must be given at least twenty-one days to consider the agreement; and (7) the employee must be given at least seven days following execution to revoke the waiver. If the employer complies with all of the requirements above, the waiver will become effective after the revocation period expires.[51]

The minimum standards for waivers of rights or claims in connection with group layoffs, reductions in force, or exit incentive programs may be considered by an individual in the group for forty-five days.[52] Such waivers must otherwise comply with the requirements for a waiver by an individual. Waivers for groups must also disclose the job titles and ages of all individuals who are eligible to participate, and of those who are not eligible.[53]

The last type of waiver covered by the Act involves the settlement of a charge filed with the EEOC or an action filed in a court by an individual alleging age discrimination. All of the minimum standards that apply to individual and group waivers apply to waivers in settlement of a charge or action, except for the provision of a revocation period and the requirement of either a twenty-one or forty-five day period of time within which to consider the waiver.[54] Instead, an individual must be given "a reasonable period of time within which to consider the settlement agreement."[55] The lack of a specific time period reflects a consideration by Congress, which was fundamental to waivers of bona fide claims under the precursor to Title II, Senate Bill 54, that an individual who has taken the formal adversarial steps of filing a claim or charge is more likely to be aware of rights under the ADEA before waiving them.[56] Therefore, Congress did not provide a specific period

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50. *Id.* § (f)(1).
51. *Id.* § (f)(1)(A)-(G).
52. *Id.* § (f)(1)(F)(ii).
53. *Id.* § (f)(1)(H)(i)-(ii).
54. *Id.* § (f)(2)(A).
55. *Id.* § (f)(2)(B).
56. 135 CONG. REC. E1131 (daily ed. Apr. 10, 1989) (statement of Rep. Roybal)

of time for individuals to consider waivers in settlement of claims or charges.

The waiver provisions of the OWBPA are more protective of older workers than the EEOC's 1987 rule. For example, the EEOC's rule did not provide an individual the power to revoke the waiver,[57] but the OWBPA allows an individual to revoke the waiver during a period of at least seven days following execution.[58] The OWBPA reverses the burden of proof, which was imposed on the employee under the EEOC's rule, by requiring that the party asserting the validity of a waiver has the burden of proving that the waiver satisfies the minimum standards imposed by the Act.[59] Ultimately, the OWBPA permanently nullifies the EEOC's rule on ADEA waivers.[60]

C. Mandatory Nature of the Minimum Standards of Title II

Ample authority exists that supports the mandatory nature of the minimum standards for a valid unsupervised waiver under Title II of the OWBPA. First, the Act provides in unambiguous language that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary."[61] Under the Act, a waiver is not knowing and voluntary unless at a minimum it meets *all* of the applicable enumerated standards, depending on the type of waiver.[62] Congress neither contemplated nor provided any other method by which to waive rights and claims under the ADEA. The canons of statutory construction mandate that courts apply first the plain meaning of the statute. In the absence of Congressional intent to the contrary, the plain meaning of a statute provides controlling law.[63] Hence, the minimum standards of Title II must be applied by the courts to determine whether an individual has executed a valid waiver of rights and claims under the ADEA. If an employer has not complied with the minimum standards of Title II, the waiver is invalid and unenforceable.

Under Title II, the provision that allocates the burden of proof to the party asserting the validity of the waiver states: "In *any* dispute that may arise over whether *any* of the requirements, conditions, and

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("It is in the nonadversarial situation, such as the use of waivers in conjunction with early retirement incentives, that the possibility of employer abuse of waivers increases.").

57. 29 C.F.R. § 1627.16(c) (1990).

58. 29 U.S.C. § 626(f)(1)(G) (Supp. 1993).

59. *Id.* § (f)(3).

60. *Id.* § (f).

61. *Id.* § (f)(1).

62. *Id.*

63. *See, e.g.*, North Dakota v. United States, 460 U.S. 300 (1983); American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).

circumstances set forth [in Title II] have been met, the party asserting the validity of a waiver shall have the burden of proving *in a court of competent jurisdiction* that a waiver was knowing and voluntary . . . ."[64] The language of the provision indicates that all of the minimum standards under Title II are mandatory, and that adjudication by the courts is unconditionally available if a dispute arises over any single standard.

Second, the language of the ADEA provides support that the minimum standards for waivers under Title II are mandatory. The ADEA as amended is unique among federal statutes in light of its legislative history of congressional concern about the misuse of waivers.[65] Although the ADEA encouraged voluntary settlement of claims alleging age discrimination before the OWBPA, the ADEA did not do so by allowing employers to obtain allegedly invalid waivers. Rather, the ADEA states that voluntary settlement shall be "in compliance with the requirements of the Act."[66] A specific mechanism of the ADEA involving conciliation before suit through the EEOC enables the potential parties to explore a voluntary settlement of age discrimination claims.[67] When Congress amended the ADEA with the OWBPA, the requirements of Title II became the requirements of the ADEA. Congress did not alter the provisions in the ADEA regarding compliance with the Act in voluntary settlements or the conciliation options through the EEOC. Courts have continued to interpret the ADEA in accordance with these provisions.[68] The Supreme Court has held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[69] Therefore, a voluntary settlement of claims or rights under the ADEA must comply with the minimum standards of Title II.

Third, the legislative history of Title II reveals further evidence of the mandatory nature of minimum standards for unsupervised waivers under the ADEA in the differences between EEOC's rule of 1987, which Congress suspended and later nullified, and Title II as law. Under the

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64. 29 U.S.C. § 626 (f)(3) (Supp. 1993) (emphasis added).

65. *See generally* LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, *supra* note 2.

66. 29 U.S.C. § 626(b) (1988).

67. Section 626(b) of the ADEA provides in part that "the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion." *Id.*

68. Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991); Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993).

69. Lorillard v. Pons, 434 U.S. 575, 580 (1978) (holding that Congress intended individual plaintiffs to have the right to a trial by jury under the ADEA).

EEOC's rule, certain factors were identified as relevant to determining whether a waiver was knowing and voluntary, but the only mandatory requirement was that the waiver be in writing. Title II includes some of the standards under the EEOC rule, but the requirement that a knowing and voluntary waiver must meet all of the minimum standards unambiguously forwards a congressional intent that Title II itself is not merely relevant to waivers under the ADEA, but mandatory.

Fourth, Congress substantially incorporated the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA)[70] into the ADEA.[71] The enforcement provisions of the FLSA have been upheld repeatedly by the Supreme Court as mandatory.[72] Moreover, the Supreme Court has held that the enforcement provisions of the FLSA should be followed in interpreting the ADEA.[73] Waivers under Title II deal purely with enforcement of the substantive prohibitions of age discrimination under the ADEA. Hence, case precedent by the Supreme Court provides authority that minimum standards for waivers under Title II should be upheld as mandatory.

In sum, the plain and strict requirements in Title II of the OWBPA provide mandatory minimum standards for unsupervised waivers of rights and claims under the ADEA. The legislative history of Title II reflects the strong congressional intent to ensure that older workers are not coerced or manipulated into waiving their statutory protections under the ADEA. While the OWBPA provides a statutory means for waiving rights and claims under the ADEA, the only way to obtain such a valid waiver is through full compliance with Title II. In other words, although rights and claims arising from the substantive provisions of the ADEA may be waived, the procedure for obtaining a valid waiver under Title II may not be waived. A waiver of the requirements of Title II would be void as against public policy, as would a waiver of any other mandatory federal requirement. The express mandates of Title II and the clear Congressional intent of the OWBPA provide the law controlling the issues of whether retention of severance benefits constitutes ratification of an ADEA waiver unless the individual tenders back the benefits to the employer, or whether retention categorically precludes a subsequent suit.

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70. 29 U.S.C. §§ 201-219 (1988).

71. 29 U.S.C. § 626 (1988). *See* THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989 (Report of the Senate Committee on Labor and Human Resources), *supra* note 42, at 3.

72. *See* Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte Co. v. Gangi, 328 U.S. 108 (1946); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).

73. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

II. History of the Appellate Split

On April 20, 1992, the Eleventh Circuit Court of Appeals held in *Forbus v. Sears Roebuck & Co.*, that "as a matter of federal law, ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases in court, and that the . . . retention of . . . severance benefits during the pendency of [a] lawsuit does not constitute ratification of those releases."[74] The holding of the Eleventh Circuit in *Forbus* contradicted previous holdings of the Fourth and Fifth Circuits that even if the waiver "was invalid,"[75] or "tainted by misrepresentation,"[76] the individual alleging age discrimination ratified the otherwise voidable waiver under the ordinary contract principles of the common law through retention of severance benefits. The holdings of Courts of Appeals involved in the split of authority have been frequently cited by the federal district courts, producing two distinct trails of opinions regarding the issue of waivers.[77]

A. Ratification of a Waiver by Retention of Benefits: Grillet *and* O'Shea

In *Grillet v. Sears, Roebuck & Co.*,[78] the Fifth Circuit Court of Appeals addressed the issues of ratification and tender with regard to a waiver of rights under the ADEA. At sixty years of age, the plaintiff in *Grillet* had spent twenty-six years as a personnel representative for a company when she was informed by her supervisor that her position would be terminated in three days as part of a restructuring plan.[79] The supervisor explained that the plaintiff could either accept ten weeks' severance pay in the amount of $9,000 if she did not sign a waiver of claims against the company, or fifty weeks' severance pay in the amount of $45,000 if she executed the waiver.[80] The supervisor presented the plaintiff with two different waiver forms, one indicating that the employee

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74. Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).

75. O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

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

77. *See, e.g.*, Seward v. B.O.C. Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1992) (holding that ratification precludes subsequent challenge of an ADEA waiver); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill, Aug. 26, 1992) (holding that retention of severance benefits did not preclude subsequent challenge of an ADEA waiver).

78. 927 F.2d 217 (5th Cir. 1991).

79. *Id.* at 218.

80. *Id.*

declined the opportunity to consult with an attorney, and the other indicating that the employee had obtained legal advice.[81] The plaintiff chose to sign the waiver without the advice of an attorney, and $45,000 was paid to her over the next several months.[82]

A week after the plaintiff executed the waiver, she learned that the company had offered new job assignments to three younger employees in her department.[83] Nineteen months after her termination, the plaintiff filed an action under the ADEA and for various state claims involving age discrimination, misrepresentation and duress.[84] The company counterclaimed for breach of contract, alleging that the plaintiff's suit constituted a breach of the waiver agreement.[85] After the company moved for summary judgment, the plaintiff offered to tender back the enhanced severance pay with interest on the condition that she receive a reinstatement to her former position and back pay, but this offer was rejected by the company.[86] The district court denied the company's motion for summary judgment based on the finding that material issues of fact remained as to whether the plaintiff had knowingly and voluntarily executed the waiver.[87] The company moved for reconsideration, asserting that the plaintiff had ratified the waiver by accepting the severance payments.[88] Upon denial of the company's second motion, the Fifth Circuit accepted the appeal under the collateral order doctrine.[89]

The Fifth Circuit held that the company should have been granted summary judgment.[90] The court incorporated into its holding the company's theory that even if the waiver was tainted by misrepresentation and duress, and thus the execution was not knowing and voluntary, the plaintiff ratified the waiver by accepting the severance benefits after learning of the misrepresentation:[91] "If a releasor . . . retains the consideration after learning that the release is voidable, her continued retention of the benefits constitutes a ratification of the release."[92]

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81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 219. The collateral order doctrine provides appellate jurisdiction to review a non-final order by a district court that "(1) conclusively determines the disputed question; (2) resolves an important issue separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment." *Id.*
90. *Id.* at 221.
91. *Id.* at 220-21.
92. *Id.* at 220.

Although the effective date of the OWBPA made the Act's minimum standards inapplicable to the plaintiff's waiver, the court did not consider congressional intent underlying the ADEA, nor the weight of the federal common law of waivers under the ADEA. Instead, the Fifth Circuit relied on a district court opinion that had found employees' general waivers of employment discrimination claims enforceable based on the theory that retention of the benefits ratified the waivers.[93] The court also incorporated the holdings of various federal decisions applying the common law of contracts to hold as follows:

> Even if Grillet's tender-back offer had been sufficient, it came too late. The law of contracts "requires a party claiming wrongful inducement to seek rescission shortly after discovering the misrepresentation." . . . To avoid ratifying the release through her conduct, Grillet should have returned the consideration soon after she learned that some younger employees in her department had not been terminated.[94]

The court also reasoned that because "[a] party seeking rescission must attempt to restore the status quo ante — that is, to return the parties to the positions they held just before they entered into the agreement,"[95] the employer could not be returned to its position after being subjected to a lawsuit for age discrimination when the employee could have been terminated previously at the will of the employer.[96] Thus, the *Grillet* decision stands for the proposition that retention of benefits received from executing a voidable unsupervised waiver constitutes ratification of the waiver, unless an individual tenders back the benefits in an effort to return to the status quo soon after learning the waiver is voidable.

Three weeks after the Fifth Circuit decided *Grillet*, the Fourth Circuit independently upheld an arguably stricter application of the ratification theory in *O'Shea v. Commercial Credit Corporation*.[97] In *O'Shea*, the

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93. *Id.* (citing Widener v. Arco Oil and Gas Co., 717 F. Supp. 1211 (N.D. Tex. 1989)).

94. *Id.* at 221 (quoting United States v. Texarkana Trawlers, 846 F.2d 297, 305 n.20 (5th Cir.) (1988), *cert. denied*, 488 U.S. 943 (1988) citing Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417 (8th Cir. 1985)). In *Anselmo*, the Eighth Circuit Court of Appeals held that the silence, acquiescence, and according conduct by the plaintiff for a considerable time following execution of a waiver and acceptance of severance pay benefits amounted to a ratification that precluded subsequent state law claims for breach of contract and fraudulent misrepresentation. *Anselmo*, 771 F.2d at 417.

95. *Grillet*, 927 F.2d at 220 (citing United States v. Texarkana Trawlers, 846 F.2d 297, 304 (5th Cir. 1988)), *cert. denied*, 488 U.S. 943 (1988)).

96. *Grillet*, 927 F.2d at 221.

97. 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

defendant was an employer that terminated the position the plaintiff had held for twenty-seven years. The plaintiff's supervisor offered a waiver of any claims against the employer in exchange for enhanced severance benefits, which included twenty-seven weeks' severance pay and a determination that she was to be considered on unpaid leave of absence for some months in order to "bridge" her early retirement to age fifty-five. The waiver contained a clause stating that execution must occur within five days, or else the plaintiff's benefits would be lost. Although the plaintiff consulted with two attorneys, neither was able to advise her as to the validity of the waiver. The plaintiff could not afford to lose the benefits set forth in the waiver, so she executed the waiver. The plaintiff claimed to have learned subsequently that her employer had taken out advertisements and had hired new employees in her department. However, the plaintiff also admitted in a letter to her Senator that she "'purposely avoided [filing an] age discrimination action,'" until all of her deferred severance had been paid.[98]

On appeal, the Fourth Circuit affirmed the district court's grant of summary judgment for the employer upon three apparent grounds.[99] First, after reviewing the pre-OWBPA standards for determining the validity of an ADEA waiver, the court held that "the better approach is to analyze waivers of ADEA claims under ordinary contract principles . . . . Accordingly, we turn to the appropriate state's law for guidance. . . ."[100] Applying state contract law, the court held that setting aside a waiver could only be done for the same reasons that allow a party to "void a contract."[101] However, the court's second ground for upholding the validity of the waiver was based essentially on an ADEA knowing and voluntary standard: "O'Shea's decision to execute the agreement was voluntary, deliberate, and informed."[102] The court found no evidence of fraud or economic duress that would allow the plaintiff to void the waiver, and because "[i]t is a well-established proposition that the retention of benefits of a voidable contract may constitute ratification, ... O'Shea validly released her ADEA rights under both federal and state law."[103] The court emphasized a distinction between voidable waivers that were induced by duress and subject to ratification absent a tender back of consideration, and void waivers that would be unaffected by a ratification theory.[104] In the alternative, the court's third

98. *Id.* at 361.
99. *Id.* at 361-62.
100. *Id.* at 362.
101. *Id.*
102. *Id.*
103. *Id.* at 362-63.
104. *Id.* at 362.

ground held that "even if the release executed by the appellant was invalid, the [employer] would have prevailed on the ground that the [individual's] subsequent acceptance of the severance pay demonstrated an intent to ratify the agreement."[105]

The *O'Shea* court also cited an Eighth Circuit case relied upon in *Grillet* that discussed the effects of a timely tender back of consideration received from a waiver, leaving open the possibility that prompt repudiation of the waiver might have preserved the plaintiff's age discrimination claims.[106] The court implied that if the parties could have been returned to the status quo existing before execution of the waiver, the plaintiff might not have been precluded from bringing her age discrimination lawsuit: "Clearly, O'Shea sought to have it both ways, and that is something which the doctrine of ratification was designed not to permit."[107] The court concluded the opinion by upholding the facial validity of the waiver, and in the alternative, the subsequent ratification of the waiver based upon the three asserted grounds.[108]

B. Impact and Post-OWBPA Implications of Ratification in Grillet *and* O'Shea

The appellate decisions of *Grillet* and *O'Shea* have been cited by a number of district courts holding that the failure to tender back severance benefits received in exchange for execution of a waiver constitutes ratification.[109] One general inquiry that these courts have borrowed from *Grillet* and *O'Shea* to decide whether an individual has ratified a waiver involves evaluating the conduct of the individual after execution with respect to the consideration from the agreement.[110] Although some courts have been willing to uphold ratification based upon the retention of a lump sum of benefits for a period of time, other courts have made the distinction that only conduct involving the continuous receipt of benefits over a period of time demonstrates an intent by the individual to ratify

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105. *Id.*

106. *Id.* at 362. (citing Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417 (8th Cir. 1985)).

107. *Id.* at 363.

108. *Id.* at 362.

109. Seward v. B.O.C. Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1992); Alphonse v. Northern Telecom, Inc., 776 F. Supp. 1075 (E.D. N.C. 1991); Ponzoni v. Kraft General Foods, Inc., 774 F. Supp. 299 (D. N.J. 1991); Haslach v. Security Pacific Bank Oregon, 779 F. Supp. 489 (D. Or. 1991); Frumkin v. International Business Machines Corp., 801 F. Supp. 1029 (S.D.N.Y. 1992).

110. *See, e.g.,* Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991) (continued acceptance of benefits by ex-employee after learning of alleged misrepresentation constituted ratification).

the agreement.[111] Generally, the courts adopting ratification theories have not scrutinized the soundness of applying state contract law with respect to the enactment of the OWBPA and other actions by Congress expressing concern over ADEA waivers. However, several district courts have either expressly rejected the ratification holding in *Grillet* and *O'Shea* or chosen not to follow the appellate holdings by distinguishing the facts from the instant case.[112]

In *Grillet*, *O'Shea*, and their progeny at the district court level, the courts have addressed issues involving waivers that predate the mandatory minimum standards of the OWBPA. The suspension of the EEOC's rule by Congress, the legislative history of Title II, and the enactment of the OWBPA, did not convince courts upholding ratification of ADEA waivers to provide special scrutiny to such agreements based upon the express congressional intent: "Put simply, [the plaintiff] is inviting this court to accord special significance to acts of Congress which have done no more than leave the law in its nascent state on the issue of unsupervised waivers. We decline that invitation."[113] Instead, the courts upheld a ratification theory that assumed the waiver had not been executed in accordance with a pre-OWBPA standard of knowing and voluntary agreement and consequently treated the waiver as a voidable contract subject either to absolute ratification upon acceptance of consideration, or to rescission upon a timely tender back of the consideration. Moreover, these courts have drawn a distinction between void and voidable contracts, claiming that waivers under the ADEA are voidable, not void, for a period of time following execution.

In light of the mandatory nature of minimum standards under Title II, courts that have previously upheld the ratification theory should defer to the OWBPA as controlling law for waivers executed after the effective date of the Act. However, it is unclear whether these courts will adhere to the mandates of the Act. Neither the decision in *Grillet* nor *O'Shea* addresses the intended impact of the holding upon post-OWBPA cases involving waivers that do not comply with Title II of the OWBPA. In

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111. *See, e.g.*, Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991) (retaining a lump sum severance payment, as opposed to continuous receipt of payments, did not constitute ratification).

112. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993) (rejecting *Grillet* and *O'Shea*); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993) (distinguishing the facts of the case from *Grillet* and *O'Shea*); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill Aug. 26, 1992) (rejecting *Grillet* and *O'Shea*); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992) (rejecting *Grillet*); Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991) (distinguishing the facts of the case from *Grillet*); Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991) (rejecting *Grillet* and *O'Shea*).

113. *O'Shea*, 930 F.2d at 361.

the first cases to present district courts with the issue of the validity of waivers executed since the OWBPA became effective, employers have asserted unsuccessful defenses that rely primarily upon *Grillet* and *O'Shea*.[114] Moreover, a recent appellate decision cited *O'Shea*, not for the ratification holding, but for the basic proposition that employees may validly waive ADEA rights and claims in private settlements.[115] The court remanded the case for a determination of the validity of the waiver based upon knowing and voluntary execution.[116] The clear impact of a possible continued adherence by the courts to variations of a ratification theory as applied to waivers covered by the effective date of Title II would render the express provisions of the Act ineffective and thwart the congressional purposes in cases involving waivers not complying with the minimum statutory requirements.

C. *Retention of Benefits Without Effect on Claims Under the ADEA:* Isaacs *and* Forbus

The decisions of *Grillet* and *O'Shea* were a few weeks old when a district court issued a contrary holding regarding the issues of ratification and tender back as a condition precedent to bringing a subsequent action.[117] Although the case of *Isaacs v. Caterpillar, Inc.* does not stand on equal authoritative ground with the appellate decisions by the Fourth and Fifth Circuits, the rationale and holding were adopted expressly in the decision of the Eleventh Circuit that officially created the appellate split.[118] Furthermore, *Isaacs* provides an extensive in-depth discussion of the tender and ratification issues, compared to the relatively brief treatment given by the appellate decisions in *Grillet* and *O'Shea*.

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114. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

115. Gormin v. Brown-Forman Corp., 963 F.2d 323 (11th Cir. 1992).

116. *Id.* at 327.

117. Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991). *Isaacs* was decided on May 23, 1991, *O'Shea*, 930 F.2d at 358, on April 11, 1991, and *Grillet*, 927 F.2d at 217, on March 26, 1991.

118. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992): "We agree with, and find persuasive, the reasoning set forth in *Isaacs* that explains public policy considerations supporting our determination that the Retirees should not be required to tender their retirement benefits back to Sears as a prerequisite to the maintenance of their lawsuit." *Id.* at 1040. The reasoning set forth in *Isaacs* that the court in *Forbus* relied upon also included a discussion of *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968), a Supreme Court decision that rejected a tender back requirement of a plaintiff under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988). *See infra* text accompanying notes 127-49.

In *Isaacs*, the plaintiffs alleged a pattern or practice by their employer of coercing older employees into retirement or separation from employment because of their age.[119] The waivers at issue stated that the employer was released from claims relating to retirement from employment in exchange for severance payments and benefits beyond the plaintiffs' entitlement under the normal retirement plan.[120] The plaintiffs alleged that the waivers were invalid under the ADEA because they were not given on a knowing and voluntary basis.[121] None of the plaintiffs offered to return the benefits they received in exchange for executing the waivers.[122] The employer moved for summary judgment, contending that the plaintiffs were required to tender back the benefits as a condition precedent to bringing an action.[123] The employer further argued that the plaintiffs had ratified the waivers by retaining the benefits during the three years of litigation involved in the action, thereby precluding subsequent challenges on the issue of validity.[124] The court adopted the employer's assertion that the court could assume the waivers "were entered into either as a result of duress, fraud, or mistake because the Plaintiffs did not know what they were signing."'[125] The employer based its sole argument for summary judgment upon the "tender/ratification argument,"[126] relying on the holdings of *Grillet* and *O'Shea* without addressing the merits of the plaintiff's claims.

The district court chose not to follow *Grillet* and *O'Shea*, but relied instead on a 1968 decision by the Supreme Court in *Hogue v. Southern Railroad Co.* [127] as the most persuasive law relating to the waivers.[128] The *Hogue* decision involved an employee's lawsuit under the Federal Employer's Liability Act (FELA). The court recognized that other cases deciding the tender/ratification issue of ADEA waivers had not previously cited the Supreme Court decision.[129] However, the *Isaacs* court found the decision highly instructive, stating "[u]nder *Hogue*, whether a tender requirement exists is not to be decided by state contract law doctrines.

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119. *Isaacs*, 765 F. Supp. at 1362.

120. *Id.* at 1363-64.

121. *Id.* at 1364.

122. *Id.*

123. *Id.* at 1363.

124. *Id.* at 1364.

125. *Id.* at 1365 (citing the court's transcript of the proceedings of May 3, 1991 relating to the motion for summary judgment made by the employer).

126. *Id.* at 1363.

127. *Hogue*, 390 U.S. 516 (1968).

128. *Isaacs*, 765 F.Supp at 1366.

129. *Id.* The *Hogue* decision had gone unnoticed during the rise of the federal judge-made law with respect to ADEA waivers. *See, e.g.*, Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988).

It is a federal question, and must be decided by considering whether such a requirement would be 'incongruous with the general policy' of the statute in question."[130] The *Isaacs* court noted that because the FELA and the ADEA are remedial statutes intended to protect employees, "[n]o apparent reason exists not to apply *Hogue* to the ADEA."[131]

The *Isaacs* court applied the *Hogue* decision to the employees' waivers in holding that (1) "as a matter of federal law, there is no requirement that ADEA plaintiffs tender the consideration received for releases as a condition of challenging those releases in a lawsuit," and (2) "[f]or the same reasons, the retention by Plaintiffs of benefits they received under the [releases] during the pendency of this lawsuit does not constitute 'ratification' of those releases."[132] The grounds offered by the *Isaacs* court included following the precedent of the Supreme Court decision in *Hogue* over the appellate decisions in *Grillet* and *O'Shea*,[133] citing the purposes and provisions of the ADEA as amended, and propounding in the alternative an analysis of contract law that would allow the retirees to maintain their ADEA suits without ratification or a tender back of consideration from the waivers.[134]

The court's analogous use of *Hogue* involved a detailed review of the Supreme Court decision.[135] In *Hogue*, an injured railroad employee signed a release in exchange for a sum of money.[136] The employee later sued, alleging that the release was void for mutual mistake of fact.[137] He did not later tender back the consideration that he had been paid for the executing the release.[138] The state courts held that under state common law, failure to tender back consideration constituted ratification, requiring the suit to be dismissed.[139] The Supreme Court reversed on two fundamental grounds. First, "[t]he 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."[140] Second, the Court held that a tender back prerequisite would be "'wholly incongruous with

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130. *Isaacs*, 765 F. Supp. at 1366.
131. *Id.* at 1367.
132. *Id.* at 1371.
133. *Id.* at 1369. The opinion states that "while this Court has the greatest respect for the Fourth and Fifth Circuits, it must follow the law as laid down by the Supreme Court in *Hogue*, and must apply the law to the ADEA unless some tenable reason exists not to do so." *Id.*
134. *Id.*
135. *Id.* at 1366.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* (citing *Hogue*, 390 U.S. at 517).

the general policy of [the FELA] to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers,'"[141] and that the original consideration paid to the employee "[should] be deducted from any award determined to be due . . . ."[142] The *Isaacs* court cited lower courts' application of *Hogue* to reject tender requirements in lawsuits under other federal remedial statutes and noted that the Supreme Court's decision was neither discussed nor mentioned in either *Grillet* or *O'Shea*.[143] Thus, *Hogue* provided the highest authority for the holdings of *Isaacs*.

The *Isaacs* court's policy grounds included "four special factors associated with the ADEA [that] make it particularly necessary to apply the rule of *Hogue* to ADEA suits."[144] First, the court found that "a tender requirement would deter meritorious challenges to releases" in ADEA lawsuits, particularly in the context of early retirement programs.[145] As a practical matter, the court noted the unlikeliness that retired employees would be able to save their severance payments "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."[146] Second, the court recognized the "continuing [congressional] preoccupation with ADEA releases," including suspension of the EEOC's rule and passage of the OWBPA, "which severely restricts the use of releases" with minimum standards.[147] The court found the congressional history 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."[148] A tender requirement would run afoul of congressional intent by making it "impossible for most employees to challenge ADEA releases."[149] Third, the court noted that a tender requirement would allow employers to circumvent the waiver provisions of the OWBPA: "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded

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141. *Isaacs*, 765 F. Supp at 1366 (citing *Hogue*, 390 U.S. at 518 (citing Dice v. Akron, C. & Y. R. Co., 342 U.S. 359 (1952))).

142. *Isaacs*, 765 F. Supp at 1366 (citing *Hogue*, 390 U.S. at 518).

143. The *Isaacs* court cited Smith v. Pinell, 597 F.2d 994, 996 (5th Cir. 1979) (Jones Act); Wahsner v. American Motors Sales Corp., 597 F. Supp. 991, 998 (E.D. Pa. 1984) (Automobile Dealers' Day in Court Act); Taxin v. Food Fair Stores, Inc., 197 F. Supp. 827, 830-31 (E.D. Pa. 1961) (Sherman Antitrust Act).

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

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

from challenging them unless they somehow could come up with the money they were given when allegedly forced into retirement."[150]

The fourth factor constituted an overt attack on the assumption made in the rationales of *Grillet* and *O'Shea* that the tender back of consideration justified rescission by restoring the parties to the condition existing before the employee executed the release.[151] The *Isaacs* court stated that "[i]mposing a 'tender' requirement for challenges to ADEA releases would frequently create insoluble practical problems."[152] The court reasoned that although a tender back of consideration from a waiver settling a personal injury claim might be fairly assumed to restore the parties to their pre-waiver condition, the use of consideration in an ADEA waiver frequently involves the inducement of an early retirement program, not merely a waiver of age discrimination claims:

> The purpose of such programs is to induce people to retire earlier than they otherwise would have done. Such early retirement is an economic benefit to the company. To get it, the company offers the employee money for leaving early. If the company has plaintiffs sign a release in connection with these incentive retirement payments, the *status quo* is *not* restored if the employee tenders the consideration received in connection with his retirement and the employer accepts it and rescinds the release. To the contrary, such an exchange would arguably unjustly enrich the employer. The 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.[153]

Thus, the insoluble practical problem that would develop from a tender requirement in ADEA cases involves the "conundrum as to how much should be tendered to restore the pre-release *status quo*."[154] The court pointed to the lack of a method that would force the parties to agree as to the appropriate amount to be tendered back, especially given that

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150. *Id.*

151. *See supra* text accompanying notes 95 and 107.

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

153. *Id.* Although the language of the court suggests the possibility of an express promise not to file a lawsuit under the ADEA in a waiver, the validity and scope of such a waiver would be highly suspect under Title II of the OWBPA. Title II expressly prohibits prospective waiver of rights and claims arising after the date the waiver is executed. 29 U.S.C. § 626(f)(1)(C) (Supp. 1993). Analogous to the prohibition of prospective waiver under the Title of the OWBPA, the Supreme Court has held that with respect to employment discrimination claims under the Civil Rights Act, "[t]here can be no prospective waiver of an employee's rights under Title VII." Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

154. *Isaacs*, 765 F. Supp at 1368.

employers do not typically specify how much consideration is in exchange for retirement and how much is in exchange for a release of claims.[155]

In *Isaacs*, the employer made numerous assertions in favor of a tender requirement as a condition precedent to bringing an action.[156] In response to the assertion by the plaintiffs that a tender requirement would largely nullify the effectiveness of the OWBPA, the employer argued that the OWBPA could not be retroactively applied to the employees' waivers to preclude a tender requirement.[157] The court rejected the employer's argument based on the lack of precedent in the courts, or in the legislative history, supporting a tender requirement:

> Neither the text nor the legislative history of the OWBPA says anything about tenders as a condition of challenging releases. The law of tender, therefore, is presumably the same after the OWBPA as it was before it. If there was a tender requirement before the OWBPA, then there still is one; if there was not, then there still is not. This point weighs heavily against the existence of a judge-made tender requirement under the ADEA, because such a judge-made requirement would eliminate the ability of most employees to challenge releases obtained in violation of the OWBPA.[158]

The employer asserted further that the consideration paid to the employees for the waivers was for the right to be free from a lawsuit, and the present action deprived the employer of the benefit of its bargain.[159] The court also rejected this assertion, stating that unless a waiver is "explicitly worded as a promise not to file a lawsuit," a waiver is "merely a potential defense to a lawsuit once filed."[160] In a general response to several other assertions by the employer criticizing the applicability of the *Hogue* decision because the ADEA "encourages voluntary settlement,"[161] disputing the potential deterrent effect of a tender requirement, and denying the difficulty in determining the amount of consideration to tender in order to return the status quo, the court concluded that a tender requirement could not be applied to the EEOC's right to enforce the ADEA without violating congressional purposes, and therefore it would be an inconsistent application to actions filed by individuals.[162]

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155. *Id.*
156. *Id.* at 1368-71.
157. *Id.* at 1369.
158. *Id.*
159. *Id.* at 1370.
160. *Id.* at 1370-71.
161. *Id.* at 1368.
162. *Id.* at 1370-71.

A final alternative ground offered by the court in *Isaacs* involved a rejection of the interpretations of contract law made in *Grillet* and *O'Shea*: "*Grillet* and *O'Shea* assume that it is a universally accepted rule of state contract law that a person who has signed a release must tender the consideration to a defendant prior to suing to void the release. There is no such unanimity."[163] In support, the court cited a number of state cases that had either expressly abandoned a tender requirement or refused to adopt one.[164] The court also cited section 480 of the American Law Institute Restatement of Contracts, which does not require a tender back of consideration "where the consideration for the release 'is merely money paid, the amount of which can be credited in partial cancellation of the injured party's claim.'"[165] Moreover, the court found relevant section 384(1)(b) of the Second Restatement of Contracts, "which excuses a tender of the consideration where the 'court can assure such return [of the consideration] in connection with the relief granted.'"[166] Neither *Grillet* nor *O'Shea* mentioned the Restatement sections relied upon by the court, and the court concluded a discussion of applicable common law of contracts by citing a general principle of contracts that "[e]ven where the law requires a tender, such tender is excused if it would be futile."[167] The court primarily relied upon the question of whether a tender in the case would be futile as a material issue of disputed fact, which alternately would require denial of the employer's motion for summary judgment.[168]

In rejecting the ordinary contract principles asserted in *Grillet* and *O'Shea* and by the employer,[169] the *Isaacs* court harshly criticized the distinction between whether a tender of consideration is a condition precedent to bringing an action to challenge a waiver and whether the retention of benefits constitutes a ratification of the waiver:

> States that require a tender to challenge a release sometimes use language of "condition precedent to suit," and sometimes use

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163. *Id.*

164. *Id.* at 1372 (citing Ruggles v. Selby, 165 N.E.2d 733, 743 (Ill. App. Ct. 1960) (holding no tender necessary to void a release for mutual mistake of law); Worthey v. Cleveland, C.C. & St. L.R. Co., 251 Ill. App. 585 (1929) (holding tenders to be required in certain circumstances but not others)).

165. *Isaacs*, 765 F. Supp. at 1372 (citing RESTATEMENT OF CONTRACTS § 480 (1932); Taxin v. Food Fair Stores, Inc., 197 F. Supp. 827 (E.D. Pa. 1961)).

166. *Isaacs*, 765 F. Supp. at 1372 (citing RESTATEMENT OF CONTRACTS (SECOND) § 384(1)(b) (1979)).

167. *Isaacs*, 765 F. Supp. at 1374 (citing Needy v. Sparks, 393 N.E.2d 1252, 1255 (Ill. App. Ct. 1979); 74 AM. JUR. 2D *Tender* §§ 4, 5 (1964)).

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

169. *Id.* at 1372 (citing *Grillet*, 927 F.2d 217).

> the language of "ratification." But there is no meaningful difference between the two. It is impossible to understand how a person can ratify a release by not making a tender if he can sue to challenge the release without making a tender. No state court decision cited by [the employer] has explained the difference between the failure to tender as barring suit and failure to tender as constituting "ratification."[170]

The overriding issue for the court consisted of whether a tender requirement should be imposed for challenging releases under remedial federal statutes.[171] Based upon the Supreme Court's decision in *Hogue*, the provisions and purposes of the ADEA as amended, and varying principles of contract law, the *Isaacs* court concluded that no such requirement existed for plaintiffs under the ADEA.[172]

Nearly a year later, the Eleventh Circuit Court of Appeals reached the same conclusion in *Forbus v. Sears Roebuck & Co.*, relying heavily upon the holding and rationale of *Isaacs*.[173] In *Forbus*, the four plaintiffs had been employed at a retail distribution center of Sears, Roebuck and Company when the company informed them that plans to convert the center to other uses would involve a substantial reduction in jobs.[174] The company offered the employees a severance incentive package, requiring as a condition the execution of a waiver that precluded the retiring employee from bringing any action against the company as a result of termination.[175] After each employee accepted the severance package and received the promised benefits, the company changed the restructuring plans and converted the center into a different facility that required more jobs than anticipated previously.[176] The retirees asked for their jobs back but were informed that none were available. Thereafter, the retirees filed charges of age discrimination with the EEOC alleging that the ADEA had been violated, that the waivers had been executed under duress, and that the misrepresentations which had been made by the company constituted breach of contract and fraud.[177] None of the retirees tendered severance payments back to the company.[178] Instead,

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170. *Id.* at 1373.
171. *Id.* at 1376.
172. *Id.*
173. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).
174. *Id.* at 1038.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

the retirees offered to offset any award received in the lawsuit by the amount of accepted severance pay.[179]

The district court granted summary judgment to the employer on state law claims because the retirees had been at-will employees and because the retirees failed to state a claim for breach of contract.[180] In arriving at its decision, the court noted that the retirees "sustained no recoverable damages, even if Sears were guilty of fraud."[181] The district court determined that the "offer to offset any award [constituted] sufficient tender" to the allow the suit under state law.[182] The retirees' ADEA claims remained for consideration by the Court of Appeals.[183] The Eleventh Circuit accepted the appeal on the basis of the collateral order doctrine.[184] The court also considered a simultaneous motion for summary judgment by the company on the basis that the retirees had unconditionally failed to tender back severance payments, thereby ratifying the waivers, even if questions of fact existed regarding the validity of the waivers based on duress and fraud.[185]

The Eleventh Circuit reviewed the ratification issue de novo and considered the company's twin arguments: (1) even if the waivers were "tainted by misrepresentation or duress," the retirees ratified the waivers "by accepting the benefits," and (2) if the retirees were allowed to retain the severance benefits while maintaining the lawsuit, the company would be denied the benefit of its bargain.[186] In response, the retirees contended that the "tender back of the severance benefits [was] not an absolute requirement."[187] The court cited the Supreme Court's decision in *Hogue* to reverse the district court's application of state law to the issue of a tender requirement under the ADEA.[188] Moreover, the court agreed with the citation of *Hogue* as controlling law in *Isaacs* and followed the holding in *Hogue* that where rights are conferred by a remedial federal statute designed to protect employees, "whether a tender back . . . [is]

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179. *Id.*
180. *Id.* at 1039.
181. *Id.*
182. *Id.* at 138-39.
183. *Id.*
184. *See supra* note 89 and accompanying text. The collateral order doctrine allows an exception to the general rule that interlocutory appeals are not appealable. The dissent argued that the collateral order doctrine did not apply and that the employer's asserted right not to be sued because of the waivers was not sufficiently important to justify an interlocutory appeal. *Forbus*, 958 F.2d at 1042-43.
185. *Id.* at 1038-39.
186. *Id.* at 1040-41.
187. *Id.* at 1040.
188. *Id.* at 1041.

a prerequisite to the bringing of the suit is to be determined by federal rather than state law."[189]

The court acknowledged the decisions by the Fourth and Fifth Circuits in *O'Shea* and *Grillet* but held *Hogue* to be binding precedent and adopted the public policy considerations of *Isaacs* as persuasive authority.[190] The court also adopted by analogy the finding in *Hogue* that a tender requirement would deter meritorious challenges to waivers in FELA lawsuits:

> The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case.[191]

The court affirmed the district court's denial of summary judgment to the employer by holding as a matter of federal law that ADEA plaintiffs are not required to tender back consideration received for waivers and that retention of the consideration "during the pendency of a lawsuit does not constitute ratification of [the] waivers."[192] Thus, *Forbus* upheld unequivocally the right of an individual to challenge the validity of an ADEA waiver, without condition precedent or conflicting interpretations of the common law of contracts.[193]

D. Impact and Post-OWBPA Implications of Isaacs *and* Forbus

The precedent established in *Forbus* and *Isaacs* provided authority for district courts deciding first impression issues regarding the validity of waivers under the OWBPA.[194] By the middle of 1992, two district courts had followed *Isaacs* and *Forbus* to hold that discharged workers who failed to return severance benefits did not lose their right to bring an ADEA action if they had executed waivers that were invalid under

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189. *Id.* at 1040 (citing *Hogue*, 390 U.S. at 517).

190. *Forbus*, 958 F.2d at 1040-41.

191. *Id.* at 1041.

192. *Id.*

193. *Id.*

194. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill, Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

the OWBPA.[195] A third district court held independently of *Isaacs* that retention of a lump sum severance payment by an individual, as opposed to continuous receipt of payments, did not constitute ratification of a voidable waiver.[196]

The mandatory nature of the minimum standards for a valid waiver under Title II of the OWBPA makes the continued uniformity of decisions following *Forbus* and *Isaacs* likely, thereby allowing challenges of waivers that are voidable under the Act. Moreover, the district court decisions that echo the holding and rationale of *Forbus* and *Isaacs* indicate the apparent soundness of the reasoning in those cases with respect to post-OWBPA waivers. In light of the rough equivalence of cases on either side of the issue, the relevant consideration mitigating in favor of the continuing force of the decisions in *Forbus* and *Isaacs* is that the cases rejecting tender or ratification theories are the most recent and deal with waivers subject to the mandatory minimum standards of the OWBPA.[197]

Although *Forbus* and *Isaacs* involved waivers that were executed before the effective date of the minimum standards for valid waivers under the OWBPA, both courts expressly intended their holdings to set precedent for waivers executed after the effective date of the OWBPA.[198] The policy behind *Forbus* and *Isaacs* was to leave the doors of courthouses open to meritorious ADEA lawsuits, while avoiding setting precedent that would allow employers to circumvent both the pre-OWBPA knowing and voluntary standard for ADEA waivers and the minimum standards in Title II of the OWBPA.[199] The risk that the courts sought to avoid involved the potential for employers to fraudulently induce the execution of severance waivers by coercion or misrepresentation with the hope that the ratification theory would preclude retirees from filing ADEA lawsuits or that retirees would not be in a financial position to return the benefits in order to meet a tender requirement within the two-year statute of limitations under the ADEA.[200] The courts reasoned that the purpose and effect of the OWBPA would be nullified if employers were able to obtain waivers under such circumstances.[201]

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195. Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill. 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

196. Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991).

197. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill., Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

198. *Forbus*, 958 F.2d at 1041; *Isaacs*, 765 F. Supp. at 1371.

199. *Id.*

200. 29 U.S.C. § 626(e)(1) (1988).

201. *Forbus*, 958 F.2d at 1036; *Isaacs*, 765 F. Supp. at 1359.

III. The Model Amendment

Title II of the OWBPA does not expressly provide an individual with the right to retain consideration received from the execution of a waiver during a challenge of the validity of the waiver in court. Nor does Title II contain provisions addressing a tender back requirement or ratification of a waiver. Moreover, nothing in the legislative history of the OWBPA addresses the issue. Title II presently allows an individual seven days during which to revoke a waiver,[202] but employers customarily do not give consideration until after expiration of the revocation period. However, disputes over the right of an individual to bring a subsequent ADEA lawsuit arise after execution of a waiver and exchange of severance benefits. Courts may review the underlying purposes of the ADEA and the OWBPA for persuasive authority, but along with absolute rejections of the federal law, differing interpretations and constructions will inevitably produce a gray area of the law. Thus, the appellate split cannot be resolved by the provisions of the ADEA as it currently stands. Amendment of the ADEA will provide a simple and necessary resolution of the appellate split.

A. Need for Amendment

Amendment of the Title II provisions of the OWBPA is necessary not only to resolve the judicial inconsistencies perpetuated by the appellate split, but also to address underlying concerns of considerable social and economic value. First, the increasing use of severance waivers as a method of corporate restructuring and necessary reductions in the size of operations, coupled with the aging of the "baby boom" generation, means that more older workers and their employers will be encountering and using unsupervised waivers.[203] The continued existence of the appellate split casts an irresolvable uncertainty upon the prerequisites for execution of valid unsupervised waivers of ADEA rights and claims. The recurring question facing employers and employees alike involves whether the minimum standards of Title II apply by mandate of Congress or instead whether employers are free to use any method of inducement in the hope that the individual will ratify the waiver through conduct or a failure to meet a tender back requirement. Such uncertainty threatens to stall the economic and social benefits and necessities addressed through the use of waivers of age discrimination claims in the termination or discharge of employees. In the wake of such uncertainty, the split of authority will deter the use of valid waivers and the filing of meritorious

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202. 29 U.S.C. § 626(f)(1)(G) (Supp. 1993).

203. *See* Rice, *Wooing Aging Baby Boomers*, Fortune, Feb. 1, 1988, at 68.

lawsuits challenging invalid waivers. In sum, the economic benefits for both sides will be deterred with the costs passed to society.

Amendment of Title II will preserve the effectiveness of the OWBPA, a piece of legislation that evolved through carefully calculated developments over several years, representing the interests of employers and employees as forwarded and considered by the EEOC, Congress and the courts. Employers have had the judge-made right to obtain waivers of age discrimination claims for approximately twenty years. Older workers have been guaranteed express federal statutory protections and remedies aimed at eliminating discriminatory practices since the enactment of the ADEA in 1967. Moreover, ambiguity regarding the applicability of the minimum standards in Title II threatens to thwart the clear congressional intent behind the OWBPA. An amendment resolving the split of authority will help to guarantee that the mandatory standards of Title II achieve widespread use.

A final relevant consideration supporting the necessity of amendment by Congress involves the current composition of the Supreme Court. When the Supreme Court's decision in *Betts* conflicted with the congressional intent underlying the ADEA, Congress was forced to quickly respond with the enactment of the OWBPA to preserve the protections of the ADEA with respect to employee benefits.[204] The Supreme Court has declined two opportunities to resolve the issues of tender and ratification involved in the appellate split.[205] However, the willingness of the Court to narrowly construe the protections accorded older workers by the ADEA provides a further incentive for Congress to take the initiative of resolving the issue before another decision by the Court is handed down that potentially conflicts with the congressional intent and stated purposes behind the ADEA.

B. Proposed Amendment to Title II of the OWBPA

The amendment of the ADEA should be consistent with the holdings of *Forbus* and *Hogue*. The strongest authority supporting such an amendment is found in the mandatory nature of the Title II provisions in the OWBPA. Congress clearly enacted the OWBPA to set mandatory minimum standards for unsupervised waivers of rights and claims under the ADEA, not as mere recommendations. The 1968 Supreme Court decision of *Hogue* instructs that federal remedial statutes provide controlling law

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204. *See supra* note 1.

205. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991).

in disputes over waivers of such statutory protections.[206] At the heart of the matter lies the attempt by Congress to ensure that waivers of age discrimination claims are knowingly and voluntarily executed in order to prevent the use of coercion or fraud.

The incorporation of the *Forbus* holding in the model amendment is consistent with the legislative history of the OWBPA. Title II of the OWBPA incorporated the holdings of federal appellate decisions regarding the non-waivability of the EEOC's right to pursue a charge of age discrimination and the minimum standards necessary to guarantee a knowing and voluntary waiver.[207] Lastly, the codification of an offset deduction finds support in *Hogue* and the American Law Institute Restatements of Contracts.[208]

The following is a model amendment, not in statutory form, which could be incorporated into Title II of the OWBPA as a final provision of 29 U.S.C. section 626.

RETENTION OF SEVERANCE BENEFITS DURING CHALLENGES UNDER THE ADEA

1. The purpose of this section is to permanently resolve the inconsistencies wrought by the federal courts with regard to the rights of ADEA plaintiffs to challenge the validity of waivers falling under the effective date of Title II of the OWBPA.

2. Any individual or group of individuals challenging the validity of a waiver or waivers executed since the effective date of Title II of the OWBPA shall not be required to tender the consideration received for such waiver or waivers as a condition prerequisite to challenging those waivers in court.

3. The retention of such consideration from a waiver by an individual or individuals challenging the validity of a waiver or waivers under the Act during the pendency of a lawsuit shall not constitute ratification of such a waiver or waivers.

4. Except as such a waiver may otherwise bar recovery, or as equitable relief may be appropriate under the ADEA, a deduction from the sum of damages paid to an individual or

206. *Hogue*, 390 U.S. 516. *See supra* text accompanying note 140.

207. EEOC v. Cosmair, Inc. L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987) (waivers of the right to file a charge with the EEOC void as a matter of public policy); Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988) (adopting minimum standards for knowing and voluntary waiver of rights and claims under the ADEA).

208. *See Isaacs*, 765 F. Supp. at 1366 (citing *Hogue*, 390 U.S. at 518), at 1372 (citing RESTATEMENT OF CONTRACTS § 480 (1932); RESTATEMENT OF CONTRACTS (SECOND) § 384(1)(b) (1980)).

individuals whose rights under the Act have been violated shall be made in the amount of any enhanced benefits received in exchange for execution of an ADEA waiver.

C. Impact Of The Proposed Amendment

The amendment should make an invalid waiver under Title II of the OWBPA voidable, regardless of the retention of benefits by an individual during a challenge of the waiver. The waiver will remain voidable before and during adjudication. The amendment will provide an unambiguous statement of the law of ADEA waivers for the courts and promises to restore effective use of waivers for employers and employees.

The safeguards of the rules of civil procedure already deter challenges of valid waivers. For example, Rule 11 of the Federal Rules of Civil Procedure provides a check against frivolous lawsuits.[209] Motions for failure to state a claim upon which relief may be granted under Rule 12 also prevent the progress of claims without merit in the federal courts.[210] Additionally Rule 50 motions for judgment as a matter of law and Rule 56 motions for summary judgment may be used for early disposition of unmeritorious lawsuits or deficient pleadings.[211]

IV. Conclusion

Congress included Title II in the OWBPA to expressly safeguard the execution of unsupervised waivers of individual rights and claims under the ADEA through mandatory minimum standards of validity. The existing split of authority between the United States Courts of Appeals threatens to undo the mandate of Congress. This Note challenges Congress to amend Title II of the OWBPA. Such amendment will resolve the controversy of the appellate split and will provide a more certain future for the use of unsupervised waivers of rights and claims under the ADEA. Congress intended the ADEA not only "to prohibit arbitrary age discrimination in employment," but also "to help employers and workers find ways of meeting problems arising from the impact of age on employment."[212] Enforcement of waivers under Title II of the OWBPA provides the necessary means for meeting this goal.

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209. Fed. R. Civ. P. 11.
210. Fed. R. Civ. P. 12(b).
211. Fed. R. Civ. P. 50, 56.
212. 29. U.S.C. § 621(b) (1988).