DETERMINING THE VALIDITY OF WAIVERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: THE THIRD CIRCUIT APPROACH AND THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT

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I. INTRODUCTION

The number of claims filed under the Age Discrimination in Employment Act of 1967 (ADEA)[1] increases steadily with each passing year. As a result, employers are understandably fearful of liability flowing from the termination of their employment relationships with their older employees—particularly when they have extended substantial post-employment benefits to these employees. Many employers have responded to this concern by requiring departing employees to sign releases or waivers of their right to sue the employer under the ADEA. Determination of the standards by which the validity of these instruments are to be ad-

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[1] Pub. L. No. 90-202, § 4, 81 Stat. 603 (1967) (current version at 29 U.S.C. § 623 (1982)).

judged has recently become a greatly debated issue. This article will examine the law providing the background for the issue, discuss the United States Court of Appeals for the Third Circuit and other judicial treatment of the issue and present, as well as analyze, the pending legislative resolution of the issue: the Age Discrimination in Employment Waiver Protection Act.

II. THE ADEA AND ANTECEDENT STANDARDS FOR DETERMINING THE VALIDITY OF WAIVERS

The ADEA makes it unlawful for employers to discriminate against persons on the basis of age when making employment decisions.[2] The substantive prohibitions against employment discrimination in the ADEA are modeled largely from title VII of the Civil Rights Act of 1964 (title VII).[3] The enforcement provisions of the ADEA, however, are taken in large part from the Fair Labor Standards Act (FLSA).[4] Because the topic of waivers is not mentioned in either the ADEA or its legislative history, the issue arises: do FLSA or title VII standards govern whether waivers are valid under the ADEA?

A. FLSA Waiver Standards and Their Application to the ADEA

Two United States Supreme Court cases have set the background for determining the validity of waivers under the FLSA. In *Brooklyn Savings Bank v. O'Neil*,[5] the Court held that there could be no waiver of the right to liquidated damages that an employee is entitled to under FLSA.[6] The Court did, however, leave open the question of whether a waiver is valid when executed incident to a "bona fide dispute" between the employer and employee.[7] This question was addressed by the Court in *D.A. Schulte, Inc. v. Gangi*.[8] The Court in *Gangi* posited that when a bona fide dispute was a legal dispute, such as over coverage of the FLSA, the rights guaranteed under the Act could not be waived.[9] However, the Court declined to overrule precedent which stated that waivers would be valid when they concerned a bona fide factual dis-

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2 *See id.; see* also 29 U.S.C. § 623(b)(c) (1982) (same proscription applies to decisions of employment agencies and labor organizations).

3 Lorillard v. Pons, 434 U.S. 575, 584 (1978).

4 *Id.* at 579; 29 U.S.C. § 626(b) (1982).

5 324 U.S. 697 (1945).

6 *Id.* at 708, 713-14.

7 *Id.* at 714.

8 328 U.S. 108 (1946).

9 *Id.* at 114.

pute.[10] Following these decisions, Congress amended the FLSA by adding to section 16 the following provision:

> The [Secretary of Labor] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have . . . .[11]

Hence, under the FLSA a waiver is valid only when it is supervised by the Secretary of Labor. A chief purpose of this enactment was to safeguard the rights of the employee.[12]

It may be argued that the FLSA's precedent gleaned from *O'Neil*, *Gangi* and section 216(c) regarding waivers had been incorporated into the ADEA, and thus, waivers which are not supervised by the Equal Employment Opportunity Commission (EEOC)[13] are invalid unless they are products of a bona fide factual dispute. This argument begins with the fact that the ADEA specifically incorporated "the powers, remedies, and procedures provided in [section 216]" and two other sections.[14] The United States Supreme Court in *Lorillard v. Pons*[15] considered the effect of this adoption of certain FLSA provisions into the ADEA.[16] In that case, the Court held that Congress intended not only to incorporate the selected FLSA statutory provisions but also their construing case law.[17] Further support for this general argument is found in the fact that Congress did not repudiate the FLSA waiver precedent in enacting the ADEA.[18]

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[10] *See id.* at 114-15 (citing Strand v. Garden Valley Tel. Co., 51 F. Supp. 898, 904-05 (D. Minn. 1943)). An example of a "factual dispute" is one over the number of hours an employee worked. *See Gangi*, 328 U.S. at 115.

[11] Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 14, 81 Stat. 923, 931 (1949) (codified as amended at 29 U.S.C. § 216(c) (1982)).

[12] *See* S. REP. No. 640, 81st Cong., 1st Sess. 7, *reprinted in* 1949 U.S. CODE CONG. & ADMIN. NEWS 2241, 2247-48.

[13] Authority over ADEA claims has been transferred to the EEOC from the Secretary of Labor. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and in* 92 Stat. 3781 (1978).

[14] 29 U.S.C. § 626(b) (1982).

[15] 434 U.S. 575 (1978).

[16] The Court in *Lorillard* considered whether there was a right to a jury trial under the ADEA. *See id.* at 576.

[17] *Id.* at 581. Specifically, the Court posited that "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.*

[18] In contrast, Congress did repudiate FLSA judicial precedent in enacting the Portal-to-Portal Pay Act. *See* 29 U.S.C. § 251(a) (1982); United States v. Allegheny-

However, only one court, the opinion from which was later reversed, has been in agreement with the argument that FLSA waiver standards should govern in ADEA cases.[19]

B. *Title VII Waiver Standards and Their Application to the ADEA*

The law pertaining to the treatment of waivers under title VII finds its genesis in *Alexander v. Gardner-Denver Co.*[20] In *Alexander*, the United States Supreme Court held that an employee could validly effect a waiver under title VII if such waiver was "voluntary and knowing."[21] Lower courts have subsequently taken one of two approaches regarding analysis of the voluntary and knowing requirement. The first approach analyzes the requirement in terms of traditional contract principles. Hence, the instrument itself is reviewed as is the possible existence of mistake, fraud or duress.[22] The second approach analyzes the totality of the circumstances. Here, not only will the instrument be examined, but all of the facts pertaining to the execution of a release will also be examined.[23]

It may be argued that title VII's precedent regarding waivers should be adopted in ADEA cases. The primary support for this argument comes from the close similarity between the statutes' language and their underlying purposes.[24] For instance, both statutes mandate informal and expeditious resolution of disputes.[25] One may contend that the alternative system—a system

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Ludlum Indus., Inc., 517 F.2d 826, 862 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

19 Runyan v. National Cash Register Corp., 37 FAIR EMPL. PRAC. CAS. (BNA) 1086 (6th Cir. 1985), *rev'd*, 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

20 415 U.S. 36 (1974).

21 *Id.* at 52 & n.15. *See also* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 860-62 (5th Cir. 1975) (rejecting use of "strict" and "inflexible" FLSA waiver standards in the Title VII cases), *cert. denied*, 425 U.S. 944 (1976).

22 *See, e.g.*, Pilon v. University of Minn., 710 F.2d 466, 468 (8th Cir. 1983); Samman v. Wharton Econometric Forecasting Assocs., Inc., 577 F. Supp. 934, 934-35 (D.D.C. 1984); Reed v. Smithkline Beckman Corp., 569 F. Supp. 672, 674-76 (E.D. Pa. 1983).

23 *See, e.g.*, Mosely v. St. Louis S.W. Ry., 634 F.2d 942, 946-47 (5th Cir.), *cert. denied*, 452 U.S. 906 (1981); Watkins v. Scott Paper Co., 530 F.2d 1159, 1172-73 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); United States v. Trucking Employers, Inc., 561 F.2d 313, 318 (D.C. Cir. 1977).

24 *See generally* Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979) (ADEA and Title VII "share a common purpose, the elimination of discrimination in the workplace.").

25 *See* 42 U.S.C. § 2000e-5(b) (1982) (Title VII); 29 U.S.C. § 626(b), (c) (1982). *See also* Silberman & Bolick, *The EEOC's Proposed Rule on Release of Claims Under the*

necessitating official oversight—would be too slow and expensive and thus would be inconsistent with the intent behind the ADEA.[26]

The courts which have considered the issue of which body of law should govern the validity of waivers under the ADEA have overwhelmingly chosen to utilize title VII standards.[27] Initially, two circuit courts of appeals ruled in this manner.[28] In *Runyan v. National Cash Register Corp.*,[29] the United States Court of Appeals for the Sixth Circuit, sitting en banc, posited that the question of whether an employee's discharge would violate the ADEA presents a "bona fide *factual* dispute."[30] As a result of this find-

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ADEA, 37 LAB. L.J. 195, 200 (1986) (In enacting the ADEA, "Congress clearly placed great emphasis on voluntary, expeditious resolutions of disputes.").

26 As the former Commissioner of the EEOC and another author have noted:

> If all voluntary waivers were submitted for EEOC supervision, the Commission could be swamped with additional demands for its increasingly scarce resources, resulting in the very unnecessary bureaucratic delays the ADEA's sponsors endeavored to avoid and thereby frustrating the interests of older workers who wish to sign releases and accept the consideration offered by their employers.

Silberman & Bolick, *supra* note 25, at 200. *See also Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcommittee on Labor of the Senate Committee on Public Welfare*, 90th Cong., 1st Sess. 24-24 (1967) (testimony of Sen. Jacob Javits) ("Delay is always unfortunate, but is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left.").

27 *See, e.g.*, Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988); Coventry v. United States Steel Corp., 856 F.2d 514 (3d Cir. 1988); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987); Moore v. McCraw Edison Co., 804 F.2d 1026 (8th Cir. 1986); Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986); Equal Employment Opportunity Comm'n v. American Express Publishing Corp., 681 F. Supp. 216 (S.D.N.Y. 1988); DiMartino v. City of Hartford, 636 F. Supp. 1241 (D. Conn. 1986). *See also* Note, *Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act Criteria to Rest*, 55 GEO. WASH. L. REV. 382 (1987); Note, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067 (1986) (both proposing that Title VII standards be utilized). *Cf.* Equal Employment Opportunity Comm'n v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987) (waiver of relief permitted, but "waiver of the right to file a charge is void as against public policy").

28 *See, e.g.*, Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986); Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986). In addition, a panel of the United States Court of Appeals for the Fourth Circuit in an unpublished, per curiam decision referenced at 823 F.2d 546 ruled similarly. Dorosiewicz v. Kayser-Roth Hosiery, Inc., No. 86-3163 (4th Cir. June 24, 1987). Subsequent to these decisions, the Third and Second Circuit Courts of Appeals ruled similarly on the issue. *See* Bormann v. A.T.&.T. Communications, Inc. 875 F.2d 399 (2d Cir. 1989); Coventry v. United States Steel Corp., 856 F.2d 514 (3d Cir. 1988).

29 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

30 *Id.* at 1044 (emphasis in original).

ing and acknowledging the holdings in the *O'Neil* and *Gangi* cases regarding bona fide factual disputes, the court held that an employee may waive his ADEA rights by execution of a private, unsupervised release.[31] The court further held that "ordinary contract principles" must be applied in determining whether a release was knowing and voluntary.[32] In *Moore v. McGraw Edison Co.*,[33] the United States Court of Appeals for the Eighth Circuit agreed with the *Runyan* court and ruled that, as the question of whether a violation of the ADEA occurred is a factual dispute, a release of rights may be effected where traditional contractual doctrines of avoidance such as fraud, unconscionability and deceit are not implicated.[34] In 1988, the United States Court of Appeals for the Third Circuit addressed the issue resolved by Sixth and Eighth Circuit courts.

III. *COVENTRY* AND *CIRILLO*: THE THIRD CIRCUIT APPROACH TO WAIVERS UNDER THE ADEA

In *Coventry v. United States Steel Corp.*,[35] the plaintiff, Ronald Hallas, worked for over thirty-five years in various positions for the United States Steel Corporation (USS) in its Clairton, Pennsylvania plant.[36] Hallas was laid off in July, 1982 as a result of a reduction in force at the Clairton plant.[37] In August, 1982, he filed a charge with the EEOC alleging that he was laid off because of his age.[38] Hallas's employment was permanently terminated in October, 1982.[39]

At the time of his termination, Hallas was advised that he could qualify for the USS " '70/80' mutual agreement pension benefit" (70/80 pension) if he executed the USS " 'Application and Release for 70/80 Retirement Under Mutually Satisfactory Conditions,' " otherwise known as the PF-116-B.[40] Within the PF-116-B was a waiver of future ADEA claims, as well as a release

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31 *Id.*

32 *Id.* n.10.

33 804 F.2d 1026 (8th Cir. 1986).

34 *See id.* at 1033. The court noted that this approach "is in accordance with encouraging amicable arm's length settlement of private disputes" under the ADEA. *Id.*

35 856 F.2d 514 (3d Cir. 1988).

36 *Id.* at 515.

37 *Id.* at 516.

38 *Id.*

39 *Id.*

40 *Id.*

of any ADEA claims an employee had against USS.[41] Specifically, the PF-116-B stated that the employee would " 'not file or permit to be filed on [his or her] behalf any such claim' " and that the employee would not " 'permit [himself or herself] to be a member of any class seeking relief and [would] not counsel or assist in the prosecution of claims against the releases, whether those claims [were] on behalf of [him or her] or others.' "[42] In addition, the form stated that " '[i]f any such claim has been filed by [the signing employee] or included [him or her] in its coverage for relief, [he or she] agree[d] to voluntarily withdraw such claim and otherwise agree[d] not to participate in such claim.' "[43]

Hallas met on November 2, 1982 with a representative of the USS Personnel Department, Robert Yost, to determine what his options were regarding his termination from employment.[44] Yost stated that Hallas was eligible for the 70/80 pension and could receive benefits under it only if he signed the PF-116-B release.[45] Hallas refused to execute the PF-116-B.[46] On November 11, 1982, Hallas met with Robert Wilson, the personnel training general supervisor.[47] Wilson presented Hallas with two options.[48] First, he could sign the PF-116-B and receive the 70/80 pension.[49] Second, he could be put on a lay-off for two years, where he would be forced to take any position that was available during that period, would not be entitled to hospitalization coverage and would not be compensated during his nonworking periods.[50] Again, Hallas refused to sign the PF-116-B.[51]

Finally, on November 29, 1982, Hallas executed the PF-116-B and was told he would begin to receive his pension benefits.[52] Hallas did not, however, receive such benefits or any other compensation from USS.[53] Upon inquiring almost two months after

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41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* Hallas stated "that he refused to sign the form because he had doubts about its legality." *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 516-17.

51 *Id.* at 517. Following this refusal, Hallas added to his EEOC discrimination charge an allegation pertaining to the USS requirement that its employees execute the PF-116-B before they may receive the 70/80 pension benefits. *Id.*

52 *Id.*

53 *Id.*

he had executed the PF-116-B, Hallas was advised that USS reconsidered its decision to allow his participation in the 70/80 pension because he did not withdraw his ADEA complaint.[54] Subsequently, Hallas "opted-in" as a plaintiff in a class action suit alleging that USS had violated the ADEA.[55] After a severance of the class and a separate bench trial, the United States District Court for the Western District of Pennsylvania held that Hallas had validly waived his ADEA claims.[56] Hallas appealed that judgment.[57]

The United States Court of Appeals for the Third Circuit began its analysis in *Coventry* by discussing whether and in what circumstances waivers are valid under the ADEA.[58] The court first determined that the validity of waivers should be measured by title VII and not FLSA precedent because "the policy concerns of the FLSA" regarding releases are not present in ADEA cases.[59] Because the court perceived FLSA as totally prohibiting private waivers of claims, the court posited that the "knowing" and "voluntary" standards of title VII "best effectuates the purposes of [the ADEA]."[60]

The court next turned to the precise factors upon which courts should rely in examining the validity of a waiver of ADEA claims.[61] General contract principles such as clarity of the wording and the absence of undue influence or fraud as used in title VII cases were acknowledged by the court to be relevant considerations.[62] In addition, the court posited that because there exists a strong policy toward the elimination of discrimination in the work place, the totality of the circumstances in which the re-

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54 *Id.*

55 *Id.*

56 *Id.* The district court also held that "although Hallas had established a *prima facie* case of age discrimination, he had failed to demonstrate that the non-discriminatory reason that USS had asserted for his discharge was pretext." *Id.* (citing Coventry v. United States Steel, No. 83-977, slip op. at 4-5 (W.D. Pa. Feb. 23, 1987)).

57 *See id.* at 517-18. As a preliminary matter, the court held that Hallas should be permitted to amend his complaint to include an allegation that the USS denial of severance benefits to its older employees violated the ADEA. *Id.* at 518-21.

58 *Id.* at 521 n.8. The court opined that "[m]ost significant, perhaps, among those policy concerns is the fact that the principal rights that the FLSA was designed to protect—minimum wages and maximum work hours— effect a public policy that Congress intended to be absolute." *Id.*

59 *Id.* at 521-22 n.8. In support of this conclusion, the court noted that "Congress intended that resolution of disputes arising under [ADEA] would be expeditiously achieved." *Id.*

60 *Id.* at 522-23.

61 *Id.* at 522.

62 *Id.* at 523.

lease was executed should be examined.[63] Hence, the court held that in determining whether a release of ADEA rights was knowing and voluntary, there must be an analysis of the release form itself, as well as consideration of the totality of the circumstances surrounding its execution, including the employee's educational and business background, the employee's role in determining the terms of the agreement, the amount of time the employee had to consider the agreement, whether the employee consulted with or was represented by an attorney and whether consideration given for execution of the agreement exceeds that which the employee is entitled to by contract or law.[64]

Turning to the facts in *Coventry*, the court noted that Hallas's execution of the release was the result of a " 'take it or leave it' predicament."[65] Hence, the court found that the release was not the product of a negotiation between Hallas and USS.[66] The court further noted that USS had not encouraged Hallas to consult with an attorney and that Hallas had not consulted with one.[67] Cognizant of these circumstances, the court held that Hallas did not effect a knowing and voluntary waiver of ADEA claims by his executing the PF-116-B.[68] As a result, the Third Circuit reversed the district court's holding and ruled that the waiver was invalid.[69]

In *Cirillo v. Arco Chemical Co.*,[70] the plaintiff, Vincent Cirillo, was one of about 700 employees terminated by the Arco Chemical Company (Arco) following an involuntary reduction in its work force.[71] Cirillo held a college degree, took a number of graduate courses and served as a managerial employee of Arco for almost forty-three years.[72] As part of the Arco involuntary reduction, Cirillo, as well as other terminated employees at specified seniority and salary levels, was offered his choice between two packages of benefits—each presenting different tax consequences.[73] The first package included payment of "an enhanced

63 *Id.* (quoting E.E.O.C. v. American Express Publishing Corp., 681 F. Supp. 216 (S.D.N.Y. 1988)).
64 *Id.* at 524.
65 *Id.*
66 *Id.* at 524-25.
67 *Id.* at 525.
68 *Id.*
69 *Id.*
70 862 F.2d 448 (3d Cir. 1988).
71 *Id.* at 449.
72 *Id.*
73 *Id.*

lump sum" of $297,351.96.[74] The second package included payment of "a normal retirement lump sum" of $258,725.30.[75]

The retirement packages offered by Arco contained additional "special allowances" of $45,624.96 and $91,249.92 respectively.[76] These special allowances, however, would only be paid if the employee executed a general release prepared by Arco.[77]

To review the benefit packages with the eligible employees, Arco scheduled small group meetings.[78] On September 10, 1986, Cirillo attended one of these meetings, run by Martin Halpin, an employee relations consultant for Arco.[79] Halpin distributed materials at the meeting including information about the

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[74] *Id.* This package included payment of $38,626.66 more than his normal retirement benefits. *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* The release stated the following:

> Notice: Various State and Federal laws prohibit employment discrimination based on age, sex, race, color, national origin, religion, handicap or veteran status. These laws are enforced through the Equal Opportunity Employment Commission (EEOC), Department of Labor and State Human Rights Agencies. If you feel that your election of the Atlantic Richfield Special Payment Allowance was coerced and is discriminatory, you are encouraged to speak with your Employee Relations representative or follow the steps described in the Employee Problem Resolution procedure. You may also want to discuss the following release with your lawyer. In any event, you should thoroughly review and understand the effect of the release before acting on it. Therefore, please take this Release home and consider it for at least (5) working days before you decide to sign it.
>
> General Release:
>
> In consideration for the Special Payment Allowance under the Atlantic Richfield Special Termination Plan offered to me by the Company I release and discharge the Company, its successors, subsidiaries, employees, officers and directors (hereinafter referred to as "the Company") from all claims, liabilities, demands and causes of action known or unknown, fixed or contingent, which I may have or claim to have against the Company as a result of this termination, and do hereby covenant not to file a lawsuit to assert such claims. This includes but it not limited to claims arising under federal, state, or local laws prohibiting employment discrimination or claims growing out of any legal restrictions on the Company's rights to terminate its employees. This release does not have any effect on any claim I may have against the company unrelated to this termination.
>
> I have carefully read and fully understand all the provisions of this Separation Agreement and General Release which sets forth the entire agreement between me and the company and I acknowledge that I have not relied upon any representation or statement, written or oral, not set forth in this document.

Id. at 450 (boldface in original).

[78] *Id.* at 449.

[79] *Id.*

benefits programs and the special allowances.[80] Reiterating what was explicit in these materials, Halpin explained that once an employee selected one of the benefit options, he then received the form with the release.[81] Cirillo told Halpin on September 26, 1986 that he decided to choose the "enhanced" package and the special allowance of $45,624.96.[82] Upon filling out the pertinent forms, Halpin handed Cirillo the release form and instructed Cirillo to bring the form home to review it.[83]

On numerous occasions before and after receiving the release, Cirillo voiced to Halpin, as well as his supervisors, his belief that he was a victim of age discrimination.[84] Cirillo did not consult an attorney, however, and executed the release on October 24, 1986.[85] On June 30, 1987, he commenced an action against Arco alleging that he was fired by reason of his age.[86] Upon Arco's filing a motion for summary judgment, the United States District Court for the Eastern District of Pennsylvania granted the motion reasoning that Cirillo had knowingly and voluntarily effectuated a wavier of his ADEA rights by signing the Arco waiver.[87] Cirillo appealed that judgment.

The United States Court of Appeals for the Third Circuit in *Cirillo* began its opinion by acknowledging that the *Coventry* panel set forth the appropriate standards for determining the validity of waivers of ADEA claims.[88] Hence, the court noted that a "totality of the circumstances" approach should be utilized and reiterated the factors enumerated in *Coventry*.[89] The *Cirillo* court observed that the claim that waivers had to be supervised by the EEOC was rejected in *Coventry*,[90] and thus, the question of EEOC supervision would not be considered.[91]

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80 *Id.*

81 *Id.*

82 *Id.* at 450.

83 *Id.*

84 *Id.* Cirillo expressed these beliefs at both meetings with Halpin and sought assurances at those meetings that the packages were not discriminatory, because ones he had read about that the DuPont Company offered were held to be discriminatory. *Id.*

85 *Id.*

86 *Id.* In addition, Cirillo alleged that his placement "into a 'special involuntary retirement program'. . . had a disparate impact upon him." *Id.* at 450-51.

87 *Id.* at 451. The district court relied, in part, upon an EEOC rule that was delayed in effectiveness by Congress soon thereafter. *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at 451 n.1.

91 *See id.*

The court next turned to an analysis of the facts in *Cirillo*.[92] It found that the language of the release itself was clear, specific and straightforward.[93] Hence, the court disagreed with Cirillo's assertion that the release was confusing and inconsistent.[94] In addition, the court pointed out that Cirillo was literate and, in fact, was well-educated[95] and that he had an understanding that he could not lawfully be discriminated against because of his age.[96]

The release form prohibited the receiving employee from executing it before five days had passed.[97] In fact, Cirillo did not sign the release for almost one month.[98] Considering these facts, the court determined that Cirillo had a reasonable time to deliberate whether to execute the release.[99] Further, the court considered as significant the fact that Arco had encouraged Cirillo to consult an attorney.[100]

Finally, the court considered whether Cirillo had been given an additional benefit because he had signed the release.[101] The court noted that unlike the plaintiff in *Coventry*,[102] Cirillo's "ordinary retirement benefits would be unaffected by whether he signed the [r]elease."[103] As a result of this and the other aforementioned factors, the court held that application of the totality of the circumstances test to the facts of *Cirillo* undoubtedly yielded a conclusion that the release was executed knowingly and voluntarily.[104] Hence, the court affirmed the district court's judgment.[105]

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92 *Id.* at 452-55.

93 *Id.* at 452.

94 *Id.*

95 *Id.* at 453.

96 *Id.* at 453-54. Cirillo repeatedly admitted that he "had reason to believe he was in a position to assert both of the ADEA claims he [later sought] to press." *Id.* at 454.

97 *Id.* at 450.

98 *Id.* at 453.

99 *Id.*

100 *Id.* at 454.

101 *Id.*

102 *Id.* at 452 n.2.

103 *Id.* at 455. In addition, the court posited that although Cirillo was not given the opportunity to negotiate the terms of either the release or special allowances, he "did not perceive himself as being completely at the mercy of an intractable employer." *Id.* at 454 n.4.

104 *Id.* at 455.

105 *Id.*

IV. THE PRIOR APPROACHES TO WAIVERS UNDER THE ADEA AND THE STATUTORY SOLUTION

The United States Court of Appeals for the Third Circuit in *Coventry* and *Cirillo* joined the Sixth and Eighth Circuit courts in holding that the validity of waivers in ADEA cases should be adjudged according to title VII standards. However, the Third Circuit departed from the analyses utilized by its sister circuit courts by examining the knowingness and voluntariness according to the totality of the circumstances rather than according to traditional contract principles.[106] The Third Circuit approach, however, is in concurrence with an EEOC final rule.

In August, 1987, the EEOC promulgated a final rule which specifically provided for the allowance of unsupervised waivers under the ADEA.[107] The rule further provided that for such a waiver to be effective, it had to be knowing and voluntary.[108] To determine this, the rule implied that all of the circumstances would be examined.[109] According to the rule, examples of circumstances that are supportive of a finding that a wavier was voluntary and knowing included a written,[110] clearly worded agreement,[111] a reasonable amount of time given for employee deliberation[112] and encouragement to the employee to consult an attorney.[113] In addition, the rule stated that "the substance and circumstances" will be analyzed "to determine whether there was fraud or duress."[114] Perceiving that a "blanket prohibition against non-government supervised ADEA settlements . . . frustrates the interests of both employees and employers," the EEOC intended that this rule would ensure the expeditious resolution of disputes.[115]

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106 Recently, the United States Court of Appeals for the Second Circuit adopted the totality of circumstances approach espoused by the Third Circuit. *See* Bormann v. AT&T Communications, Inc., 875 F.2d 399 (2d Cir. 1989).

107 52 Fed. Reg. 32,296 (1987) (codified at 29 C.F.R. § 1627.16 (1988)). The rule became effective on September 28, 1987. *Id.*

108 29 C.F.R. § 1627.16(c)(1) (1988). In addition, the rule provided that to be effective, a waiver could "not provide for the release of prospective rights or claims" or could not be "in exchange for consideration that includes employment benefits to which the employee is already entitled." *Id.*

109 *See id.* § 1627.16(c)(2).

110 The rule required that the waiver be in writing. *Id.*

111 *Id.* § 1627.16(c)(2)(i).

112 *Id.* § 1627.16(c)(2)(ii).

113 *Id.* § 1627.16(c)(2)(iii).

114 *Id.* § 1627.16(c)(2).

115 50 Fed. Reg. 40,870 (1985) (to be codified at 29 C.F.R. pt. 1627) (proposed Oct. 7, 1985). As the EEOC commented:

In an action supported by many groups opposed to the EEOC's rule, Congress suspended the effectiveness of the rule during the fiscal year of 1988.[116] Congress later extended its suspension of the rule to the fiscal year 1989.[117]

Responding to the EEOC rule and case law which has developed in the area,[118] Congress has pending before it the Age Discrimination in Employment Waiver Protection Act of 1989 (the Act).[119] Under the Act, persons cannot waive their ADEA rights without the EEOC or court supervision.[120] Persons may waive their rights under the ADEA, however, when such a waiver is a settlement of a bona fide claim asserting age discrimination.[121] The Act defines a bona fide claim as an age discrimination charge filed with the EEOC,[122] an age discrimination action filed by a person or a person's representative in a court or a specific, good faith allegation of age discrimination made in writing by a person or a person's representative directly to the person's employer.[123]

The Act permits waivers in connection with settling a bona fide claim only where such waiver is knowing and voluntary.[124] In addition, the Act sets forth five prerequisites for a valid waiver

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> The policy that requires government supervision of releases and waivers is at odds with one that encourages expeditious resolution of disputes. . . . The Commission believes that the remedial purposes of the Act will be better served by allowing agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are voluntary and knowing.

Id. See also Silberman & Bolick, *supra* note 25 (discussing utility of EEOC rule).

116 Continuing Appropriations, Fiscal 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987).

117 Departments of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216 (1988).

118 136 CONG. REC. S289-01 (daily ed. Jan. 25, 1989) (statement of Sen. DeConcici disapproving of EEOC and judicial solutions to issue of waivers).

119 S.54, 101st Cong., 1st Sess. (1989) [hereinafter Senate bill]; H.R. 1432, 101st Cong., 1st Sess. (1989) [hereinafter House bill]. The Act will take effect upon the date of its enactment. In addition, the Act provides that the EEOC rule is of not force or effect. Senate bill, *supra*, § 3; House bill, *supra*, § 5.

120 Senate Bill, *supra* note 119, § 2. The House Bill does not contain an equivalent provision. The remainder of this article is written as if supervised waivers will be permitted under the Act, and the bills will be collectively referred to as "the Act."

121 Senate bill, *supra* note 119, § 2; House bill, *supra* note 119, § 2.

122 The Senate Report accompanying the Act states that a charge filed with a fair employment agency at the state or local level would also satisfy this provision. S. REP. No. 79, 101st Cong., 1st Sess. 19 (1989) [hereinafter SENATE REPORT].

123 Senate bill, *supra* note 119 § 2; House bill, *supra* note 119, § 2.

124 *Id.*

of ADEA rights. First, the settlement agreement must be in writing and must refer specifically to ADEA claims or rights.[125] Second, the agreement may not waive claims or rights arising under the ADEA after the agreement was executed.[126] Third, the person must receive in exchange for his waiver, consideration additional to that which he is already entitled or that which has been offered to either a class or group of individuals pursuant to an early retirement incentive or some other employment termination program.[127] Fourth, the person must be afforded a reasonable time period to consider the agreement.[128] Fifth, the person must be notified in writing to consult with an attorney before entering into the agreement.[129]

V. Analyzing The Act and Its Impact

Waiver and release agreements benefit both the employer and employee. For the employer, they offer protection from subsequent litigation and the substantial expenses associated with such litigation. For the employee, they normally guarantee an additional benefit without the risks appurtenant to institution of a lawsuit.

The Act responds to the factual circumstance where an older employee is told of his discharge and is advised that he must sign a waiver as a prerequisite to his receipt of benefits. In such a circumstance, where the employee may stand to gain substantially, the employee may have no reason to suspect a violation of the ADEA and will proceed to sign the form. The Act is intended to protect older employees from being coerced into signing their rights away.

The Act will institute a hybrid system for determining the validity of waivers by incorporating standards from both the FLSA and title VII. Where no bona fide claim exists, the FLSA requirement of supervision is imposed to effect a valid waiver of

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125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* The House bill set a minimum of 14 days to consider the agreement. House bill, *supra* note 119, § 2.

129 The House bill contains two additional requirements. First, the person must be notified in writing, and orally, that he or she may be accompanied by another person during settlement negotiations. *Id.* Second, the EEOC must receive notice of a settlement. *Id.* Both bills provide that no waiver may affect the responsibilities or rights of the EEOC to enforce the Act, or be used as a justification to interfere with the rights of employees to file charges or participate in EEOC proceedings or investigations. Senate bill, *supra* note 119, § 2; House bill, *supra* note 119, § 2.

rights under the ADEA. Hence, the EEOC[130] or a court will have to be consulted and approve the settlement terms before a waiver will be valid in the absence of a bona fide claim.

Where a bona fide claim does exist, title VII standards are utilized by the Act. The Act's requirements in the circumstances of a bona fide claim do not mandate official supervision and thus reflect that presumably when employees are in an adversarial relationship with their employer, they are more likely to make informed judgments regarding their ADEA rights. The Act provides that in addition to the execution of a waiver being knowing and voluntary, several other enumerated factors must be met. For instance, the Act makes clear that settlements must extend consideration in addition to that which the employee was originally entitled. Further, a waiver executed pursuant to a settlement may not effect prospective rights.

The Act's "knowing and voluntary plus" standard is somewhat analogous to the standard utilized by the Third Circuit in *Coventry* and *Cirillo*. The court has posited, in support of its standard, that all of the circumstances, in addition to traditional contract principles which measure knowingness and voluntariness, should be considered "[i]n light of the strong policy concerns to eradicate discrimination in employment."[131] Although the Act, if enacted, will implicitly overrule the chief legal conclusions in *Coventry* and *Cirillo*, the factors the courts set forth for determining the validity of waivers under the knowing and voluntary standard and the courts' respective analyses regarding those factors will serve as useful guidelines to employers seeking waivers from employees.[132]

A bona fide claim is made under the Act when an employee files an age discrimination charge with the EEOC or the appropriate state fair employment agency or when an employee or the employee's representative files an age discrimination action in a

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130 Exactly how the EEOC will "supervise" is not clear at the present time. At the hearings on the Act, Clarence Thomas, chairman of the EEOC, advocated that the Act or its legislative history should contain a statement making clear that EEOC review of a generic waiver agreement or of a prototype would be sufficient supervision. *Does Waiver of ADEA Rights Need Supervision?*, Lab. Rep. (CCH) No. 355 (Apr. 19, 1989).

131 *Coventry*, 856 F.2d at 522-23.

132 The Senate Report accompanying the Act states "[t]he Committee expects that courts reviewing the 'knowing and voluntary' issue will scrutinize carefully the complete circumstances in which the waiver was executed. In this regard, the Committee expresses support for the approach taken on this limited issue in *Cirillo*." SENATE REPORT, *supra* note 122, at 20.

court. The final means for making a bona fide claim under the Act is by the employee or the employee's representative directly communicating an allegation of age discrimination to the employer. This final means may be utilized where the employee has not taken any legal action upon his suspicion that he has been discriminated against by reason of age. As such, this less-formalized means of making a bona fide claim under the Act promotes the ADEA policy of conciliation without litigation.

The direct communication to an employer of an allegation of age discrimination sufficient to make a bona fide claim under the Act, however, is subject to three technical requirements. These requirements will assist in guarding against situations wherein employers encourage their employees to allege age discrimination and then attempt to circumvent the Act's substantive protections.[133] The first requirement is that the allegation of age discrimination be specific. The allegation must be related to a distinct employment decision—such as a dismissal or a failure to promote. A standard of what will constitute a specific allegation under the Act may be defined as follows: a statement which, if offered to the EEOC, would suffice as a charge or a complaint of discrimination based upon age.[134] The second requirement is that the allegation must be made in writing. This requirement helps to ensure that the allegation was not manufactured and has the obvious evidentiary advantage of solidifying facts such as when the allegation was made and what is the precise scope of the allegation. The third requirement is that the allegation must be made in good faith. This requirement applies to the intent of the person making the allegation, not to the merits of the allegation itself.[135] Hence, a specific allegation made in writing directly to the employer which is genuinely motivated may be considered to be a bona fide claim under the Act.

The Act is certain to have a positive effect from an employee standpoint as it will erect a substantial wall of protection against the "signing away" of an employee's ADEA rights. The Act, however, may also have negative effects for employees. For instance, no matter what level of cognizance the employee possesses regarding his ADEA rights, he or she will be precluded

133 The House bill specifically prohibits employers from assisting employees in making bona fide claims of age discrimination. House Bill, *supra* note 119, § 2.

134 SENATE REPORT, *supra* note 132, at 19.

135 *Id.*

from making his or her own choice about those rights without governmental involvement, where no bona fide claim exists.

Employers will also benefit from the Act in certain respects. One important respect is the greater *certainty* the Act will provide, if enacted. Employers will then execute releases with the justifiable confidence that, for example, when the EEOC supervises a waiver, the waiver will not later be found to be invalid. In addition, employers will be more certain that when adhering to the standards enumerated to settle a bona fide claim under the Act, releases of ADEA rights will be valid. This is in contrast to pre-Act releases, which were examined according to varying judicial standards.

The advent of the Act presents practical issues in at least two circumstances. The first circumstance is where a former employee who executed a waiver now attempts to assert an ADEA claim and contends that the claim is not barred by the waiver which does not conform to the requirements of the law. This circumstance necessarily implies the issue of retroactivity of the Act. The Reports accompanying the Act state the intention that the Act will apply retroactively.[136] As a result, the Act will be applied retroactively to all claims pending as of the date of its enactment. The second circumstance is where a waiver, executed subsequent to the enactment of the Act and following a bona fide claim, is later challenged and determined to be invalid. This circumstance calls to question what is done with the consideration which has been exchanged for the waiver. In short, it is likely that the employee will be required to tender back the consideration he has already received.[137]

VI. CONCLUSION

The ADEA does not make clear whether the FLSA or title VII standards should govern the validity of waivers or releases under the ADEA, although judicial precedent strongly favors the utilization of title VII "knowing and voluntary" standards. The Third Circuit is in agreement with this view but departed from the position taken by other courts by holding that a more comprehensive inquiry into execution of the waiver and its surround-

136 *Id.* at 23; H.R. REP. No. 221, 101st Cong., 1st Sess. 19 (1989).

137 *See* Small v. Chemlawn Corp., 584 F. Supp. 690, 693 (W.D. Mich. 1984), *aff'd*, 765 F.2d 146 (6th Cir. 1985). *See also* Winfield v. St. Joe Paper Co., 20 FAIR EMPL. PRAC. CAS. (BNA) 1103, 1114 n.8 (N.D. Fla. 1979) (although issue not raised by parties, monies already paid would be deducted from awards that may be owing).

ing circumstances was warranted, considering the importance of the rights at stake. In proposing the Age Discrimination in Employment Waiver Protection Act of 1989, Congress acknowledged the great importance of these rights and crafted this legislation which goes beyond the protections offered by the Third Circuit, by adopting a hybrid approach of FLSA and title VII standards to determine the validity of waivers under the ADEA. The Act is a safeguard which will infuse new and welcome certainty in this previously ambiguous area of the law and will inevitably have a positive effect upon employees and employers alike, if it is enacted.