A STATE OF DISARRAY: THE "KNOWING AND VOLUNTARY" STANDARD FOR RELEASING CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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I. INTRODUCTION

Dean Edward L. Rubin once said that the law of waiver, when viewed as a totality, is in disarray.[1] Likewise, the law governing when a court should enforce a person's purported waiver or release[2] of claims under Title VII of the Civil Rights Act of 1964,[3] made pursuant to an agreement

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1. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 480 (1981).

2. Although the terms "waiver" and "release" are technically distinct terms, *see* Mary E. Metz, *Waivers Under the Age Discrimination in Employment Act*, 50 UMKC L. REV. 351, 351 n.1 (1991) (explaining the distinction between "waiver" and "release"), I often use the terms "waiver" and "release" interchangeably throughout this article because the courts do so when referring to releasing claims under Title VII. *See* Judith D. Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. LAW. 261, 268 (1996) (noting that courts use these terms interchangeably).

3. 42 U.S.C. §§ 2000e-2000e-17 (2000). Title VII prohibits covered employers from failing or refusing to hire or from discharging "any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." *Id.* § 2000e-2. Title VII also prohibits a covered employer from discriminating against any employee or applicant "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge,

with an employer,[4] is in disarray. Although the courts of appeal agree that a person[5] can waive a Title VII claim if the person's consent to the release is "knowing" and "voluntary,"[6] they disagree on the standard to determine whether such consent is knowing and voluntary.[7]

Lacking guidance from Congress,[8] the Supreme Court,[9] or the United

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testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *Id.* § 2000e-3.

4. This Article's scope is limited to the release of claims pursuant to a private agreement between a person and his or her current or former employer. It does not extend to a release of claims when a plaintiff fails to assert a Title VII claim in a lawsuit, or when a lawsuit is dismissed by a court pursuant to a settlement. In such instances, principles of stage preclusion would affect the analysis. *See* Rubin, *supra* note 1, at 514–15 ("Waivers of defenses, objections, or causes of action during a civil trial . . . are governed by the principle of stage preclusion."); *see also* Jessica W. Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 314 n.162 (2003) (noting that the rule of preclusion "lacks the knowing element required by waiver."). One commentator distinguishes between "waivers-for-private-gain," which she defines as waivers made prior to the filing of an administrative complaint or a civil action, and "waivers-by-settlement," which she defines as waivers made after the filing of an administrative complaint or a civil action. *See* Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 484–86 (2001) (distinguishing these two types of waivers). This Article applies to both types of waivers, although the issue of whether a release is effective will most often arise in the "waivers-for-private gain" context. Once an administrative complaint or civil action has been filed, the party releasing the claim is more likely to be represented by counsel, and thus more likely to enter into a release with a full appreciation of its consequences.

5. I use the term "person" throughout this article instead of "employee" because Title VII prohibits discrimination against applicants as well as employees. *See* 42 U.S.C. §§ 2000e-2, 2000e-3 (referencing applicants and employees).

6. *See* O'Shea v. Commercial Credit Corp., 930 F.2d 358, 361 (4th Cir. 1991) ("There is no dispute among the circuits that employees may validly waive their federal [employment discrimination] rights in private settlements with their employers, provided that their consent to a release is both knowing and voluntary."). *But see* Makins v. Dist. Of Columbia, 277 F.3d 544, 547 (D.C. Cir. 2002) (questioning whether the knowing and voluntary standard applies to the release of Title VII claims).

7. An argument can be made that the division between the courts is not over the proper standard for determining when a waiver is knowing and voluntary, but whether the knowing and voluntary standard is even applicable. *See Makins*, 277 F.3d at 547 (raising the question if the knowing and voluntary standard should be used); *see generally* Rubin, *supra* note 1, at 528 ("There are . . . two basic rationales that courts employ in deciding waiver cases: the 'voluntary' and 'knowing' framework used in criminal law, and the contractual framework used in civil law."). However, because most courts view the division to be over the proper test to be applied to the knowing and voluntary standard, I follow that model in this Article.

8. *See* H.R. REP. NO. 101-664, at 24 (1990) ("Title VII is silent on the waiver issue."); S. REP. NO. 101-97, at 13 (1989) (same); Silverstein, *supra* note 4, at 485 ("When enacting laws like Title VII. . . Congress focused on defining the nature of the newly-recognized rights and on the means for enforcement; there is no reference to the possibility of, or the conditions under which, beneficiaries of the legislation could contract out of the statutes' provisions."). At least one court has relied on the standards for waiving claims under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634 (2000), as established by Congress in the Older Workers Benefit Protection Act of 1990

States Equal Employment Opportunity Commission ("EEOC"),[10] a majority of the federal circuits determine whether consent was knowing and voluntary based on the totality of the circumstances, and apply a test that focuses on the releasing person's state of mind more than would an application of ordinary contract principles. These circuits include the First,[11] Second,[12] Third,[13] Fifth,[14] Seventh,[15] Ninth,[16] Tenth,[17] Eleventh,[18]

("OWBPA"), Pub. L. 101-433, 104 Stat. 983 (1990), to assess the validity of a release of Title VII claims. *See* Cole v. Gaming Entm't, L.L.C., 199 F. Supp. 2d 208, 213–14 (D. Del. 2002) (applying the OWBPA's requirements to a Title VII release). However, any reliance on the OWBPA for assessing releases under Title VII is misplaced. The OWBPA does not apply to waivers of claims under Title VII, and had Congress intended its requirements to apply to Title VII, it could have easily done so. The OWBPA's legislative history also supports the argument that Congress did not intend the Act to apply to Title VII releases. *See* H.R. REP. NO. 101-664, at 24 (1990) (distinguishing between Title VII and the ADEA). The notion that the OWBPA was intended to codify the general concept of "knowing and voluntary" has been described as "hardly plausible." *See* Blackwell v. Cole Taylor Bank, 152 F.3d 666, 673 (7th Cir. 1998) (stating that it is "hardly plausible" that "the highly specific requirements of OWBPA . . . codify the general concept of 'knowing and voluntary' . . . ."); *see generally* Silverstein, *supra* note 4, at 491 n.67 (discussing the courts' rejection of OWBPA standards for Title VII releases). *But see* Jan W. Henkel, *Waiver of Claims Under the Age Discrimination in Employment Act After* Oubre v. Entergy Operations, Inc., 35 WAKE FOREST L. REV. 395, 420 (2000) ("Congress might have intended to define 'knowing and voluntary' for all federal employment discrimination statutes . . . . Almost all of the OWBPA requirements are general in nature and could be applied to a waiver of an employment discrimination claim.").

9. As discussed later, the Supreme Court has simply stated that a Title VII claim can be waived if the waiver is "voluntary and knowing," without providing guidance about the meaning of these terms. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974) (stating, without further explanation, that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing.").

10. The EEOC, the federal agency that enforces Title VII, has not issued a regulation defining the appropriate test for determining when a person can waive Title VII claims. Only agency action having the force of law would be subject to *Chevron* deference. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. . . . Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation.").

11. Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 274 (1st Cir. 2002).

12. Livingston v. Adirondack Beverage Co., 141 F.3d 434, 438 (2d Cir. 1998); Bormann v. AT & T Commc'ns, Inc., 875 F.2d 399, 402 (2d Cir. 1989) (pre-OWBPA ADEA claim).

13. Coventry v. United States Steel Corp., 856 F.2d 514, 521–22 (3d Cir. 1988) (pre-OWBPA ADEA claim).

14. Smith v. Amedisys Inc., 298 F.3d 434, 441 (5th Cir. 2002); O'Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990) (pre-OWBPA ADEA claim).

15. Pierce v. Atchison, Topeka & Sante Fe Ry., 65 F.3d 562, 571 (7th Cir. 1995).

16. Stroman v. W. Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989). The Ninth Circuit uses the phrase "voluntary, deliberate, and informed" waiver. *Id.*

17. Torrez v. Pub. Serv. Co. of N.M., Inc., 908 F.2d 687, 690 (10th Cir. 1990).

and District of Columbia.[19] A minority of the circuits apply contract law principles. These include the Fourth,[20] Sixth,[21] and Eighth,[22] though the

18. Puentes v. United Parcel Serv. Inc., 86 F.3d 196, 198 (11th Cir. 1996). However, if one considers anti-discrimination statutes other than Title VII, Eleventh Circuit law is inconsistent. In *Schwartz v. Fla. Bd. of Regents*, 807 F.2d 901 (11th Cir. 1987), the court, in a case under the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d) (2000), stated that "[a] settlement agreement is a contract and, as such, its construction and enforcement are governed by principles of Florida's general contract law." *Id.* at 905. In *Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347 (11th Cir. 2000), the court, in a case under Title II of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12134 (2000), held that "even though this settlement agreement arose under the ADA, state contract law directs our analysis here." *Id.* at 1350. The court, citing to *Schwartz*, stated that "[w]e generally disfavor federal common law and apply it in only rare instances concerning 'rights and obligation of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.'" *Id.* at 1350 n.4 (quoting Kobatake v. E.I. DuPont de Nemours and Co., 162 F.3d 619, 624 n.3 (11th Cir. 1998) (quoting in turn Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981))). The court held that "[b]ecause this settlement agreement is between two private parties, federal common law does not apply." *Id.* In fact, other courts have cited to the Eleventh Circuit as a circuit that applies state law. *See* Makins v. Dist. of Columbia, 277 F.3d 544, 548 (D.C. Cir. 2002) ("[The Eleventh Circuit] now look[s] to state law in determining if a valid and enforceable settlement agreement exists."); Klein v. Bd. of Regents, 666 N.W.2d 67, 72 n.6 (Wisc. Ct. App. 2003) (stating that "other federal courts have concluded that state contract law should be employed" and citing *Resnick* and Hayes v. Nat'l Serv. Indus., 196 F.3d 1252, 1253 (11th Cir. 1999)).

19. United States v. Trucking Employers, Inc., 561 F.2d 313, 318 (D.C. Cir. 1977). *But see Makins*, 277 F.3d at 548 (holding that local law applies, at least in the context of a person represented by an attorney who negotiates a settlement on the person's behalf); Samman v. Wharton Econometric Forecasting Assocs., Inc., 577 F. Supp. 934, 934–35 (D.D.C. 1984) (relying on decisions from the circuits adopting a contract law analysis and holding that a person's subjective belief he or she is not releasing claims under Title VII is insufficient to avoid enforcement).

20. O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991) (pre-OWBPA ADEA claim). Inexplicably, the court in *Cassiday v. Greenhorne & O'Mara, Inc.*, 220 F. Supp. 2d 488 (D. Md. 2002), *aff'd*, 63 F. App'x 169 (4th Cir. 2003), applied the totality of the circumstances standard, simply stating that "[c]ourts review the validity of a Title VII waiver under a 'totality of the circumstances' standard," and cited to a First Circuit decision. *Id.* at 493 (citing Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 276 (1st Cir. 2002)). The Fourth Circuit, in an unpublished opinion, affirmed the district court decision, citing to the same First Circuit decision. *See* Cassiday v. Greenhorne & O'Mara, Inc., No. 02-2060, 63 F. App'x 169, 169, 2003 WL 21186383, at *1 (4th Cir. May 21, 2003) (unpublished) (affirming the district court's decision). Although *Cassiday* was decided under Title VII, and *O'Shea* under the pre-OWBPA ADEA, relevant distinctions between the two statutes are difficult to conceive. *See, e.g.*, Cole v. Gaming Entm't., L.L.C., 199 F. Supp. 2d 208, 212–13 n.1 (D. Del. 2002) ("The enactment of the OWBPA rendered the Third Circuit's totality of the circumstances test irrelevant for ADEA purposes. However, there is no indication that the test is inappropriate in the Title VII context where Congress has not yet codified standards for voluntariness.") (citation omitted).

21. Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1184 (6th Cir. 1997) (ADA claim); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc) (pre-OWBPA ADEA claim). The court in *Runyan* did not cite to *Odomes v. Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981), a prior Sixth Circuit decision stating that Title VII plaintiffs should

Sixth only applies such principles if "overreaching or exploitation is not inherent in the situation."[23]

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be accorded the same level of protection as plaintiffs under comparable legislation and citing to 15 U.S.C. § 1635 (which provides that a consumer may rescind a transaction until midnight of the third business day following the consummation of the transaction) as the basis for the decision. *Id.* at 252. The panel in *Odomes* seemed to be leaning toward a totality of the circumstances test. However, *Runyan* was decided by the Sixth Circuit *en banc*, and presumably eliminates any precedential value *Odomes* may have, even though *Odomes* was decided under Title VII and *Runyan* under the ADEA. The *Runyan* court also did not cite to *Lyght v. Ford Motor Co.*, 643 F.2d 435 (6th Cir. 1980), which seemed to take a totality of the circumstances approach. *See Lyght*, 643 F.2d at 441 ("Though Title VII evinces a congressional preference for conciliation over litigation, the fact remains that a person who claims injury from discrimination in employment practices is entitled to a hearing in federal court. . . . [W]aiver of such a federal remedial right is not lightly to be inferred.").

22. Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir. 1987) (pre-OWBPA ADEA claim). District courts in the Eighth Circuit have applied the totality of the circumstances test, arguing the issue is not settled in that circuit. *See, e.g.*, Kujawski v. U.S. Filter Wastewater Group, Inc., No. CIV. 00-1151DWFAJB, 2001 WL 893918, at *4 (D. Minn. Aug. 7, 2001) (applying the totality of the circumstances test and stating that "the Eighth Circuit has yet to clearly establish the standard by which releases of claims under the ADA and [Family and Medical Leave Act of 1993] should be evaluated"). In *EEOC v. American Home Products Corp.*, 144 F. Supp. 2d 1084 (N.D. Iowa), *on reconsideration*, 165 F. Supp. 2d 886 (N.D. Iowa 2001), the court identified the totality of the circumstances factors as those factors applied by the Eighth Circuit to determine whether a person's consent to a release is knowing and voluntary, relying on the Eighth Circuit's application of such factors to a release of a claim under the Employee Retirement Income Security Act of 1974. *Id.* at 1091–96. The court seemed to presume that the standard governing a beneficiary's release of a claim against a fiduciary should be applied to an employee's release of a claim against an employer. As discussed later, the Supreme Court's decision in *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625 (1948), likely precludes such a conclusion. The decision in *American Home Products* was recently followed in a magistrate judge's report and recommendation. *See* Johnson v. Univ. Good Samaritan Ctr., No. Civ. 04-4684DWFJSM, 2005 WL 1705836, at *5 n.6 (D. Minn. June 21, 2005) (citing *Am. Home Prods.*, 144 F. Supp. 2d 1084).

23. *Runyan*, 787 F.2d at 1045. *See also Mararri*, 130 F.3d at 1184 ("This court has held that waivers of employee rights are to be examined under normal contract principles unless overreaching or exploitation is inherent in the situation."). The Sixth Circuit's focus on overreaching or exploitation necessitates a review of some of the factors relied on by the courts employing the totality of the circumstances test. *See, e.g.*, *Runyan*, 787 F.2d at 1044 (observing the plaintiff was not a low paid worker with "little education and little understanding"). In fact, in one case, the Sixth Circuit referred to the totality of the circumstances test to evaluate whether the release was knowingly and voluntarily executed. *See* Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995) ("In evaluating whether a release has been knowingly and voluntarily executed, we look to . . . the totality of the circumstances."). Also, a district court, after noting that "the Sixth Circuit instructs courts to apply ordinary contract principles," stated that courts should consider the totality of the circumstances factors. Howard v. Daimler Chrysler Corp., 290 F.Supp 2d 784, 790 (E.D. Mich. 2003). Under the Sixth Circuit's approach, which focuses on overreaching and exploitation, it would make sense to apply a narrower view of "voluntary" than would be applied under contract law principles, but it is not readily apparent why a narrower view of "knowing" would be applied.

Not only are the circuits in disarray, each of the tests applied by them is in disarray. Courts applying the totality of the circumstances test, a test that focuses more on the releasing person's state of mind than a strict contract law test, often apply contract rules, which are generally objective rules focusing on what a person says and does, not what he or she thinks. Courts applying the contract law test often look at factors used under the totality of the circumstances test, despite such factors usually being irrelevant under contract law principles.

The disarray is not surprising. The question of what standard should be adopted is enmeshed in the difficult issue of whether a Title VII release should be viewed as a waiver of fundamental rights, calling for a more subjective test, or as a contract, calling for a more objective test. In this respect, the issue is reminiscent of the early twentieth century struggle between "the respective proponents of two theories of contracts, (a) the 'actual intent' theory—or 'meeting of the minds' or 'will' theory—and (b) the so-called 'objective' theory."[24] The "actual intent" theory, or subjective theory, focused on whether the parties had a subjective meeting of the minds to determine whether a contract was formed.[25] The objective theory focused on what the parties said and did, not what they thought, and "transferred from the field of torts that stubborn anti-subjectivist, the 'reasonable man.'"[26] The objective theory prevailed,[27] but the struggle has re-emerged in the context of what standard should apply to determine the effectiveness of a person's consent to release Title VII claims.

The disarray is compounded by the difficult question of the appropriate source of law. Courts adopting the totality of the circumstances test have done so under their power to create a rule of federal common law, yet they sometimes apply state law in addition to federal common law, or they rely on state law to give content to the federal rule. Courts applying contract rules do not make clear whether the source

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24. Ricketts v. Pa. R.R., 153 F.2d 757, 760–61 (2d Cir. 1946) (Frank, J., concurring).

25. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 429 (2000) [hereinafter *Origins*]. Although there is no single subjective theory, it generally provides for "a mutual standard 'which would allow only such meanings as conform to an intention common to both or all the parties, and would attach this meaning although it violates the usage of all other persons.'" *Id.* (quoting RESTATEMENT OF CONTRACTS § 227(3) (1932)). "This is the classic 'meeting of the minds,' the 'aggregatio mentum' or 'consensus ad idem' of the mid-nineteenth century." *Id.*

26. *Ricketts*, 153 F.2d at 761 (Frank, J. concurring). "[A] portion of the objectivists' credo is that objective manifestations of intent of the party would generally be viewed from the vantage point of a reasonable person in the position of the other party." JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 27 (5th ed. 2003).

27. *Ricketts*, 153 F.2d at 761–62; *see also* Bennett v. Emerson Elec. Co., 186 F. Supp. 2d 1168, 1171 (D. Kan. 2002) ("This subjective theory of contract formation has been rejected by contemporary contract experts and the Restatement."), *aff'd*, No. 02-3094, 64 F. App'x 708, 2003 WL 21101486 (10th Cir. May 15, 2003).

of law is the forum state's law or general common law. The source of law question necessarily involves the larger debate over when state law should be borrowed to provide a federal common law rule's content. Although Supreme Court precedent suggests the creation of a uniform (i.e., nationwide) federal rule is appropriate to determine the validity of a release of federal statutory claims, the Court's later rulings in other contexts limit the circumstances in which federal courts should reject the incorporation of state law. These later decisions call into doubt the older precedent.

The first part of this Article addresses the origin of the knowing and voluntary standard for waiving Title VII claims and explains how the test's origin provides little guidance about the test's substance. The second part of this Article discusses the totality of the circumstances test and the contract law test, explains how each test is in disarray, and discusses the importance of the distinction between the two tests. The third part addresses the two primary sources of the disarray: (1) whether a release of Title VII claims is more like a contract (mandating an objective test) or more like a waiver of fundamental or constitutional rights (mandating a subjective test); and (2) whether the source of law should be federal law or state law and if federal law, whether the forum state's law should be borrowed to provide the federal rule's content. I conclude in the third part that Supreme Court precedent dictates application of a contract law test if a uniform federal common law rule is appropriate. However, I also conclude that recent Supreme Court precedent dictates the rejection of a uniform federal common law rule and requires the use of state law to provide the substance of the federal common law rule, except in limited circumstances.[28]

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28. The discussion in this Article is also applicable to claims under Title I of the ADA, 42 U.S.C. §§ 12101-12117 (2000). *See* Poppelreiter v. Straub Int'l Inc., No. 99-4122-SAC, 2001 WL 1464788, at *4 (D. Kan. Oct. 30, 2001) (noting that the test for releasing Title VII claims is applicable to ADA claims). The discussion in this Article is not, however, generally applicable to claims under the ADEA. Pursuant to the OWBPA, to be effective, a waiver of ADEA rights must comply with certain minimum requirements. The OWBPA provides that "[a]n individual may not waive any right or claim under [the Act] unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). It then sets forth minimum requirements for a waiver of ADEA rights to be considered knowing and voluntary. 29 U.S.C. § 626(f)(1)(A)-(H). However, inasmuch as these OWBPA standards are minimum requirements, this article would arguably apply to any additional requirements for waiving ADEA claims. Such a position is weakened, though, by OWBPA's legislative history. The Senate's Committee on Labor and Human Resources, and the House of Representative's Committee on Education and Labor, in their reports on the OWBPA, indicated support for the totality of the circumstances test instead of a contract law test. S. REP. NO. 101-263, at 32 (1990); H.R. REP. NO. 101-664, at 51 (1990). This Article is also not applicable to the release of claims under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219 (2000). Such claims can generally only be released under the supervision of the United States Department of Labor or a court. *See* Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697 (1945) (holding that a person cannot waive a liquidated damages claim in exchange for past

II. ORIGIN OF THE KNOWING AND VOLUNTARY STANDARD FOR RELEASING CLAIMS UNDER TITLE VII

The origin of the knowing and voluntary standard for determining the effectiveness of a Title VII release is the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*[29] In *Alexander*, an employer fired an employee, allegedly for poor performance.[30] The employee challenged his termination by filing a grievance under a collective bargaining agreement between his union and his former employer.[31] The collective bargaining agreement provided that the employer could terminate employees for "proper cause" but could not discriminate against employees because of their race.[32] The grievance procedure ended in arbitration, and at the arbitration, the employee argued he had been fired because of his race.[33] The arbitrator rejected the grievance, finding proper cause for the employee's termination.[34] The arbitrator did not reference the race

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due wages); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946) (holding that a person cannot waive a claim where dispute existed regarding the employer's coverage under FLSA, but amount owed was not in controversy); Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982) (interpreting *Brooklyn Savings* and *Gangi* as precluding the waiver of FLSA claims without the Department of Labor or court supervision). It is important to note, however, that *Brooklyn Savings* and *Gangi* arguably permit the waiver of FLSA claims without Department of Labor or court supervision for certain types of "factual" disputes. *See* Coventry v. United States Steel Corp., 856 F.2d 514, 521–22 n.8 (3d Cir. 1988) ("We note coincidentally that it was only the release of claims concerning the *rights* granted by the FLSA [that were at issue in *Brooklyn Savings* and *Gangi*], and not the release of claims grounded in factual disputes. . . ."); *see also* THE FAIR LABOR STANDARDS ACT 1307-10 (Ellen C. Kearns ed., 1999) (discussing the cases dealing with the private settlement of FLSA claims). *But see Lynn's Food Stores, Inc.*, 679 F.2d at 1355 (interpreting Brooklyn Savings and Gangi as precluding *any* waiver of FLSA claims without Department of Labor or court supervision). If *Coventry* is correct and *Lynn's Foods* is incorrect, this Article would apply to the release of FLSA claims involving "factual" disputes. To the extent this Article is not applicable to the release of claims under the FLSA, it is also not applicable to the release of claims under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601-2654 (2000), and the EPA, if *Brooklyn Savings* and *Gangi* are held applicable to the release of such claims. *See, e.g.*, Taylor v. Progress Energy, Inc., 415 F.3d 364, 374 (4th Cir. 2005) (enforcing United States Department of Labor ("DOL") regulation prohibiting waiver of FMLA rights without DOL supervision or court approval); Morris v. Pa. Mut. Life Ins. Co., CIV. A. No. 87-7063, 1989 WL 14063, at *4 (E.D. Pa. Feb. 21, 1989) (applying *Brooklyn Savings* and *Gangi* to an EPA claim), *aff'd*, 887 F.2d 261 (3d Cir. 1989) (unpublished table decision). *But see* Faris v. Williams WPCI, Inc., 332 F.3d 316, 322 (5th Cir. 2003) (holding that an FMLA claim for money damages can be released without DOL supervision or court approval); *Poppelreiter*, 2001 WL 1464788, at *4 (noting that the test for releasing Title VII claims applies to FMLA claims).

29. 415 U.S. 36 (1974).
30. *Id.* at 38.
31. *Id.* at 39.
32. *Id.*
33. *Id.* at 42.
34. *Id.*

discrimination allegation.[35]

The employee then filed a civil action under Title VII in federal court against his former employer, alleging his former employer terminated him because of his race.[36] The district court held that the employee's Title VII claim was barred because he had pursued his claim through the grievance procedure, and he was thus bound by the arbitrator's decision.[37] The court of appeals affirmed.[38] The district court and the court of appeals relied on two doctrines: (1) election of remedies; and (2) waiver.[39]

The Supreme Court reversed, reasoning that "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination."[40] The Court held that "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."[41]

The Court then addressed, and rejected, the lower courts' reliance on election of remedies and waiver.[42] The Court, in addressing waiver (the doctrine that is important for present purposes), stated that an employee cannot prospectively waive his or her rights under Title VII.[43] Thus, when the employer and the union agreed to a nondiscrimination provision in the collective bargaining agreement, the union could not have been waiving the employee's right under Title VII to be free from discrimination in return for the contractual nondiscrimination provision. The union must have agreed to some other concession as part of the economic bargain struck with the employer over the inclusion of a nondiscrimination provision in the agreement.[44] When the employee sought to enforce his right to be free from discrimination under the agreement's nondiscrimination provision, he was enforcing his rights under the National Labor Relations Act ("NLRA").[45] The Court noted that "[i]t is settled law that no additional

35. *Id.*
36. *Id.* at 43.
37. *Id.*
38. *Id.*
39. *Id.* at 46.
40. *Id.* at 48–49.
41. *Id.* at 49.
42. *Id.* at 49–54.
43. *Id.* at 51. Allowing a person to prospectively waive his or her rights under Title VII would tend to encourage violations of the Act. Allowing a waiver under such circumstances would contravene Title VII's statutory policy of preventing employment discrimination. *See, e.g.*, Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 704 (1945) ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.").
44. 415 U.S. at 52.
45. 29 U.S.C. §§ 151-169 (2000).

concession may be exacted from any employee as the price for enforcing those [NLRA] rights."[46] Thus, the employee could not be considered to be waiving his right to bring a Title VII action by pursuing the grievance because this would be extracting an additional concession for the enforcement of previously bargained-for NLRA rights.[47]

In discussing why pursuing the grievance under the collective bargaining agreement was not a waiver of the right to bring a Title VII action, the Court stated that "presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement."[48] The Court then stated in a footnote that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing."[49]

The Court's statement regarding a "voluntary and knowing" waiver was, of course, dictum.[50] The Court, in holding that the employee had not waived his right to file a Title VII action, acknowledged that "[i]n this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII."[51]

Not only was the statement dictum, but the Court failed to explain what it meant by "voluntary and knowing." This lack of explanation is problematic because these words do not have an agreed upon meaning. For example, "knowing" can simply mean "[d]eliberate" or "conscious,"[52] or it can mean "well-informed."[53] Simply stating that a waiver must be "knowing" does not identify what information the individual must know or the degree of knowledge needed.[54]

The term "voluntary" is particularly difficult to define. As stated by Dean Rubin:

> Any general principle has its uncertainties, but voluntariness achieves a unique level of obscurity. Not only is it difficult to prove that an act is voluntary, it is difficult to define "voluntary"

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46. 415 U.S. at 52.

47. *Id.*

48. *Id.*

49. *Id.* at 52 n.15.

50. That the Court's statement was dictum was recognized in *Makins v. District of Columbia*, 277 F.3d 544, 547 (D.C. Cir. 2002).

51. 415 U.S. at 52 n.15.

52. BLACK'S LAW DICTIONARY 876 (7th ed. 1999).

53. *Id.* For example, Professor Jessica Berg believes that "[k]nowledge requires both understanding of the current situation as well as understanding of the consequences of different decisions." Berg, *supra* note 4, at 314 n.162.

54. *See, e.g.*, Berg, *supra* note 4, at 314 (stating that "knowledge requirements have at least two aspects," including identifying "(1) what information the individual must know for the decision to be considered autonomous, and (2) to what extent the individual must know the information, which is a slightly different issue.").

> as anything that is capable of proof. Judicial definitions of voluntariness include such mysterious terms as "free will" or "free choice," terms that have been sources of debate for several milennia [sic]. Efforts to avoid such philosophical issues necessarily lead to the equally uncertain field of psychology. As Justice Frankfurter wrote, the question of volition "invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society." It seems unlikely that any court could respond to this invitation with a set of clear legal rules.[55]

Dean Rubin, writing with respect to the notion of "voluntariness" in the criminal law context, has stated that "voluntariness is an unwieldy notion which is not amenable to direct assessment and whose use in waiver cases has been a source of continuing confusion."[56] It has been noted that there are degrees of voluntariness, and "the legal issue [involved in determining whether a waiver is voluntary] is whether the action in question lacks voluntariness to the degree that it should be considered involuntary and thus the resulting waiver labeled 'invalid.'"[57] Such an analysis can necessarily only be performed on a case-by-case basis and will depend on the context of the waiver.[58] For example, "the definition of coercion has never been clearly established—only what counts as coercion in particular cases."[59] Some take the position that acceptance of an offer must be voluntary if the choice is between the status quo (if the offer is rejected) and making the recipient better off (if the offer is accepted).[60] Others take the position that even these so-called "beneficial offers" can be coercive.[61] Authorities also differ on whether an action can be coercive if a party's rights are not violated.[62] "Standard contract analysis holds that

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55. Rubin, *supra* note 1, at 529–30 (footnotes omitted) (quoting United States v. Washington, 431 U.S. 181, 188 (1977); Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Haley v. Ohio, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring)).

56. Rubin, *supra* note 1, at 530; *see also* Berg, *supra* note 4, at 308–09 ("There are very few legal definitions of voluntariness, and even the ethical dimensions of the concept remain unclear.").

57. Berg, *supra* note 4, at 311.

58. *Id.*

59. *Id.* at 308.

60. *See, e.g.*, Henn v. Nat'l Geographic Soc'y, 819 F.2d 824, 826 (7th Cir. 1987) (stating that an offer is beneficial when one offer makes the recipient better off while the other maintains the status quo).

61. *See, e.g.*, Silverstein, *supra* note 4, at 519–20 (reciting Joel Feinberg's famous example of a beneficial yet coercive offer, where the mother of a dying child, who is unable to afford the expensive surgery necessary for saving her child's life, is approached by a lecherous millionaire who offers to pay for the surgery on the condition that the mother become his mistress).

62. *See generally* Sian E. Provost, Note, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629 (1995) (discussing various

consent is uncoerced as long as it is not the product of duress, which normally means physical force or fraud."[63]

Even if one can agree on the definitions of "knowing" and "voluntary," one is still left to determine whether the requirements are subjective or objective. For example,

> [t]he requirement that a right be "known" can be a subjective requirement, demanding that the person be aware of the legal right that he is giving up, or it can be an objective requirement, demanding only that the circumstances would make a reasonable man aware that he was waiving such a right. A subjective rule requires actual knowledge while an objective rule requires constructive knowledge.[64]

The requirement that consent be "voluntary" can also be a subjective requirement or an objective requirement.[65]

Thus, "the current conceptual framework for waivers contains two components [knowing and voluntary], each with two possible methods of proof [subjective or objective]."[66] The court in *Alexander* not only failed to provide any guidance on the definitions of knowing and voluntary, but failed to state whether the requirements should be considered subjective or objective.

The Court in *Alexander* also used the term "waiver" without explaining whether it intended the general law of waivers to apply or whether it intended for the more specific law of releases to apply. This is significant because, as will be explained more fully below, a release is generally considered a contract and thus subject to the rules of contract law. Under the rules of contract law, a contract is formed as long as the parties manifest assent to its terms, even if they do not actually assent.[67] In contrast, an effective waiver requires that the party intend the waiver.[68]

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approaches to defining coercion).

63. Silverstein, *supra* note 4, at 511.

64. Rubin, *supra* note 1, at 492. For example, even in those situations in which it is required that a person know he or she has a particular right before it can be considered waived, this knowledge might be presumed when the consequences of the waiver are minor. Berg, *supra* note 4, at 322–23. Professor Silverstein defines "knowingly" to be a situation in which the waiver has been "disclosed by the employer," which would be an objective test. Silverstein, *supra* note 4, at 510.

65. Rubin, *supra* note 1, at 492.

66. *Id.* at 493.

67. RESTATEMENT (SECOND) OF CONTRACTS § 19(3) (1981).

68. The Supreme Court has stated that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Montgomery Ward & Co. v. Robert Cagle Bldg. Co., 265 F. Supp. 469, 474 (S.D. Tex. 1967) ("Although 'waiver' does not require reliance or consideration, it must be intended by one party and so understood by the other."); Thomason v. Thomason, No. CX-01-1770, 2002 WL 1315793, at *2 (Minn. Ct. App. June 18, 2002)

III. DISARRAY

Without guidance from the Supreme Court, the courts of appeal disagree on the test to determine whether a person's consent to a Title VII release is knowing and voluntary. A majority apply the so-called totality of the circumstances test (a test that appears similar to the one applied by the Supreme Court to most waivers of constitutional rights by criminal defendants), and a minority apply contract law rules. This division is not surprising; these courts seem to have split along the lines of the two generally accepted tests for waiver—the criminal law's standard for waiving constitutional rights (which defines a waiver as "an intentional relinquishment of a known right"), and the civil law's current standard (which generally employs contract terminology).[69] However, as demonstrated below, not only are the circuit courts in disarray as to the proper test, but each of the two tests applied by the circuits is itself in disarray.

A. The Totality of the Circumstances Test

Courts adopting the totality of the circumstances test hold that whether a person's consent to a release of Title VII claims is knowing and voluntary is determined from an "examin[ation] [of] the factors surrounding its execution . . . ."[70] To determine whether a person's consent is knowing and voluntary under the totality of the circumstances, courts apply a list of factors:[71] the person's education and business experience,[72] the person's

("While waiver does not require consideration, it does require intent."). The Supreme Court's definition of waiver in *Johnson* was not novel. "The *Johnson* Court was merely paraphrasing the standard common law definition of waiver—a definition which courts had experienced considerable difficulty in applying." Rubin, *supra* note 1, at 481.

69. Rubin, *supra* note 1, at 491. *See also id.* at 528 ("There are . . . two basic rationales the courts employ in deciding waiver cases: the 'voluntary' and 'knowing' framework used in criminal law, and the contractual framework used in civil law."). The division is also somewhat reminiscent of the current debate over whether the objective prong for a hostile-work-environment claim (which requires that a "reasonable person" perceive the work environment as hostile) involves a more "contextual" approach than would be applied under a traditional "reasonable person" standard, and if so, just how contextualized the standard is (including whether it is sufficiently contextualized to turn the "reasonable person" standard into the "reasonable victim" or the "reasonable woman" standard). *See generally* Linda K. Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 174, 176 (2005) (discussing "reasonable person" standard under hostile-work-environment claim).

70. Riley v. Am. Family Mut. Ins. Co., 881 F.2d 368, 372 (7th Cir. 1989).

71. *See* Livingston v. Adirondack Beverage Co., 141 F.3d 434, 438 (2d Cir. 1998) (listing factors in the totality of circumstances test); Torrez v. Pub. Serv. Co. of N.M., Inc., 908 F.2d 687, 689–90 (10th Cir. 1990) (same). Not all courts apply all of the factors I identify, and the courts do not always phrase the factors in exactly the same way.

72. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 689. A high school education is

role in determining the release's provisions,[73] the release's clarity and specificity,[74] the time the person had to review and consider the release,[75]

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generally sufficient for this factor to favor the employer. *See, e.g.*, Kinney v. Hamilton Partners, No. 03 C 3905, 2004 WL 765882, at *7 (N.D. Ill. Apr. 7, 2004) (finding that plaintiff's general equivalency diploma plus business experience resulted in the factor favoring the defendant), *aff'd*, 112 F. App'x 508 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 2911 (2005); Nobles v. Discover Fin. Servs., Inc., No. 02 C 2446, 2003 WL 22326584, at *3 (N.D. Ill. Oct. 9, 2003) ("A high school education is usually deemed sufficient to weigh the first factor in the defendant's favor."); Prunella v. Carlshire Tenants, Inc., 94 F. Supp. 2d 512, 516 (S.D.N.Y. 2000) ("[A] high school diploma generally is sufficient. . . ."). *But see* Grant-Hyndman v. Olivetti Mgmt. of Am., Inc., No. 95 Civ. 7736(CSH), 1997 WL 630180, at *3 (S.D.N.Y. Oct. 9, 1997) (noting that the plaintiff's education was "limited to a high school diploma"). Learning disabilities, mental illnesses, and one's mental state have been considered under this factor. *See Nobles*, 2003 WL 22326584, at *3 ("Learning disabilities and mental illness can also impact the educational factor."); Meyers v. TruGreen, Inc., No. 03 C 7570, 2004 WL 1146120, at *4 (N.D. Ill. May 21, 2004) ("However, since this factor considers whether an employee, based on their age, education and experience, was able to understand the terms of the release, the court also looks at Meyers' mental state."). At least one court has required medical evidence to support a claim that a mental condition affected one's capacity to understand a release. *See* Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 277 (1st Cir. 2002) (noting that plaintiff had not presented competent medical evidence to support claims of depression and bulimia made in the affidavit); *see also Kinney*, 112 F. App'x at 508 ("Kinney also claims that he was on medication when he signed the agreement, which he says clouded his thoughts. But as the district court noted, he has provided no admissible evidence in support of this claim, and his bare assertion that the medication interfered with his will is not enough to create a genuine issue of material fact.").

73. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 689; *see also* Riddell v. Med. Inter-Ins. Exch., 18 F. Supp. 2d 468, 473–74 (D.N.J. 1998) ("The ability to negotiate suggests that the atmosphere surrounding the signing of the release was not oppressive and thus indicates a voluntary waiver."). It has been stated that "absent an oppressive atmosphere, lack of opportunity to negotiate should not weigh heavily in the court's analysis." Roberts v. Comcast Cable Co., No. Civ.A. 03-397 GMS, 2004 WL 1887487, at *7 (D. Del. Aug. 23, 2004).

74. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 689–90. Most courts have held the release need not specifically mention Title VII. Smith v. Amedisys Inc., 298 F.3d 434, 443 (5th Cir. 2002); Stroman v. W. Coast Grocery Co., 884 F.2d 458, 461 (9th Cir. 1989). *But see* Cole v. Gaming Enter., L.L.C., 199 F. Supp. 2d 208, 213 (D. Del. 2002) (stating that the standard for voluntariness under Title VII requires that the waiver language refer to Title VII). However, the failure to mention Title VII may "diminish" the release's clarity and specificity. *See* Poppelreiter v. Straub Int'l Inc., No. 99-4122-SAC, 2001 WL 1464788, at *5 (D. Kan. Oct. 30, 2001) (finding that a failure to detail the specific claims being waived diminishes the clarity of the release in question).

75. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 689. There is no bright-line test for determining the amount of time needed to consider a release. One day has been held insufficient absent some reason for urgency. *See* Puentes v. United Parcel Serv. Corp., 86 F.3d 196, 199 (11th Cir. 1996) (holding that twenty-four hours time to decide on releases was insufficient); *see also Cole*, 199 F. Supp. 2d at 213 ("Allowing one day to review a document of the type in question seems insufficient under . . . Title VII . . . ."). Having possession of the release for as many as five days might still be insufficient for this factor to favor the employer. *See Grant-Hyndman*, 1997 WL 630180, at *3 (noting plaintiff "had possession of the release for only five days . . . ."); *see also* EEOC v. Am. Express Publ'g

whether the person read the release and considered its terms before signing it,[76] whether the person knew or should have known his or her rights upon executing the release,[77] whether the person was represented by an attorney or had other independent advice,[78] whether there was consideration for the

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Corp., 681 F. Supp. 216, 220 (S.D.N.Y. 1988) (finding that "[t]hree days, while not conclusive as to involuntariness, is sufficiently short to create a question on the subject."); Meyers v. TruGreen, Inc., No. 03 C 7570, 2004 WL 1146120, at *5 (N.D. Ill. May 21, 2004) (refusing to find as a matter of law that three days was an ample amount of time, particularly where there was pressure for the release to be signed "right away"). However, even a few hours might be adequate when the person is able to consider the agreement and reject several offers as inadequate during that time period. *See* Evans v. Waldorf-Astoria Corp., 827 F. Supp. 911, 913 (E.D.N.Y. 1993) (finding that a few hours constituted sufficient time because the agreement was very simple and also because the plaintiff, with the assistance of her lawyer, considered several other offers and rejected them), *aff'd*, 33 F.3d 49 (2d Cir. 1994) (unpublished table decision). Also, even when the employee does not have access to the agreement, the amount of time he was aware of the offer will be taken into consideration. *See* Prunella v. Carlshire Tenants, Inc., 94 F. Supp. 2d 512, 516 (S.D.N.Y. 2000) ("[Employee] had several weeks to ponder settlement even if he did not see the exact terms until the date he signed the agreement."). An agreement reached during mediation will also take into account the fact that the parties agreed to mediation prior to that time and the very purpose of the process was that a mediated settlement might be reached. *See* McKoy v. Potter, No. 01 Civ.1984(SHS)(GWG), 2002 WL 31028691, at *7 (S.D.N.Y. Sept. 12, 2002) (concluding that the long mediation time negated the short amount of time the employee had with final agreement), *aff'd*, 98 F. App'x 28 (2d Cir. 2004), *cert denied*, 125 S. Ct. 649 (2004). That the employee chooses to sign the release before he or she is required to will not result in this factor weighing against the employer as long as the employee was given a reasonable amount of time to review the release and chose not to take advantage of such time. *Roberts*, 2004 WL 1887487, at *5

76. Pierce v. Atchison, Topeka & Sante Fe Ry., 65 F.3d 562, 571 (7th Cir. 1995).

77. Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1998) (pre-OWBPA case); *see also* Riddell, 18 F. Supp. 2d at 473 (relying, in part, on plaintiff's allegation that she did not know she was protected by the age discrimination and disability discrimination laws). This factor appears to involve not only whether the employee knew of his or her legal rights, in the sense of being aware that employment discrimination violates the law, but whether he or she believes, or has reason to believe, that the facts might support a legal claim. *See, e.g.*, Bard v. Mark Steven CVS, Inc., 378 F. Supp. 2d 33, 42 (D.R.I. 2005) (discussing whether employee waived her claims "with knowledge of the facts," and concluding she did because she was aware she had a potential legal claim against her former employer prior to signing the release); *Roberts*, 2004 WL 1887487, at *6 (discussing factor solely in terms of whether employee knew, or should have known, her termination was retaliatory).

78. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 689; *see also* Wright v. Sw. Bell Tel. Co., 925 F.2d 1288, 1292 (10th Cir. 1991) (employee represented by union representatives throughout negotiations); *Prunella*, 94 F. Supp. 2d at 516 (employee represented by union representative). Some courts view this factor as addressing the issue of bargaining power. For example, in *McKoy v. Potter*, the court held this factor weighed in favor of the employer when the employee was represented at mediation by a union representative and the employer was represented by a company manager. The court stated, "As both parties were on equal footing in terms of the absence of counsel, and [the employee] had representation from a party presumably familiar with these sorts of proceedings, these circumstances weigh in favor of [the employer]." *McKoy*, 2002 WL 31028691, at *8.

release,[79] and whether the person's consent was induced by improper conduct by the employer,[80] including whether the employer encouraged or discouraged the person from consulting with an attorney.[81] This list is not exhaustive,[82] and the absence of any one factor is not dispositive.[83] The factors are not to be treated as a checklist, and courts do not insist on rigid adherence to them.[84] However, each factor should be independently analyzed.[85] When reasonable persons can differ as to whether the person's consent was knowing and voluntary under the totality of the circumstances, the issue is for the jury.[86]

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79. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 690. Courts treat this factor as simply whether the employee received some consideration for the release. *See, e.g.*, *Pierce*, 65 F.3d at 571 (stating this factor as "whether the consideration is given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law"); Cuchara v. GAI-Tronics Corp., 129 F. App'x 728, 731 (3d Cir. 2005) (noting that the release did not provide the employee "with much compensation in exchange for the release of several potentially meritorious claim[s]," but that "Cuchara concedes that in exchange for waiving these claims, he received compensation to which he was not otherwise entitled: four week's salary."); Rinaldi v. World Book, Inc., No. 00 C 3573, 2001 WL 477145, at *5 (N.D. Ill. May 3, 2001) (noting that receipt of two weeks' compensation favored the employer because the plaintiff was not entitled to compensation); *Poppelreiter*, 2001 WL 1464788, at *7 ("The defendant maintains the consideration paid the plaintiff exceeds what he was already entitled by contract or law at the time he signed the release. Because the defendant was disputing liability, the plaintiff necessarily received consideration when he signed the release. This factor favors the defendant."). *But see McKoy*, 2002 WL 31028691, at *9 (enforcing a settlement agreement despite the lack of consideration). The holding in *McKoy* that consideration is not necessary to enforce a Title VII release is questionable under Supreme Court precedent. *See, e.g.*, Maynard v. Durham & S. Ry., 365 U.S. 160, 163 (1961) (holding that consideration is necessary for effective release of a claim under Federal Employers' Liability Act). Perhaps the court in *McKoy*, without so stating, was influenced by New York law, which enforces written releases despite a lack of consideration. *See* N.Y. GEN. OBLIG. LAW § 15-303 (McKinney 2001) ("A written instrument which purports to be a total or partial release . . . shall not be invalid because of the absence of consideration. . . ."). Some courts focus on whether the person had a proper appreciation of the benefits he or she was receiving. *See, e.g.*, *Grant-Hyndman*, 1997 WL 630180, at *4 ("[a] proper appreciation of benefits to be received puts an employee on notice that something else must be relinquished. In the context of a waiver of federal statutory protection, it is essential that an employee be fully apprised of the terms of the bargain sought by an employer.").

80. *Pierce*, 65 F.3d at 571.

81. *Livingston*, 141 F.3d at 438; *Torrez*, 908 F.2d at 690. One court has gone so far as to state that "[w]aivers under both the ADEA and Title VII require that an employee be advised of the right to seek counsel." *Cole*, 199 F. Supp. 2d at 214. The decision in *Cole* appears to be based on the mistaken belief that the requirements of the OWBPA apply to Title VII.

82. Bormann v. AT & T Commc'ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989).

83. Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 240 (S.D.N.Y. 2000).

84. Gorman v. Earmark, Inc., 968 F. Supp. 58, 61 (D. Conn. 1997).

85. Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 820 (11th Cir. 1998).

86. *See id.* at 820 (holding that a jury question existed as to whether a release of ADA

The list of factors originated in *EEOC v. American Express Publishing Corp.*[87] What is interesting is that the court's list in *American Express Publishing Corp.* is derived from two other cases, one of which is the Eighth Circuit opinion adopting a contract law analysis—*Lancaster v. Buerkle Buick Honda Co.*[88] The other case, *DiMartino v. City of Hartford*,[89] relied in part on another Eighth Circuit opinion—*Pilon v. University of Minnesota*.[90] The provenance of the totality of the circumstances test shows that, rather than being derived from established law, it was created almost virtually out of whole cloth (though, as previously discussed, it seems related to the test usually employed to analyze criminal law waivers). Further complicating the matter is that the totality of the circumstances test has not been clearly defined by the courts (as will be discussed later). Because courts have not identified the test as being derived from any established law that can be relied on for precedent, the courts' failure to clearly define the test is particularly problematic.[91]

Courts applying the totality of the circumstances test have said a waiver of Title VII rights is not to be inferred lightly,[92] and "the waiver of

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claims was knowing and voluntary); Puentes v. United Parcel Serv. Inc., 86 F.3d 196, 199–200 (11th Cir. 1996) (noting that the question of whether the company gave the plaintiffs only twenty-four hours to review releases was an issue for the jury); Larsen v. Simonds Indus., Inc., 337 F. Supp. 2d 331, 338 (D. Mass. 2004) ("A jury is the appropriate arbiter of Larsen's credibility and whether the waiver and release was knowing and voluntary. The jury should also determine whether the waiver and release satisfied the relevant requirements under federal law."). However, there must be sufficient evidence for a jury to find that the employee did not enter into the agreement knowingly or voluntarily. Smith v. Amedisys Inc., 298 F.3d 434, 444 (5th Cir. 2002); *see also* Pierce v. Atchison, Topeka & Santa Fe Ry., 65 F.3d 562, 572 (7th Cir. 1995) ("[N]ot every allegation that a waiver was not knowing and voluntary properly reaches the jury."). An argument can be made that the validity of a release is a question for the court. "[T]he settlement of a dispute generally renders a case moot." U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 748 (11th Cir. 1991). "[I]f the controversy is moot, [both the trial and appellate courts] lack subject matter jurisdiction." Carr v. Saucier, 582 F.2d 14, 16 (5th Cir. 1978). "[T]he court is empowered to resolve factual disputes when subject matter jurisdiction is challenged." Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990) (citation omitted). On the issue of the right to a jury trial with respect to the validity of a release, see generally W. M. Moldoff, Annotation, *Right to Jury Trial on Issue of Validity of Release*, 43 A.L.R.2d 786 (1955) (surveying case law addressing whether validity of release is an issue for the court or the jury).

87. 681 F. Supp. 216, 219 (S.D.N.Y. 1988).

88. 809 F.2d 539 (8th Cir. 1987).

89. 636 F. Supp. 1241 (D. Conn. 1986).

90. 710 F.2d 466 (8th Cir. 1983).

91. If for no other reason, an application of contract law is preferable because it has the advantage of predictability. *See e.g.*, S. REP. NO. 101-79, at 17 (1989) (noting that courts applying the totality of the circumstances test "scrutinize many different factors or criteria on a case-by-case basis, in effect promising more litigation in the future").

92. Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir. 1976).

such remedial rights must be closely scrutinized."[93] Most courts applying the totality of the circumstances test have held that the burden of proof is on the employer to establish that consent was both knowing and voluntary.[94] However, if consent was knowing and voluntary, federal courts will enforce the release in order to promote Congress' policy of encouraging voluntary settlements of Title VII claims.[95] Also, an employee cannot avoid a release "merely because the employee grows dissatisfied with the payment for which he or she settled."[96]

These courts have essentially adopted the traditional common law definition of waiver (as opposed to releases in specific), which defines a waiver as "an intentional relinquishment . . . of a known right or privilege."[97] In 1938, in *Johnson v. Zerbst*,[98] this common law definition of

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93. Puentes v. United Parcel Serv. Inc., 86 F.3d 196, 198 (11th Cir. 1996).

94. Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 276 (1st Cir. 2002); Vital v. Interfaith Med. Ctr., 168 F.3d 615, 622 (2d Cir. 1999); Stribling v. S. Pac. Transp. Co., 841 F.2d 1130, 1988 WL 17097, at *2 (9th Cir. Feb. 24, 1988) (unpublished table decision); Roberts v. Comcast Cable Co., No. Civ.A. 03-397 GMS, 2004 WL 1887487, at *4 (D. Del. Aug. 23, 2004). The Seventh Circuit requires the plaintiff to raise the issue that his consent was not knowing nor voluntary, and "to produce specific evidence of factors that vitiated his consent to the release." Pierce v. Atchison, Topeka & Santa Fe Ry., 110 F.3d 431, 438 (7th Cir. 1997). However, the burden of proof then rests with the employer to establish that the plaintiff's consent to the release was knowing and voluntary. *Id.* at 437–38. The Fifth Circuit requires the employer to establish that the plaintiff "signed a release that addresses the claims at issue, received adequate consideration, and breached the release," but the burden then shifts to the former employee to establish its invalidity because of "fraud, duress, material mistake, or some other defense." Smith v. Amedisys, 298 F.3d 434, 441 (5th Cir. 2002) (quoting Williams v. Phillips Petroleum Co., 23 F.3d 930, 935 (5th Cir. 1994)). Presumably, "some other defense" includes an argument it was not entered into knowingly or voluntarily under the totality of the circumstances test, to the extent such a test is broader than the standard contract defenses of fraud, duress, and material mistake. It seems that it would be appropriate to presume that a current or former employee's consent to a release of Title VII claims was "knowing" if the employer complied with the requirement that it post in a conspicuous place on its premises a notice describing the applicable provisions of Title VII. *See* 42 U.S.C. § 2000e-10(a)(2000) (providing that every employer must post in a conspicuous place upon its premises a notice prepared or approved by the EEOC setting forth excerpts or summaries of Title VII's pertinent provisions); 29 C.F.R. § 1601.30(a) (2004) (same). Whether such a notice was posted has been used in other contexts to determine whether an employee was aware of his or her Title VII rights. For example, "[f]ailure to post the required notice will toll the running of the limitation period, at least until such time as aggrieved persons seek out an attorney or acquire knowledge of their rights under the Act." Schele v. Porter Mem'l Hosp., 198 F. Supp. 2d 979, 986 (N.D. Ind. 2001).

95. *See* Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981) (holding that an oral settlement agreement under which the person's consent was knowing and voluntary is enforceable, despite Louisiana's requirement that settlement agreements be reduced to writing, because such a requirement might hamper the significant federal interest in encouraging voluntary settlements of Title VII claims).

96. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 858 (5th Cir. 1975).

97. Rubin, *supra* note 1, at 481.

waiver was adopted by the United States Supreme Court as the standard definition for the waiver of a constitutional right by a criminal defendant.[99] In fact, some of the courts adopting the totality of the circumstances test seem to view a waiver of Title VII rights as analogous to a criminal defendant's waiver of a constitutional right.[100] Also, it has been recognized that the "voluntary and knowing" language used by the Court in *Alexander* is reminiscent of the language used for the constitutional waiver standard applied to criminal defendants.[101] The Supreme Court has explained that, under this constitutional waiver standard, waivers, to be effective, must be "voluntary . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[102] Some of the courts

98. 304 U.S. 458 (1938).

99. *Id.* at 464.

100. *See, e.g.*, Mosley v. St. Louis Sw. Ry., 634 F.2d 942, 946 n.5 (5th Cir. Jan. 1981) (citing Brady v. United States, 397 U.S. 742 (1970), which dealt with a criminal defendant's waiver of the constitutional right to a jury trial); Garvin v. Postmaster, 553 F. Supp. 684, 687 n.2 (E.D. Mo. 1982) (stating that "[t]he analysis used by the Supreme Court to determine whether there has been an effective waiver of a constitutional right may be a helpful analogy for the purpose of determining the validity of the plaintiff's waiver" under Title VII, and citing to *Johnson v. Zerbst*), *aff'd*, 718 F.2d 1108 (8th Cir. 1983) (unpublished table decision).

101. *See* Makins v. Dist. of Columbia, 277 F.3d 544, 547 (D.C. Cir. 2002) (stating that the *Alexander* Court, in using term "voluntary and knowing," was "invoking the familiar test of *Johnson v. Zerbst*.").

102. Brady, 397 U.S. 742, 748 (1970). Under this standard, "courts indulge every reasonable presumption against waiver." *Johnson*, 304 U.S. at 464 (quoting Ohio Bell Tel. Co. v. Pub. Util. Comm'n, 301 U.S. 292, 307 (1937)). In fact, when applied in the context of a criminal defendant's waiver of his right to counsel, "[t]he fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." Von Moltke v. Gillies, 332 U.S. 708, 724 (1948). Rather, to be valid, such a waiver must be made with an appreciation of the nature of the charges, the offenses included within them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Id.* at 724. "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is entered." *Id.* "For that reason, it is the State that has the burden of establishing a valid waiver. Doubts must be resolved in favor of protecting the constitutional claim." Michigan v. Jackson, 475 U.S. 625, 633 (1986) (citation omitted). Although the Court's language in *Alexander* is reminiscent of the Court's language for the constitutional standard, too much reliance on *Alexander* is misplaced. As previously discussed, the statement in *Alexander* was dictum, and it would be reasonable to believe that if the Court were to decide that the "voluntary, knowing and intelligent" constitutional standard be adopted for Title VII releases, such an important statement of law would not be announced in a single sentence of dictum. Also, the Court in *Alexander* did not use the word "intelligent." This omission suggests the Court might not have been referring to the "voluntary, knowing and intelligent" constitutional standard in its full rigor. *But see* Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 678–79 (2001) (noting that in reference to

adopting the totality of the circumstances test have also relied on the Supreme Court's standard for assessing the validity of a seaman's release of claims under the Jones Act.[103] This standard views seamen as "wards of admiralty" and treats such releases like a contract between a fiduciary and a beneficiary, with the burden on the employer to prove the agreement is fair.[104]

Few courts using the totality of the circumstances test have explained why a standard different from a contract law analysis should be used as the federal common law rule.[105] For those who have, it has been based on the argument that the totality of the circumstances test is consistent with the strong congressional purpose to eradicate employment discrimination[106] or the principle that waivers of federal remedial rights are not lightly inferred.[107] One court said that "[t]he contract approach . . . does not give

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the phrases "knowing and intentional," "knowing, voluntary, and intentional," "knowing, voluntary, and intelligent," "voluntary and intentional," "knowing and intelligent," and "knowing and voluntary," "[t]he courts have not drawn any distinctions based on the slight differences in the wording of these phrases").

103. 46 U.S.C. § 688 (2000). *See, e.g.*, Stribling v. S. Pac. Transp. Co., 841 F.2d 1130, 1988 WL 17097, at *2 (9th Cir. Feb. 24, 1988) (unpublished table decision) (drawing on maritime law for the burden of demonstrating that a release is valid); United States v. Trucking Employers, Inc., 561 F.2d 313, 318 n.18 (D.C. Cir. 1977) (relying on *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), a case setting forth the requirements for an effective release under the Jones Act).

104. *Garrett*, 317 U.S. at 247. One district court judge noted that "in employment discrimination cases the courts have treated plaintiffs as 'sort of wards of the court.'" *See* Odomes v. Nucare, Inc., 653 F.2d 246, 252 (6th Cir. 1981) (quoting the district court judge in this case).

105. In developing a rule of federal common law applicable uniformly throughout the nation,

> the Court may look to such Congressional policies as it can discern, to the common law or statutory policies used by any state to solve related problems, or to any other source. The Court is acting in this instance just as any common law court would act. Its job is to formulate the best solution to the problem before it, consistent with any controlling legislative policy.

PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS & THE LAW OF FEDERAL-STATE RELATIONS 129 (1998).

106. Pierce v. Atchison, Topeka & Sante Fe Ry., 65 F.3d 562, 571 (7th Cir. 1995); Bormann v. AT & T Commc'ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989); Coventry v. U.S. Steel Corp., 856 F.2d 514, 522–23 (3d Cir. 1988).

107. Poppelreiter v. Straub Int'l Inc., No. 99-4122-SAC, 2001 WL 1464788, at *4 (D. Kan. Oct. 30, 2001). This principle is derived from *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937), in which the Court held that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Id.* at 393. One wonders about the rationale for the principle that waivers of fundamental rights are not lightly inferred. Is it because a waiver of certain "fundamental" rights is usually not rational, and the waiver of such rights is therefore itself evidence the person did not act knowingly and voluntarily? Or is it because allowing persons to enforce certain rights has a public benefit, and enabling persons to revoke a waiver of such rights (and then enforce them) is beneficial to society?

sufficient weight to the federal interest in ensuring that the goals of the [employment discrimination laws] are not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives."[108] Another court reasoned that cases adopting federal rules to assess the validity of releases of federal statutory claims (including Title VII claims) all "involve federal statutory schemes . . . aimed at rectifying historical inequalities in bargaining power between parties."[109]

1. What Does "Knowing and Voluntary" Mean Under the Totality of the Circumstances Test?

Despite numerous cases applying the totality of the circumstances test, few have explained what "knowing" and "voluntary" mean under such a test.[110] This is not surprising inasmuch as even those courts applying the "intentional relinquishment of a known right of privilege" waiver standard at common law never made "clear how intentional the waiver had to be and how much information had to be known before a waiver would be found."[111] Courts adopting the totality of the circumstances approach simply say the test is a "pragmatic one,"[112] and "[t]he essential question is whether, in the totality of the circumstances, the individual's waiver of [his or] her right can be characterized as 'knowing and voluntary.'"[113]

Those few courts attempting to define "knowing" have disagreed on the definition. Some have applied an expansive definition. One described the concept as a "full understanding" of the release's terms,[114] and another stated the person must "understand the legal consequences of [his or] her actions."[115] Other courts have not adopted such an expansive definition. One said that "[w]hether [the employee] fully grasped the legal ramifications of the Agreement is irrelevant for purposes of assessing the validity of the release."[116] Another described the concept of "knowing" as

108. Pierce v. Atchison, Topeka & Santa Fe Ry., 110 F.3d 431, 437 (7th Cir. 1997).

109. Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112, 114–15 (4th Cir. 1983).

110. *See* Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1224 (2002) ("The first problem with implementing the knowing and voluntary standard . . . is that no court has explicitly defined the terms 'knowing' and 'voluntary.'").

111. Rubin, *supra* note 1, at 481.

112. Gorman v. Earmark, Inc., 968 F. Supp. 58, 61 (D. Conn. 1997).

113. Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 276 (1st Cir. 2002). The totality of the circumstances test has been described as a "peculiarly fact-sensitive inquiry." Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437–38 (2d Cir. 1998).

114. Puentes v. United Parcel Serv. Inc., 86 F.3d 196, 198 (11th Cir. 1996).

115. Hudson v. Ind. Limestone Co., 143 F. Supp. 2d 1032, 1037 (S.D. Ind. 2001).

116. Kujawski v. U.S. Filter Wastewater Group, Inc., No. CIV. 00-1151DWFAJB, 2001 WL 893918, at *5 (D. Minn. Aug. 7, 2001).

simply ensuring "that a release was executed purposefully, and not due to mistake or accident."[117] One said a release is simply "*more likely* to be knowing and voluntary if the employee understood the rights being waived."[118] At least one court has combined "knowing" and "voluntary," defining "voluntary" as whether the person comprehended the rights he or she released.[119]

The courts' failure to define "knowing" and "voluntary" has complicated the use of the very factors identified by these courts as being relevant to determining whether consent was "knowing" and "voluntary"; courts apply these factors without knowing what these factors are being used to determine. The use of these factors is further complicated by the opportunity to use some factors, not as a device to determine whether a person's consent was knowing and voluntary (assuming we knew what these terms meant), but to ensure that the process leading to the employee executing the release was "fair" (such as when courts consider the amount of time the employer gave the person to review the release or whether the employer discouraged the person from seeking the advice of counsel).[120]

However, merely because the process leading to the execution of the release was in some sense "unfair" does not necessarily mean the person's

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117. Berner v. Tesseract Corp., No. 94 C 1717, 1994 WL 559138, at *3 (N.D. Ill. Oct. 7, 1994).

118. Poppelreiter v. Straub Int'l Inc., No. 99-4122-SAC, 2001 WL 1464788, at *6 (D. Kan. Oct. 30, 2001) (quoting Riddell v. Med. Inter-Ins. Exch., 18 F. Supp. 2d 468, 473 (D. N.J. 1998)) (emphasis added).

119. Cox v. Allied Chem. Corp., 538 F.2d 1094, 1098 (5th Cir. 1976). *See* Rubin, *supra* note 1, at 493 (noting that courts "sometimes conflate the two components by defining 'voluntariness' to require 'knowledge.'"). However, treating "knowledge" as an aspect of "voluntariness" has venerable roots. *See* Berg, *supra* note 4, at 307 n.120 (noting that Aristotle and St. Thomas Aquinas "use the terms nonvoluntary and involuntary to refer to actions that stem from a lack of knowledge").

120. As stated by Dean Rubin, in discussing the doctrine of waiver generally, "[i]n some cases, courts simply abandon their own rationales; in others, they use the uncertainty of these rationales as a way of smuggling other standards into the analysis." Rubin, *supra* note 1, at 545; *see also id.* at 533 ("Even when the rationales [of waiver] can be applied consistently, courts are often unwilling to accept their implications and resort instead to standards and policies that are not part of articulated waiver rationales."). The concern that courts will use the totality of the circumstances factors to police the process for "fairness," rather than as a tool to determine whether consent was knowing and voluntary, is not unfounded. The best example of a case using the totality of the circumstances factors to punish perceived bad behavior by an employer (i.e., conduct that rendered the process "unfair") is *Puentes v. United Parcel Serv.*, 86 F.3d 196 (11th Cir. 1996). The court's holding seems to have been driven by the court's belief that the company might have engaged in conduct designed to prevent the plaintiffs from obtaining the advice of counsel, even though the plaintiffs did not seriously contest the knowing and voluntary nature of their consent to the releases. *See id.* at 199 (suggesting twenty-four hours for the plaintiffs to review their releases was company conduct designed to prevent plaintiffs from consulting counsel). The case seems to have been decided simply on the belief that the process was "unfair."

consent to the release can be considered "unknowing" or "involuntary." Of course, such a circumstance might suggest the person's consent was not knowing and voluntary, but these factors should only be used as a tool to assist in reaching this determination; they should not be used as an end in themselves. If they are used in this fashion, courts have departed from the rule that consent is effective as long as it is knowing and voluntary and have replaced it with a rule requiring that the process be fair. While this might be an attractive rule from an ethical or legislative standpoint, it is a rule different from the rule requiring that consent be "knowing" and "voluntary."[121]

2. Is "Knowing and Voluntary" a Subjective Requirement or an Objective Requirement Under the Totality of the Circumstances Test?

Courts have struggled with whether the totality of the circumstances test is purely subjective or whether it has objective elements. Some early cases suggest it is purely subjective. In 1976, the Fifth Circuit held that an employee's signature on a release is insufficient to establish that a waiver is knowing and voluntary.[122] The court wrote: "The plaintiffs' theory is that the forms were signed without understanding. To assume that, notwithstanding strong evidence to the contrary, a signature implies understanding is to allow a rule of contract law to play too salient a part in the administration of a remedial civil rights statute."[123] That same year, the Fifth Circuit said a person must "in fact" comprehend the rights released.[124]

Recent courts continue to use language suggesting a purely subjective standard. The Seventh Circuit stated that "[t]he inquiry into whether a waiver of [employment discrimination] rights was knowing and voluntary is, at bottom, an inquiry into the mental state of the party who is purported to have waived those rights."[125] That same court stated the person must "understand" his or her decision to waive a substantive right grounded in

121. One could argue that once it is determined that the process was "unfair" (itself a term that would require definition), an irrebuttable presumption should arise that consent was not "voluntary." However, such a shorthand method of determining whether consent was voluntary will necessarily be overinclusive, and no court has advocated such an approach. An argument could also be made that once it is determined that the process was "unfair," any consent was necessarily somewhat less voluntary than it would have been if the process had been fair, even if ever so slightly. This, however, would be defining "voluntary" as only encompassing those decisions made free of any pressures whatsoever. No court has advocated such an approach.

122. Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir. 1976).

123. *Id.*

124. *Cox*, 538 F.2d at 1098.

125. Pierce v. Atchison, Topeka & Santa Fe Ry., 110 F.3d 431, 442 (7th Cir. 1997).

federal statutory law.[126] One court held that the "plaintiff's claimed lack of understanding precludes summary judgment on waiver grounds," even though the plaintiff was a management-level employee and the agreement was written in "straightforward terms."[127]

In practice, however, courts applying the totality of the circumstances test have usually refused to apply a purely subjective standard. For example, the Seventh Circuit, although seemingly adopting a purely subjective approach, has stated that "[i]n order to protect truly voluntary bargains, we do not permit claims of subjective misunderstanding, standing alone, to defeat an otherwise valid release."[128]

Courts often refuse to apply a purely subjective standard when the releasing person did not act reasonably. In a case in which a person failed to read the release, the court reverted to state law for the proposition that "one who signs a paper, without reading it, if he is able to read and understand, is guilty of such negligence in failing to inform himself of its nature that he cannot be relieved from the obligation contained in the paper thus signed."[129] In a case in which the plaintiff asserted he did not read the release prior to signing it and declined to take a copy of the release to review it during an agreed seven-day revocation period, the court stated that "[i]t would be unjust to penalize Defendant for Plaintiff's foolhardy decision."[130] In one case, the fact that the employee chose to sign the release the day it was provided to her did not weigh against enforcement when the employee was given a reasonable amount of time to review the

126. Gibson v. Neighborhood Health Clinics, 121 F.3d 1126, 1129 (7th Cir. 1997).

127. Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 242 n.3 (S.D.N.Y. 2000); *see also* Riddell v. Med. Inter-Ins. Exch., 18 F. Supp. 2d 468, 473 (D.N.J. 1998) (relying, in part, on plaintiff's allegation she did not know she was protected by the age discrimination and disability discrimination laws). While of limited relevance to Title VII releases, the Senate's Committee on Labor and Human Resources, and the House of Representative's Committee on Education and Labor, in their reports on the OWBPA, indicated their belief that the knowing and voluntary requirement of the OWBPA is a subjective standard. *See* S. REP. NO. 101-263, at 31–32 (1990) ("The unsupervised waiver must be knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal."); H.R. REP. NO. 101-664, at 51 (1990) ("A waiver must be knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release his or her ADEA claims and must have understood that he or she was accomplishing this goal.").

128. *Pierce*, 110 F.3d at 442.

129. Scott v. Home Choice, Inc., No. 99-2311-JWL, 1999 WL 1096048, at *4 (D. Kan. Nov. 18, 1999) (quoting Sanger v. Yellow Cab Co., 486 S.W.2d 477, 481 (Mo. 1972)); *see also* James v. Chi. Transit Auth., No. 95 C 5869, 1997 WL 269596, at *3 n.4 (N.D. Ill. May 15, 1997) (stating that an employee who agrees to terms in writing without understanding or investigating terms does so at his or her peril). It is unclear why the court in *Scott* reverted to state law for this proposition, as opposed to holding that such a principle applied as a matter of federal common law.

130. Kinney v. Hamilton Partners, No. 03 C 3905, 2004 WL 765882, at *8 (N.D. Ill. Apr. 7, 2004), *aff'd*, 112 F. App'x 508 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 2911 (2005).

release and chose not to take advantage of such time.[131] Also, the use of the "should have known" standard with respect to whether the employee was aware of his or her legal rights[132] is itself an objective standard. For example, in one case, the court, in enforcing a release, said that the employee "had at least constructive if not actual knowledge of the rights she waived."[133]

Other courts have rejected a subjective approach when the employer had no reason to know of the particular reason that might make a person's consent unknowing or involuntary, which is consistent with the objectivists' emphasis on what a reasonable person in the position of the other party would believe.[134] For example, one court said that "in some limited circumstances [emotional strain] could be a consideration," but that "such stress would have to be obvious or at least emphasized at the time the agreement would otherwise be final."[135] In one case, the plaintiff alleged she had low self-esteem, tended to be deferential to authority, and was under stress when she signed the release.[136] The court, although suggesting a pure subjective approach, said that "[e]ven assuming her claims to be true, such subjective factors cannot be the basis upon which an individual may invalidate an otherwise lawful agreement."[137] The court said that a

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131. Roberts v. Comcast Cable Co., No. Civ.A. 03-397 GMS, 2004 WL 1887487, at *5 (D. Del. Aug. 23, 2004).

132. *See* Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1998) (pre-OWBPA case) (stating that whether an employee "knew or should have known of his rights upon execution of the release" is a factor to consider); *see also Roberts*, 2004 WL 1887487, at *6 (discussing the factor solely in terms of whether the employee knew, or should have known, her termination was retaliatory).

133. Anderson v. Lifeco Servs. Corp., 881 F. Supp. 1500, 1504 (D. Colo. 1995).

134. *See Origins*, *supra* note 25, at 427 ("Nonetheless, the objective theory . . . holds that the intentions of the parties . . . are to be ascertained from their words and conduct rather than their unexpressed intentions.").

135. Mancuso v. Danfoss, Inc., No. 00-2626, 6 F. App'x 391, 2001 WL 371928, at *3 (7th Cir. Apr. 12, 2001). Such a holding is consistent with the general principal that

> the legal discussion of voluntariness focuses on pressures and threats imposed by others. Thus, internal pressures (such as those imposed by illness), or even imagined outside pressures may not invalidate a waiver . . . . Thus, the concern is not necessarily that a waiver was freely given in some psychological or philosophical sense of the term, but that it is not the result of improper pressures.

Berg, *supra* note 4, at 309–10. Courts applying the totality of the circumstances test have, however, departed from this general principle. *See, e.g.*, Wichman v. County of Volusia, 110 F. Supp. 2d 1354, 1357 (M.D. Fla. 2000) (relying, in part, on the employee's allegation she was distraught when she signed release).

136. Hudson v. Ind. Limestone Co., 143 F. Supp. 2d 1032, 1037–38 (S.D. Ind. 2001).

137. *Id.* Other courts have been less strict. *See, e.g.*, Meyers v. TruGreen, Inc., No. 03 C 7570, 2004 WL 1146120, at *4-5 (N.D. Ill. May 21, 2004) (relying, in part, on the employee's alleged mental state to hold that a disputed issue of fact existed as to whether the release was executed knowingly and voluntary, even though the defendant argued that

"subjective misunderstanding" is insufficient to defeat an otherwise valid release.[138] Another court held that "[s]ubjective evidence of a party's own belief as to the meaning of the contract is not admissible."[139]

A subjective standard has sometimes been rejected when the person waiving the claim was represented by an attorney. The Seventh Circuit has held that "a plaintiff who executes a release pursuant to the advice of independent counsel, or a party whose attorney actively negotiates the release, is presumed to have executed the document knowingly and voluntarily absent claims of fraud or duress."[140] The Fifth Circuit has said an agreement to settle a Title VII claim is enforceable if the person knowingly and voluntarily agreed to the terms *or* authorized his or her attorney to settle the claim.[141]

Other circuits apply state or local law when the person waiving the claim was represented by an attorney. For example, the District of Columbia Circuit applies local law to determine if an attorney can settle a Title VII claim on his or her client's behalf.[142] The Eleventh Circuit applies state law to cases in which "the employee (or former employee) was represented by an attorney who settled the matter on the employee's behalf."[143] Applying state or local law would result in the rejection of the subjective standard if the forum state's law (1) enforces settlement agreements entered into by an attorney irrespective of whether the client consented or (2) enforces releases despite one party not understanding the agreement's terms.

Attributing an attorney's actions to his or her client is consistent with a waiver standard that is more lenient than the strict subjective waiver standard adopted in *Johnson v. Zerbst*.[144] The rationale for rejecting a subjective knowing and voluntary standard in these situations can include

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the employee's affidavit was "self-serving"); *Wichman*, 110 F. Supp. 2d at 1357 (relying, in part, on the employee's allegation that she was distraught when she signed the release).

138. *Hudson*, 143 F. Supp. 2d at 1039.

139. Baker v. Potter, No. 02 C 525, 2005 WL 843169, at *17 (N.D. Ill. Jan. 20, 2005). Courts applying the *Johnston v. Zerbst* standard also sometimes "fail to state whether they are using a subjective or objective method of proof." Rubin, *supra* note 1, at 493.

140. Pierce v. Atchison, Topeka & Sante Fe Ry., 65 F.3d 562, 571 n.1 (7th Cir. 1995).

141. Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981).

142. Makins v. Dist. of Columbia, 277 F.3d 544, 547–48 (D.C. Cir. 2002).

143. Hayes v. Nat'l Serv. Indus., 196 F.3d 1252, 1254 n.2 (11th Cir. 1999). A district court in the Eleventh Circuit has interpreted this exception narrowly, holding that the totality of the circumstances test still applies in a situation in which the employee is represented by counsel during the negotiation process, presumably limiting the *Hayes* exception to a situation in which the attorney alone negotiates and settles the case. Wichman v. County of Volusia, 110 F. Supp. 2d 1354, 1356 (M.D. Fla. 2000). This seems to be a strained reading of *Hayes*.

144. Rubin, *supra* note 1, at 497. "Only the strict waiver standard implies a subjective method of proof. If this standard is not used, the court need not examine the defendant personally, but can consider his attorney's actions to be dispositive." *Id.* at 504.

the concept of apparent authority (when the attorney releases the claim irrespective of whether the client gave the attorney authority to do so) or actual authority (when the client provides the attorney with authority to settle the claim on his or her behalf on whatever terms the attorney believes are appropriate). The rejection of a subjective standard when the waiving person is represented by an attorney is perhaps also driven by the difficulty of applying, in the context of collective entities (such as a client and his or her attorney), a standard that focuses on the state of mind of a single person.[145] Most likely, however, a subjective standard is rejected in these situations because a person represented by counsel is not viewed as needing the protection of a strict waiver standard.

In any event, the above demonstrates that the totality of the circumstances test, while purportedly a test that focuses more on the waiving person's state of mind than a contract law test, is in practice a test that often applies objective rules. It is also a test that, while paying lip service to the waiving person's state of mind, often focuses more on the fairness of the process involved (including whether the employer engaged in improper tactics) than on the subjective beliefs of the waiving person. The totality of the circumstances test is thus itself a test in disarray.

The disarray surrounding this test was inevitable. By the time the Supreme Court adopted the knowing and voluntary common law definition of waiver in 1938 for constitutional waivers by criminal defendants, the courts had already experienced difficulty in applying the definition, and the American Law Institute had even abandoned the definition in the Restatement of Contracts in 1932, believing the definition was inexact.[146]

3. Source of Law

Courts have adopted the totality of the circumstances test under their power to create federal common law. They believe "[c]reation of a federal rule rather than absorption of a state rule is appropriate where . . . the rights of the litigants and the operative legal policies derive from a federal source."[147] These courts also believe "[n]o significant state interest would

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145. As stated by Dean Rubin:

> Because voluntariness is a meaningful concept only when applied to the mental processes of a single individual, it is rather difficult to apply to collective entities. The typical defendant in a criminal case, of course, is a collective entity composed of the defendant and his lawyer. . . . In this context, use of waiver standards that relate exclusively to the defendant's state of mind seems inappropriate.

Id. at 531.

146. Rubin, *supra* note 1, at 481.

147. Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981).

be served by absorbing state law as the rule of decision governing Title VII settlement agreements."[148] Some of these courts, however, look to the forum state's law "to provide the content of federal law."[149] The Seventh Circuit holds that the test supplements state law.[150] To the extent the totality of the circumstances test supplants state law but still incorporates such common law contract defenses as fraud, duress, mistake, and incompetency, it is unresolved whether the forum state's law or federal common law applies to such defenses.[151] Unfortunately, none of the courts adopting the totality of the circumstances test have thoroughly analyzed whether it is appropriate to adopt a uniform rule of federal common law instead of applying state law.

4. Failings by the Totality of the Circumstances Courts

As demonstrated above, the most significant failings by the courts adopting the totality of the circumstances test have been (1) not defining "knowing" and "voluntary," which is essential to achieving a consistent application of an inherently vague test;[152] (2) not deciding whether the test is purely subjective or has objective elements, and if the latter, when these objective elements apply; and (3) not sufficiently analyzing whether it is appropriate to adopt a uniform federal common law rule instead of applying state law.

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148. *Id.*

149. Prunella v. Carlshire Tenants, Inc., 94 F. Supp. 2d 512, 517 (S.D.N.Y. 2000).

150. Pierce v. Atchison, Topeka & Sante Fe Ry., 65 F.3d 562, 568–71 (7th Cir. 1995).

151. *See, e.g.*, Cuchara v. GAI-Tronics Corp., 129 F. App'x 728, 731–32 (3d Cir. 2005) (applying Pennsylvania law with respect to the employee's argument that release of Title VII and ADA claims were invalid based on duress and fraudulent inducement); Bennett v. Coors Brewing Co., 189 F.3d 1221, 1229–31 (10th Cir. 1999) (applying Colorado law to issues of fraud and duress); Poppelreiter v. Straub Int'l Inc., No. 99-4122-SAC, 2001 WL 1464788, at *8 (D. Kan. Oct. 30, 2001) (noting, without deciding, that an issue existed as to whether state law or federal common law applied to an allegation of unilateral mistake); Kujawski v. U.S. Filter Wastewater Group, Inc., No. CIV. 00-1151DWFAJB, 2001 WL 893918, at *5 (D. Minn. Aug. 7, 2001) (applying Minnesota law with respect to competency, even though adopting totality of the circumstances approach); Reid v. IBM Corp., No. 95 CIV.1755(MBM), 1997 WL 357969, at *6 n.3 (S.D.N.Y. June 26, 1997) (noting, without deciding, that an issue existed as to whether state law or federal common law applied to an allegation of duress); Reed v. SmithKline Beckman Corp., 569 F. Supp. 672, 674 (E.D. Pa. 1983) (holding that defenses of duress and coercion to Title VII release were grounded in state law, and under the *Erie* doctrine, state law applied).

152. As Dean Rubin has stated, "A legal rationale, if it is to be useful, should possess internal logic . . . . To possess internal logic, a rationale must use terms . . . that can be applied with a reasonable degree of consistency." Rubin, *supra* note 1, at 528. Until the courts adopting the totality of the circumstances test clearly define "knowing" and "voluntary," the test cannot be applied with a reasonable degree of consistency.

B. *Contract Law Test*

Applying contract law principles to determine whether a person's consent to a Title VII release is knowing and voluntary generally renders the person's subjective beliefs irrelevant. Although a contract's formation requires the parties to manifest mutual assent,[153] under the prevailing view of contract formation—the so-called objective theory—"[t]he conduct of a party may manifest assent even though he does not in fact assent."[154] The objective theory "holds that the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions."[155] For example, "[t]he Restatement authors chose 'manifestation of assent' in lieu of 'meeting of the minds' to underscore that apparent, as much as actual, assent suffices."[156] As stated by Judge Learned Hand:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.[157]

Therefore, "[i]ntent does not invite a tour through [the plaintiff's] cranium, with [the plaintiff] as the guide."[158] That one party "gives the matter no thought does not impair the effectiveness of one's assent, for there is no requirement that one intend or even understand the legal consequences of one's actions."[159] Accordingly, one commentator has aptly described the contract law test for determining the enforceability of releases of employment discrimination claims as the "plain meaning" test, emphasizing the test's focus on the plain meaning of the release, not the

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153. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

154. *Id.* § 19(3).

155. *Origins*, *supra* note 25, at 427.

156. Deborah A. Schmedemann, *Beyond Words: An Empirical Study of Context in Contract Creation*, 55 S.C. L. REV. 145, 147 (2003).

157. Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50, 231 U.S. 60 (1913). Judge Hand's statement has been described as the objective theory in its "staunchest objectivist stance." Bock v. Computer Assocs., Int'l, 257 F.3d 700, 708 (7th Cir. 2001).

158. *Bock*, 257 F.3d at 708 (quoting Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814 (7th Cir. 1987)).

159. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.7 (2d ed. 2001).

subjective intent of the parties.[160]

For example, in *Halvorson v. Boy Scouts of America*,[161] the employee argued that when he signed a release waiving his employment discrimination claims, his neck was hurting, he believed he had to sign the agreement or be fired, and he was in an agitated and anxious mood, causing him to sign the agreement involuntarily without understanding its effects.[162] The court affirmed summary judgment for the employer, noting the employer never told the employee he had to sign the agreement or be fired and that "the source of his agitation was internal."[163]

In *Horton v. Norfolk Southern Corp.*,[164] the plaintiff argued that a release of all claims did not preclude his Title VII action because he misunderstood the release's legal effect, and it should be voided under the doctrine of mutual mistake.[165] The court held that state law applied, and noted that under North Carolina law, "a release is contractual in nature and is governed by the same rules of execution, validity, and interpretation as those governing contracts."[166] The court then observed that under North Carolina law, a mutual mistake is a mistake common to all the parties.[167] Finding that the employer was not mistaken about the release's legal effect, the court granted summary judgment in the employer's favor.[168]

The objective theory is attained through rules that exclude or minimize the parties' subjective intent,[169] such as the parol evidence rule, the plain meaning rule, the duty-to-read rule, and the rule that only bilateral mistakes allow avoidance.[170] If a contract's language is clear, the court will determine the parties' intent by the language's ordinary meaning.[171] A release whose language is clear will therefore be enforced according to its terms.[172] The trial judge decides whether a release's language is clear by examining the contract's four corners, and if the language is clear, the court

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160. *See* Metz, *supra* note 2, at 369 (distinguishing the use of the plain meaning and totality of the circumstances tests).

161. 215 F.3d 1326, 2000 WL 571933 (6th Cir. May 3, 2000) (unpublished table decision).

162. *Id.* at *2.

163. *Id.* at *3.

164. 102 F. Supp. 2d 330 (M.D.N.C. 1999), *aff'd*, 199 F.3d 1327 (4th Cir. 1999) (unpublished table decision).

165. *Id.* at 339.

166. *Id.*

167. *Id.*

168. *Id.* at 339–40.

169. *See* JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.12, 426 (2002) [hereinafter CORBIN] ("This result is achieved by rules that exclude or minimize the true subjective intention of the parties.").

170. Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989).

171. SAMUEL WILLISTON, 29 A TREATISE ON THE LAW OF CONTRACTS § 73:7, at 25 (4th ed. 2003).

172. *Id.* § 73:7, at 25–26.

determines its meaning as a matter of law.[173] A party's failure to read a contract is generally not a defense to enforcement.[174] "[W]here the language of a release is clear and unambiguous, the signing of the release is a 'jural act' that is binding on the parties."[175] The objective theory is also attained by the general rule that avoidance is not available for a unilateral mistake.[176]

Under contract law, as long as the parties exchange some consideration, the amount is irrelevant. "The law will not inquire as to the adequacy of consideration when the thing to be done is asked to be done, be it ever so small."[177] Thus, with respect to releases, "there is no public policy against making a bad deal in the first place or abandoning a good cause of action."[178] At least one state does not even require consideration for a written release to be effective.[179]

Rather than demonstrating that there was not a subjective meeting of the minds, a party seeking to avoid enforcement of a contract must rely on defenses such as fraud, duress, mutual mistake, or unconscionability. These defenses can be difficult to establish. For example, "one may not avoid a contractual undertaking for duress simply because the contract was particularly disadvantageous or because the bargaining power of the parties was unequal or because there was some unfairness in the negotiations leading up to the contract."[180] Also, the party seeking to avoid the contract has the burden of establishing these defenses, usually by clear and convincing evidence.[181]

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173. *Id.* at 26.

174. *Id.* § 73:14, at 45–46.

175. *Id.* at 46.

176. CORBIN, *supra* note 169, § 28.39, at 223.

177. Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (N.J. 1955), *aff'd on reh'g*, 120 A.2d 107 (N.J. 1956).

178. Rubin, *supra* note 1, at 531–32.

179. *See* N.Y. GEN. OBLIG. LAW § 15-303 (McKinney 2001) (stating that a lack of consideration will not invalidate a written release).

180. WILLISTON, *supra* note 171, at §71.43, at 577–79. On the issue of what constitutes duress by an employer or former employer with respect to an employee's release, *see generally*, Jay M. Zitter, Annotation, *What Constitutes Duress by Employer or Former Employer Vitiating Employee's Release of Employer from Claims Arising Out of Employment*, 30 A.L.R. 4th 294 (1984).

181. *See, e.g.*, In re Marriage of Hamm-Smith, 633 N.E.2d 225, 230 (Ill. App. Ct. 1994) (holding that a person asserting duress has the burden of proving duress by clear and convincing evidence); Rogers v. Yourshaw, 448 S.E.2d 884, 887 (Va. Ct. App. 1994) (holding that a party seeking to rescind a contract on the basis of unconscionability has the burden of proving unconscionability by clear and convincing evidence); Helstrom v. N. Slope Borough, 797 P.2d 1192, 1197 (Alaska 1990) (holding that the burden is on the party seeking to void the contract because of duress to establish duress by clear and convincing evidence); Schaffer v. Standard Timber Co., 331 P.2d 611, 615 (Wyo. 1958) (holding that the party seeking to void the contract on the basis of mistake has the burden of proving mistake by clear and convincing evidence); Scott v. Seabury, 262 N.W. 804, 807 (Iowa

However, just as courts applying the totality of the circumstances test sometimes feel compelled to abandon a subjective approach and apply contract law rules (such as the duty-to-read rule), courts applying contract law rules sometimes feel compelled to consider factors used by courts applying the totality of the circumstances test. For example, the Eighth Circuit relies on some of the totality of the circumstances factors.[182] The Sixth Circuit only applies a contract law analysis if "overreaching or exploitation is not inherent in the situation,"[183] thus necessitating a review of some of the totality of the circumstances factors.

Courts adopting a contract law analysis have not made it clear whether the source of law is general common law contract principles or the forum state's law. The Fourth Circuit looks to the forum state's law for guidance,[184] but it is unclear whether it applies ordinary contract law rules as a matter of federal common law and looks to state law for guidance, or whether it applies state law of its own force. In practice, district courts in these circuits generally apply the forum state's law, as opposed to general common law. For example, district courts in the Fourth and Eighth Circuits have looked to the forum state's law for authority.[185] The distinction would be important if a state adopted the totality of the circumstances test.

However, the source of law for determining if a release is effective is irrelevant to the issue of whether the validity of the release is a question for the jury or a question for the court. As long as the action is brought in federal court, federal law determines whether a party is entitled to a jury trial on an issue, even when the issue is governed by state substantive law, and even when state law would preclude a jury trial.[186] Federal courts have

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1935) (holding that the party seeking to void the contract on the basis of fraud, duress, or undue influence has the burden of establishing such defenses by clear and convincing evidence).

182. *See* Pilon v. Univ. of Minn., 710 F.2d 466, 467–68 (8th Cir. 1983) (finding the waiver was voluntary and knowing because the plaintiff had been represented by counsel, a standard form agreement was not used, and the plaintiff negotiated language in the release).

183. Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc). The court in *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 522 n.9 (3d Cir. 1988), accused the court in *Runyan* of considering factors not relevant to a contract law analysis because the *Runyan* court noted that the plaintiff was "an attorney knowledgeable in labor and employment discrimination matters." *Runyan*, 787 F.2d at 1044. Interestingly, the Fourth Circuit, in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir. 1991), noted that the plaintiff received "substantial consideration," despite the amount of consideration being irrelevant to a contract law analysis.

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

185. *See* Horton v. Norfolk S. Corp., 102 F. Supp. 2d 330, 339 (M.D.N.C. 1999) (applying North Carolina law), *aff'd*, 199 F.3d 1327 (4th Cir. 1999) (unpublished table decision); EEOC v. Am. Home Prods. Corp., 144 F. Supp. 2d 1084, 1096–97 (N.D. Iowa 2001) (applying Iowa law).

186. Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 571 (8th Cir. 1998).

held that certain contract defenses are questions for the court, not the jury.[187]

Courts adopting a contract law analysis have not adequately explained why the totality of the circumstances test is inappropriate, and why a contract law analysis will not frustrate Title VII's purposes. The Sixth Circuit, when adopting the contract law test, simply said that ordinary contract principles would apply,[188] though its reasoning seems to have been based on the principle that the law encourages the "amicable settlement of honest differences between men dealing at arm's length with one another."[189] The Eighth Circuit, without explanation, said, "In determining whether the release was knowingly and voluntarily given, 'we apply ordinary contract principles,'" and cited to the Sixth Circuit opinion.[190] The Fourth Circuit, also without explanation, concluded, "We believe that the better approach is to analyze waivers of [employment discrimination] claims under ordinary contract principles, and, thus, we adopt the position taken by the Sixth and Eighth Circuits."[191]

As demonstrated above, the most significant failings by the courts adopting a contract law analysis have been (1) relying on factors used in the totality of the circumstances test that are not relevant under contract law; (2) not clearly stating whether the source of law is the forum state's law or the general common law of contracts; and (3) not explaining why a contract law analysis will not frustrate Title VII's purposes.

C. *Importance of the Distinction Between the Two Tests*

The difference between the two tests is important because it is more difficult to enforce a release under the totality of the circumstances test than under a contract law test.[192] Thus, application of one test instead of

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187. *See, e.g.*, Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1502 (5th Cir. 1992) (holding there is no right to jury trial under that the Seventh Amendment for a claim of mutual mistake seeking reformation of contract); Giant Eagle, Inc. v. Fed. Ins. Co., 884 F. Supp. 979, 985 (W.D. Pa. 1995) (stating that reformation due to a mutual mistake is an equitable issue to be decided by the court rather than by the jury); *see generally* Moldoff, *supra* note 86 (discussing the right to a jury trial with respect to the validity of a release).

188. Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc).

189. *Id.* at 1045 (quoting D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 122 (1946) (Frankfurter, J., dissenting)).

190. Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir. 1987) (quoting *Runyan*, 787 F.2d at 1044 n.10).

191. O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991).

192. *See* Pierce v. Atchison, Topeka and Santa Fe Ry., 110 F.3d 431, 437 (7th Cir. 1997) ("[A] waiver viewed as a contract is more likely to be enforced."); Long v. Sears Roebuck & Co., 105 F.3d 1529, 1538 (3d Cir. 1997) (noting that the totality of the circumstances test is "more stringent" than "ordinary state contract law principles"); *O'Shea*, 930 F.2d at 361

the other can be outcome determinative.[193] For example, in *Puentes v. United Parcel Service*,[194] the court applied the totality of the circumstances test and concluded that a twenty-four hour consideration period (for the release of all employment discrimination claims arising out of two employees' terminations) was insufficient for consent to be knowing and voluntary, even when the plaintiffs were former management-level employees who did not seriously contest the knowing and voluntary nature of their consent and who received substantial consideration.[195] Under contract law rules, the releases would most likely have been enforced. In *Campbell v. Alliance National Inc.*,[196] the mere allegation of not understanding a release was sufficient to create a factual issue as to the release's effectiveness under the totality of the circumstances test.[197]

In *Pierce v. Atchison, Topkea and Santa Fe Railway*,[198] the court held that a release was effective under state contract law,[199] but remanded the

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(describing the totality of the circumstances test as "a more stringent" standard than an ordinary contract law analysis); Cordoba v. Beau Deitl & Assocs., No. 02 Civ.4951 MBM, 2003 WL 22902266, at *6 (S.D.N.Y. Dec. 8, 2003) ("It is well settled that the totality-of-the-circumstances standard is stricter than ordinary contract law principles for determining whether a release is knowing and voluntary."); S. REP. NO. 101-79, at 17 (1989) (describing the totality of the circumstances test as "more protective" than a contract law analysis). The test has also been described as a "more subtle standard" than a simple contract law analysis, EEOC v. Am. Express Publ'g Corp., 681 F. Supp. 216, 219 (S.D.N.Y. 1988), and as a "middle course between a rule of per se invalidity and a contractual approach that would enforce all unambiguous waivers absent fraud or duress." Pierce v. Atchison, Topeka & Santa Fe Ry., 110 F.3d 431, 437 (7th Cir. 1997). Dean Rubin has stated, "If the court applies the *Johnson* [*v. Zerbst*] rule [a standard arguably similar to that employed by the totality of the circumstances courts] in its full rigor and requires both knowledge and intent, the resulting criteria can be termed the 'strict' waiver standard." Rubin, *supra* note 1, at 491.

193. For a discussion of the important distinction between the two tests, in the context of a person consenting to arbitrate future disputes and waiving the right to a jury trial, *see* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. AND CONTEMP. PROBS. 167, 170–76 (2004). Professor Ware concludes that

> a knowing-consent standard could be far more exacting than the . . . contractual standards of consent, and this would result in courts finding consent in far fewer arbitration agreements. This might well be the case in virtually all agreements involving . . . employees . . . who did not first have a lawyer review the agreement.

Id. at 176.

194. 86 F.3d 196 (11th Cir. 1996).

195. *Id.* at 199. This decision supports Professor Ware's suggestion that finding a lack of knowing consent is like finding procedural unconscionability without also having to find substantive unconscionability. Ware, *supra* note 193, at 174.

196. 107 F. Supp. 2d 234 (S.D.N.Y. 2000).

197. *Id.* at 240–42 n.3.

198. 65 F.3d 562 (7th Cir. 1995).

199. *Id.* at 568–70.

case for the jury to determine whether the release was effective under the totality of the circumstances test.[200] On appeal after the remand, the court affirmed the jury's determination that the release was not effective under the totality of the circumstances test.[201] The court affirmed the jury's determination because, among other things, there was evidence the employer told the plaintiff the release would not waive discrimination claims, a factor that the court felt would alone most likely render the release ineffective.[202] The plaintiff was also given only one business day to consider the release,[203] and there was evience the plaintiff might not have been aware that the consideration he received was for, among other things, the release.[204] Thus, despite such evidence being insufficient to void the release under state contract law, the release was found ineffective under the totality of the circumstances test.

To the extent that the totality of the circumstances test is considered a subjective test, the importance of the distinction between that test and a contract law test (an objective test) is readily apparent. Also, the mere fact that the totality of the circumstances test is considered a stricter test than the contract law test reveals that the courts applying this test must be envisioning definitions of "knowing" and "voluntary" that are more difficult to satisfy than under contract law principles, even though those courts have failed to clearly define those terms.

Additionally, under the totality of the circumstances test, the employer bears the burden of proving that the employee's consent to the release was knowing and voluntary. Under a contract law test, the employee bears the burden of proving any of the defenses allowing him or her to avoid the contract, and the employee must usually establish the defenses by clear and convincing evidence. Which party bears the burden of proof on a particular issue often determines which party prevails on that issue. Thus, which test applies is important, particularly because the issue involves whether a judgment will be entered in favor of the employer without a trial on the merits.[205]

Two leading commentators have said that "[t]he differences between

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200. *Id.* at 572.

201. Pierce v. Atchison, Topeka & Santa Fe Ry., 110 F.3d 431, 441 (7th Cir. 1997).

202. *Id.* at 439.

203. *Id.* at 440.

204. *Id.* at 441.

205. *See* Rubin, *supra* note 1, at 514 ("[A] valid waiver of the right to litigate a civil trial . . . will be dispositive of any claim that might have been raised in the litigation . . . ."). It is curious that the distinction between a contract test and a stricter test to determine the enforceability of an arbitration agreement has received substantial scholarly attention, while the distinction between the two tests to determine the enforceability of a release has not. An arbitration agreement might waive the right to a trial by jury, but a release waives a right to a trial at all.

the [totality of the circumstances test and the contract law test] may be more superficial than real" because "[t]he cases applying 'ordinary contract principles' generally consider the circumstances surrounding the execution of the release, the clarity of the release, and whether the complainant was represented by counsel."[206] This view, however, ignores that the Sixth and Eighth Circuits enforced the releases in those cases in which they referenced factors not ordinarily considered under a contract law analysis.[207] The references to such factors can thus be viewed as these courts simply suggesting the releases would be enforceable even if the totality of the circumstances test was applied, and not as an indication that such factors are applicable under the contract law test.

Also, this view simply acknowledges the disarray surrounding the two tests. If a constitutional rights waiver test and a contract law test are in practice being applied in the same fashion, this demonstrates that these courts are not clear as to the content of the tests each has adopted. The two tests, on paper, are very different.[208] Additionally, the vague nature of the totality of the circumstances test provides a court with significant discretion as to whether to enforce a release and allows a court to reach an unpredictable conclusion.[209] At a minimum, for the sake of consistency and to enable parties to better predict the outcome of cases, such disarray should be dispelled.

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206. BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1917 (1996).

207. *See* Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc) (finding that "[t]he release in this case was knowingly and deliberately executed. . . ."); Pilon v. Univ. of Minn., 710 F.2d 466, 468 (8th Cir. 1983) (ruling that the release would be upheld where the wording was clear, the plaintiff was represented by an attorney, the parties engaged in negotiations, and the plaintiff did not assert fraud or duress). The Sixth Circuit's consideration of such factors can be viewed as necessary to determine whether overreaching or exploitation was inherent in the situation. *See* Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1184 (6th Cir. 1997) (ruling that a "last chance agreement" would be upheld because such voluntary agreement does not provide evidence of overreaching or exploitation); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc) (ruling that an age discrimination release would not be overreaching because the employee was well-educated, well-paid and knowingly signed the release).

208. *See, e.g.*, Rubin, *supra* note 1, at 498 ("There are clearly substantial differences between the requirements and methods of proof applicable to [the strict subjective waiver standard and the more lenient objective standard]. . . ."). The dispute over whether the contract law test or the totality of the circumstances test should apply has all of the trappings of a "rule" versus "standard" debate, with the contract law test being a "rule," and the totality of the circumstances test being a "standard." Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

209. The dispute over whether the contract law test or the totality of the circumstances test should apply has all of the trappings of a "rule" versus "standard" debate, with the contract law test being a "rule," and the totality of the circumstances test being a "standard." *See generally* Schlag, *supra* note 208 (discussing the "rules" versus "standards" debate).

IV. THE SOURCES OF DISARRAY

There are two sources of the disarray. First, a Title VII release has a split personality. On the one hand, it is a release; under common law, a release is generally considered a contract and interpreted and construed in accordance with contract principles,[210] resulting in the application of the objective theory of contract formation. On the other hand, a Title VII release, which releases a person's civil rights, can be considered akin to a waiver of fundamental or constitutional rights. Such waivers are closely scrutinized, and generally require the government to prove that the waiver was made knowingly, intelligently, and voluntarily,[211] a test focusing on the waiving party's state of mind. Courts must decide whether the enforceability of a Title VII release is to be determined by the objective theory of contract formation or the subjective theory applied to the waiver of fundamental or constitutional rights. Second, courts do not agree whether the source of law for evaluating Title VII releases is federal common law or state law.

A. Objective Contract Test Versus Subjective Waiver Test

The courts of appeal, in creating a test for assessing the validity of a Title VII release, should determine whether a contract law approach, grounded in the objective theory, or a constitutional rights waiver test, grounded in the subjective theory, is more appropriate. The courts of appeal should also analyze Supreme Court precedent involving employees releasing claims under other federal statutes to help determine how a release of Title VII claims should be treated. As discussed below, while neither a strict objective test nor a strict subjective test seems entirely appropriate for Title VII releases, Supreme Court precedent dictates the application of a contract law test and, thus, in general, the objective theory of contract formation.

1. Which Test is More Appropriate?

A Title VII release, if supported by consideration, is certainly contractual in nature. A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the

210. WILLISTON, *supra* note 171, § 73:7, at 22.

211. Brady v. United States, 397 U.S. 742, 745, 758 (1970). Although Dean Rubin notes that "fundamental rights demand particularly stringent protection," Rubin, *supra* note 1, at 534, he also notes that a more lenient waiver standard is often employed to the waivers of rights that can be characterized as "fundamental." *Id.* at 498.

law in some way recognizes as a duty."[212] Support for a contract law test can be based on the presumption that Congress legislates against the background of the common law, and the common law thus generally controls, absent a clear indication by Congress to alter the common law rule.[213] Under common law, a release is considered a contract and interpreted and construed in accordance with contract law principles,[214] and Congress has not clearly indicated that the common law rule should be altered.[215] Releases are enforced under common law like other contracts because the peaceful settlement of disputes is in the community's interest.[216] Similarly, Congress has expressed a "strong preference for encouraging voluntary settlement of employment discrimination claims."[217] A contract law analysis is consistent with this policy because if persons can avoid releases by simply alleging they did not understand them, employers will be wary of entering into such agreements.

Although there is force to these arguments, it is limited. Congress' encouragement of voluntary settlements of Title VII claims does not mean Congress intended releases to be effective when persons released claims without a full understanding and appreciation of what they were releasing. It is also questionable whether this preference for settlement (at least as it

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212. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). The reluctance by courts adopting the totality of the circumstances test to view a release of Title VII claims as a simple contract might stem from a "waiver" not being viewed as a contract. *See* Stange v. United States, 282 U.S. 270, 276 (1931) ("[A] waiver is not a contract . . . .").

213. United States v. Texas, 507 U.S. 529, 534 (1993); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35–36 (1983).

214. WILLISTON, *supra* note 171, § 73:7, at 22; *see also* Rubin, *supra* note 1, at 513 ("Settlements . . . are regarded as private contracts and interpreted according to contract rules.").

215. *See* H.R. Rep. No. 101-664, at 24 (1990) ("Title VII is silent on the waiver issue."); S. Rep. No. 101-79, at 13 (1989) (same). *See also* Silverstein, *supra* note 4, at 485 ("When enacting laws like Title VII and the ADEA, Congress focused on defining the nature of the newly-recognized rights and on the means of enforcement; there is no reference to the possibility of, or the conditions under which, beneficiaries of the legislation could contract out of the statutes' provisions.").

216. FARNSWORTH, *supra* note 159, § 2.12, at 71–72; CORBIN, *supra* note 169, § 28.53, at 371.

217. Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal."). Section 118 of the Civil Rights Act of 1991, which amended Title VII, also provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations . . . is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991) (codified at Notes to 42 U.S.C. § 1981).

was expressed in Title VII, prior to the Civil Rights Act of 1991) extends with full force to releases executed by persons when the EEOC is not overseeing the settlement, or when the release does not require the employer to come into compliance with Title VII. The proposition that Congress encourages voluntary settlements is based in part on Title VII's language referring to the EEOC engaging in conciliation efforts after concluding a violation has occurred.[218] Moreover, this proposition is also based in part on Congress' desire that employers come into voluntarily compliance with Title VII,[219] a condition rarely included in private settlement agreements. Although the Civil Rights Act of 1991, which amended Title VII, indicates that Congress encourages the resolution of Title VII "disputes" through "settlement negotiations,"[220] the use of the word "disputes," and the use of the phrase "settlement negotiations," seems to contemplate releases arising out of anticipated or existing litigation with active negotiations between the parties (which will not be the case with many Title VII releases).[221] Also, with respect to the common law treating a release as a contract, the Supreme Court has rejected the notion that common law concepts are to be simply transplanted into Title VII, stating such concepts should be adapted to Title VII's practical objectives.[222] For example, the Court has refused to transplant common law agency notions into Title VII to determine employer liability.[223]

To determine whether a traditional contract law approach, with its application of the objective theory of contract formation, is appropriate, one should explore the basis for the objective theory. If the basis for such theory does not apply to releases of Title VII claims, support for a contract law analysis (at least in its full objective theory form) is weakened.

The objective theory is considered a "necessary adjunct of a 'free enterprise' economic system,"[224] a system requiring legal certainty and stability.[225] "The objective theory is strongly supported by those who place

218. *See* Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981) (citing 42 U.S.C. § 2000e-5(b)).

219. *See* Hutchings v. United States Indus., Inc., 428 F.2d 303, 309 (5th Cir. 1970) ("[I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation, on the ground that voluntary compliance is preferable to court action.") (citation omitted).

220. Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991) (codified at Notes to 42 U.S.C. § 1981).

221. For an interesting discussion of Section 118's legislative history, see Angelito Remo Sevilla, Comment, *The End of Duffield and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act's Arbitration Provision*, 93 CAL. L. REV. 323, 345–56 (2005).

222. Faragher v. City of Boca Raton, 524 U.S. 775, 803 n.3 (1998).

223. *Id.*

224. Ricketts v. Pa. R.R., 153 F.2d 757, 761 n.2 (2d Cir. 1946) (Frank, J., concurring).

225. *Id.*

the basis of contract law upon the promisee's justified reliance upon a promise or upon the needs of society and trade. An objective test is believed to protect 'the fundamental principle of the security of business transactions.'"[226] As stated by Judge Frank H. Easterbrook of the Seventh Circuit: "[I]f intent where wholly subjective . . . no one could know the effect of a commercial transaction until years after the documents were inked. That would be a devastating blow to business."[227]

The traditional justification for the objective theory's application is not strong in the context of a release of Title VII claims. A release of an employment discrimination claim, like a release of a personal injury claim,[228] is not a commercial transaction, and an employer's need to rely on a person's promise not to sue is not as strong as a company's need to rely on promises made in a commercial context; employers will usually not change position based on a promise not to sue.[229] Not surprisingly, "[t]he classic clarion call for a return to a subjective theory [of contract formation]"[230] was in a case involving an employee's release of claims under the Federal Employers' Liability Act.[231]

If the objective theory of contracts is not particularly suited to an employee releasing Title VII claims, should such a release be viewed as a waiver of fundamental or constitutional rights, like the totality of the circumstances courts seem to treat it? While the importance of preventing employment discrimination cannot be understated, the Supreme Court has emphasized that the "voluntary, knowing, and intelligent" standard for

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226. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 25 (2d ed. 1977) (footnotes omitted) (quoting SAMUEL WILLISTON, 1 A TREATISE ON THE LAW OF CONTRACTS § 35 (3d ed. 1957)).

227. Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) (Easterbrook, J.).

228. *See* CORBIN, *supra* note 169, § 28.34, at 174–75.

229. Although there will be exceptions (such as failing to preserve evidence), in such a situation, avoidance of the release could be denied on those grounds. However, the danger that an employer will fail to preserve evidence is minimized by the short time frames under which a person must assert a Title VII claim. A person must file a charge of discrimination with the EEOC within 180 or 300 days of the alleged unlawful employment practice (the amount of days depending on whether the state has an agency authorized to grant or seek relief from employment discrimination practices). 42 U.S.C. § 2000e-5 (2000). The EEOC is required to notify the employer within ten days of receipt of the charge. *Id.* Thus, employers will (presumably) be advised of a charge within one year of the alleged unlawful employment practice. Also, employers are required to preserve employment records for one year from the date of the making of the record or the personnel action involved, whichever is later. 29 C.F.R. § 1602.14 (2004).

230. CALAMARI & PERILLO, *supra* note 226, at 24 n.5 (citation omitted).

231. *See* Ricketts v. Pa. R.R., 153 F.2d 757, 760–70 (2d Cir. 1946) (Frank, J., concurring) (arguing for the application of the subjective theory of contract formation, at least with respect to releases by employees).

waiving constitutional rights[232] should not be uncritically applied to the potential waiver of all constitutional rights. "Even in the criminal context, the Court has not consistently applied this standard."[233] "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."[234]

For example, the Court, in rejecting the argument that the "voluntary, knowing, and intelligent" constitutional standard should apply to a waiver of the Fourth Amendment's right against unreasonable searches and seizures, stated that the standard is designed to preserve the fairness of the criminal trial process.[235] The Court noted that "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[236] The Court concluded:

> In short, there is nothing in the purposes or application of the ["voluntary, knowing, and intelligent"] waiver requirements . . . that justifies, much less compels, the easy equation of a knowing waiver with a consent search. To make such an equation is to generalize from the broad rhetoric of some of our decisions, and to ignore the substance of the differing constitutional guarantees. We decline to follow what one judicial scholar has termed "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation."[237]

When courts have employed the strict standard in the criminal law context, they have used a subjective method of proof, but when a more lenient standard is employed, they have used an objective method of

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232. When referring to the general constitutional waiver standard, I use the terms "voluntary, knowing, and intelligent" because these are the terms used by the Court. *See* Brady v. United States, 397 U.S. 742, 748 (1970) (holding that waivers, to be effective, must be "voluntary . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

233. Ware, *supra* note 193, at 181; *see also* Rubin, *supra* note 1, at 496 (noting that courts have applied a less demanding waiver standard to certain rights connected with criminal adjudications, including "the right to be tried in the district where the offense was committed, to be present at one's trial, to raise defenses and objections, and to avoid self-incrimination at trial," and that such rights need not be waived knowingly).

234. United States v. Olano, 507 U.S. 725, 733 (1993).

235. Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973).

236. *Id.* at 237.

237. *Id.* at 246 (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 950 (1965)). For a discussion of the Court's rejection in *Schneckloth* of the requirement that a waiver of Fourth Amendment rights be "knowing" or that it be subjectively voluntary, see Rubin, *supra* note 1, at 505–07.

proof.[238]

A wholesale adoption of the "voluntary, knowing, and intelligent" constitutional standard to releases under Title VII fails to take into consideration the Supreme Court's statements regarding the limited applicability of that standard. In fact, the Court has never held that a similar standard applies in the civil context (though the Court has suggested it does).[239] "While knowing consent to waive a constitutional right is sometimes not required in the criminal context, it is often not required in the civil context."[240] A commentator recently concluded that "contract-law standards of consent are at least as common as knowing-consent standards in the law governing civil waivers of constitutional rights."[241]

Furthermore, Title VII was enacted under Congress' discretionary power to regulate commerce.[242] If the Constitution does not require that Title VII be adopted, there can be nothing constitutionally suspect in allowing a person to waive such a claim. If some constitutional waivers need not satisfy the "voluntary, knowing, and intelligent" constitutional standard, it is doubtful waivers of statutory rights should have to satisfy such a heightened standard.[243]

However, a subjective standard might be supported by the general requirement that a waiver be intentional,[244] a requirement that is

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238. Rubin, *supra* note 1, at 497.

239. In *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), the Court applied the standard to a civil case but did not hold that the standard must necessarily apply, finding the waiver at issue was made "voluntarily, intelligently, and knowingly." *Id.* at 187. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court again found it unnecessary to resolve the issue, simply holding that "a waiver of constitutional rights in any context must, at the very *least*, be clear." *Id.* at 95. The Court stated, "We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id.*

240. Ware, *supra* note 193, at 182.

241. *Id.* at 197–98. Dean Rubin believes that "the Court [in *Overmyer*] suggested . . . that contract law provides the standard for determining whether civil law waivers satisfy the due process clause." Rubin, *supra* note 1, at 518. Dean Rubin also states that this suggestion was repeated in *Fuentes*, and that "[l]ower federal courts have also followed the idea in *Overmyer* that waivers of notice and hearing must be judged by contractual standards." *Id. But see* Krentz v. Robertson Fire Prot. Dist., 228 F.3d 897, 908 n.8 (8th Cir. 2000) (Beam, J., dissenting) (collecting cases from courts of appeal holding that the standard is the same in the civil context as in the criminal context).

242. United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 n.6 (1979).

243. Dean Rubin has noted that "[t]he Supreme Court [in *Johnson v. Zerbst*] may have adopted the common law definition . . . because it wanted to apply a particularly stringent definition in cases involving waivers of constitutional rights." Rubin, *supra* note 1, at 481 n.27.

244. *See* Montgomery Ward & Co. v. Robert Cagle Bldg. Co., 265 F. Supp. 469, 474 (S.D. Tex. 1967) ("Although 'waiver' does not require reliance or consideration, it must be intended by one party and so understood by the other."); Thomason v. Thomason, No. CX-01-1770, 2002 WL 1315793, at *2 (Minn. Ct. App. June 18, 2002) ("While waiver does not

understandable. A waiver is not considered a contract,[245] and thus waivers often lack the protections afforded by contract law rules that help increase the likelihood agreements are entered into by the parties with an understanding of the agreement's terms. For example, because a waiver is not considered a contract, a "[w]aiver of a right or a benefit may be established by . . . acquiescence, and even the silence of a party."[246] A waiver generally does not require agreement, consideration, or even reliance.[247] Thus, because a waiver can be established without demonstrating the existence of a contract (and the concomitant requirements that help increase the likelihood the agreement is entered into with an understanding of its terms), it is understandable that before declaring a waiver effective, it should be determined if the waiver was intended. For example, if the party waiving a right does not receive consideration in return for the waiver, there is a real question as to whether the releasing party understood what he or she was doing. After all, who gives up something for nothing?

When a waiver, however, is derived from a contract between private parties (which will most often be the case with a release of Title VII claims), a contract analysis, not a waiver analysis, would seem appropriate. As stated by Dean Rubin:

> [C]ivil law waivers are judged according to contract law principles. This is not surprising since civil law permits parties to structure their own legal relationships and to contractually agree to waive rights to which they would otherwise be entitled. Contract law seems a natural source of principles for analyzing waivers of this kind.[248]

In such a situation, the protections afforded by contract law would apply, thus decreasing the need for a determination that the release was intended.

For example, unlike waivers of constitutional rights, which will often occur without the exchange of consideration, a release of Title VII claims, made pursuant to an agreement, will usually include such an exchange ("I will provide you with $2000 in severance pay in return for a complete release"), thus creating a presumption the releasing party understood he or she was giving something up in return for the consideration. If there is a lack of consideration, there is generally not an enforceable promise, and

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require consideration, it does require intent.").

245. Stange v. United States, 282 U.S. 270, 276 (1931).

246. Mitchell v. Kemp & Burpee Mfg. Co., 218 F. 843, 846 (3d Cir. 1915).

247. *See* David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607, 626 (1999) ("A waiver does not require agreement, consideration, or reliance . . . .").

248. Rubin, *supra* note 1, at 512.

thus no release.[249] Also, waiving rights in the context of a contract generally involves "far less danger of overreaching and duress by the party seeking to enforce the waiver" than waivers in noncontractual settings.[250] Another reason why a contract analysis might be more suitable than the waiver analysis employed in the criminal law context is that one of the theories supporting the enforcement of contracts—reliance by the promisee[251]—has questionable application with respect to waivers of constitutional rights by criminal defendants (though, as previously discussed, the degree of reliance by an employer in the context of a Title VII release will usually be limited).[252]

Significant authority exists, however, for the proposition that a waiver analysis still applies even if the waiver is within a contract between parties. For example, with respect to waiving the right to a jury trial in a civil case, one commentator has noted that "it is clear that the presumption against waiver is applicable in the contractual context as well."[253] Distinguishing between waivers within contracts and waivers without contracts might therefore oversimplify the issue. Ultimately, the question is whether "more than contract law is involved,"[254] even when the waiver is within a contract.

In conclusion, while an agreement to release Title VII claims might not require the application of the objective theory of contracts like a contract in a commercial transaction, it also does not require application of the "voluntary, knowing, and intelligent" constitutional waiver standard. A Title VII release seems to fall somewhere between the two standards, which explains why the totality of the circumstances courts often apply contract rules, and why contract law courts often apply the totality of the circumstances factors.[255]

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249. *But see* N.Y. GEN. OBLIG. LAW § 15-303 (McKinney 2001) (providing that consideration is not required for written release).

250. L&R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 755 (Conn. 1998); *see also* Ware, *supra* note 193, at 182 n.88 (finding a smaller probability of abuse when constitutional rights are waived in the civil context because the waiver is part of a contract).

251. *See Perillo*, *supra* note 26, at 9 ("Proponents of the reliance theory of contracts profess to see the foundation of contract law not in the will of the promisor to be bound but in the expectations engendered by, and the promisee's consequent reliance upon, the promise.").

252. *See* Rubin, *supra* note 1, at 535 ("The argument that waivers should be enforced to protect those who rely on them is especially questionable in the context of criminal law.").

253. Sternlight, *supra* note 102, at 677.

254. Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo. 1997) (en banc) (referring to waiver of right to jury trial in arbitration agreement).

255. The Seventh Circuit has seemingly acknowledged that the appropriate test falls somewhere between, noting that the court rejects a "pure contract analysis," yet also does not "permit claims of subjective misunderstanding, standing alone, to defeat an otherwise valid release. . . ." Pierce v. Atchison, Topeka & Santa Fe Ry., 110 F.3d 431, 442 (7th Cir. 1997). Dean Rubin, concluding that the two existing rationales for analyzing waivers (the strict *Johnson v. Zerbst* standard and the more lenient contract standard) "fail to strike an

The courts of appeal, however, need not address the question of whether a Title VII release should be treated as a waiver of fundamental or constitutional rights or as a contract, or perhaps as something in between. As discussed below, Supreme Court precedent compels the conclusion that general contract law principles (and, thus, for the most part, the objective theory of contract formation)[256] should apply to a uniform federal common

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adequate balance between [the] values and dangers [of waivers]," Rubin, *supra* note 1, at 536, developed a "general theory of waiver," which he describes as the "functional equivalence standard." *See id.* at 536–63. Dean Rubin's "functional equivalence standard" would enforce waivers only if "the parties who waive a particular right obtain the functional equivalent of that right in the context of their more informal interaction." *Id.* at 537. Dean Rubin states that

> [s]ettlements. . . serve as functional equivalents of judgment after trial and will generally foreclose subsequent consideration of the issue. They must therefore [under the "functional equivalence standard"] reach a result that a court might have reached. . . . In procedural terms, the party executing the waiver must receive notice that the agreement constitutes a settlement . . . and the agreement must be specifically bargained for. Given the nature of a settlement . . . this is typically the case; settlement negotiations will be invalidated only if they are the product of an influence that could not be brought to bear in court, such as duress or fraud.

Id. at 554–55. An alternative theory, premised on the concept of autonomy, has been developed by Professor Jessica Berg. *See* Berg, *supra* note 4, at 324. Unlike Dean Rubin, Professor Berg argues that her theory functions both descriptively and normatively. *Id.* Since I conclude below that Supreme Court precedent dictates that a uniform federal common law rule be premised on contract law principles (presuming, of course, that a uniform federal common law rule is appropriate), I do not attempt to devise what I believe would be an appropriate standard between a strict objective test and a strict subjective test. Nor do I address what the standard would look like under Dean Rubin's "functional equivalence standard" or Professor Berg's "autonomy" standard.

256. The extent to which modern contract law principles reject a strict objective theory of contract formation is an issue beyond the scope of this Article. However, modern contract law, in contrast to classical contract law, does incorporate subjective elements. *See* Melvin A. Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1131 (1994) ("A deep difference between classical contract law and modern contract law is that classical contract law tended to be objective and standardized, while modern contract law tends to include subjective and individualized elements as well."). As discussed in the portion of this Article addressing choice of law, state contract law might often address the concerns of those courts adopting the totality of the circumstances test as a result of the modern trend to retreat, in certain circumstances, from the strict objective theory of mutual assent. In other words, general contract law principles might include exceptions to the objective theory of contract formation sufficient to result in a test for the release of claims under Title VII that falls somewhere between a strict objective test and a strict subjective test. The critical point with respect to Supreme Court precedent dictating the application of contract law principles is not that there is no room for exceptions to the strict objective theory of mutual assent, but that the test (and any exceptions to the objective theory) must be found within contract law principles, not general waiver principles. The totality of the circumstances test, a seemingly subjective test with the burden of proof on the defendant to prove a knowing and voluntary waiver, has no foundation in contract law principles and cannot be supported under Supreme Court

law rule governing the enforceability of releases under Title VII (assuming, of course, that a uniform federal common law rule is appropriate, an issue discussed later).[257] Interestingly, in determining the appropriate test for assessing the enforceability of a Title VII release, federal courts have neglected this precedent.[258]

2. Supreme Court Precedent Compels the Application of Contract Law Principles (if a Uniform Federal Common Law Rule is Appropriate)

In 1942, in *Garrett v. Moore-McCormack Co.*,[259] the Supreme Court set forth the standard for the enforceability of releases under the Jones Act;[260] the Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law."[261] The Act was passed to ensure "that seamen would have the same rights to recover for negligence as other tort victims."[262]

The Court held that a release between an employer and its seaman employee is to be judged according to the standard for contracts between fiduciaries and beneficiaries. The Court held that seamen are viewed as "wards of the admiralty," and "are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trustent* with their trustees."[263] The Court stated the employer bears the burden of proving "that no advantage has been taken; and his burden is particularly heavy where there

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precedent.

257. As I later explain, I believe a uniform federal common law rule is not appropriate. Rather, state law should generally provide the substance for the federal common law rule. The application of state law is not only dictated by recent Supreme Court precedent (as I explain below), it also has the practical advantage of not requiring federal courts to determine general common law principles with respect to any exceptions to the objective theory of contracts. Such a task seems daunting.

258. Because the Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), stated that "presumably" a person can waive Title VII claims, *id.* at 52, and because no circuit holds otherwise, I do not consider an argument that the holdings in the FLSA context should be extended to Title VII claims and that Title VII claims cannot be waived without EEOC or court supervision. *See supra* note 28.

259. 317 U.S. 239 (1942).

260. Ch. 250, § 33, 41 Stat. 1007 (1920) (codified as amended at 46 U.S.C. § 688 (2000)).

261. 46 U.S.C. § 688(a) (2000).

262. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991) (quoting G. GILMORE & C. BLACK, LAW OF ADMIRALTY 328–29 (2d ed. 1975)).

263. *Garrett*, 317 U.S. at 246 (quoting Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047).

has been inadequacy of consideration."[264] The Court held that "[s]uch releases are subject to careful scrutiny. 'One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman.'"[265] Under this standard, "the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."[266] Interestingly, the Court, in establishing the appropriate standard for determining the enforceability of a release under the Jones Act, used contract law language, equating such a release to a contract between beneficiaries and fiduciaries.[267]

After the Court's decision in *Garrett*, whether its holding was to be extended to employees other than seamen was an open question. For example, in 1946, in *Ricketts v. Pennsylvania Railroad*,[268] Judge Jerome Frank, in a concurring opinion, addressed the appropriate standard for determining the enforceability of a release by an employee under the Federal Employers' Liability Act ("FELA").[269] The FELA is similar to the Jones Act (and Title VII) in that it is designed to provide a remedy for employees injured as a result of actions by their employers. The FELA, enacted in 1906, is designed "to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees."[270] "A primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases."[271] The Court has described the FELA as a "broad remedial statute," and has adopted a standard of liberal construction to accomplish Congress' objectives.[272] Section 5 of the FELA provides that any contract enabling any common carrier to "exempt itself

264. *Garrett*, 317 U.S. at 247.

265. *Id.* at 248 (quoting Harmon v. United States, 59 F.2d 372, 373 (5th Cir. 1932)).

266. *Garrett*, 317 U.S. at 248. Under the rule set forth in *Garrett*, a seaman's release is not executed knowingly and voluntarily simply because he understood that he was relinquishing whatever rights he possessed. Orsini v. O/S Seabrooke O.N., 247 F.3d 953, 964 (9th Cir. 2001). When the seaman is not represented by an attorney, "the vessel's owner or agent [is] obligated to advise him of his undisputed legal rights and possible causes of action against the ship." *Id.* The owner is required to make a "full, fair and complete disclosure as to all of [a seaman's] rights, including his right to sue for damages under the Jones Act." *Id.* (quoting Blake v. W.R. Chamberlin & Co., 176 F.2d 511, 513 n.1 (9th Cir. 1949)).

267. *Garrett*, 317 U.S. at 247 ("The analogy suggested by Justice Story . . . between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seaman as wards of admiralty, a close one.").

268. 153 F.2d 757, 760–70 (2d Cir. 1946).

269. Ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (2000)).

270. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 561 (1987).

271. *Id.*

272. *Id.* at 562.

from any liability created by this chapter, shall to that extent be void."[273] Section 5 was passed to remedy the problem of many railroads insisting on a contract with their employees that discharged the railroad from liability for personal injuries.[274]

Judge Frank argued in *Ricketts* that releases under the FELA should be governed by the same standard as releases under the Jones Act.[275] Judge Frank took the objective theory to task, particularly with respect to its application to releases by employees, stating, "I believe that the courts should now say forthrightly that the judiciary regards the ordinary employee as one who needs and will receive the special protection of the courts when, for a small consideration, he has given a release after an injury."[276]

In 1948, the Supreme Court in *Callen v. Pennsylvania Railroad*[277] addressed the standard for releases by employees under the FELA. The decision in *Callen* would determine whether the Court would adopt Judge Frank's belief that any employee giving his or her employer a release should receive the special protection of the *Garrett* (at least when given for small consideration) standard, or whether that standard would stop at the Jones Act.

The Court in *Callen* did not follow Judge Frank's opinion in *Ricketts*, instead holding that

> the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.
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> . . . .
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> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.[278]

The Court rejected the argument that the employer should bear the burden of establishing the validity of the release, regardless of the potential

273. 45 U.S.C. § 55 (2000).
274. Wicker v. Consol. Rail Corp., 142 F.3d 690, 696 (3d Cir. 1998).
275. Ricketts v. Pa. R.R., 153 F.2d 757, 760–70 (2d Cir. 1946) (Frank, J., concurring).
276. *Id.* at 768.
277. 332 U.S. 625 (1948).
278. *Id.* at 630–31.

inequality of bargaining power between the parties.[279] The Court felt that such a change should be left to Congress and stated that until Congress "adopt[s] a policy depriving settlements of litigation of their *prima facie* validity . . . the releases of railroad employees stand on the same basis as the releases of others."[280] Four justices dissented, believing that releases under the FELA should be governed by the same standard as releases under the Jones Act.[281]

The force of the *Callen* holding for Title VII purposes cannot be ignored. The FELA is similar to Title VII in that they are both remedial statutes interpreted broadly to effectuate their purposes. Arguably, releases under the FELA should be subject to a standard that makes it more difficult to enforce such releases because Title VII does not contain a provision similar to the FELA's Section 5, and in fact Title VII has been interpreted to favor the voluntary settlement of claims.[282]

Furthermore, employees under Title VII cannot be considered wards of the court or their employer to the same extent seamen are considered wards of admiralty. "[The admiralty] rules are designed to protect seamen injured at sea, usually far from home, who, particularly when injured, are to be treated as wards of the vessel."[283] The law has a "tendency to treat seamen as virtually incompetent,"[284] a characterization that does not apply to all employees. Unlike seamen, other employees are usually not geographically isolated and will have ready access to attorneys. For example, the Second Circuit refused to apply the holding in *Garrett* to a release of claims executed by a longshoreman for injuries sustained aboard ship, and instead applied the holding in *Callen* for the following reasons:

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279. *Id.* at 630.

280. *Id.*

281. *Id.* at 631 (Black, J., Douglas, J., Murphy, J., Rutledge, J., dissenting).

282. *See* Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal."); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981) ("Congress has mandated a policy of encouraging voluntary settlement of Title VII claims."). Section 118 of the Civil Rights Act of 1991, which amended Title VII, also provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations . . . is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991) (codified at Notes to 42 U.S.C. § 1981).

283. Orsini v. O/S Seabrooke O.N., 614,410, 247 F.3d 953, 964 (9th Cir. 2001).

284. Daniel C. Cohn, Note, *Displacement of State Rules of Decision in Construing Releases of Federal Claims*, 63 CORNELL L. REV. 339, 350 (1978).

> [L]ongshoremen do not share with seamen the special problems that may justify the invalidation of releases executed by them because of inadequate advice of counsel.
>
> The particularly authoritarian relationship of shipowners and their representatives to seamen and the isolation of the latter from the legal, economic, and psychological support of a landbased community may put the seamen at a serious bargaining disadvantage. Longshoremen, more closely similar to other workers ashore, do not confront these problems. Nor do we think special treatment of longshoremen is dictated by other considerations formerly cited to justify the status of seamen as 'wards of admiralty,' such as their alleged propensity toward 'rashness' and 'credulity,' . . . and the United States' military and commercial interest in protecting its maritime industry . . . .
>
> In short, we see no compelling reason to apply more stringent standards to longshoremen's releases for injuries sustained aboard ship than to those entered into by longshoremen and other workers for injuries sustained ashore.[285]

Accordingly, *Callen* not only supports application of a contract law standard, it compels it (assuming a uniform federal common law rule is appropriate).[286] This is particularly true because it is presumed Congress is familiar with the Court's precedents and expects its statutes to be read in conformity with such precedents.[287]

Although lower courts have placed some limitations on the applicability of *Callen*'s holding, these limitations are not applicable to Title VII cases. The Sixth Circuit has held that *Callen*'s holding is limited to releases for those injuries known to the employee at the time the release is executed.[288] The Third Circuit has held that *Callen*'s holding is limited

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285. Capotorto v. Compania Sud Americana de Vapores Chilean Line, Inc., 541 F.2d 985, 987 (2d Cir. 1976).

286. Application of the *Callen* standard would not, however, automatically result in a traditional contract law analysis being applied in all instances. For example, the Court has rejected the application of the tender back rule to releases under the FELA on the grounds it is inconsistent with the Act's policy of providing compensation to injured workers. *See* Hogue v. S. Ry., 390 U.S. 516, 517 (1968) (holding that an express agreement requiring the injured employee to make a tender back to the employer before suing the employer on a FELA claim is void under § 5 of the FELA).

287. N. Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995). Further support for the application of common law contract principles is found in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). In *Rumery*, the Court held that whether a waiver of a right to sue under 42 U.S.C. § 1983 is unenforceable is resolved "by reference to traditional common-law principles." *Id.* at 392. The Court then relied on contract law principles to determine whether the waiver was unenforceable. *See id.* at 392 & n.2 (stating that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.").

288. Babbitt v. Norfolk & W. Ry., 104 F.3d 89, 92 (6th Cir. 1997).

to releases for those injuries and those *risks* known to the employee at the time the release is executed.[289] These limitations are based on language in *Callen* that a release is as valid as any other release "[w]here controversies exist as to whether there is liability, and if so for how much . . . ."[290] The Third Circuit also limits the rule in *Callen* to situations in which the release is "executed as part of a negotiation settling a dispute between the employee and the employer."[291] If there is no negotiation, the release is void under Section 5.[292]

These limitations have no impact on the rule applicable to Title VII releases. The injury under Title VII is an adverse employment action, such as a refusal to hire, a termination, the denial of a promotion, or a hostile work environment, and the adverse employment action (at least with respect to tangible adverse employment actions) occurs when it is communicated to the employee.[293] Thus, the concern motivating the limitations placed on *Callen* (an employee not knowing of a particular injury or the risk of an injury at the time of signing a general release) will not apply in Title VII cases; the employee will be aware of the injury.[294]

With respect to the Third Circuit's holding that *Callen* is limited to situations in which the parties engage in negotiations, such a holding has little support in *Callen*. There does not appear to have been much negotiation in *Callen*, and the Supreme Court's holding was driven by its refusal to establish a rule depriving settlements of their prima facie validity absent evidence Congress intended such a change. *Callen* was based on the Court deferring to common law principles in the absence of a contrary indication from Congress, not on the need for negotiation. Even if negotiation is needed to render enforceable a release of claims under the FELA, this is best explained as a limitation imposed as a result of the FELA's Section 5, a provision that does not have a similar counterpart in Title VII.

In conclusion, the Court's statement in *Callen* that it was Congress' place to deprive settlements of their prima facie validity, not the Court's, and that releases executed by railroad employees therefore stand on the

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289. Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998).

290. *Babbitt* at 92; *Wicker* at 697.

291. *Wicker*, 142 F.3d at 700.

292. *Id.*

293. Del. St. Coll. v. Ricks, 449 U.S. 250, 258 (1980).

294. For example, the Senate's Committee on Labor and Human Resources, in its report on the OWBPA, recognized that "[i]ndividual separation agreements are the result of actual or expected adverse actions against an individual employee," and thus "[t]he employee understands the action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with the employer." S. REP. NO. 101-263, at 32 (1990); *see also* H.R. REP. NO. 101-664, at 53 (1990) (making virtually identical statements).

same footing as releases by other employees (with the employee bearing the burden of proving the release is tainted with invalidity through fraud or mutual mistake), applies with equal force to the release of claims under Title VII. Thus, Supreme Court precedent dictates that a contract law analysis would provide the substance for any uniform federal common law rule created to determine the enforceability of a Title VII release.

But there is a catch. As discussed below, under recent Supreme Court precedent, state law should usually provide the substance of any federal common law rule.

B. Source of Law

The applicable source of law for assessing the validity of a Title VII release is important because if the source of law is state law, federal courts would not create a test to give content to the knowing and voluntary standard. Rather, they would apply the law adopted by the forum state for assessing the validity of a release of employment discrimination claims. If the state does not have an employment discrimination statute, a federal court would look to the law applied by the state in the most analogous situation, such as the law applied by the state to releases of other statutory rights.[295] A contract law analysis would usually be applied because states generally treat a release as a contract whose validity is governed by contract law rules.[296]

Few courts have analyzed the source of law question. The leading case holding that creation of a federal common law rule is appropriate is *Fulgence v. J. Ray McDermott & Co.*[297] In *Fulgence*, the Fifth Circuit stated that "[c]reation of a federal rule rather than absorption of a state rule is appropriate where, as here, the rights of the litigants and the operative legal policies derive from a federal source."[298] The court felt that "[n]o significant state interest would be served by absorbing state law as the rule of decision governing Title VII settlement agreements."[299] *Fulgence* involved a Louisiana statute requiring settlement agreements to be written, and the court held that Congress' policy of encouraging Title VII claims to be settled was better served by a rule enforcing oral settlement

295. For example, courts look to the "most analogous" state statute of limitations when a federal law does not contain its own statute of limitations. *See* Wilson v. Garcia, 471 U.S. 261, 268 (1985) (holding that the "most analogous" state statute of limitations applies to claims under 42 U.S.C. § 1983, which does not provide a specific limitations period).

296. *See* Rubin, *supra* note 1, at 491 ("In civil law, courts generally employ contract terminology in judging the validity of waivers.").

297. 662 F.2d 1207 (5th Cir. Dec. 1981).

298. *Id.* at 1209.

299. *Id.*

agreements.[300]

The leading cases advocating application of state law are *Morgan v. South Bend Community School Corp.*[301] and *Makins v. District of Columbia.*[302] In *Morgan*, the Seventh Circuit, in an opinion by Judge Easterbrook, suggested (without deciding) that state law applied in determining whether a school superintendent and a school board attorney had authority to settle a Title VII claim brought against the school board. Judge Easterbrook proposed that the Rules of Decision Act[303] and 42 U.S.C. § 1988(a) might prevent federal courts from applying federal common law to issues involving the enforceability of Title VII releases.[304]

In *Makins*, the District of Columbia Circuit held that local law applied in determining whether an attorney had authority to bind his client to a Title VII agreement.[305] The court relied on *Morgan*, stating that "[t]he power of the federal courts to formulate law in this area, and the need for national uniformity, are doubtful at best, as Judge Easterbrook forcefully demonstrated . . . ."[306] The court noted that "[t]here is also an advantage for members of the bar to know that in negotiating settlements, the law governing the validity of their agreements will be the same in federal and state court."[307]

What is interesting about these three cases is that none directly involved whether a person's consent to a release was knowing and voluntary.[308] In fact, whether a uniform federal rule is needed in such a circumstance has never been analyzed by a court. Whether federal law or state law applies to such a situation depends on whether the Rules of Decision Act or 42 U.S.C. § 1988(a) requires the application of state law, and if neither does, whether the federal common law rule should borrow state law for the federal rule's content. Each of these issues is addressed below.

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300. *Id.*
301. 797 F.2d 471 (7th Cir. 1986).
302. 277 F.3d 544 (D.C. Cir. 2002).
303. 28 U.S.C. § 1652 (2000).
304. *Morgan*, 797 F.2d at 474–76.
305. 277 F.3d at 548.
306. *Id.* at 547–48.
307. *Id.* at 548.
308. *Morgan* and *Makins*, both involving the authority of a party's agent to enter into a binding agreement on the party's behalf, can be viewed as indirectly involving the question of whether the party's consent was knowing and voluntary.

1. The Rules of Decision Act

The Rules of Decision Act,[309] first enacted as part of the Judiciary Act of 1789,[310] currently provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[311] The Act, if taken literally, appears to preclude federal common law, and this position has been adopted by some commentators, leading to academic debate on the Act's scope.[312]

However, "[i]n general, the modern Supreme Court treats the Act not as a barrier to lawmaking [by federal courts] but 'as if it did not exist.'"[313] The Court has stated that a federal statute's silence on an issue

> "is no reason for limiting the reach of federal law . . . . To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. 'At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.' . . ."
>
> Since *Erie* [*R.R. v. Tompkins*[314]], no decision of this Court has held or suggested that the Act requires borrowing state law to fill gaps in federal substantive statutes. . . .
>
> [N]either *Erie* nor the Rules of Decision Act can now be taken as establishing a *mandatory* rule that we apply state law in

309. 28 U.S.C. § 1652 (2000).

310. 1 Stat. 73 (1789).

311. 28 U.S.C. § 1652 (2000). Rules of decision are "the laws which are applied by courts to determine the questions brought before them." Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1428 n.6 (1960).

312. *Compare* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989) (arguing that the Rules of Decision Act precludes federal common law) *with* Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989) (arguing that the Rules of Decision Act does not preclude federal common law).

313. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 31 (1985) (quoting PHILIP KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 62 (1970)).

314. 304 U.S. 64 (1938).

the enforceability of releases under Title VII, an employer knows the EEOC retains the right to sue, thereby deterring violations of Title VII.[372] Third, the remedies available to a plaintiff in a Title VII action—including back pay, front pay, compensatory damages, punitive damages, and attorney's fees[373]—coupled with the cost of defending a Title VII action, render it unlikely that easier enforcement of releases would increase noncompliance, particularly when an employer has no guarantee a person subjected to unlawful employment discrimination will agree to release his or her Title VII claim (and agree to do so for less than fair compensation).

With respect to the third reason, the situation is similar to the one addressed by the Supreme Court in *Robertson v. Wegmann*,[374] in which the Court upheld the application of a Louisiana survivorship law to a claim under 42 U.S.C. § 1983, even though the state statute extinguished the claim because the decedent was not survived by any close relatives (as required by the state statute).[375] The Court rejected the argument that the claim's extinguishment was inconsistent with § 1983's deterrent objective:

> A state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him. In light of this prospect, even an official aware of the intricacies of Louisiana survivorship law would hardly be influenced in his behavior by its provisions. In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before the conclusion of the § 1983 suit . . . and who would not be survived by any close relatives.[376]

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specific relief after the employee settles his or her claim with the employer. *See* Senich v. American-Republican, Inc., 215 F.R.D. 40, 44 (D. Conn. 2003) (granting the EEOC's motion to file an amended complaint to seek victim-specific relief for plaintiffs who signed waivers and releases with employer as a condition of receiving severance payments).

372. The members of the House of Representatives who opposed the OWBPA made a similar argument:

> [P]roponents claim that waivers, however knowing and voluntary on the part of the employee, are used as shields by employers for discriminatory actions. Employers can, thus, ignore the law with impunity. In fact, however, EEOC's authority to investigate and prosecute violations of the law is clearly unaffected by waivers signed by employees, although a valid waiver may preclude recovery of individual damages, and a waiver cannot prohibit an individual from filing, or participating in the investigation of, a charge with the EEOC.

H.R. REP. NO. 101-664, at 88 (1990) (dissenting views).

373. 42 U.S.C. § 2000e-5(g) (2000); 42 U.S.C. § 1981a (2000).

374. 436 U.S. 584 (1978).

375. *Id.* at 593.

376. *Id.* at 592 & n.10. *Robertson* relied on 42 U.S.C. § 1988 for the application of state

Similarly, an employer contemplating unlawful discriminatory conduct must always be prepared to face the prospect of a Title VII action. To mimic the language in *Robertson*, even an employer aware of the intricacies of state contract law would hardly be influenced in its behavior by such law. In order to find even a marginal influence on behavior as a result of applying state contract law, one would have to make the rather farfetched assumptions that an employer had both the desire and ability to deliberately select as victims those persons who, after being discriminated against, would agree to release their Title VII claims, and who would release their claims in a manner that would result in enforcement of the release under a contract law test when it would not be enforced under the totality of the circumstances test. Further, there is no evidence to support the belief that persons release meritorious Title VII claims for less than adequate compensation often enough to undermine Title VII's deterrent objective.[377]

With respect to Title VII's compensatory objective, application of contract law rules could frustrate this objective in specific situations, but not in every case. If a person executes a Title VII release without a full understanding of the legal consequences, or does so in a situation of unequal bargaining power, there is a greater chance the person will not receive fair value for his or her claim than if he or she entered into the agreement completely knowingly and voluntarily. However, application of contract law rules would only frustrate Title VII's compensatory objective in those situations in which the employer in fact violated Title VII (if the employer did not violate Title VII, the complaining person would not be entitled to compensation), and the releasing person did not receive fair compensation for the violation.

For a court to determine that application of a contract law analysis

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law. It is an unresolved issue whether § 1988 provides for a stronger presumption that state law should be applied than the general presumption under *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991), that state law should be incorporated. If § 1988 does not apply to Title VII actions, this would be an important issue for purposes of *Robertson*'s weight as precedent with respect to Title VII claims. Title VII, however, has a provision similar to § 1988:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4 (2000). This provision, which supports application of state law, has been neglected by the courts when determining the appropriate source of law for evaluating Title VII releases.

377. If the person received adequate compensation, Title VII's deterrent objective will likely be achieved.

would frustrate Title VII's compensatory objective in a specific case, the court would have to determine that a violation occurred and that the consideration provided was insufficient to compensate the plaintiff for his or her damages.[378] Thus, if an employer demonstrates that the release should be enforced under state law (but cannot demonstrate it should be enforced under the totality of the circumstances test), and then prevails on the merits at trial, an application of state law could not frustrate Title VII's compensatory purpose, and the release should be enforced. Of course, for the defendant who has already defended the case on the merits and won, such a victory would be largely academic, and probably pyrrhic, though the employer might recover attorney's fees as damages under a breach of contract theory (if the employer had asserted a breach of contract counterclaim).[379]

To help reduce situations in which an employer demonstrates the enforceability of a release under state law, only to have the court postpone a determination that state law applies until after the employer prevails on the merits, the court might require the plaintiff, early in the litigation, to demonstrate that his or her case has a certain degree of merit. If the plaintiff fails to make such a demonstration, it is unlikely Title VII's compensatory purpose will be frustrated by an application of state law because it is improbable the plaintiff is entitled to any compensation. Requiring a plaintiff in a Title VII action to make such a preliminary

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378. When determining whether the amount of compensation is adequate, the plaintiff's ability to avoid the transaction costs of litigation should be added to the tangible consideration provided. *See* Silverstein, *supra* note 4, at 492 (noting that parties often settle lawsuits because they are emotionally draining and time consuming). Also, when assessing the value of the claim, the valuation must take into account the uncertainty of litigation. Thus, receiving $35,000 today might be of more value than pursuing a claim in which the plaintiff has a fifty percent chance of prevailing and receiving $100,000, after taking into account the chance of losing, the undesirability of risk, the costs involved (which cannot be recovered if the plaintiff loses), the emotional toll, the necessary time investment, and the reduction of damages to present value.

379. Courts disagree whether a defendant can recover attorney's fees incurred in defending an action brought in violation of a covenant not to sue when the agreement did not include an attorney's fee provision. *Compare* Anchor Motor Freight, Inc. v. Int'l Bhd. of Teamsters, 700 F.2d 1067, 1072 (6th Cir. 1983) (holding that defendant union could assert a claim for attorney's fees and costs incurred in defending action brought by plaintiff company in alleged breach of covenant not to sue in collective bargaining agreement), *and* Widener v. Arco Oil & Gas Co., 717 F. Supp. 1211, 1217 (N.D. Tex. 1989) (holding in an ADEA action that an employer was entitled to recover attorney's fees and costs incurred in defending action as damages for the plaintiff's breach of covenant not to sue), *with* Gruver v. Midas Int'l Corp., 925 F.2d 280, 284 (9th Cir. 1991) (holding attorney's fees are not awardable unless the agreement includes an attorney's fee provision), *and* Carroll v. Primerica Fin. Servs. Ins. Mktg., 811 F. Supp. 1558, 1568 (N.D. Ga. 1992) (holding in an ADEA action that breach of a release may only be used for defensive purposes unless the release expressly provides for damages in the event of a breach, or the subsequent lawsuit was brought in bad faith).

showing is not unprecedented. For example, in determining whether to appoint an attorney to represent a plaintiff under Section 706(f) of Title VII, courts examine the merits of the plaintiff's claim.[380]

However, that a plaintiff with a meritorious claim who received less than fair compensation for his or her damages might lose the litigation under a contract law test (because the release is enforced) is insufficient to find such a test inconsistent with Title VII's compensatory purpose. As the Court stated in *Robertson v. Wegmann*[381] with respect to a § 1983 claim:

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant.[382]

Thus, under *Robertson*, a contract law analysis would not significantly conflict with Title VII's compensatory purpose.

Professor Eileen Silverstein has argued that releases of employment discrimination claims result in the employer and the employee deregulating by contract, thus thwarting the legislative will to prevent harm.[383] She also

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380. *See, e.g.*, Castner v. Colo. Springs Cablevision, 979 F.2d 1417, 1420 (10th Cir. 1992) (recognizing the merits of plaintiff's case as a factor in the appointment of counsel in a Title VII case); Gonzalez v. Carlin, 907 F.2d 573, 580 (5th Cir. 1990) (including "the merits of the plaintiff's claims of discrimination" as an element for consideration); Jones v. WFYR Radio/RKO Gen., 626 F.2d 576, 578 (7th Cir. 1980) (citing the merits of plaintiff's claim as a factor for consideration in the appointment of counsel in a Title VII case), *overruled on other grounds by* Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981). At least one court has held a hearing on the issue at which the trial judge questioned the plaintiff. *See* Battie v. Freeman Decorating, No. Civ.A. 01-2282, 2001 WL 883884, at *1 (E.D. La. Aug. 6, 2001) (mentioning the conference held by a magistrate judge on the issue of appointment of counsel during which the plaintiff was sworn and testified). Courts differ on the standard to be applied when determining if the plaintiff's case has merit. *Compare* Vera v. Utah Dep't of Human Servs., No. 99-4069, 203 F.3d 836, 2000 WL 130717, at *3 (10th Cir. Feb. 4, 2000) (unpublished table decision) (stating that the standard is "lower than the standard in motions for summary judgment"), Poindexter v. FBI, 737 F.2d 1173, 1187 (D.C. Cir. 1984) ("[If] . . . the plaintiff appears to have some chance of prevailing, then appointment should not be refused for want of a meritorious claim."), *and* Bradshaw v. Zoological Soc'y of San Diego, 662 F.2d 1301, 1308 (9th Cir. 1981) (stating that the plaintiff must only show that the claim has "some merit"), *with* Smith v. City Univ. of N.Y., No. 91 Civ. 2301 (MJL), 1993 WL 106395, at *3 (S.D.N.Y. Apr. 7, 1993) (holding that the standard is higher than simply avoiding summary judgment).

381. 436 U.S. 584 (1978).

382. *Id.* at 593.

383. Silverstein, *supra* note 4, at 493. Professor Silverstein questions the enforceability of any "waivers-for-private-gain" with respect to statutory employment rights. (Professor Silverstein defines "waivers-for-private-gain" as waivers occurring before the filing of an administrative complaint or civil action, as opposed to "waivers-by-settlement," which occur after the filing of an administrative complaint or civil action. *Id.* at 484–86.) Thus,

argues that "the security of believing that legal action will not follow allows decision-makers, if they wish, to engage in the very conduct prohibited by the laws."[384] She therefore concludes that "[t]he twin goals of deterrence and compensation are simply not served by allowing employers to contract out of the non-discrimination mandate by drafting sophisticated waiver clauses."[385]

Professor Silverstein, however, was not analyzing these issues in the choice of law context and thus did not assess whether such releases "significantly conflict" with Title VII's objectives (as opposed to simply not serving Title VII's objectives). Professor Silverstein also fails to note that the compensatory objective would only be frustrated if Title VII was in fact violated and the amount of compensation was inadequate, and she fails to address *Robertson*. With respect to the argument that enforcing releases will encourage employers to discriminate, I have previously addressed and rejected such an assertion. No employer can predict whether a particular employee will release his or her claims. It is farfetched to believe that an employer would unlawfully discriminate against a particular person because the employer believes it will be able to extract a release from the employee after committing the act of discrimination. Few employers would actually believe "legal action will not follow" simply because there is a chance the employee might sign a release.[386]

In any event, a federal court should not simply assume the forum state's laws frustrate Title VII's objectives, and should not consider creating a federal common law rule until after it has analyzed the state's laws. Upon inspection, the forum state's laws might be sufficient to address the concerns raised by the courts adopting the totality of the circumstances test.

Significantly, the rule prohibiting avoidance of a contract based on unilateral mistake has often been relaxed. In fact, the general rule prohibiting avoidance based on unilateral mistake has been ignored in numerous decisions,[387] and the broad generalization that relief will only be given for mutual mistakes has been described as "misleading and

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she does not address whether the totality of the circumstances test or a contract law test is appropriate, or whether the appropriate source of law should be federal law or state law. However, her argument that any waivers-for-private-gain thwart Title VII's objectives is also relevant in determining whether the more lenient contract law waiver test would thwart Title VII's objectives.

384. *Id.* at 493

385. *Id.* at 494.

386. While some terminated employees have a strong incentive to sign a release in exchange for much needed money, many of these employees, disgruntled by their termination, will have little interest in accepting a small amount of consideration for the release.

387. CORBIN, *supra* note 169, § 28.39, at 224.

untrue."[388] Today, avoidance is generally allowed for unilateral mistake if two conditions exist: "(1) enforcement of the contract against the mistaken party would be oppressive or, at least, result in an unconscionably unequal exchange of values; and (2) avoidance would impose no substantial hardship on the other."[389]

Under modern rules of unilateral mistake, "even a negligent party may obtain relief for mistake if the other party is given prompt notice before changing position materially and the rights of third parties have not intervened."[390] This view allows avoidance for a unilateral mistake even when the party was careless (since a careless act is not equated with a wrongful act), as long as the "mistake is convincingly proved and the other party can be restored to the status quo ante."[391] Thus, even a failure to read will not prohibit avoidance if the two conditions for avoidance are otherwise established.[392] Also, a party's mistake as to his or her existing legal rights may be treated as a mistake of fact.[393]

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388. *Id.*

389. *Id.* For example,

> Florida case law allows for application of the unilateral mistake doctrine where all of the following conditions are met: (1) "the mistake goes to the substance of the agreement," (2) the error does not result from an inexcusable lack of due care, and (3) the other party has not relied upon the mistake to his detriment.

Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283, 1291 (11th Cir. 1998) (quoting Langbein v. Cornerford, 215 So. 2d 630, 631 (Fla. Dist. Ct. App. 1968)).

390. CORBIN, *supra* note 169, § 28.39, at 232. The American Law Institute accepted this position:

> The mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude either avoidance . . . or reformation. . . . Indeed, since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence.

RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. a (1979). However, "in extreme cases the mistaken party's fault is a proper ground for denying him relief for a mistake that he otherwise could have avoided." *Id.*

391. CORBIN, *supra* note 169, § 28.38, at 213–14.

392. *Id.* For example, it has been said that "the failure to read an instrument is not negligence per se but must be considered in light of all surrounding facts and circumstances." Chandler v. Aero Mayflower Transit Co., 374 F.2d 129, 136 (4th Cir. 1967). *But see* Lex Tenants Corp. v. Gramercy N. Assocs., 624 N.Y.S.2d 414, 414–15 (N.Y. App. Div. 1995) (holding that a party who fails to read a contract before signing it does not exercise ordinary care and bears the risk of a unilateral mistake under § 154 of RESTATEMENT (SECOND) OF CONTRACTS (1981)).

393. CORBIN, *supra* note 169, § 28.53, at 369. This is true even when the party's mistake is based on a mistake or ignorance of a rule of law. *Id.* For example,

> in numerous cases the mistake as to "rights" is caused solely by a mistake as to the rules of law that are to be applied to the known facts. In these cases, in order to avoid seeming conflict with common statements as to "mistake of law," emphasis is placed upon mistake of the resulting "rights," so that the case may

The modern law of mistake appears particularly well suited for ensuring Title VII's objectives are not frustrated by persons releasing claims. For example, the requirement that the release include an "unconscionably unequal exchange of values" focuses the inquiry on the very releases most likely to frustrate Title VII's deterrent and compensatory objectives—those for inadequate consideration. Also, in the case of a release of claims, "there is less likelihood that a change of position by the releasee should prevent a setting aside of the release for unilateral mistake."[394]

State contract rules preventing the enforcement of unconscionable contracts might also be sufficient to address the concerns of the courts adopting the totality of the circumstances test. There are two types of unconscionability: substantive and procedural. Substantive unconscionability involves contracts whose terms are "one-sided or overly harsh."[395] "'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability."[396] Procedural unconscionability is the lack of a meaningful choice, considering all the surrounding circumstances, and including the manner in which the parties entered into the contract, whether the party had a reasonable opportunity to understand the contract's terms and whether important terms were hidden in fine print.[397]

Interestingly, one court's explanation of procedural unconscionability is strikingly reminiscent of the knowing and voluntary standard adopted by the totality of the circumstances courts:

> The indicators of procedural unconscionability generally fall into two areas: (1) lack of knowledge, and (2) lack of voluntariness. A lack of knowledge is demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms. A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market

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be classified as one involving "mistake of fact."

Id. at 371. "[T]he modern view is that the existing law is part of the state of facts at the time of agreement. Therefore, most courts will grant relief for such a mistake, as they would for any other mistake of fact." FARNSWORTH, *supra* note 159, § 9.2, at 649.

394. CORBIN, *supra* note 169, § 28.28, at 213–14.

395. Adler v. Fred Lind Manor, 103 P.3d 773, 781 (Wash. 2005) (en banc) (quoting Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975)).

396. *Adler*, 103 P.3d at 781 (quoting Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995).

397. *Adler*, 103 P.3d at 781.

> factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.[398]

Courts are split on whether both substantive and procedural unconscionability must exist to void a contract or whether just one is sufficient.[399] Although in some states procedural as well as substantive unconscionability must be established, for those states that only require substantive unconscionability, the analysis will focus on those contracts that could potentially frustrate Title VII's deterrent and compensatory objectives—contracts in which the employer provides little consideration for a release.

This is not to say that state contract law rules will result in essentially the same standard being applied as that applied under the totality of the circumstances test. As previously discussed, the two tests have significant differences, including which party bears the burden of proof regarding the validity or invalidity of the release. However, many contract law rules address the types of concerns raised by the courts adopting the totality of the circumstances test, further supporting that state contract law rules will not generally frustrate Title VII's objectives. In those situations in which a contract law rule is particularly harsh (such as the Ohio rule discussed in *Dice*, perhaps), application of a uniform federal common law rule would be appropriate.

In addition to *Dice*, Supreme Court cases identify other situations in which a common law rule might frustrate Title VII's objectives. For example, in *Brooklyn Savings Bank v. O'Neil*,[400] the Court refused to apply to a release of FLSA claims a New York statute that rendered written releases enforceable despite an absence of consideration. In *Brooklyn Savings*, the defendant conditioned the payment of wages owed under the FLSA on the execution of a release by the plaintiff waiving his entitlement to liquidated damages under Section 16(b) of the FLSA.[401] There was no consideration because there was no bona fide dispute regarding liability.[402] The Court held that enforcing the release would thwart the legislative will of the FLSA:

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398. Bank of Ind., v. Holyfield, 476 F. Supp. 104, 109–10 (S.D. Miss. 1979) (citations omitted).

399. *See* Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 927 (2000) (discussing the split among jurisdictions as to whether to require solely substantive unconscionability to void a contract or whether procedural unconscionability is necessary as well).

400. 324 U.S. 697 (1945).

401. *Id.* at 700. Under section 16(b) of the FLSA, a plaintiff, in addition to being able to recover any wages owed, is entitled to an additional equal amount as liquidated damages. 29 U.S.C. § 216(b) (2000).

402. 324 U.S. at 703.

> To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that §16(b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place. To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violations of law are void as contrary to public policy.[403]

Thus, under *Brooklyn Savings*, a state law (such as New York's) enforcing a release without consideration would frustrate Title VII's deterrent objective when the employer conditions the receipt of compensation indisputably owed upon the execution of a release of Title VII claims, at least when the employee signed the release because of financial need.[404] The holding in *Brooklyn Savings* was reaffirmed in *Maynard v. Durham & Southern Railway*,[405] in which the Court held that consideration is necessary to render a release of federal statutory claims enforceable.[406]

In *Hogue v. Southern Railway*,[407] the Court held that an employee seeking to void a release under the FELA was not required to tender back the consideration as a prerequisite to filing suit,[408] a common requirement under contract law rules.[409] In *Oubre v. Entergy Operations, Inc.*,[410] the Court, in a case under the Age Discrimination in Employment Act of 1967,[411] expanded on the rationale for rejecting the tender back rule with respect to plaintiffs seeking to void releases of federal claims, stating that

> In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return. These realities might tempt employers to risk

403. *Id.* at 709–10.

404. What is interesting about *Brooklyn Savings* is that it analogized the situation to a contract void under public policy because it encouraged violations of the law. *Id.* at 710. Thus, even when holding a particular state law inconsistent with a federal law's objectives, the Court relied on the language of contract law. The Court has also relied on contract law principles to assess whether a waiver of the right to sue under 42 U.S.C. § 1983 is enforceable. *See* Town of Newton v. Rumery, 480 U.S. 386, 392 & n.2 (1987) (looking to the RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) to resolve the question of the enforceability of a waiver).

405. 365 U.S. 160 (1961).

406. *Id.* at 163.

407. 390 U.S. 516 (1968).

408. *Id.* at 517.

409. *But see* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998) (questioning how unified the states are with respect to adopting the tender back rule).

410. 522 U.S. 422 (1998).

411. 29 U.S.C. §§ 621-34 (2000).

> noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification. We ought not to open the door to an evasion of the statute by this device.[412]

Thus, under these authorities, the tender back rule might arguably be inconsistent with Title VII's deterrent objective.[413]

In conclusion, while the application of contract law rules might at times have the potential to frustrate Title VII's objectives, in general, such rules do not significantly conflict with this attainment. *Kimbell*'s second factor therefore favors the incorporation of state law.

c. *Commercial relationship*

An application of the third factor does not favor the use of state law. A release of employment discrimination claims cannot be considered a commercial transaction. For example, a release of a personal injury claim, which is analogous to an employment discrimination claim, is not considered a commercial transaction.[414]

d. *Conclusion with respect to the* Kimbell *factors*

An analysis of the *Kimbell* factors, behind the presumption that state law should apply, demonstrates that in general, a federal common law rule for assessing the enforceability of a Title VII release is unwarranted. Courts adopting the totality of the circumstances test as a rule of federal

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412. 522 U.S. at 427.

413. *See also* Duncan v. Thompson, 315 U.S. 1, 7–8 (1942) (holding that employee need not return money prior to filing suit under the FELA even though the money was provided by the employer in return for the employee's promise to negotiate a potential resolution of the claim prior to filing suit and based on the premise that the money would be returned prior to filing suit). Whether the tender back rule applies to Title VII releases is an issue over which the courts have disagreed. *Compare* Fleming v. United States Post. Serv. AMF O'Hare, 27 F.3d 259, 262 (7th Cir. 1994) (applying tender back rule) *and* Halstead v. Am. Int'l Group Inc., No. Civ. 04-815-SLR, 2005 WL 8852001, at *2 (D. Del. Mar. 11, 2005) (applying tender back rule), *with* Rangel v. El Paso Natural Gas Co., 996 F. Supp. 1093, 1099 (D. N.M. 1998) (rejecting tender back rule). When the tender back rule is applied, the appropriate source of law is an issue. *See, e.g.*, Cuchara v. GAI-Tronics Corp., 129 F. App'x 728, 732 (3d Cir. 2005) (applying Pennsylvania law to the employee's assertion that he was fraudulently induced to enter into a release of Title VII and ADA claims, and holding that, under Pennsylvania law, the employee's failure to return the consideration "dooms his fraudulent inducement claim"); *Halstead* at *2 (applying Delaware law). Even if the tender back rule is held inapplicable to a Title VII release, the related concept of ratification might still be applicable. *See, e.g.*, Aikins v. Tosco Refining Co., No. C-98-00755-CRB, 1999 WL 179686, at *5 (N.D. Cal. Mar. 26, 1999) ("[A] release may be ratified even where the tender back rule is inapplicable").

414. CORBIN, *supra* note 169, § 28.34, at 174–75.

common law have argued that the test is consistent with the strong congressional purpose of eradicating employment discrimination.[415] While this might be true (because such a rule enforces fewer releases), the standard is whether a particular state law significantly conflicts with Title VII's objectives. Even in those cases in which state law applies common law contract principles to determine the enforceability of a release, this standard will usually not be met.

V. CONCLUSION

Supreme Court precedent dictates that if a uniform federal common law rule regarding the enforceability of Title VII releases is appropriate, contract law principles generally apply. Thus, the totality of the circumstances test cannot be sustained under Supreme Court precedent, and those courts adopting a contract law test as a matter of federal common law are correct (if a uniform federal common law rule is appropriate). However, under recent Supreme Court precedent, state law should generally be used to provide the substance of the federal common law rule governing the enforceability of a Title VII release.

415. Pierce v. Atchison, Topeka & Sante Fe Ry., 65 F.3d 562, 571 (7th Cir. 1995); Bormann v. AT & T Commc'ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989); Coventry v. United States Steel Corp., 856 F.2d 514, 522–23 (3d Cir. 1988) (pre-OWBPA ADEA claim).