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Show Me the Money The Applicability of Contract Laws Ratification and TenderBack Doctrines to Title VII Releases

Daniel P. O'Gorman

Show Me the Money: The Applicability of Contract Law's Ratification and Tender-Back Doctrines to Title VII Releases

Daniel P. O'Gorman*

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* © 2010 Daniel P. O'Gorman. Assistant Professor of Law, Barry University School of Law. J.D., *cum laude*, New York University, 1993; B.A., *summa cum laude*, University of Central Florida, 1990. I would like to thank my Research Assistant Kaylynn Shoop for her assistance during the preparation of this Article.

I. INTRODUCTION

If an employee releases her claims under Title VII of the Civil Rights Act of 1964 (Title VII),[1] but her assent to the release is not "voluntary and knowing,"[2] the release is voidable at her option.[3] But

1. 42 U.S.C. §§ 2000e to e-17 (2006). Title VII prohibits covered employers from discriminating against employees and applicants on the basis of "race, color, religion, sex, or national origin." *Id.* § 2000e-2.

2. Although an employee can release Title VII claims, the employee's assent must be "voluntary and knowing." *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974) ("In determining the effectiveness of any such waiver [of a Title VII claim], a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing."). To determine if an employee's assent to a release of Title VII claims is "voluntary and knowing," some courts apply a totality-of-the-circumstances test and others apply ordinary contract principles. *See generally* Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 80-108 (2005) (discussing the "knowing and voluntary" standard for releasing claims under Title VII); Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of the Circumstances Test with a "Waiver Certainty" Test*, 58 U. FLA. L. REV. 305, 309-31 (2006) (same).

3. *See, e.g.*, Oubre v. Entergy Operations, Inc., 522 U.S. 422, 430-32 (1998) (Breyer, J., concurring) (noting that an agreement to release claims under the Age Discrimination in Employment Act of 1967 that is not "knowing and voluntary" because it does not comply

under common law, the power of a party to void a release, or any other contract,[4] could be lost if the party ratifies the release or fails to tender back the consideration received.[5] This raises the issue of whether these common law contract doctrines apply to releases that are voidable under Title VII.

Although the United States Supreme Court in *Oubre v. Entergy Operations, Inc.*[6] held that the Older Workers Benefit Protection Act of 1990 (OWBPA)[7] generally precludes the application of the ratification and tender-back doctrines to a voidable release of claims under the Age Discrimination in Employment Act of 1967 (ADEA),[8] the decision in *Oubre* does not resolve whether ratification and tender back apply to a Title VII release. The Court's rationale in *Oubre* relied primarily (though not exclusively) on the specific language in the OWBPA for an effective waiver of ADEA claims,[9] and the OWBPA

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with the requirements for an effective release under the Older Workers Benefit Protection Act is merely voidable, not void).

4. If all of the consideration for a release has been provided, and the releasing party has not made any other promises other than releasing claims, the release is technically no longer a contract because there are no remaining promises of future action. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 1.1, at 4 (4th ed. 2004) (explaining that a contract requires a promise of future action); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 3 (6th ed. 2009) ("[A] contract is executory in nature. It contains a promise or promises that must be executed, that is, performed."). A release might be construed, however, as including an implicit covenant not to sue, if such a promise is not explicit. In any event, for ease of reference, this Article uses the term "contract" to refer to executed agreements as well as executory agreements.

5. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmts. d-e (1981).

6. 522 U.S. 422 (1998).

7. 29 U.S.C. §§ 626(f)(1)(B), (F)-(G) (2006).

8. *Id.* §§ 621-634. I say "generally" because ratification and tender back arguably apply when the voidable nature of the release is due to a factor other than a failure to comply with the waiver requirements under the OWBPA.

9. *See* 522 U.S. at 427 (holding that the text of the OWBPA precludes the use of ratification and tender back but then noting that such doctrines would also "frustrate the statute's practical operation"). With respect to ADEA releases entered into prior to the OWBPA, the courts were divided on whether ratification and tender back applied to such releases. N. Jansen Calamita, Note, *The Older Workers Benefit Protection Act of 1990: The End of Ratification and Tender Back in ADEA Waiver Cases*, 73 B.U. L. REV. 639, 640-41 (1993). *Compare* Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1040-41 (11th Cir. 1992) (holding that tender back is not required prior to filing an ADEA suit), *abrogated on other grounds by* Digital Equip. Corp v. Desktop Direct, Inc., 511 U.S. 863 (1994), *and* Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359, 1365 (C.D. Ill. 1991) (holding that in general there is not a requirement that an employee tender back consideration prior to challenging an ADEA release), *with* O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991) (finding ratification of ADEA release), *superseded by statute*, 42 U.S.C. § 2000e to e-17 (2006), *and* Grillet v. Sears, Roebuck & Co., 927 F.2d 217, 220-21 (5th Cir. 1991) (same), *superseded by statute*, 42 U.S.C. § 2000e to e-17, *abrogated on other grounds by* Digital Equip. Corp v. Desktop Direct, Inc., 511 U.S. 863 (1994). Presumably, as previously mentioned, the issue

does not apply to Title VII.[10] Lacking binding precedent on the issue from the Supreme Court,[11] lower courts have reached different conclusions.[12]

The uncertain state of the law regarding the application of ratification and tender back to Title VII releases adds further unpredictability to the already confusing law regarding the release of Title VII claims. The U.S. courts of appeals are divided on the proper test to apply to determine if a Title VII release was entered into knowingly and voluntarily, and the majority rule—the totality-of-the-circumstances test—is itself confusing and unpredictable.[13] Thus, not only is it often unclear if a Title VII release is voidable, it is often unclear if an employee has lost the power to void the release because of the doctrines of ratification and tender back.

This Article seeks to remove this confusion and set forth the proper role (if any) for the common law contract doctrines of ratification and tender back with respect to a release of Title VII claims. Part II provides the background of these common law contract doctrines. Part III reviews the Supreme Court precedent on the application of the ratification and tender-back doctrines to the release of federal claims. Part IV reviews lower-court precedent on the application of these doctrines to the release of Title VII claims. Part V addresses whether Supreme Court precedent with respect to the application of the ratification and tender-back doctrines to other federal statutes compels a particular result regarding Title VII releases. Part VI discusses the competing policies and principles with respect to whether ratification and tender back should apply to Title VII releases. Lastly, Part VII demonstrates that ratification should apply to Title VII

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still exists for an ADEA release that is voidable for reasons other than failing to comply with the specific OWBPA requirements for an effective ADEA waiver.

10. Blackwell v. Cole Taylor Bank, 152 F.3d 666, 673 (7th Cir. 1998).

11. *See* Richardson v. Sugg, 448 F.3d 1046, 1055 (8th Cir. 2006) ("The Supreme Court has not addressed the applicability of the tender-back and ratification doctrines to Title VII claims . . . .").

12. *Compare* Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 261-62 (7th Cir. 1994) (Posner, J.) (applying tender-back doctrine); Wright v. Apple Creek Dev. Ctr., No. 5:06 CV 0542, 2008 WL 818790, at *3 (N.D. Ohio Mar. 24, 2008) (same); Halstead v. Am. Int'l Group, Inc., No. Civ. 04-815-SLR, 2005 WL 885200, at *2 (D. Del. Mar. 11, 2005) (same); Ware v. Cooper Cameron Iron Works, No. CIV.A. 01-0280, 2002 WL 1274793, at *4 (W.D. La. Apr. 24, 2002) (same), *with* Rangel v. El Paso Natural Gas Co., 996 F. Supp. 1093, 1099 (D.N.M. 1998) (rejecting tender-back rule, but applying ratification doctrine); Cole v. Gaming Entm't, L.L.C., 199 F. Supp. 2d 208, 215-16 (D. Del. 2002) (holding that ratification does not apply to Title VII claims).

13. O'Gorman, *supra* note 2, at 85-100 (discussing the confusion regarding the totality-of-the-circumstances test).

releases, but that the tender-back doctrine should be applied flexibly on a case-by-case basis.

II. THE COMMON LAW CONTRACT DOCTRINES OF RATIFICATION AND TENDER BACK

A. Voidable Contracts and the Power To Disaffirm

The contract law doctrines of ratification and tender back apply to so-called "voidable" contracts and have the effect of extinguishing a party's power to void the contract.[14] A voidable contract is one in which one or more of the parties to the contract have the power to void it,[15] and this power is referred to as the power of avoidance or disaffirmance.[16] A voidable contract remains valid until a party holding the power of avoidance exercises that power.[17] Examples of voidable contracts are ones entered into by an infant[18] or a person lacking the requisite mental capacity,[19] or contracts induced by mistake,[20] misrepresentation,[21] duress,[22] or undue influence.[23] If a

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14. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmts. d-e (1981).

15. *Id.* § 7; *see also* PERILLO, *supra* note 4, at 19 ("A contract is voidable if one or more of the parties has the power to elect to avoid the legal relations created by the contract . . . ."); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 18, at 39 (4th ed. 2001) ("In certain types of contracts, one or more of the parties may have the power to put an end to the contract simply by manifesting an election to do so. This is known as a 'voidable' contract since it can be avoided by one or more of the parties.").

16. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b ("Avoidance is often referred to as 'disaffirmance.'").

17. *See id.* § 7 cmt. e ("The propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised."); MURRAY, *supra* note 15, § 18, at 39 (same).

18. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b ("Typical instances of voidable contracts are those where one party was an infant . . . ."); *id.* § 14 ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday."); MURRAY, *supra* note 15, § 18, at 39 ("Illustrations of voidable contracts include those where one party is an infant . . . .").

19. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15(1) ("A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect . . . he is unable to understand in a reasonable manner the nature and consequences of the transaction, or . . . he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.").

20. *See id.* § 7 cmt. b ("Typical instances of voidable contracts are those . . . where the contract was induced by . . . mistake . . . ."); *id.* § 152(1) ("Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . . ."); MURRAY, *supra* note 15, at 39 ("Illustrations of voidable contracts include . . . contracts induced by . . . mistake . . . .").

contract is voidable, the power to disaffirm is usually (though not always) held by only one of the parties: the party who lacked the requisite capacity to contract, or who entered the contract through mistake, misrepresentation, duress, or undue influence.[24] Disaffirmance occurs through "[a]ny manifestation of unwillingness to be bound by the transaction," including raising a defense in a lawsuit or bringing suit to rescind the contract.[25]

A voidable contract should be distinguished from what is sometimes called a "void contract."[26] A "void contract" is an agreement that the courts will not enforce and that does not create any duty of performance by either of the parties.[27] An example of an agreement that is void is one that violates the law or is otherwise contrary to public policy.[28] A "void contract" is in fact not a contract at all because a "contract" is a promise for whose breach there is a legal remedy or the performance of which is recognized as a legal duty.[29] As

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21. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b ("Typical instances of voidable contracts are those . . . where the contract was induced by fraud . . . ."); *id.* § 164(1) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."); MURRAY, *supra* note 15, § 18, at 39 ("Illustrations of voidable contracts include . . . contracts induced by fraud . . . .").

22. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b ("Typical instances of voidable contracts are those . . . where the contract was induced by . . . duress . . . ."); *id.* § 175(1) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); MURRAY, *supra* note 15, § 18, at 39 ("Illustrations of voidable contracts include . . . contracts induced by . . . duress.").

23. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(2) ("If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.").

24. *See id.* § 7 cmt. b ("Usually the power to avoid is confined to one party to the contract, but where, for instance, both parties are infants, or where both parties enter into a contract under a mutual mistake, the contract may be voidable by either one of the parties.").

25. PERILLO, *supra* note 4, § 8.3, at 251.

26. *See* MURRAY, *supra* note 15, § 18, at 39 n.183 ("Sometimes the phrase 'void contract' is used incorrectly to mean 'voidable contract.'").

27. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a ("A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is often called a void contract."); PERILLO, *supra* note 4, § 1.8(b), at 18 ("A contract is void . . . when it produces no legal obligation.").

28. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 431-32 (1998) (Breyer, J., concurring).

29. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (noting that a promise that is void "is not a contract at all; it is the 'promise' or 'agreement' that is void of legal effect"); MURRAY, *supra* note 15, § 18, at 39 ("The phrase 'void contract' is a misnomer. Unlike a voidable contract that is a contract until avoided, a 'void contract' never was a contract since there was never any legal obligation."); PERILLO, *supra* note 4, § 1.8, at 18 (noting that the term "void contract" is "a contradiction in terms" and that "[i]t would be more exact to say

previously mentioned, a "void contract" will not be enforced, and neither party is required to perform her promise under such an agreement. Thus it is not really a "contract" at all.

A voidable contract can be avoided even if each party has performed its obligations under the contract, and the contract is therefore fully executed.[30] Thus, even if a party has received consideration for executing a release and has released her claims at the same time, the release can still be avoided if one of the previously mentioned grounds makes the release voidable.

The issue of disaffirmance can arise in different procedural contexts. If the party with the power to disaffirm has not yet performed, she need simply disaffirm and refuse to perform. If the other party sues for breach, the party with the power to disaffirm can raise the disaffirmance as a defense to the action to enforce the contract.[31] If the party with the power to disaffirm has performed and desires the return of the consideration, it will be necessary (if the other party refuses to return the consideration) for the disaffirming party to bring an action to rescind the contract and obtain restitution of the consideration provided.[32] With respect to a release that is voidable, legal proceedings might result because the party with the power to void the release files suit to enforce the original claim, to recover damages for fraudulent inducement of the release, or to obtain a court order of rescission.[33] The party could, in a single action, seek rescission and sue on the original claim.[34]

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that no contract was created"); RESTATEMENT (SECOND) OF CONTRACTS § 1 ("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 law in some way recognizes as a duty.").

30. *See* FARNSWORTH, *supra* note 4, § 4.15, at 253 ("Although there was once authority for the proposition that avoidance for a nonfraudulent misrepresentation was precluded if the contract was fully performed by both parties, this view is now rejected.").

31. *See id.* § 4.15, at 252-53 ("The recipient may avoid the contract by disaffirming it and then assert the misrepresentation . . . by raising it as a defense to an action brought to enforce the contract.").

32. *See id.* ("The recipient may avoid the contract by disaffirming it and then assert the misrepresentation . . . by bringing an action based on avoidance (or 'rescission') of the contract.").

33. Graham v. Atchison, T. & S.F. Ry. Co., 176 F.2d 819, 826 (9th Cir. 1949). *See generally* A.M. Srarthout, Annotation, *Return or Tender of Consideration for Release or Compromise as Condition of Action for Rescission or Cancelation, Action upon Original Claim, or Action for Damages Sustained by the Fraud Inducing the Release or Compromise*, 134 A.L.R. 6, 7 (1941).

34. *See* Srarthout, *supra* note 33, at 7.

B. Ratification

Even though a voidable contract can be avoided by one or more of the parties, a party with the power to avoid the contract can lose that power by ratifying (also called "affirming"[35]) the contract.[36] Ratification of a contract is "[a] person's binding adoption of an act already completed but either not done in a way that originally produced a legal obligation or done by a third party having at the time no authority to act as the person's agent."[37]

Ratification can be express or implied by conduct or a failure to act,[38] but it can only occur after the events giving rise to the voidable nature of the contract cease to exist (for example, the duress or undue influence has ceased, the infant has reached the age of majority, or the person with a mental illness or defect becomes competent)[39] or the facts that make the contract voidable become known (or should have become known) to the party with the power to void it (for example, the mistake or misrepresentation becomes known to the party with the power to void it).[40] The party asserting that the voidable contract was ratified has the burden of demonstrating that the other party intended to ratify it.[41]

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35. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 436 (1998) (Thomas, J., dissenting) (noting that the doctrine of ratification is also known as "affirmation" in contract law).

36. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981) (providing that the power to avoid a contract can be extinguished through ratification); *see also* FARNSWORTH, *supra* note 4, § 4.15, at 252 ("One cannot avoid, however, if one has already ratified the contract."); MURRAY, *supra* note 15, § 18, at 39 ("[E]ven though one of the parties has the power of avoidance, he may extinguish that power by ratification of the contract.").

37. BLACK'S LAW DICTIONARY 1376 (9th ed. 2009).

38. FARNSWORTH, *supra* note 4, § 4.15, at 253; RESTATEMENT (SECOND) OF CONTRACTS § 380 cmt. b ("A party may manifest his intention to affirm by words or other conduct . . . .").

39. *See, e.g.*, PERILLO, *supra* note 4, § 8.3, at 250 ("An effective ratification obviously cannot take place prior to the attainment of majority; any purported ratification prior to that time suffers from the same infirmity of voidability as the contract itself."); FARNSWORTH, *supra* note 4, § 4.19, at 263 (stating that the time in which a party must disaffirm a contract entered into under duress does not commence until the duress has ceased).

40. *See, e.g.*, FARNSWORTH, *supra* note 4, § 4.15, at 253 (stating that the time in which a party must disaffirm a contract entered into due to misrepresentation does not commence until the party discovers that the representation was false); *id.* § 9.3, at 613 (stating that the time in which a party must disaffirm a contract entered into as a result of a mistake does not commence until the party discovers, or should have discovered, the actual facts).

41. Brown v. City of South Burlington, 393 F.3d 337, 343-44 (2d Cir. 2004).

1. Express Ratification

An express ratification will occur when the party with the power to void the contract manifests an intention to affirm it to the other party.[42] This will occur through oral or written words, rather than conduct.

2. Implied Ratification

There are four general ways a party can impliedly ratify a voidable contract. First, ratification will occur if the party with the power to void the contract, "with full knowledge of the material facts entitling him to rescind, has engaged in some unequivocal conduct giving rise to a reasonable inference that he intended the conduct to amount to a ratification."[43] For example, ratification will occur if the party "acts with respect to anything that he has received in a manner inconsistent with disaffirmance."[44] Therefore, ratification will occur if the party uses any property received under the contract as if it were her own,[45] such as the purchaser of a horse continuing to use the horse after discovering the seller's misrepresentation in connection with the sale.[46]

Second, an implied ratification can occur through a mere delay in disaffirming,[47] even if the party has not exercised dominion during the relevant time period over any consideration received from the other side. This will occur either because the party received nothing from the other party or because the consideration is no longer in her possession.[48] Thus a party will be deemed to have ratified the contract if she does not disaffirm within a reasonable time after learning of the

42. RESTATEMENT (SECOND) OF CONTRACTS § 380(1)-(2).

43. *Brown*, 393 F.3d at 344 (quoting 66 AM. JUR. 2D *Release* § 27 (2001)); *see also* 17A AM. JUR. 2D *Contracts* § 11 (2004) (providing that generally, for a ratification to be found, the ratifying party must have acted voluntarily and with full knowledge of any relevant facts).

44. RESTATEMENT (SECOND) OF CONTRACTS § 380(2).

45. FARNSWORTH, *supra* note 4, § 4.15, at 253.

46. Ward v. Marvin, 62 A. 46, 47 (Vt. 1905).

47. RESTATEMENT (SECOND) OF CONTRACTS § 381; FARNSWORTH, *supra* note 4, § 4.15, at 253; PERILLO, *supra* note 4, § 8.3(a), at 251 (noting that an infant who fails to disaffirm within a reasonable amount of time after reaching majority ratifies the contract); § 8.3(c), at 253 ("Ratification by failure to make a timely disaffirmance ... may be considered a kind of ratification by conduct, at least if inaction be deemed conduct.").

48. RESTATEMENT (SECOND) OF CONTRACTS § 381 cmt. a ("Ordinarily, if the party with the power of avoidance retains during the delay something that he has received from the other party, avoidance will be precluded by the rule stated in § 380. The importance of the present Section is, therefore, chiefly in cases in which the party with that power has received nothing.").

contract's defect.[49] In other words, the avoiding party must promptly manifest her election to avoid the contract.[50]

Importantly, though, the duty to promptly exercise the power of avoidance does not arise until the event that caused the voidable nature of the transaction is removed.[51] Thus an infant does not have to void a contract until she reaches the age of majority.[52] With respect to fraud, the duty arises upon discovery of the fraud, and for mistake, the duty arises after that party should be aware of the true facts.[53] With respect to a person with a mental illness or defect who has the power to avoid a contract, the duty to avoid does not arise until the incompetent party regains full capacity.[54]

What is a reasonable amount of time depends on the facts,[55] and "[w]hile a lengthy passage of time *may* be a significant factor, it is not necessarily controlling."[56] Relevant factors include whether (1) as a result of the delay, the "party with the power of avoidance" was able, or might have been able "to speculate at the other party's risk;"[57] (2) the other party or third persons engaged in justifiable reliance as a result of the delay;[58] (3) the voidable nature of the contract was due to either party's fault;[59] and (4) the other party's actions increased the delay.[60]

If the contract is entirely executory, a manifestation of intent to disaffirm is generally not needed until an action is brought against the party with the power to void the contract.[61] Reliance by the party who does not have the power to void the contract is not necessarily required

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49. FARNSWORTH, *supra* note 4, § 4.15, at 253; RESTATEMENT (SECOND) OF CONTRACTS § 381(1)-(2).

50. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. d.

51. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 434 (1998) (Scalia, J., dissenting) ("[R]atification cannot occur until the impediment to the conclusion of the agreement is eliminated. Thus, an infant cannot ratify his voidable contracts until he reaches majority, and a party who has contracted under duress cannot ratify until the duress is removed.").

52. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. c.

53. *Oubre*, 522 U.S. at 434 (Scalia, J., dissenting).

54. RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. d.

55. *See* PERILLO, *supra* note 4, § 8.3(a), at 251 (noting with respect to contract by minors that "[w]hat is a reasonable time is often a question of fact").

56. Brown v. City of South Burlington, 393 F.3d 337, 345 (2d Cir. 2004).

57. RESTATEMENT (SECOND) OF CONTRACTS § 381(3)(a).

58. *Id.* § 381(3)(b).

59. *Id.* § 381(3)(c).

60. *Id.* § 381(3)(d).

61. *Id.* § 7 cmt. d.

for the other party's delay to be unreasonable.[62] Even if the other party has relied, however, and even if a significant amount of time has passed since the original transaction, if the party with the power to void the contract exercises that option within a reasonable time after learning of the facts entitling her to void the contract, avoidance is generally permitted.[63] Additionally, "[t]he power of a party to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and if damages will be adequate compensation."[64]

Third, a combination of delay coupled with the retention of benefits can support a finding of ratification.[65] By retaining the benefits after the voidable nature of the contract has become apparent, the party with the power to void expresses her intention to be bound by the contract and is considered to have made a new promise to abide by its terms.[66] For example, if a party with the power to void a contract retains money received as consideration under the contract after becoming aware of the grounds for voiding the contract, ratification might occur.[67]

Fourth, the receipt of performance after the defect has been removed will usually result in a finding of ratification.[68] Thus a party can be deemed to have ratified a voidable contract if the party accepts the consideration from the other party after the defective nature of the agreement has become apparent.

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62. FARNSWORTH, *supra* note 4, § 4.15, at 253; *see also* Link Assocs. v. Jefferson Standard Life Ins. Co., 291 S.E.2d 212, 215 (Va. 1982) ("[T]he duty of prompt disaffirmance is not dependent upon the proof of harm . . . caused by the delay.").

63. RESTATEMENT (SECOND) OF CONTRACTS § 381 cmt. b.

64. *Id.* § 381(2).

65. *Id.* § 7 cmt. d, § 381; PERILLO, *supra* note 4, § 8.3(c), at 253 ("Retention and enjoyment of property received pursuant to contract for more than a reasonable time after attaining majority involves both kinds of conduct, that is, active use of the property coupled with a failure to disaffirm. Under such circumstances, a ratification will often be found to have occurred.").

66. Aikins v. Tosco Ref. Co., No. C-98-00755-CRB, 1999 WL 179686, at *4 (N.D. Cal. Mar. 26, 1999).

67. Brown v. City of South Burlington, 393 F.3d 337, 344 (2d Cir. 2004).

68. PERILLO, *supra* note 4, § 8.3(c), at 253.

C. Tender Back

The tender-back doctrine requires a party who seeks to void a contract to return any consideration to the other party.[69] Thus, as a general rule, the disaffirming party is required to make restitution of what she received or an equivalent sum of money.[70]

1. Tender Back as a Subset of Ratification or as a Distinct Doctrine

Some courts view the tender-back doctrine as a subset of ratification and find that a failure to tender back the consideration operates as a ratification.[71] The tender-back rule has thus been characterized as a rule that construes a failure to tender the consideration as an act (or omission) that will constitute a ratification of the voidable contract.[72] For example, the tender-back requirement has been described as "an application to releases of the generally applicable ratification doctrine."[73] Thus, it has been stated that "[a] key element of ratification . . . is the failure of the plaintiff to tender back, or to offer to tender back, the consideration that he received in exchange for executing the [contract]."[74] Other courts view tender back and ratification as distinct, though related, doctrines.[75]

2. Time for the Tender Back

Stating that a party who seeks to disaffirm must return any consideration does not answer the question of when the consideration must be returned. Attempting to answer this question reveals that there are two different versions of the tender-back rule. One describes the

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69. Am. Airlines, Inc. v. Cardoza-Rodriquez, 133 F.3d 111, 119 (1st Cir. 1998); *see also* 17A AM. JUR. 2D *Contracts* § 574 (2004) ("[T]he general rule is that a party who wishes to rescind a contract must return the opposite party to the status quo.").

70. FARNSWORTH, *supra* note 4, § 4.15, at 254.

71. Cole v. Gaming Entm't, L.L.C., 199 F. Supp. 2d 208, 215 (D. Del. 2002) (characterizing tender back "as a subset of the ratification doctrine"); *see also* Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359, 1373 (C.D. Ill. 1991) ("States that require a tender to challenge a release . . . sometimes use the language of 'ratification.'").

72. *See Brown*, 393 F.3d at 344 ("In order to avoid a finding of ratification where consideration has been paid, it is essential that the [party with the power to void the contract] tender back the sum received.").

73. Reid v. IBM Corp., No. 95 Civ. 1755(MBM), 1997 WL 357969, at *10 (S.D.N.Y. June 26, 1997).

74. Livingston v. Bev-Pak, Inc., 112 F. Supp. 2d 242, 249 (N.D.N.Y. 2000).

75. *See* Davis v. Eastman Kodak Co., No. 04-CV-6098, 2007 WL 952042, at *6 (W.D.N.Y. Mar. 29, 2007) ("Though factually related, and thus often lumped together for analytical purposes, the rules of ratification and tender-back can represent distinct hurdles . . . .").

rule as requiring a tender back within a reasonable amount of time, and the other describes the rule as requiring a tender back before filing suit to obtain restitution or to sue on a released claim.

The doctrine of implied ratification generally requires that tender back occur no later than a reasonable amount of time. For example, as previously discussed, under the law relating to implied ratification, delay coupled with the retention of benefits can support a finding of ratification.[76] In this respect, the tender-back rule is properly considered a subset of the ratification doctrine.

Some courts, however, characterize the tender-back doctrine as a rule that requires the tender back as a condition precedent to filing suit for restitution or on claims that have been released.[77] Justice Clarence Thomas has described the doctrine in these terms,[78] and his definition has been used by some lower courts.[79]

Under this version of the rule, a party who disaffirms a contract and files suit to obtain restitution will not be granted relief unless "he returns or offers to return, conditional on restitution, any interest in property that he has received in exchange in substantially as good condition as when it was received by him."[80] Therefore, even if a party promptly manifests an intent to disaffirm and then promptly brings suit, the failure to tender back or offer to tender back the consideration will bar the suit. Importantly, "If a party seeking restitution offers to return what he has received, he may make his offer conditional on restitution being made to him."[81] The purpose of this version of the tender-back rule is to protect the defendant in an action to rescind a contract; "the defendant should not by rescission sacrifice the benefits

76. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. d, § 381 (1981).

77. *See* Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359, 1373 (C.D. Ill. 1991) ("States that require a tender to challenge a release sometimes use the language of 'condition precedent to suit' . . . .").

78. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 436-37 (1998) (Thomas, J., dissenting) ("The tender back doctrine requires, *as a condition precedent to suit*, that a plaintiff return the consideration received in exchange for [the] release . . . .") (emphasis added)); *see also* 17A AM. JUR. 2D *Contracts* § 575 (2004) ("Ordinarily, before an action at law for rescission of a voidable contract can be maintained, such restitution of what the plaintiff has received by virtue of the contract as is necessary to put the other party back in the position he or she was in prior to the making of the contract must be made or attempted.").

79. *See Davis*, 2007 WL 952042, at *6 (quoting Justice Thomas's definition of tender back in *Oubre*).

80. RESTATEMENT (SECOND) OF CONTRACTS § 384(1)(a).

81. *Id.* § 384 cmt. b.

of the agreement and at the same time not be restored the benefits previously received by the plaintiff."[82]

The American Law Institute (ALI), in the Restatement (Second) of Contracts, provided an exception for the requirement of tender back prior to the filing of suit. If the court can ensure the return of the consideration in connection with the relief granted, a presuit tender is not necessary.[83] This exception originated in equity. In an equity action, the failure to make an offer to tender back the consideration before filing suit did not preclude relief, and the court's decree could be made conditional on such an offer.[84] In an action at law, however, an offer was generally considered a condition precedent to a suit based on rescission, except perhaps when the party with the power to void averred that a tender would not be accepted.[85]

The ALI and Professor E. Allan Farnsworth, the Reporter for the Restatement chapter on remedies in the Restatement (Second) of Contracts,[86] felt that "[t]he merger of law and equity and modern procedural reforms" rendered any such distinction between law and equity undesirable,[87] and the Restatement therefore provides a single rule applicable to both types of actions.[88] Thus, under the Restatement (Second) of Contracts, if the court has the power to ensure the tender back in connection with its order of relief, a presuit tender is not necessary.[89] The ALI made it clear, however, that even though a presuit tender might not be necessary, ratification might still occur through the exercise of dominion over the consideration.[90]

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82. Thorstenson v. ARCO Alaska, 780 P.2d 371, 375 (Alaska 1989); *see also* Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994) (Posner, J.) ("The tender requirement . . . is a protection for defendants . . . ."). The phrase "rescission of contract" refers to not merely the termination of a contract, but the undoing of it from its inception. BLACK'S LAW DICTIONARY 679 (5th ed. 1983). Rescission can occur (1) by mutual agreement of the parties, (2) by one of the parties unilaterally rescinding when there are legally sufficient grounds to do so, or (3) by seeking a court order rescinding the agreement. *Id.*

83. RESTATEMENT (SECOND) OF CONTRACTS § 384(1)(b).

84. *Id.* § 384 cmt. b.

85. *Id.*; FARNSWORTH, *supra* note 4, § 4.15, at 254-55.

86. *See* Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2043 (2001) (noting that Professor E. Allan Farnsworth was the "Reporter for the chapter on contract remedies").

87. RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b; *see also* FARNSWORTH, *supra* note 4, § 4.15, at 255 (discussing how rules in equity should be applied to actions at law today).

88. RESTATEMENT (SECOND) OF CONTRACTS § 384(1)(b).

89. *Id.* § 384 cmt. b.

90. *Id.*

Exceptions to the requirement of a tender back prior to bringing suit include a situation in which a release was provided without consideration or the plaintiff alleges that assent to the contract was obtained through fraud.[91] Another exception is if the party no longer possesses the property because it "has been used or disposed of without knowledge of the grounds for restitution if justice requires that compensation be accepted in its place and the payment of such compensation can be assured."[92] Also, when the plaintiff is an infant, and the property the infant received has depreciated, courts are divided on whether the infant must, in addition to returning the property, account for any depreciation or damage to the property.[93]

III. SUPREME COURT PRECEDENT INVOLVING THE APPLICABILITY OF THE RATIFICATION AND TENDER-BACK DOCTRINES TO THE RELEASE OF CLAIMS UNDER FEDERAL STATUTES

The Supreme Court has addressed the applicability of the ratification and tender-back doctrines to federal statutes twice: in *Hogue v. Southern Railway Co.*[94] and *Oubre*.[95] Both cases are discussed below.

A. Hogue v. Southern Railway Co.

In *Hogue*, the Supreme Court addressed the applicability of the tender-back doctrine to a claim under the Federal Employers' Liability Act of 1908 (FELA).[96] The plaintiff was an employee of Southern Railway Company who injured his knee during employment.[97] The plaintiff alleged that the employer's doctor had assured him and the employer that he had only suffered a bruised knee and was not permanently injured.[98] As a result, the parties executed an agreement under which the plaintiff released his claims against the employer in exchange for $105.[99] The plaintiff alleged that it was later determined that he had suffered a permanent injury, he had to undergo two surgeries, and he ultimately lost a kneecap.[100]

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91. *Id.*
92. *Id.* § 384(2)(b).
93. PERILLO, *supra* note 4, § 8.5(b), at 255-56.
94. 390 U.S. 516 (1968).
95. 522 U.S. 422 (1998).
96. 390 U.S. 516; 45 U.S.C. § 51 (2006).
97. 390 U.S. at 517.
98. *Id.*
99. *Id.*
100. *Id.*

The plaintiff brought suit in Georgia state court under FELA, asserting that the release was voidable because of mutual mistake.[101] The plaintiff, however, apparently did not tender back the $105 prior to bringing suit.[102] The Georgia Court of Appeals held that a plaintiff who seeks to void a release of claims under FELA on the grounds of mutual mistake must, as a condition to filing suit, tender back to the employer the consideration for the release and, therefore, entered judgment in the employer's favor.[103]

The Supreme Court reversed.[104] The Court first held that federal law, not state law, applies to the issue of whether tender back prior to suit was required.[105] It then held that "a tender back is . . . not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries."[106] The Court disclaimed the need to rely on section 5 of FELA,[107] which provides that "[a]ny contract . . ., the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."[108] Rather, the Court stated:

> It is sufficient for the purposes of this decision to note that a rule which required a refund as a prerequisite to institution of suit would be 'wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.' Rather it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.[109]

What is interesting about *Hogue* is that the Court did not address the particulars of the plaintiff's situation or whether he was able (or unable) to return the consideration prior to filing suit. Rather than adopting a flexible standard, the Court adopted a rule that tender back would never be required as a prerequisite to suit (at least when the contract was voidable for mutual mistake based on the nature and

101. *Id.* at 516.
102. *Id.* at 517.
103. *Id.* at 516.
104. *Id.* at 518.
105. *Id.* at 517.
106. *Id.*
107. *See id.* at 518 ("There is no occasion to decide whether the release here involved violated § 5.").
108. 45 U.S.C. § 55 (2006).
109. *Hogue*, 390 U.S. at 518 (quoting Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 362 (1952)).

extent of the plaintiff's injuries). Another interesting aspect of *Hogue* is that the Court did not require that an obligation to repay the consideration arise upon the rescission of the release but only required the amount to be deducted from any recovery by the plaintiff.[110]

Notably, the Court did not address the ratification doctrine. Thus, the decision should not be read as holding that the ratification doctrine does not apply to the release of FELA claims.[111]

B. Oubre v. Entergy Operations, Inc.

In *Oubre*, the Supreme Court addressed the applicability of the ratification and tender-back doctrines to the avoidance of a release under the ADEA.[112] In *Oubre*, an employee had signed a release of all claims against her employer as part of a termination agreement and in return had received severance pay in installments.[113] The release, however, had not complied with the requirements under the OWBPA for an effective release of ADEA claims.[114] After the employee received her last payment, she brought suit against her employer for age discrimination.[115]

The employee, however, had not returned or offered to return the severance pay to the employer, and it was not clear she had the means to do so.[116] The employer argued that the employee ratified the release by keeping the severance payments and that, even if she had not ratified the release, she was required to tender back the money as a condition to filing suit.[117] The employer also relied on the doctrine of equitable estoppel, asserting that "equitable estoppel bars a party from

110. *Id.*

111. *See, e.g.*, Norfolk S. Corp. v. Smith, 414 S.E.2d 485, 487 (Ga. 1992) (finding nothing in *Hogue* as prohibiting the application of ratification to a FELA release).

112. 522 U.S. 422 (1998); 29 U.S.C. §§ 621-634 (2006).

113. *Oubre*, 522 U.S. at 423-24. The release provided that "she 'agree[d] to waive, settle, release, and discharge any and all claims, demands, damages, actions, or causes of action . . . that [she] may have against Entergy.'" *Id.* at 424. The severance pay included six payments totaling $6258 paid over four months. *Id.*

114. *Id.* at 424. The release did not give the employee at least twenty-one days to consider the agreement, did not give her seven days after signing the release to revoke it, and did not specifically refer to rights or claims arising under the ADEA. *Id.* at 424-25; *see* 29 U.S.C. § 626(f)(1)(B), (F)(i), (G) (requiring that waiver of rights under ADEA is not effective unless, among other things, "the waiver specifically refers to rights or claims arising under this chapter," "the individual is given a period of at least 21 days within which to consider the agreement," and "the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired").

115. *Oubre*, 522 U.S. at 424.

116. *Id.* at 425.

117. *Id.*

shirking the burdens of a voidable transaction for as long as she retains the benefits received under it."[118] The district court granted summary judgment in the employer's favor, and the court of appeals affirmed.[119]

The Supreme Court reversed.[120] The Court, asserting that "[t]hese general rules [regarding ratification, tender back, and equitable estoppel] may not be as unified as the employer asserts," held that they would not apply to a waiver of ADEA rights in any event.[121] The Court held that the application of these contract law doctrines was barred by the OWBPA's text,[122] which provides that an employee may not waive claims under the ADEA unless the waiver complies with the OWBPA's specific requirements.[123]

The Court also found that the application of the contract law doctrines of ratification, tender back, and equitable estoppel "would frustrate the statute's practical operation" because employees will often have spent the money and be unable to return the funds.[124] In turn, this may "tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification."[125] The Court noted, however, that the employer might have "claims for restitution, recoupment, or setoff against the employee,"[126] and Justice Stephen Breyer (joined by Justice Sandra Day O'Connor), concurring in the opinion, wrote separately to emphasize that once an employee has sued, "nothing in the statute prevents his employer from asking for restitution of his reciprocal payment or relief from any ongoing reciprocal obligation."[127]

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118. *Id.* at 425-26.

119. *Id.* at 425.

120. *Id.* at 428.

121. *Id.* at 426-27.

122. *Id.*

123. *See* 29 U.S.C. § 626(f)(1) (2006) ("An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum . . . ."); *Oubre*, 522 U.S. at 426-27.

124. *Oubre*, 522 U.S. at 423.

125. *Id.* at 427; *see also Title VII—Tender Back Rule—Ratification of Release,* Rangel v. El Paso Natural Gas Co., *996 F. Supp. 1093 (D.N.M. 1998)*, 13 FED. LITIGATOR 247, 248 (1998) ("An important factor in the *Oubre* approach . . . is the obstacle a tender back requirement or ratification rule places in the way of achieving the anti-discrimination objectives of the ADEA . . . .").

126. *Oubre*, 522 U.S. at 428.

127. *Id.* at 433 (Breyer, J., concurring).

IV. LOWER COURTS AND THE APPLICABILITY OF THE RATIFICATION AND TENDER-BACK DOCTRINES TO THE RELEASE OF TITLE VII CLAIMS

Lower courts have divided on the issue of whether the ratification and tender-back doctrines apply to the release of Title VII claims. The relevant case law is discussed below, organized according to the Circuit in which the court sits.

A. The Second Circuit

Although the United States Court of Appeals for the Second Circuit has not ruled on whether tender back and ratification apply to Title VII releases, district courts within the Second Circuit have consistently applied those doctrines.

In *Kristoferson v. Otis Spunkmeyer, Inc.*, the court engaged in a thorough and thoughtful analysis of the issue and adopted an innovative approach.[128] The plaintiffs alleged that they had been terminated because "of their gender, in violation of Title VII and various state statutes."[129] The employer alleged that when they were terminated, the plaintiffs, in exchange for consideration, each executed agreements releasing the employer from any claims.[130]

The employer moved for summary judgment on the ground that the plaintiffs had ratified the releases by failing to tender back the consideration before filing suit.[131] The court noted that ratification can only occur when the putative plaintiff, after becoming aware that the release is potentially voidable, retains the benefits.[132] The court felt that the typical employee will have already spent the money by the time she realizes it is voidable and repayment might have to include partial payments over time.[133] The court therefore felt that "as a practical matter, a strict application of a tender-back requirement would prevent many employees from whom releases had been coercively obtained from ever challenging the validity of the releases."[134]

The court recognized, however, that permitting employees to retain the consideration and still sue was not only unfair, but would

128. 965 F. Supp. 545 (S.D.N.Y. 1997).
129. *Id.* at 546.
130. *Id.*
131. *Id.*
132. *Id.* at 548.
133. *Id.*
134. *Id.*

promote "doubtful litigation," which conflicted with the policy of encouraging the voluntary settlement of claims.[135] The court decided:

> Balancing these competing considerations ... requires a federal court to take the same kinds of initiatives as courts in equity have historically taken to lessen the rigors of the common law. In particular, equity's answer to the severe common law requirement of tendering-back was to permit an offer to tender back, made coincident with the bringing of the action challenging the underlying contract, to substitute for the actual tender.[136]

The court therefore required the plaintiff to agree to repay the amount pursuant to a schedule to be determined by the court, after the conclusion of the case, if the release were declared invalid (regardless of whether the plaintiff prevailed).[137] The court explained its reasoning for this approach as follows:

> The Court's theory in promulgating this approach is to place formerly-released plaintiffs at some potential economic risk if they choose to breach the facial terms of the release by bringing Title VII actions, while, on the other hand, not to impose an immediate price to the bringing of such a lawsuit that may prove prohibitive to legitimate victims of discrimination whose very economic circumstances may have contributed to their involuntarily executing a dubious release. In short, the object is to make sure that neither side gets a completely free ride on the expensive conveyance of legal process.[138]

Other district courts in the Second Circuit have applied the ratification and tender-back doctrines less flexibly. In *Tung v. Texaco Inc.*, the plaintiff executed a release when he was terminated, which allowed him to receive enhanced benefits.[139] He received approximately $46,000 between May 3, 1995 and November 1, 1995.[140] After receiving a notice of right to sue from the United States Equal Employment Opportunity Commission (EEOC) on March 7, 1997, he filed suit under Title VII and the ADEA without returning the benefits.[141] When his employer moved for summary judgment on the

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135. *Id.*

136. *Id.* at 548-59 (citations omitted).

137. *Id.* at 549.

138. *Id.*

139. 32 F. Supp. 2d 115, 117 (S.D.N.Y. 1997), *aff'd in part, vacated in part*, 150 F.3d 206 (2d Cir. 1998).

140. *Id.* at 118 n.2.

141. *Id.* at 116, 118.

ground that the plaintiff had released his claims, the plaintiff offered to return the benefits.[142]

The district court, however, found that the offer was too late, concluding that the plaintiff had ratified the allegedly defective release by accepting and retaining the severance payments and not seeking to return them sooner.[143] On appeal, the Second Circuit vacated the ratification holding with respect to the ADEA claim because of *Oubre*, which had been decided in the interim, but affirmed the Title VII dismissal because the court felt that under the totality-of-the-circumstances test, the plaintiff's waiver of his Title VII rights was knowing and voluntary.[144]

In *Reid v. IBM Corp.*, the plaintiff took voluntary retirement, under which he executed a release (which included a release of Title VII claims) in return for severance benefits totaling $28,000 after taxes.[145] The plaintiff then sued his former employer under Title VII, the ADEA, the Americans with Disabilities Act of 1990, and New York state law without having returned or having offered to return the consideration for the release.[146] The employer moved for summary judgment, asserting, among other things, that the release barred his claims.[147]

The court held that the plaintiff had ratified the release by accepting the consideration and failing to tender it back.[148] The court rejected the approach taken in *Kristoferson*, finding its articulated policy considerations were insufficient to overcome the long-established tender-back requirement and the lack of any evidence of congressional modification of the rule.[149] Additionally, the court felt that federal common law would include the ratification and tender-back doctrines because they are basic to contract law.[150]

The court rejected the *Kristoferson* policy considerations because the opinion offered no empirical support for the conclusion that the typical employee will have already spent the monies received by the

142. *Id.*
143. *Id.*
144. Tung v. Texaco Inc., 150 F.3d 206, 208-10 (2d Cir. 1998).
145. No. 95 Civ. 1755(MBM), 1997 WL 357969, at *2 (S.D.N.Y. June 26, 1997).
146. *Id.* at *1, *3.
147. *Id.* at *1.
148. *Id.* at *10.
149. *Id.* at *12. The court noted that "[m]ost states abide by the tender back requirement." *Id.* The court also noted that the Supreme Court had directed courts to read statutes so that the common law remains intact in the absence of congressional intent to the contrary. *Id.* (citing United States v. Texas, 507 U.S. 529 (1993)).
150. *Reid*, 1997 WL 357969, at *12.

time she realizes the release is voidable.[151] Additionally, even if there was support for that statement, the court felt that the *Kristoferson* rule would not improve the situation because the plaintiff would still be required to return the monies after the litigation, and this approach would simply postpone the employee's obligation.[152]

The court concluded by distinguishing *Hogue* on the grounds that Congress's purpose in enacting FELA was to facilitate employee recoveries for injuries by removing several common law defenses for employers and providing for liability if an employer's negligence was in any way responsible for the employee's injury.[153] The court felt that the Court's holding in *Hogue* thus advanced the broad remedial purpose of FELA by removing another common law obstacle to an employee's recovery.[154] The court felt that Congress had not evinced a similar intent under Title VII "to promote liberal, unburdened and expeditious recoveries" for plaintiffs.[155]

The court also believed that eliminating the tender-back requirement as a condition to a FELA suit and deducting the consideration for the release from the final award makes sense in a FELA case because, in such a case, unlike in a Title VII case, an award is virtually guaranteed.[156] Also, the court relied on the fact that some courts had read *Hogue* narrowly as simply creating an exception where the release was obtained through mutual mistake or fraud.[157] Lastly, the court did not believe the Supreme Court in *Hogue* would have intended such a far-reaching holding through a three-paragraph *per curium* opinion.[158] Accordingly, the court limited *Hogue* to FELA cases.[159]

In *Livingston v. Bev-Pak, Inc.*, the plaintiff, who had filed a charge of discrimination against his current employer, signed a release in exchange for $10,000.[160] More than two years later, the plaintiff brought suit against his former employer under Title VII and state

151. *Id.*
152. *Id.*
153. *Id.* at *15.
154. *Id.*
155. *Id.* (quoting Wamsley v. Champlin Ref. & Chems., Inc., 11 F.3d 534, 541 (5th Cir. 1993), *overruled on other grounds by* Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998)).
156. *Reid*, 1997 WL 357969, at *16.
157. *Id.* (citing Raczak v. Ameritech Corp., 103 F.3d 1257, 1267 (6th Cir. 1997) (Boggs, J., dissenting)).
158. *Id.*
159. *Id.*
160. 112 F. Supp. 2d 242, 246 (N.D.N.Y. 2000).

law.[161] The plaintiff had not tendered back or offered to tender back the consideration despite the fact that he had been represented by counsel for two years and his counsel was aware of the tender-back requirement.[162] The district court found that the plaintiff's inaction resulted in a ratification of the release, even if it was otherwise voidable.[163]

In *Cheung v. New York Palace Hotel*, the plaintiff was terminated by her employer, and she signed a severance agreement under which she received approximately $80,000 in return for releasing any claims against the employer, including Title VII claims.[164] The plaintiff thereafter filed suit under Title VII and state statutes, and the employer moved to dismiss on the grounds that she had not tendered back the consideration.[165] The court, concluding it was bound by Second Circuit precedent, dismissed the case because it was "undisputed that plaintiff ha[d] failed to tender back the consideration she received for releasing her claims nor ha[d] she made such an offer."[166]

In *Wright v. Eastman Kodak Co.*, the plaintiffs accepted payments of approximately $21,000 and $10,000 in exchange for executing releases but then filed suit under Title VII and other laws.[167] The district court granted summary judgment on the claims based on the releases, finding, among other things, that pursuant to New York law the plaintiffs had ratified the releases by accepting and retaining the payments and making no effort to return them.[168]

In *Davis v. Eastman Kodak Co.*, the plaintiffs brought suit under Title VII despite having executed releases at the time of their

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161. *Id.* at 244, 246.

162. *Id.* at 249.

163. *Id.*

164. No. 03-CV-0091 DLI WDW, 2005 WL 2387573, at *1 (E.D.N.Y. Sept. 28, 2005).

165. *Id.* at *4.

166. *Id.* The district court incorrectly concluded it was bound by the Second Circuit opinion in *Tung v. Texaco Inc.*, 150 F.3d 206 (2d Cir. 1998). Although the defendant in *Tung* had argued that a release of Title VII claims had been ratified, the Second Circuit affirmed the dismissal of the plaintiff's Title VII case because "under the totality-of-the-circumstances analysis, Tung's waiver of his right to sue under Title VII was knowing and voluntary." *Id.* at 208. Accordingly, the release would not have been voidable, rendering the ratification issue irrelevant. The district court also relied on *Brown v. City of South Burlington*, 393 F.3d 337 (2d Cir. 2004), a case whose central claim was one under the False Claims Act. *Id.* at 346. The court in *Brown* held that ratification and tender-back doctrines applied and distinguished *Oubre* and *Hogue* because "[w]ith regard to retaliation actions brought under the False Claims Act, . . . Congress provided no relief from the common law rules governing tender and ratification." *Id.* Thus, the district court's reliance in *Cheung* on *Brown* is more defensible than its reliance on *Tung*.

167. 445 F. Supp. 2d 314, 315-16 (W.D.N.Y. 2006).

168. *Id.* at 320.

separation from employment in return for severance payments.[169] Prior to commencing suit, the plaintiffs did not return or offer to return the payments.[170] The court recognized that courts within the Second Circuit had applied ratification and tender back in Title VII cases, and thus the court held that the releases were enforceable under those doctrines because the plaintiffs failed to return the consideration, even after they were aware of the facts that allegedly rendered the releases voidable.[171] With respect to the *Kristoferson* approach, the court stated: "While this approach is innovative, it has not been suggested by plaintiffs in response to the instant motion, it has not been endorsed by the Second Circuit, and this Court declines to adopt it here."[172]

B. Third Circuit

In *Cole v. Gaming Entertainment, L.L.C.*, the plaintiff was terminated by his employer, and he then signed a release of any claims (including Title VII claims) in exchange for approximately $3000.[173] The plaintiff thereafter filed suit against his employer under Title VII and the ADEA.[174] The employer moved to dismiss the complaint, arguing, among other things, that the plaintiff had ratified the release and failed to tender back the consideration prior to filing suit.[175] The district court held that ratification does not apply to Title VII claims, relying on a United States Court of Appeals for the Third Circuit post-OWBPA, pre-*Oubre* case that held that ratification does not apply to ADEA releases.[176] The district court relied on the fact that the Third Circuit, as a result of *Hogue*, made broad statements that tender back should not apply to "federal remedial statutes."[177]

Also, the court found that "the purposes of Title VII would be eroded if [Title VII releases] were made subject to the tender back and ratification doctrines."[178] The court further held that even if the tender-back doctrine applied in general, it did not apply to the instant case because the consideration was provided for the ADEA release as well,

169. No. 04-CV-6098, 2007 WL 952042, at *1 (W.D.N.Y. Mar. 29, 2007).
170. *Id.* at *9.
171. *Id.* at *7, *9.
172. *Id.* at *9 n.7.
173. 199 F. Supp. 2d 208, 210-11 (D. Del. 2002).
174. *Id.* at 210.
175. *Id.*
176. *Id.* at 215-16 (citing Long v. Sears Roebuck & Co., 105 F.3d 1529 (3d Cir. 1997)).
177. *Id.* at 216.
178. *Id.* at 216 n.4.

and the tender-back doctrine did not apply to an ADEA release that did not comport with the OWBPA. The inability to segregate the consideration meant none of it needed to be tendered back.[179] The court then held that because of the similarities between ratification and tender back, the ratification doctrine did not apply either.[180] In any event, according to the court, the current record was insufficient to demonstrate a clear intent to ratify the release because a short time after signing the release the plaintiff filed an EEOC charge, which was evidence of an intent not to ratify.[181] The court did state, however, that if the plaintiff prevailed, it would be appropriate to reduce the award by the amount of consideration for the release.[182]

C. Fifth Circuit

In *Ware v. Cooper Cameron Iron Works*, the plaintiff was terminated from employment as part of a reduction in force.[183] The plaintiff then executed an agreement under which he received nine weeks of pay in exchange for releasing the company from any claims, including claims under Title VII.[184] After receiving the checks, the plaintiff deposited them into his bank account.[185] The record indicated that although the plaintiff "had contacted attorneys prior to being laid off, he did not consult with counsel prior to executing the release or cashing the checks."[186]

About three months later, the plaintiff filed suit against his former employer alleging the employer had discriminated against him based on his race in violation of Title VII by laying him off and subjecting him to a hostile work environment and different work conditions.[187] With respect to the release, the employee took the position that his consent was not knowing and voluntary and that it was procured by duress and misrepresentation.[188] The plaintiff did not, however, return the consideration to his employer.[189]

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179. *Id.* at 216.
180. *Id.* at 217.
181. *Id.*
182. *Id.*
183. No. CIV.A. 01-0280, 2002 WL 1274793, at *1 (W.D. La. Apr. 24, 2002).
184. *Id.* at *1-2.
185. *Id.* at *2.
186. *Id.*
187. *Id.*
188. *Id.* at *3.
189. *Id.* at *4.

The employer moved for summary judgment, arguing, among other things, that even if the release was voidable, the plaintiff had ratified the release by not tendering back the consideration.[190] The district court agreed.[191] The court relied on United States Court of Appeals for the Fifth Circuit precedent involving pre-*Oubre* ADEA claims and Worker Adjustment and Retraining Notification Act cases for the proposition that "[t]he Fifth Circuit has repeatedly held that retaining the consideration after learning that the release is voidable constitutes a ratification of the release."[192]

The court stated that "[a] person who signs a release, then sues his employer for matters covered under the release, is obligated to return the consideration."[193] The court further stated that "[t]o properly rescind the contract, the employee must . . . restore the status quo ante, and . . . rescind shortly after the discovery of the alleged deficiency" and that "[o]ffering to tender back the consideration after obtaining relief in the lawsuit would be insufficient to avoid a finding of ratification."[194] The court therefore concluded that the plaintiff had ratified the release, and summary judgment was entered in the employer's favor.[195]

D. Sixth Circuit

In *Gascho v. Scheurer Hospital*, the plaintiff executed a separation agreement on March 1, 2007, under which she received one year's salary and reimbursement of the Consolidated Omnibus Budget Reconciliation Act's premium payments for eighteen months (an estimated total value of $70,000) in exchange for a release of any claims against her employer, including Title VII claims.[196] According to the plaintiff, she learned that she could seek to revoke the agreement in the summer of 2007.[197] On November 19, 2007, she retained counsel to pursue that possibility.[198]

On December 17, 2007 (nine-and-a-half months after signing the separation agreement, and half a year after learning she could seek to revoke the agreement), the plaintiff's attorney sent a letter to the

190. *Id.* at *2.
191. *Id.* at *4.
192. *Id.* The court did not discuss *Oubre*'s potential effect on Title VII releases. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. 589 F. Supp. 884, 888 (E.D. Mich. 2008).
197. *Id.*
198. *Id.*

former employer, advising that the firm had been retained to represent the plaintiff with respect to a wrongful discharge claim.[199] The attorney further stated that the plaintiff was tendering back the severance payments and was repudiating the separation agreement. The attorney further stated that unless the employer responded by a certain date, the plaintiff would presume the tender had been rejected.[200] According to the employer, the letter did not contain any form of payment.[201]

The employer responded on January 7, 2008, stating that it believed the agreement was effective, but that if the plaintiff intended to challenge its enforceability, she must provide the employer with the consideration that had been provided under the agreement.[202] On March 6, 2008, the plaintiff, without having returned the consideration, commenced an action seeking to rescind her separation agreement and asserted claims for sexual harassment, employment discrimination, breach of contract, and retaliation under Title VII and Michigan law.[203]

The employer moved to dismiss, arguing that the plaintiff had not tendered back the consideration as required under Michigan state law.[204] In lieu of a hearing on the motion, counsel for the parties attended a status conference, and they agreed to confer regarding the amount the plaintiff was required to tender back to the employer to pursue her rescission claim.[205] The plaintiff thereafter tendered the necessary amount into an escrow account.[206] Then, when the plaintiff sought to amend her complaint, the employer again moved to dismiss, arguing, among other things, that the plaintiff's sexual harassment and employment claims were barred because of the plaintiff's failure to tender back the consideration received under the separation agreement prior to, or contemporaneous with, filing suit, as required under Michigan law.[207]

With respect to the application of the tender-back doctrine to the plaintiff's Title VII claims, the court stated that federal law, not Michigan state law, controls the enforceability of a release of federal claims.[208] The court then held that the tender-back rule did not

199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 886.
204. *Id.* at 886, 890.
205. *Id.* at 886.
206. *Id.*
207. *Id.* at 890.
208. *Id.* at 891 (citing Street v. J.C. Bradford & Co., 886 F.2d 1472, 1481 (6th Cir. 1989)).

preclude the amendment of the plaintiff's Title VII claims.[209] The court relied on the Supreme Court's decision in *Oubre*, noting that the Court had emphasized that application of the tender-back rule to the ADEA would deter ADEA claims because the employee will have often spent the money.[210] The court also noted that Title VII and the ADEA "are similar in that they address employment opportunities," and that "the purpose of Title VII, like the ADEA, is to make it easier for plaintiffs to bring meritorious suits."[211] The court also noted that even if federal law required the consideration to be tendered back, "federal law does not require that the tender back be before, or contemporaneous with, the filing of the original complaint."[212]

In *Wright v. Apple Creek Development Center*, the plaintiff, after being removed from her position, entered into an agreement with her employer under which her termination was changed to a resignation, and she received $3000 and a neutral reference in exchange for a release of any claims.[213] Prior to signing the agreement, she had filed a charge of discrimination against her employer with the EEOC, and after signing the agreement, she cashed the check, filed suit nine months later alleging discrimination in violation of Title VII and the ADEA (without having told her employer of her intent to void the release), and failed to tender back the $3000.[214] The court granted summary judgment for the employer because, among other reasons, her retention of the consideration after learning of the voidable nature of the agreement was a ratification of the release, and she also failed to tender it back.[215] The court stated: "[The plaintiff] failed to repudiate the agreement until she filed suit, and is therefore bound by her waiver."[216]

E. Seventh Circuit

The leading case in the United States Court of Appeals for the Seventh Circuit (or perhaps any Circuit for that matter) addressing the applicability of the tender-back doctrine to Title VII is Judge Richard Posner's opinion for the court in *Fleming v. United States Postal*

209. *Id.*
210. *Id.* (citing Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998)).
211. *Id.*
212. *Id.* The court did not reference *Oubre*, even with respect to the plaintiff's ADEA claim.
213. No. 5:06 CV 0542, 2008 WL 818790, at *2 (N.D. Ohio Mar. 24, 2008).
214. *Id.*
215. *Id.* at *3-4.
216. *Id.* at *3.

Service AMF O'Hare.[217] In *Fleming*, the plaintiff was an African-American woman with schizophrenia and a hearing impairment who was fired from the United States Postal Service.[218] She believed the Postal Service had discriminated against her in violation of Title VII, and after filing a charge of discrimination with the EEOC, she commenced an action in federal court.[219]

When the Postal Service offered to settle the case for $75,000 ($50,000 to her and $25,000 for her attorney's fees), the district court judge held a settlement hearing, during which the plaintiff's lawyer told the judge that they had conferred and the plaintiff wanted to accept the settlement offer.[220] Thereafter, the parties apparently entered into a written settlement agreement.[221] After the case was dismissed, the plaintiff asked the court to reinstate the case, asserting that she had not comprehended the significance of the settlement agreement and wanted to be reinstated to employment despite no provision for reinstatement in the agreement.[222] The district court refused to reopen the case, and the plaintiff received and cashed the $50,000 check from the Postal Service, and her attorney received a check for $25,000.[223]

A couple of weeks later, and presumably after she had cashed her check, the plaintiff, acting pro se, filed a handwritten motion under Federal Rule of Civil Procedure 60(b) alleging that she had been "'confused, disoriented, and under a lot of pressure' at the settlement hearing and did not remember having instructed her lawyer to accept the Postal Service's offer."[224] The district judge denied the motion, the plaintiff retained new counsel, and the plaintiff appealed.[225]

Although the briefs on appeal focused on the principles governing Rule 60(b), when settlements or releases may be rescinded, what authority attorneys have to settle cases on behalf of clients, the relevance of a party's mental illness, and the applicable source of law, Judge Posner avoided all of these issues and decided the case in favor of the Postal Service on the tender-back doctrine.[226]

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217. 27 F.3d 259 (7th Cir. 1994). The panel also included Judge Easterbrook. *Id.* at 259.

218. *Id.* at 260.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 260-62.

Judge Posner stated that it was "one of the most elementary principles of contract law . . . that a party may not rescind a contract without returning to the other party any consideration received under it."[227] Although noting that it was not clear whether Illinois state law or federal common law should provide the rule of decision, Judge Posner stated that it did not make a difference because the tender-back principle was established in Illinois and as a "general principle of contract law . . . would surely be a component of any federal common law of releases."[228]

In support of the tender-back rule, Judge Posner stated that "[n]ot even plaintiffs are helped in the long run by a rule allowing them to have their cake and eat it, for a defendant will not pay as much for a release that the plaintiff can challenge without having to repay the money as the price of maintaining the challenge."[229] He later added that "a premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract."[230] Judge Posner distinguished cases under FELA, the Jones Act, and the ADEA because each of those statutes regulates releases, and, in such a case, the common law rule requiring tender as a condition precedent to rescission "may have to give way."[231] Judge Posner recognized that "no statute regulates [Title VII] releases."[232]

Judge Posner then noted that the plaintiff never tendered the consideration she received (the full $75,000, which included the amount for attorney's fees), which made it irrelevant whether any tender would have needed to have preceded the commencement of the action "or whether, as courts now hold in equity cases . . . , it is enough that the complaint contains an offer to restore the consideration, an offer that the court could enforce by a conditional judgment."[233] Although Judge Posner felt the plaintiff could not be faulted for not realizing she had to make a tender prior to filing her pro se Rule 60(b) motion, her counsel on appeal never asked that the case be remanded to the district court so that the plaintiff could file a proper Rule 60(b) motion with the required tender, nor did he ever tell the appellate court that the plaintiff was willing and able to tender the $75,000 in return

227. *Id.* at 260.
228. *Id.* at 260-61.
229. *Id.* at 261.
230. *Id.*
231. *Id.*
232. *Id.* at 262.
233. *Id.* at 261.

for the rescission of the agreement.[234] The plaintiff did not even submit a tender after oral argument, even though the tender issue was explored at length during the argument.[235]

Although Judge Posner observed that the district court could condition an award of reinstatement (the remedy the plaintiff was seeking) on the plaintiff returning the $75,000, Judge Posner said that there was no reasonable basis for believing that she could or would fulfill such a condition, and the Postal Service should not be subjected to the expense of defending the action without such assurance.[236] The court therefore affirmed the district court's order denying the plaintiff's Rule 60(b) motion because of the absence of a tender.[237]

Thus the Seventh Circuit applies the tender-back doctrine to Title VII releases, and distinguishes *Hogue* and *Oubre* on the grounds that those statutes regulate releases whereas Title VII does not. Though the decision in *Fleming* took place before *Oubre*, district courts in the Seventh Circuit have continued to apply *Fleming* to Title VII cases.[238]

F. Eighth Circuit

In *Richardson v. Sugg*, the plaintiff was a college basketball coach who alleged his termination, among other things, violated Title VII.[239] Under the plaintiff's employment contract, upon his termination he received $500,000 per year for each year left on his contract—the consideration for which was a release of claims.[240] The employer asserted that the plaintiff's retention of the money constituted a ratification of the release.[241] The United States Court of Appeals for the Eighth Circuit rejected the argument, finding that there can be no ratification of a release that prospectively waives Title VII rights.[242]

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234. *Id.* at 262.
235. *Id.*
236. *Id.*
237. *Id.*
238. *See, e.g.*, Marshall v. LA-Z-BOY Inc., No. 2:06-CV-378, 2007 WL 3232188, at *3-4 (N.D. Ind. Oct. 30, 2007) (citing *Fleming* in a Title VII action as controlling precedent, but deferring ruling on the tender-back issue); Wright v. Heritage Envtl. Servs., No. 99 C 7579, 2000 WL 1474410, at *3-4 (N.D. Ill. Oct. 4, 2000) (holding that court was bound by *Fleming* with respect to a Title VII claim, requiring the plaintiff to return the consideration before proceeding, and rejecting the plaintiff's argument that a mere offer to return the consideration in the pleadings is sufficient).
239. 448 F.3d 1046, 1050 (8th Cir. 2006).
240. *Id.* at 1053.
241. *Id.*
242. *Id.* at 1056.

The court further held that, similar to the reasoning in *Oubre* with respect to a concern about frustrating the ADEA's "practical objectives," application of the ratification and tender-back doctrines "would frustrate the no-prospective-waiver rule, and thereby Title VII's objectives."[243] The court distinguished Judge Posner's opinion for the Seventh Circuit in *Fleming* on the grounds that it dealt with a settlement agreement to resolve accrued employment claims (which are not invalid under Title VII) and that it was decided before *Oubre* and, therefore, the court in *Fleming* did not have "the aid of *Oubre*'s policy underpinnings to the effect that releases of claims under remedial statutes like the ADEA and Title VII frustrate the purposes of those statutes."[244]

G. Ninth Circuit

In *Aikins v. Tosco Refining Co.*, the plaintiff was terminated by his employer and executed a release of all claims, including Title VII claims, in return for severance payments.[245] Two months later he sent his employer a letter seeking to rescind the release, but he did not return or offer to return any of the severance payments he had received.[246] In fact, two days after the date of the rescission letter, he cashed his first severance check and continued thereafter to cash the severance checks he received from his employer.[247] About eight months later he filed suit against his employer alleging discrimination in violation of, among other things, Title VII.[248]

The employer moved for summary judgment based on the release.[249] According to the court, the employer did not argue that the plaintiff's claim was barred because he failed to tender back the severance payments. Instead, the employer's argument was based on the fact that he ratified the release by cashing the checks.[250] The district court granted summary judgment, finding that the plaintiff ratified the release when he cashed the checks.[251] The court held that ratification applies to a Title VII case and that *Oubre* did not mandate a different result because *Oubre* was based on the clear statutory

243. *Id.*
244. *Id.* at 1057.
245. No. C-98-00755-CRB, 1999 WL 179686, at *1 (N.D. Cal. Mar. 26, 1999).
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at *5.
251. *Id.* at *6.

command of the OWBPA and its requirements for an effective waiver.[252]

The court also relied on the fact that the decision dealt with tender back—not ratification—and that ADEA releases that do not comply with the OWBPA are voidable—not void—suggesting they can be ratified (such as when the violation of the OWBPA's requirements are cured).[253] The court felt that "[a]lthough these doctrines are related, they involve separate and distinct considerations. Thus, a release may be ratified even where the tender-back rule is inapplicable."[254] The court then found that the evidence supported a finding that the plaintiff had ratified the release by cashing all of the severance payments "after he had regained his mental functions and after he understood the terms of the Release."[255] The court denied the motion for summary judgment, however, because this conclusion was debatable.[256]

H. Tenth Circuit

In *Rangel v. El Paso Natural Gas Co.*, the plaintiff's employer allegedly told the plaintiff and other employees in his department that the company was downsizing and the decision of which employees would be retained would be based in part on a rating from each employee's supervisor.[257] The employer thereafter allegedly told the plaintiff that his job was going to be eliminated and that his evaluation was poor.[258] As a result, the plaintiff entered into a separation agreement with his employer, under which he "received one year's severance pay in exchange for releasing [the company] from any potential liability."[259]

Shortly thereafter, he learned his position had not been eliminated and that his supervisor had not prepared an evaluation of him.[260] Two weeks after signing the separation agreement, the plaintiff filed a

252. *Id.* at *4-5.

253. *Id.* at *5. The court's statement that *Oubre* did not deal with ratification is incorrect. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 425 (1998) (noting that the defendant asserted that the plaintiff ratified the release by retaining the severance payments).

254. *Aikins*, 1999 WL 179686, at *5.

255. *Id.* at *6.

256. *Id.*

257. 996 F. Supp. 1093, 1094 (D.N.M. 1998).

258. *Id.* at 1094-95.

259. *Id.* at 1095.

260. *Id.*

charge of discrimination with the EEOC and then commenced an action asserting claims under Title VII and state law.[261]

Although the plaintiff asserted his release was voidable, the employer moved for summary judgment, arguing that the plaintiff's suit was an attempt to rescind the settlement agreement and rescission was unavailable based on the doctrines of ratification and tender back.[262] In response, the plaintiff averred that he was financially unable to repay the severance benefits.[263] The court stayed the proceedings pending a decision by the Supreme Court in *Oubre*,[264] and after the decision in *Oubre* was announced, the court denied the employer's motion for summary judgment.[265]

The court relied on the statement in *Oubre* that a tender-back requirement "would frustrate the [ADEA's] practical operation" because in many instances the employee may have spent the money and may lack the ability to return the resources, which might tempt employers to risk noncompliance with the OWBPA knowing it will be difficult for employees to repay the monies.[266] The court stated that similar reasoning applied to the instant case because the plaintiff had averred that he was unable to repay the severance amount.[267] The court stated that "[t]his frustrates the fulfillment of the primary objectives underlying Title VII and could prevent many employees from bringing meritorious actions."[268] The court, following *Oubre*, also stated:

> [R]equiring a Title VII claimant to tender back prior to filing suit tempts employers, who wish to discharge employees for discriminatory reasons, to make fraudulent misrepresentations to those employees in the hope they will sign release agreements in exchange for severance benefits and subsequently 'ratify' the agreements by retaining the benefits.[269]

The court stated that although Title VII did not have a specific provision setting forth the requirements for an effective waiver, "the statutory goals of the two statutes [Title VII and the ADEA] are very similar in that the objectives of both are to expand employment

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261. *Id.* at 1094.
262. *Id.* at 1095-96.
263. *Id.* at 1096.
264. *Id.* at 1094.
265. *Id.*
266. *Id.* at 1096 (quoting Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998)).
267. *Id.*
268. *Id.* at 1098.
269. *Id.*

opportunities and to combat workplace discrimination."[270] The court also noted that "the ADEA and Title VII often are interpreted 'in tandem'" and "the ADEA and Title VII share common substantive provisions and common purposes."[271] The court felt that "[a]n inflexible application of the tender back rule would" preclude courts from determining if a Title VII release had been obtained under conditions that would render it voidable and would preclude plaintiffs with meritorious suits from bringing their claims, which would be contrary to Congress's intent in passing Title VII.[272]

The court also believed that it would be inconsistent to apply contract law rules like ratification and tender back when the Tenth Circuit had rejected contract law rules in favor of a totality-of-the-circumstances approach to determining the enforceability of a Title VII release.[273] The court concluded the tender-back analysis by stating, "After balancing the competing interests and policies involved, I conclude that the preferable way of handling this case is to offset the amount [the plaintiff] received for severance pay from [the company] against any monies he recovers in this case."[274]

The court declined to follow Judge Posner's opinion in *Fleming*, asserting that Judge Posner had applied the tender-back rule under a "'free-market'-contract law analysis."[275] The court felt that "[b]ecause of the language in *Oubre*, the merit of this approach now seems highly questionable."[276] The court stated that "[i]t is clear that Title VII was created precisely to combat a deficiency in the market, namely inappropriate discrimination, which had the effect of placing parties in unequal bargaining positions"; that one of Title VII's purposes was to make it easy for plaintiffs with limited means to bring suit; and Title VII's remedies were intended to promote the goals of Title VII (to eliminate the effects of past discrimination and prevent future discrimination).[277] The court further indicated that "[i]t would appear contrary to Congressional intent to apply a free market approach in

270. *Id.* at 1096.
271. *Id.* at 1097.
272. *Id.*
273. *Id.* at 1098 (citing Torrez v. Pub. Serv. Co. of N.M., Inc., 908 F.2d 687, 690 (10th Cir. 1990)).
274. *Id.* at 1099.
275. *Id.* at 1097.
276. *Id.*
277. *Id.*

interpreting a statute aimed at fighting the market deficiency of improper discrimination."[278]

With respect to the ratification doctrine, the court stated that "[t]he ratification and tender back doctrines are closely related" and then found that two facts dictated a different result regarding ratification: the fact that the plaintiff retained the consideration, which implied that he sanctioned the separation agreement, and the fact that within two weeks of signing the agreement he filed a complaint with the EEOC.[279] The court concluded by stating that "[u]nder the totality of circumstances there appears to be a genuine issue of material fact regarding whether [the plaintiff's] actions amounted to ratification, thereby precluding summary judgment."[280]

V. DOES SUPREME COURT PRECEDENT COMPEL THE CONCLUSION THAT RATIFICATION AND TENDER BACK DO NOT APPLY TO TITLE VII RELEASES?

No analysis of whether the doctrines of ratification and tender back should apply to Title VII releases can be performed without first determining whether *Hogue* or *Oubre* provide a controlling answer. Also, even if it is determined that those cases are not considered binding precedent on the issue, the rationales of those decisions might still be relevant to the Title VII analysis.

Each case is in some sense distinguishable from the issue under consideration in this Article. On a most simplistic level, each case is distinguishable because it involved a statute other than Title VII. *Hogue* involved FELA, and *Oubre* involved the ADEA.

But Title VII, the ADEA, and FELA share certain characteristics. Each is aimed at protecting employees, and each has been described in similar terms. For example, FELA has been characterized as a "broad remedial statute," which is to be liberally construed to accomplish

278. *Id.* at 1098. The court also found, with respect to the state law claims, that New Mexico's tender-back doctrine was flexible, and a presuit tender "will not be required where it clearly appears that the equities between the parties can be fully adjusted in the final decree." *Id.* at 1099 (quoting Woods v. City of Hobbs, 408 P.2d 508, 510-11 (N.M. 1965)). The court also found that "the New Mexico Supreme Court has implied that a court may take into account a party's financial resources in determining whether requiring tender back is appropriate." *Id.* Accordingly, the court could have reached the same result with respect to tender back and the Title VII claim if it had analyzed whether state law or federal common law applies to the release of Title VII claims, and concluded that state law applies. *See generally* O'Gorman, *supra* note 2, at 124-47 (discussing whether federal common law or state law should apply to the release of Title VII claims).

279. *Rangel*, 996 F. Supp. at 1099.

280. *Id.*

Congress's objective of providing a recovery for injured railroad workers.[281] Some courts have stated that "[t]he ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment."[282] Likewise, other courts have stated that "Title VII is a remedial statute which should be liberally construed."[283] But these similarities are irrelevant if these common characteristics were not the basis for the Court's holdings in *Hogue* and *Oubre*.

A. Does Hogue *Dictate a Result for Title VII Releases?*

An important limitation on the precedential value of *Hogue* is that the decision was limited to the tender-back doctrine and did not address the related doctrine of ratification. Thus, *Hogue* should not be construed as a limitation on the possible application of the ratification doctrine to the release of Title VII claims.

With respect to the tender-back doctrine, the precedential weight to be given to *Hogue* outside FELA is difficult to determine. For those seeking to distinguish *Hogue*, reliance on section 5 of FELA is tempting. Section 5 provides that a contract that enables a common carrier to "exempt itself from any liability created by this chapter, shall to that extent be void."[284] But the Court specifically disclaimed reliance on section 5 for its holding.[285] Accordingly, the arguments made by some lower courts that distinguished *Hogue* on the grounds that FELA regulates the release of claims and Title VII does not, are not persuasive.

The Court relied not on section 5, but on its belief that

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281. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 562 (1987).

282. Naton v. Bank of Cal., 649 F.2d 691, 696 (9th Cir. 1981) (quoting Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977)).

283. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1220 (10th Cir. 2007). For example, the purposes of the Family and Medical Leave Act of 1993 (FMLA) have been held sufficiently similar to warrant the rejection of the tender back rule to FMLA releases. *See* Riddell v. Medical Inter-Ins. Exch., 18 F. Supp. 2d 468, 476 (D.N.J. 1998) ("Forcing employees with serious health problems to tender back their severance benefits would deter meritorious challenges to releases of FMLA claims and thus undermine Congress's goal of encouraging job security for such employees.").

284. 45 U.S.C. § 55 (2006).

285. *See* Hogue v. S. Ry. Co. 390 U.S. 516, 517-18 (1968) ("We have held that an express agreement of an injured employee who obtained funds from a carrier to help defray living expenses first to return the sum paid as a prerequisite to the filing and maintenance of an action under the FELA was void under § 5 of the Act. There is no occasion to decide whether the release here involved violated § 5." (citation omitted)).

> a rule which required a refund as a prerequisite to institution of suit would be 'wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.' Rather it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.[286]

Thus, the Court's reasoning was brief, providing subsequent courts with the ability to read the language as broadly or as narrowly as they like.

Various federal statutes give employees a right to recover just compensation for injuries inflicted by their employers, and it would certainly be more consistent with those statutes' "general policy" to reject the tender-back rule inasmuch as application of the rule would preclude some meritorious cases from being brought. Therefore, for those who read *Hogue* broadly, the conclusion for Title VII is clear: tendering back consideration is not a prerequisite to filing suit, and the consideration received need only be set off from any recovery by the plaintiff.

Some lower courts, however, have rightly been troubled by an expansive reading of *Hogue*. It seems unlikely such a brief opinion, with two sentences of reasoning, was intended to declare the tender-back doctrine inapplicable to any federal statute giving employees the right to recover compensation from their employers. In fact, a broad reading of *Hogue* would arguably extend its holding to any federal statute designed to provide individuals with "just compensation."

Some lower courts have sought to limit *Hogue* to cases involving mutual mistake regarding the nature and extent of the employee's injuries or where there is fraud in the execution of the release.[287] Fraud in the execution of the release is a traditional exception to the tender-back doctrine,[288] and the Court in *Hogue* specifically held that "a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the

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286. *Id.* at 518 (citation omitted).

287. *See* Reid v. IBM Corp., No. 95 Civ. 1755(MBM), 1997 WL 357969, at *16 (S.D.N.Y. June 26, 1997) ("[S]ome courts have read *Hogue* narrowly as merely carving out an exception to the general tender back requirement in cases where the release was obtained through fraud or mutual mistake.").

288. Graham v. Atchison, Topeka & Santa Fe Ry. Co., 176 F.2d 819, 826 (9th Cir. 1949).

nature and extent of the employee's injuries."[289] Although at first there might not seem to be a logical reason to limit the Court's holding to these factual situations, such a limitation might be warranted.

The first exception (fraud in the inducement) was a traditional exception. The second exception ("mutual mistake as to the nature and extent of the employee's injuries") might also justify an exception more than other situations that would render a release voidable. In such a situation, the potential injustice that could result would be great because it is likely that the employee would have accepted a small sum for injuries that turned out to be severe. Also, the fact that the Court specifically stated it was holding that the tender-back doctrine did not apply to this situation suggests that the Court might not have intended its holding to be interpreted more broadly.

More importantly, however, the above discussion reveals a ground for limiting *Hogue* to FELA cases entirely. FELA addresses work-related injuries to railroad employees, the types of cases in which an employee might sign a release without being aware of the full extent of her injuries.[290] In fact, this was the situation in *Hogue*. Thus, the tender-back doctrine presents a significant threat to the Act's purpose of providing for just compensation. In contrast, most employees who have been discriminated against in violation of Title VII will suspect as much at the time they execute the release and will be aware of the extent of the injury (a lost job, a denied promotion, etc.). Accordingly, the tender-back doctrine is not as much of a threat to Title VII's purpose of providing for compensation to employees who have been discriminated against, as FELA is to employees who have been injured.[291]

Also, even though the Court did not rely on section 5 of FELA to support its decision, section 5 still evinces a particular concern by Congress with respect to employers avoiding their obligation to compensate employees through agreements. In this regard, even if the Court in *Hogue* did not rely on section 5, and even if it is deemed inapplicable to postinjury releases, it offers insight into the level of concern Congress had for ensuring that railroad employees are able to obtain complete compensation for their injuries. The same concern

289. *Hogue*, 390 U.S. at 517.

290. 45 U.S.C. § 51 (2006).

291. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (stating that one of Title VII's purposes is to provide make-whole compensation for employees who have been discriminated against), *superseded by statute on other grounds*, Pub. L. No. 95-256, 92 Stat. 189, 190.

was not expressed as strongly by Congress in Title VII, even if one of Title VII's purposes is to provide compensation.

Accordingly, the brevity of *Hogue*'s reasoning, the significant danger that employees will execute releases for personal injuries without being fully aware of the extent of the injury, and Congress's expressed concern that employers would seek to limit liability through agreements with employees dictate that the decision should be limited to FELA cases.

B. Does Oubre *Dictate a Result for Title VII Releases?*

In *Oubre*, the Court rejected both the tender-back doctrine and the ratification doctrine.[292] Thus, in this sense *Oubre* was broader in its holding than *Hogue*. If *Oubre* is binding precedent for Title VII releases, not only will the tender-back doctrine be inapplicable, the ratification doctrine will be as well, at least to the extent the purported ratification is based on the retention of consideration.[293]

But whereas *Hogue* disclaimed reliance on Section 5 of FELA, the Court in *Oubre* principally relied on the statutory requirements for an effective waiver of ADEA claims under the OWBPA.[294] Thus, if this had been the sole rationale of the Court, *Oubre* would have little, if any, precedential value for Title VII releases.

The Court in *Oubre*, however, provided an additional rationale. After holding that the text of the OWBPA foreclosed the employer's defense, the Court then noted that the tender-back rule and ratification doctrine "would frustrate the statute's practical operation as well as its formal command."[295] The Court stated that in many instances the employee would have spent the consideration and thus could not return it, and because this might tempt employers to violate the OWBPA's waiver provisions, the Court did not want to "open the door to an evasion of the statute by this device."[296] Thus the Court expressed concern that the common law doctrines of ratification and tender back would encourage employers to ignore the rules that make ADEA releases voidable, a concern that is perhaps transferable to Title VII releases.

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292. Oubre v. Entergy Operations Inc., 522 U.S. 422, 425-27 (1998).

293. *See id.* at 428 ("Nor did the employee's mere retention of moneys amount to a ratification equivalent to a valid release of her ADEA claims . . . .").

294. *Id.* at 425-27.

295. *Id.* at 427.

296. *Id.*

This reasoning could be dismissed as dictum, but dictum from the Supreme Court should be ignored with caution.[297] Significantly, though, the Court expressed concern with opening the door to evasions of the OWBPA's specific waiver requirements.[298] Thus, the Court was addressing a situation in which Congress had set forth specific statutory waiver provisions for ADEA claims because of a concern about waivers of such claims. If Congress was sufficiently concerned about the release of ADEA claims such that it enacted specific statutory waiver provisions, any common law rule that encouraged evasions of the statute should give way. In contrast, Congress has not enacted statutory waiver provisions for Title VII, and thus a similar concern about the application of common law rules to Title VII waivers does not exist (or at least was not expressed).

Accordingly, neither *Hogue* nor *Oubre* is particularly helpful in resolving whether the common law doctrines of ratification and tender back should apply to Title VII releases. Whether those doctrines should apply to Title VII releases must therefore be assessed independently of *Hogue* and *Oubre*. At the same time, the concerns raised by the Court in those cases should not be entirely ignored.

VI. THE COMPETING POLICIES AND PRINCIPLES

Determining the proper role for the doctrines of ratification and tender back with respect to Title VII releases requires a careful balancing of the interests served by these well-established common law doctrines against the types of concerns raised by the Supreme Court in *Hogue* and *Oubre*, and by the various lower-court opinions discussed previously. Before addressing the appropriate role for the doctrines of ratification and tender back with respect to Title VII releases, I will therefore address the different principles and policies involved.

A. The Presumption that Common Law Rules Are Incorporated into Statutes

The starting point for determining whether ratification and tender back should apply to Title VII releases is the presumption that the common law is deemed incorporated into federal statutes unless

297. *See, e.g.*, Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

298. *Oubre*, 522 U.S. at 427.

Congress's intent to the contrary is clear.[299] Unlike FELA and the ADEA, Title VII does not include any provisions regulating the release of claims, and there is nothing in Title VII's text that suggests Congress intended to displace these well-established common law doctrines.[300] This creates a presumption that these doctrines apply to Title VII releases.

B. Fairness

With respect to the general rule that any benefits received be returned prior to filing suit, the rule avoids the unfairness of permitting a party to retain the benefits of a contract while at the same time seeking to rescind it.[301] Similarly, the ratification doctrine prevents an employee from taking action suggesting an intention to be bound by the contract, while at the same time (or thereafter) seeking to avoid the contract. Thus, equitable arguments support application of the tender-back and ratification doctrines.

C. Judge Posner's "Freedom of Contract" Argument

As discussed previously, Judge Posner has argued that abandoning a presuit tender requirement might in the long run harm employees.[302] If employees can challenge a release's validity without having to first tender back the consideration, employers might pay less for such releases.[303] The same theory would presumably also apply to rejecting the ratification doctrine with respect to Title VII releases.

While it would be difficult to prove this suggestion, it is logically correct. If an employee, as a condition to challenging a release, was required to tender back the consideration, fewer employees would seek to challenge releases. Some employees would be financially unable to return the consideration, and others would not consider the price of the challenge a good bargain based on the strength of their case (the latter is precisely the kind of challenge we would want to avoid because the employee believes the consideration received for the release is worth more than the lawsuit). Also, if the ratification doctrine applied to

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299. United States v. Texas, 507 U.S. 529, 534 (1993).

300. Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 261-62 (7th Cir. 1994) (Posner, J.).

301. Thorstenson v. ARCO Alaska, Inc., 780 P.2d 371, 375 (Alaska 1989); *see also* Kristoferson v. Otis Spunkmeyer, Inc., 965 F. Supp. 545, 549 (S.D.N.Y. 1997) (recognizing that it would be unfair to permit employees to retain the consideration and still sue).

302. *Fleming*, 27 F.3d at 261.

303. *Id.*

Title VII releases, fewer releases would be challenged because some employees (and their attorneys) would recognize the futility of seeking to avoid the release, or the overall chance of succeeding in the case would be reduced to a point where the case is no longer worthwhile. If fewer releases are challenged, the transaction costs involved with releases are less, and the money saved could be apportioned to the consideration for the release. Also, the greater the chance a release is enforceable, the more it is worth to the employer, and the more the employer would therefore be willing to pay.

Judge Posner's argument was rejected by the court in *Rangel*, but the criticism was a bit off the mark.[304] The court felt that a "free market" approach was inappropriate because Title VII was enacted to remedy a failure of the market, that is, employment discrimination.[305] But Judge Posner was discussing Title VII releases, not Title VII violations, and whether there is some sort of market failure with respect to parties entering into agreements to release Title VII claims is a different issue from a market failure with respect to employment decisions. The fact that employers might discriminate against employees under a free-market system does not necessarily mean that a "freedom of contract" approach to Title VII releases is harmful to employees. Employment decisions and entering into releases are sufficiently dissimilar such that rejection of a free-market approach under the former should have no bearing on whether it is applied to the latter.

Judge Posner, however, did fail to address some countervailing concerns with the freedom-of-contract approach. For example, although reducing challenges to releases might increase the consideration paid per release (and increase employer willingness to give any consideration for a release), the benefit per employee might be small, while the application of the tender-back rule or ratification doctrine might have a significant negative effect on some employees. The percentage of employees who seek to challenge their releases is most likely small, such that the application of the tender-back rule and ratification doctrine would not provide significant cost savings to the employer. If this is so, the amount of additional consideration that would be provided to each employee as a result of the application of the tender-back rule and ratification doctrine would be quite small. The detriment to a particular employee who is financially unable to

304. 996 F. Supp. 1093, 1097-98 (D.N.M. 1998).
305. *Id.* at 1097.

tender back the consideration, however, would be significant. The release might be voidable, and the employee's discrimination claim might be meritorious, but the employee would be precluded from bringing suit. To the extent Title VII was intended to encourage employees subjected to discrimination to bring (meritorious) Title VII lawsuits,[306] the *Rangel* court's concern about the tender-back rule was justified with respect to those employees who do not have the financial means to tender back the consideration.

But Judge Posner's observation is still an important one. The security of contract, in the respect that each party knows the contract can be enforced, facilitates exchanges. If the enforcement of a particular promise cannot be adequately assured, a party would not pay as much for it or would perhaps avoid the transaction altogether.[307] Thus, making it too easy to challenge a release undermines Congress's "strong preference for encouraging voluntary settlement of employment discrimination claims."[308]

This does not necessarily mean, however, that courts should always charge Title VII plaintiffs a price for challenging a Title VII release. Rather, it simply means that courts should be wary of permitting such challenges free of charge, so as to avoid a reduction in the consideration employers are willing to provide for releases or to avoid employers from refusing to enter into such agreements at all.

D. Avoiding "Doubtful Litigation"

The court in *Kristoferson* expressed concern that a failure to apply the tender-back rule to Title VII cases would promote "doubtful litigation."[309] It is not entirely clear why a failure to apply the tender-back rule (or the ratification doctrine) would promote doubtful litigation. In fact, an employee who knows that she will have to demonstrate that a release is voidable before proceeding to the merits of her claim will perhaps only bring a suit when she is confident of her Title VII claim (the more hurdles, the greater the likely payoff will need to be).

It makes sense, however, to vary the price for challenging a Title VII release based on the strength of the underlying Title VII claim. On balance, Title VII claims are only beneficial to society if there has in

306. Parker v. Califano, 561 F.2d 320, 330 (D.C. Cir. 1977).

307. *See, e.g.*, Charles G. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1265 (1980).

308. Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981).

309. 965 F. Supp. 545, 548 (S.D.N.Y. 1997).

fact been a violation (any deterrence achieved from a lawsuit brought when there is no violation is outweighed by the costs incurred by the parties and the judicial system). Thus, if the case does not appear to have much merit, the tender-back rule should be applied more strictly than if the case appears to have significant merit.

E. Discouraging Bad Behavior by Employers

In *Oubre*, the Supreme Court expressed concern that application of the ratification and tender-back doctrines to ADEA cases would tempt employers to violate the OWBPA's waiver requirements because employers would know that employees might have difficulty returning the consideration.[310] Similarly, the application of such doctrines to the release of Title VII claims could encourage employers to engage in conduct leading employees to release Title VII claims unknowingly or involuntarily. Accordingly, a factor that should be considered in a particular case is whether the employer intentionally engaged in conduct to have the employee enter into the release unknowingly or involuntarily.

F. Do the Ratification and Tender-Back Doctrines Frustrate Title VII's Purposes?

Although the common law is generally presumed to be incorporated into a statute in the absence of the legislature expressing a contrary intent,[311] if a common law rule would frustrate a federal statute's purposes, it should give way.[312] To determine if the doctrines of ratification or tender back would frustrate Title VII's purposes (deterring discrimination and providing compensation),[313] account should be taken of the particular circumstances involved in a case. In other words, if the analysis is conducted on too general a level, circumstances in which the doctrines would not frustrate Title VII's purposes would be treated the same as circumstances in which they would frustrate Title VII's purposes. Also, no statutory purpose should be pursued at all costs, and competing policies and principles external to a statute should always be considered.[314] Thus, it is too simplistic to say that Title VII is designed to prevent discrimination and to provide

310. 522 U.S. 422, 427 (1998).

311. United States v. Texas, 507 U.S. 529, 534 (1993).

312. Smith v. Pasqualetto, 246 F.2d 765, 769 (1st Cir. 1957).

313. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975), *superseded by statute on other grounds*, Pub. L. No. 95-256, 92 Stat. 189, 190.

314. RONALD DWORKIN, LAW'S EMPIRE 339 (1986).

compensation, and, because the doctrines of ratification and tender back will preclude some meritorious suits from proceeding, the doctrines must always give way.

Keeping these principles in mind, there is little reason to believe that the doctrines of ratification and tender back would frustrate Title VII's purposes in all cases, or virtually all cases, such that a bright-line rule prohibiting the doctrines is justified. With respect to ratification, a ratification can only occur after a party learns of the facts that would render the release voidable.[315] Thus, if a release was not entered into knowingly and voluntarily, the employee could not ratify the release until she was sufficiently aware that she had released her Title VII claims, or any circumstances that made her assent involuntary had ceased.[316] Also, the short time frame for filing a charge of discrimination with the EEOC as a condition precedent to suit[317] suggests that many releases that would be ratified through delay in disaffirming would be for claims that would be time-barred anyway.

Additionally, as already mentioned, relevant factors involved in deciding whether a delay has been unreasonable include the extent to which the party with the power to disaffirm was able to speculate at the other party's risk and whether the other party or third persons engaged in justifiable reliance as a result of the delay.[318] These factors will generally not be present in the context of a Title VII release. Although the retention of money received in consideration for a release can support a finding of ratification, because a finding of implied ratification should be based on acts that demonstrate an intent to ratify, an employee who has spent the money before learning the release was voidable and cannot repay it would generally not be found to have impliedly ratified the release. Accordingly, the ratification doctrine would likely not apply often enough to frustrate Title VII's purposes.

In fact, to frustrate Title VII's deterrent effect the ratification doctrine would have to be applied often enough for employers to

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315. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 434 (1998) (Scalia, J., dissenting) ("[R]atification cannot occur until the impediment to the conclusion of the agreement is eliminated. Thus, an infant cannot ratify his voidable contracts until he reaches majority, and a party who has contracted under duress cannot ratify until the duress is removed.").

316. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974) (noting in dictum that although an employee can release Title VII claims, the employees assent must be "voluntary and knowing").

317. *See* 42 U.S.C. § 2000e-5(e) (2006) (180 or 300 days, depending on the state).

318. RESTATEMENT (SECOND) OF CONTRACTS § 381(3)(a)-(b) (1981).

become generally aware of the doctrine's application and then choose to violate Title VII because they expect the employee will sign a release that was not knowing and voluntary and then ratify it. This chain of events is highly unlikely.

In any event, if the employee has truly ratified the agreement, the fact that the employee's initial assent was not knowing and voluntary is irrelevant, inasmuch as the employee has subsequently made a knowing and voluntary assent to the terms. This no more frustrates Title VII's purpose than permitting an employee to waive Title VII claims when the waiver is voluntary and knowing, a practice that the Supreme Court has sanctioned.[319]

Also, although some employees will not be fully compensated for a possible Title VII violation, the employee would have received consideration for the release.[320] Thus, there is not a significant concern that application of the ratification doctrine would frustrate Title VII's compensation purpose any more than the right to settle claims would frustrate that purpose.

The concern with the application of the tender-back doctrine is that the employee might no longer have the ability to repay the funds when it is time to file suit. Whether this will occur often enough to frustrate Title VII's compensatory and deterrent purposes is debatable, but, for purposes of this Article, I will presume that a sufficient number of employees will not have the financial means to return the funds (particularly because many of them will have been terminated and not found another position), such that a threat to Title VII's purposes exists. Additionally, applying the tender-back doctrine without flexibility would result in a Title VII rule directly at odds with *Hogue* and *Oubre*, a result that is undesirable even if those decisions are not controlling on a Title VII case.

But application of the tender-back rule will not frustrate Title VII's purposes in every case. It is only likely to do so in those cases where the plaintiff does not have the financial ability to return the funds. To the extent the employee has the financial ability to return the funds, and simply does not value her Title VII case enough to pay that price (i.e., the price of tender back), Title VII's purposes will not be

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319. *See Alexander*, 415 U.S. at 52 & n.15 ("[P]resumably an employee may waive his cause of action under Title VII as part of a voluntary settlement .... In 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.").

320. *See* Berner v. Tesseract Corp., No. 94-C-1717, 1994 WL 559138, at *2 (N.D. Ill. Oct. 7, 1994) (holding that a Title VII "release must be supported by consideration").

significantly impacted because the employee's choice demonstrates the employee has likely already received more than the case is worth. I recognize that the value of the case to the plaintiff is decreased at this point based on her knowledge that she must demonstrate that the release is voidable, but in general, if she chooses not to proceed, she has received an amount that is roughly proportional to what she believes the merits of her case are worth. Thus, Title VII's purposes will not be frustrated if an employee has the financial means to return the consideration and simply chooses not to make the tender.

VII. THE PROPER ROLE FOR THE DOCTRINES OF RATIFICATION AND TENDER BACK FOR TITLE VII RELEASES

Taking account of all of the considerations discussed previously, this Part addresses the appropriate role for the doctrines of ratification and tender back with respect to Title VII releases. Because the issue is likely governed by federal common law, federal courts have broad discretion in fashioning the appropriate rules.[321] "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."[322] Also, with respect to the tender-back doctrine, the fact that conditions precedent to suit are subject to equitable modification provides the court with further power to ensure that the tender-back rule operates fairly in a particular case.[323]

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321. *See* Hogue v. S. Ry. Co., 390 U.S. 516, 517 (1968) (stating that federal law, not state law, determines whether the tender-back doctrine applies to a FELA release). *But see* Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 260-61 (7th Cir. 1994) (questioning whether federal or state law applies to application of tender-back doctrine to Title VII release, but concluding that the applicable law would be the same in either event); Wright v. Eastman Kodak Co., 445 F. Supp. 2d 314, 320 (W.D.N.Y. 2006) (finding ratification of Title VII release pursuant to New York law).

322. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 129 (1998). I have previously argued that the appropriate federal common law rule for the enforceability of a Title VII release will usually be the applicable state rule because the applicable state rule will likely not significantly frustrate Title VII's purposes. *See* O'Gorman, *supra* note 2, at 146. I suspect this will likely be the case as well with respect to the doctrines of ratification and tender back. However, this Article proceeds on the assumption that the federal courts will formulate their own federal common law rule as opposed to simply incorporating the applicable state rule.

323. Pinkard v. Pullman-Standard, 678 F.2d 1211, 1215 (5th Cir. 1982) (Kravitch, J., concurring).

A. *Ratification*

Starting with the presumption that the common law is deemed incorporated into federal statutes unless Congress's intent to the contrary is clear,[324] there is no reason to reject or modify ratification's application to Title VII cases. The doctrine is designed to enforce a person's express or implied consent to the contract after the events giving rise to its voidable nature have passed, and the person learns of the contract's defect. The application of the ratification doctrine to Title VII releases will therefore not undermine Title VII's purposes any more than the general rule that employees can knowingly and voluntarily release Title VII claims. Although applying the ratification doctrine might encourage employers to compel employees to enter into Title VII releases unknowingly and involuntarily, the subsequent ratification of the contract removes any defect that might have existed, suggesting that the ratification doctrine will only apply in those situations in which the employee would have consented to the release in the first instance if she had been acting knowingly and voluntarily.

Also, the flexible nature of the doctrine will enable courts to apply it in a way that avoids harsh results. For example, as previously discussed, various factors are taken into consideration when determining if there has been unreasonable delay in disaffirming. And importantly, the time in which an employee would be expected to disaffirm does not commence until the employee learns of the facts that render the release voidable.

Accordingly, to the extent an employee, after learning of the voidable nature of the release, has explicitly indicated an intent to affirm the release, accepted settlement funds, spent the funds, or unreasonably delayed in disaffirming (taking into account the relevant factors previously discussed, including whether the benefits received were retained during the period of delay), the employee should be deemed to have ratified the release. The defendant has the burden of demonstrating that the employee intended to ratify an otherwise voidable release.[325] Whether an otherwise effective disaffirmance is insufficient to avoid a finding of ratification because the employee failed to tender back the consideration received is discussed below in the tender-back discussion.

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324. United States v. Texas, 507 U.S. 529, 534 (1993).

325. *See* Brown v. City of South Burlington, 393 F.3d 337, 343-44 (2d Cir. 2004) (stating that the party asserting that the voidable contract was ratified has the burden of demonstrating that the other party intended to ratify the contract).

B. Tender Back

The tender-back doctrine presents a more difficult issue. A requirement that an employee tender back the consideration at the time of disaffirmance or prior to filing suit might preclude an effective disaffirmance simply because the employee does not have the financial means to return the funds. As discussed previously, this could possibly conflict with Title VII's compensatory and deterrent objectives.

If the employee has the means to tender back the consideration, there is no reason to excuse the employee from such a requirement. If the employee has the ability to repay and has not done so within a reasonable amount of time after learning of the release's voidable nature, the employee should be deemed to have ratified the release. If, however, the employee tendered back the consideration (even after an unreasonable delay) and the employer accepted the tender, the release should be deemed void. The employer's acceptance of the tender is a manifestation of assent to the rescission of the release.

If the employee's failure to tender back was due to a financial inability to return the funds, this failure to tender, in and of itself, should be insufficient to bar the employee's suit. It should not operate as a ratification because, as long as the employee spent the funds before learning of the voidable nature of the release, the employee's failure to return the funds cannot be construed as a manifestation of assent to the release.

The issue becomes more complicated, however, once the employee files suit without tendering back the consideration. As already discussed, the purpose of requiring a tender before filing suit is because "the defendant should not by rescission sacrifice the benefits of the agreement and at the same time not be restored the benefits previously received by the plaintiff."[326] Also, as noted by Judge Posner, a defendant should not be subjected to the expense of defending an action without the assurance that the plaintiff can return the consideration if the release is declared void.[327] Without such assurance, employers might be dissuaded from entering into release agreements, thereby conflicting with Congress's desire to have Title VII claims resolved informally.

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326. Thorstenson v. ARCO Alaska, Inc., 780 P.2d 371, 375 (Alaska 1989); *see also* Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994) (Posner, J.) ("The tender requirement . . . is a protection for defendants . . . .").

327. *Fleming*, 27 F.3d at 262.

As an initial matter, even if an employee should be required to tender back any consideration prior to filing suit, if the employee had and has the financial means to do so but has not (and for whatever reason did not thereby ratify the release), she should be given an opportunity to cure this defect by tendering the consideration within a short amount of time after filing suit. For example, courts have permitted plaintiffs to obtain notices of right to sue from the EEOC after filing suit, even though the receipt of such a notice is a condition precedent to a Title VII case.[328]

Of course, if a tender is made and accepted by the defendant, this should operate as a concession by the defendant that the contract has been voided. Therefore, because the voidable nature of the release will usually be contested by the defendant, most tenders at the commencement of the lawsuit will operate simply as the employee demonstrating that the funds are available for the defendant and an open offer to the defendant to accept the funds. The defendant would usually not accept the funds unless, and until, the release was declared void by the court.

To ensure that the funds are available, the court should require that the plaintiff place the funds in escrow, post a bond, or otherwise demonstrate an ability to pay. Absent unusual circumstances, proof of an ability to pay should be required to avoid the concern raised by Judge Posner—that a defendant not be subjected to the cost of defending the action with no assurance of a return of the consideration if the release is declared void.[329]

If the plaintiff's financial means are such that the plaintiff is unable to demonstrate an ability to return the consideration in the event the release is voided, the district court, pursuant to its federal common law power and the equitable modification of conditions precedent to suit, has wide discretion in deciding on an appropriate course of action.[330] In such a situation, the court should consider all relevant circumstances in deciding whether to dismiss the suit (as was traditionally done in actions at law), reduce the tender amount, postpone the repayment obligation (perhaps to the conclusion of the case), excuse the required showing of an ability to pay, require a tender

328. Pinkard v. Pullman-Standard, 678 F.2d 1211, 1215 (5th Cir. 1982).

329. *See Fleming*, 27 F.3d at 262 (stating that a defendant should not be subjected to the expense of defending the action without an assurance of payment).

330. For example, as previously discussed, courts in equitable actions would excuse a presuit tender if the court's decree could be made conditional on such an offer. RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981).

obligation only in the event the plaintiff prevails on the merits (through a set-off from the judgment, as was done in equitable actions and *Hogue*,[331] and as was suggested in *Oubre*[332]), or impose some other appropriate alternative.

In deciding on an appropriate course of action, relevant factors should include the following: (1) whether the plaintiff has the means to tender at least a portion of the consideration at the time of filing suit (the plaintiff should at least be required to tender an amount commensurate with her financial means), (2) the strength of the plaintiff's case (if the case is weak, a dismissal for failure to tender back will likely not frustrate Title VII's purposes), (3) the strength of the plaintiff's argument that the release is voidable (the less likely it is that the release is voidable, the less likely the plaintiff will ever be able to proceed to the merits of her case), (4) when and if the plaintiff will be able to repay the amount (the longer the delay, or the greater the chance the defendant will never be repaid, the greater unfairness to the defendant who has to litigate in the interim), and (5) whether the defendant intentionally engaged in conduct designed to render the plaintiff's assent to the release unknowing or involuntary (the defendant should not be rewarded for its improper conduct).

For example, if the plaintiff's Title VII case appears weak and there is little evidence the plaintiff will ever be able to repay the amount (particularly because there will probably not be a favorable judgment for the plaintiff on the Title VII claim), and the defendant engaged in no wrongdoing with respect to the release, it would be appropriate to dismiss the case for failing to make the tender. On the other hand, if the plaintiff's Title VII case is strong and the defendant is accused of engaging in wrongdoing when the parties entered into the release agreement, it might be appropriate to only require a tender back by means of a set-off from any favorable judgment and otherwise excuse the tender requirement (presuming, of course, that the plaintiff does not otherwise have the financial means to return the consideration).

A set-off from a favorable plaintiff's judgment should be used sparingly, however, because unlike FELA, a Title VII recovery is not

331. *See* Hogue v. S. Ry. Co., 390 U.S. 516, 518 (1968) (noting that consideration received could be deducted from any recovery).

332. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 428 (1998).

virtually guaranteed.[333] Thus, equity's solution to make a decree contingent on a tender back is not particularly useful because an order rescinding the release will not automatically result in the plaintiff being entitled to some sort of relief. If the release is rescinded, but the plaintiff loses on the merits, there will be no relief for the plaintiff to "purchase" by returning the consideration for the release.

Thus, simply setting off the consideration received from any favorable recovery would preclude defendants from recovering the consideration in many cases. Accordingly, it should be reserved for those cases in which the plaintiff has a strong case (thus suggesting a likely recovery from which to make a set off), the defendant engaged in some wrongdoing in connection with the release, and in which the plaintiff is likely to never be able to return the consideration absent a favorable judgment. If the plaintiff is likely to be able to return the consideration in the future, the court should at least adopt the approach in *Kristoferson* and enter a judgment for the defendant at the conclusion of the case in the amount of the tender-back obligation, if the release is declared invalid.[334]

Because tender back was traditionally a condition precedent to suit, and because the plaintiff is generally required to prove the occurrence of any conditions precedent[335] and is more familiar with her financial condition than the defendant, it is appropriate to place the burden of proof on the employee to demonstrate that a presuit tender is not necessary based on the factors discussed previously. If the plaintiff fails to carry this burden, the case should be dismissed for failure to satisfy a condition precedent to the action. The plaintiff would also need to assert in the complaint that all conditions precedent have been performed or have occurred.[336] If the plaintiff has reason to believe that a presuit tender should be excused, a general statement to this effect should be sufficient to satisfy the plaintiff's pleading obligation. Of course, the defendant must specifically plead the failure to tender back prior to suit for the issue to be preserved.[337]

This issue should be addressed as soon as practicable in the litigation so as to avoid the defendant having to incur unnecessary

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333. *See* Reid v. IBM Corp., No. 95 Civ. 1755(MBM), 1997 WL 357969, at *16 (S.D.N.Y. June 26, 1997) (distinguishing FELA from Title VII because in a Title VII action a recovery for the plaintiff is, according the court, virtually guaranteed).

334. 965 F. Supp. 545, 549 (S.D.N.Y. 1997).

335. Montes v. Vail Clinics, Inc., 497 F.3d 1160, 1167 (10th Cir. 2007).

336. FED. R. CIV. P. 9(c).

337. *See id.* (stating that a defendant must plead specifically and with particularity the failure of the plaintiff to comply with a condition precedent to suit).

litigation expenses, and to preserve court resources. The parties should, however, be given the opportunity to conduct discovery regarding the applicability of the factors addressed previously, though it might be appropriate to limit at this stage of the litigation the amount of discovery regarding the strength of the plaintiff's case. Permitting extensive merits-based discovery might unduly delay a decision on the tender-back issue, an issue that should be resolved early in the litigation. It would seem appropriate for the court to assess the strength of the plaintiff's case based solely on the plaintiff's evidence in support of the filing of the complaint, or to perhaps permit some limited discovery on the merits. Of course, the matter cannot be resolved until one of the parties requests court resolution of the issue.

VIII. CONCLUSION

As set forth above, the ratification doctrine should apply to Title VII releases, while the tender-back doctrine should be applied flexibly on a case-by-case basis. This approach preserves the bases for these well-established common law rules, while at the same time ensuring that Title VII's purposes are not frustrated.