

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENE R. ROMERO, *et al.*,

v.

ALLSTATE INSURANCE COMPANY,
THE ALLSTATE CORPORATION and
EDWARD M. LIDDY,

:
:
: Civil Action No. 01-3894
: CLASS ACTION
:
:
:
:
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:
:

PROPOSED ORDER

AND NOW, this ____ day of _____, 2004, IT IS ORDERED:

1. Plaintiffs' motion for reconsideration is hereby granted;
2. The Memorandum and Order dated March 30, 2004, is hereby amended to eliminate any requirement that employee agents who desire to effectively rescind the General Release and Waiver Agreement (the "Release") must tender to Allstate Insurance Company repayment of any and all benefits received in exchange for signing the Release.
3. The Declaratory Judgment entered March 31, 2004, is hereby withdrawn and superceded by the Amended Declaratory Judgment entered herewith.

Fullam, Sr. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENE R. ROMERO, *et al.*,

v.

ALLSTATE INSURANCE COMPANY,
THE ALLSTATE CORPORATION and
EDWARD M. LIDDY,

Civil Action No. 01-3894
CLASS ACTION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

v.

ALLSTATE INSURANCE COMPANY

Civil Action No. 01-7042

AMENDED DECLARATORY JUDGMENT

AND NOW, this ___ day of _____, 2004, IT IS ORDERED, ADJUDGED
AND DECLARED that the Declaratory Judgment entered March 31, 2004, is amended as
follows:

1. The releases signed by the former employee-agents of Allstate Insurance
Company pursuant to the "Preparing for the Future" Reorganization Program, on their
face, violate the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f), and 29
C.F.R. § 1622.25(i)(2), which provides "no waiver agreement may include a provision
prohibiting any individual . . . from filing a charge or complaint, including a challenge to
the validity of the waiver agreement, with EEOC." Moreover, it is illegal to either
retaliate, or threaten to retaliate, against an employee to prevent him from exercising

rights under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all been threatened with such an outcome if they exercised their right to refuse to sign the proposed release.

2. Each employee-agent who signed such a release may rescind the release by taking the following action: within 90 days after receiving notice of this Order, notifying Allstate Insurance Company, in writing, of his or his wish to rescind the release.

3. Counsel for plaintiffs in the above-captioned actions shall submit to the Court for approval a proposed form of notice implementing the foregoing.

John P. Fullam, Sr. J.

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(3d Cir. 1997), other authorities and the common law, “tender back” is not required for plaintiffs and prospective class members to proceed with their claims. Plaintiffs therefore ask the Court to affirm, for the reasons given below, that plaintiffs and other employee agents who signed the facially invalid Release have nothing to tender back and that notice of tender back need not be issued. If, however, the Court disagrees, plaintiffs request additional guidance as to what should be placed in the form of notice to be sent to prospective class members. Finally, if the Court requires tender back of certain so-called “benefits” that would have the effect of precluding the majority of the proposed class to participate in the lawsuit, it should certify its ruling for immediate appeal under 28 U.S.C. § 1292(b).

ARGUMENT

I. **THE TENDER BACK DOCTRINE DOES NOT APPLY TO PLAINTIFFS’ CLAIMS**

Plaintiffs asserted claims for discrimination and retaliation under the ADEA in their First Amended Complaint. Among other things, plaintiffs allege that the Mass Termination Program violates the ADEA in at least two different respects: (1) the Release requirement and accompanying threats that Allstate ultimately made good on constitute unlawful retaliation under the ADEA, and (2) Allstate violated the ADEA by terminating substantially all of its remaining employee agents in order to rid itself of thousands of older employee agents.¹

As *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), and *Long* make clear, the common law doctrine of tender back does not apply to claims under the ADEA. Indisputably, therefore, tender back is not required to prosecute plaintiffs’ claims under the ADEA. In

¹ The Court did not dismiss plaintiffs’ termination claims under the ADEA in stating that there was “no basis” for them on the record before it. Even if the termination claims subsequently are dismissed, plaintiffs’ claims for retaliation, as well as appeal rights, remain.

addition, the reasoning of the Supreme Court and Third Circuit, and decisions from district courts within this Circuit applying these precedents, shows that tender back should not be required as to any other claim in this case as well.

In *Oubre*, the Supreme Court observed, “in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation.” 522 U.S. at 426. Here, two of the three non-ADEA claims asserted by plaintiffs – claims under ERISA § 510 (“Section 510”), 29 U.S.C. § 1140, and for breach of fiduciary duty – are equitable in nature. Thus, tender back should not be required of plaintiffs or prospective class members to assert those claims.

The Third Circuit’s analysis in *Long* also compels the conclusion that tender back is not required to seek equitable relief under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). In connection with a mass layoff, Sears had offered a “reorganization package,” which included severance benefits, in exchange for execution of a release. 105 F.3d at 1531. After signing the release and receiving severance payments, the plaintiff filed a lawsuit asserting termination claims under the ADEA, claims under Section 510, and state common law claims. *Id.* The district court dismissed all claims on the ground that the plaintiff had ratified the release by failing to return the severance payments, and plaintiff appealed only as to the dismissed ADEA claims. *Id.* at 1533.

The Third Circuit vacated the dismissal and remanded, including as to the ERISA and common law claims that had not even been subject to appeal. In so doing, it held that the common law tender back and ratification doctrines had been supplanted for four reasons, each equally applicable to plaintiffs’ Section 510 claims in this case.

First, looking to *Hogue v. Southern R. Co.*, a case in which the Supreme Court decided that application of the tender back doctrine to claims under the Federal Employer's Liability Act ("FELA") would be "wholly incongruous with the general policy of [FELA]," 390 U.S. 516, 518 (1968) (quotations & citations omitted), the Third Circuit ruled that requiring tender back under federal remedial statutes would compromise the goals of those statutes. *Id.* at 1541. It is indisputable that ERISA, like FELA and the ADEA, is a federal remedial statute. *United Healthcare Benefits Trust v. Pennsylvania*, 1993 U.S. Dist. LEXIS 13480, *7 (E.D. Pa. Sept. 16, 1993). Also like the ADEA, Section 510 has the goal of preventing unlawful discrimination and retaliation. *See* 29 U.S.C. § 1140 ("it shall be unlawful for any person to . . . discriminate against a participant or beneficiary" for exercising any right under an employment benefit plan or under Title I of ERISA). Application of the tender back doctrine clearly would compromise the goals and remedial purposes underlying Section 510. *See generally Isaacs v. Caterpillar, Inc.*, 765 F.Supp. 1359, 1367 (C.D. Ill. 1991) ("retired employees need all the protection they can get; Congress has passed ERISA and other laws on this assumption. Such workers are unlikely to put their severance benefits aside for future 'tenders,' or be able to come up with the money [at a] later time . . .") This is particularly the case because ERISA has been interpreted as affording more limited remedies than Title VII and other federal remedial statutes to which *Long* has been extended. *See Cole v. Gaming Entertainment, L.L.C.*, 199 F.Supp.2d 208, 216-17 (D. Del. 2002) (Title VII); *Riddell v. Medical Inter-Ins. Exch.*, 18 F.Supp.2d 468, 476 (D.N.J. 1998) (Family and Medical Leave Act).

Second, the Third Circuit feared that tender back would deter meritorious lawsuits. *Id.* at 1541-42. This reasoning applies with equal force to claims under Section 510: "[F]orcing older employees to tender back their severance benefits [or other benefits allegedly received] in order to attempt to regain their jobs would have a crippling effect on the ability to challenge releases

obtained by misrepresentation or duress.” *Long*, 105 F.3d at 1541. *Accord Isaacs*, 765 F.Supp. at 1367 (“[n]o matter how egregiously releases might violate the requirements of the [OWBPA], employees would be precluded from challenging them unless they somehow ... come up with the money they were given when allegedly forced into retirement”).

Third, the court in *Long* also considered the potential windfall to employers that the tender back requirement could create in situations where employment status has been terminated. Under these circumstances, equally applicable to plaintiffs’ claims under Section 510, requiring tender back prior to any award to the employee “where it is difficult to return the employee to his pre-release position . . . would arguably unjustly enrich the employer.” *Id.* at 1543 (quotations & citations omitted). While in this case tender back would restore Allstate to the *status quo ante*, Allstate – which has already been found guilty of having imposed a defective and retaliatory Release requirement – would not be required to restore anything, including employee benefits it stripped and the protections of employment, until after the conclusion of litigation, which may be many years in the future.

Finally, the Third Circuit recognized that a tender back requirement would create an “insoluble practical problem” when employees receive severance benefits because “typically the employer does not specify how much of the consideration paid to the employees is for the retirement and how much is for the release.” *Id.* at 1543-44. *Accord Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683-84 (7th Cir. 1993); *Howlett v. Holiday Inns, Inc.*, 120 F.3d 598, 602-03 (6th Cir. 1997); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036, 1040-41 (11th Cir. 1992). In this case, there are two “insoluble practical problem[s],” whether claims are brought under the ADEA or ERISA. Plaintiffs have shown that Allstate not only anticipated, but desired, that a substantial number of agents leave its service as a result of the Mass Termination Program. Thus, as in *Long*, Allstate offered enhanced severance benefits and an accelerated right to sell

books of business (*see* Part II, below) to employee agents, not only because they signed the Release, but also because they were severing their agency relationship with Allstate and relinquishing all interest in the book of business built as employees. Second, the Release was not only of claims under ERISA or the ADEA, but also innumerable other statutory and common law claims. Indeed, plaintiffs have offered evidence that Allstate was aware that the mass termination would breach the R830 and R1500 employment contracts. Any attempt to isolate the amount of any payment made by Allstate in exchange for the waiver of the common law claims, as distinct from amounts paid in return for alleged waivers of either the ADEA and ERISA claims, would create an insoluble “conundrum.” *Id.* at 1543.

When a plaintiff brings multiple claims in the context of an employment dispute, some of which are not subject to the common law doctrine of tender back, courts have decided that, rather than requiring tender back at the onset, the most appropriate solution is to offset the amount of any eventual recovery by the consideration received in exchange for executing the release. *See Long*, 105 F.3d at 1543 (“[a]n employer found liable will be entitled to a set-off of any severance benefits paid”). *Accord Cole*, 199 F.Supp.2d at 217-18; *Oberg*, 11 F.3d at 683-84, 685; *Forbus*, 958 F.2d at 1040-41; *Rangel v. El Paso Natural Gas Co.*, 996 F.Supp. 1093, 1099 (D.N.M. 1998). *See also Oubre*, 522 U.S. at 428 (“courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee . . .”). The Court here similarly should offset the amount of any eventual recovery by the amount of the benefits, if any, plaintiffs received in exchange for executing the Release.

Tender back is inappropriate at this time for another reason. Plaintiffs have alleged and offered evidence that the Release was void as an integral “part and parcel” of an illegal scheme to violate federal law and vitiate contractual rights. If, after being permitted discovery, plaintiffs can prove their allegations, the Court should decide that tender back would be inappropriate,

even if it does not so hold under *Long*, because the Release would be not just voidable, but void. The Court should not prejudge the issue by imposing a tender back requirement now.

For these reasons, the Court's ruling as to tender back requirement is at odds with *Oubre*, *Long*, and their progeny. The Court should modify its Declaratory Judgment to reflect that all that is required of employee agents who wish to rescind the Release is to mail written notice of the intention to rescind to Allstate within 90 days after receiving such notice as the Court may direct to the 6,200 or so prospective class members.

II. THE COURT SHOULD PROVIDE GUIDANCE TO PLAINTIFFS IN PREPARING NOTICE FOR CLASS MEMBERS.

If the Court denies the motion for reconsideration notwithstanding the arguments set out above, Allstate and plaintiffs have strikingly different ideas about what "benefits" prospective class members must repay. Plaintiffs believe that, under the Declaratory Judgment and the common law doctrine of tender back, nothing needs to be repaid to Allstate under the facts of this case. On the other hand, Allstate's prior filings make clear that it thinks that there are numerous "benefits" that could be subject to a tender back requirement.

The Court directed plaintiffs' counsel to submit a proposed form of notice informing each class member of his or her right to notify Allstate "in writing, of his or her wish to rescind the release, and, within 30 days thereafter, tendering to Allstate Insurance Company repayment of any and all benefits received by the signer in exchange for signing the release." (Declaratory Judgment ¶ 2.) Plaintiffs believe that any such notice must as precisely and accurately as possible inform prospective class members as to what benefits, if any, they would have to repay in order to permit them to make an informed decision about rescinding the Release. Until the Court clarifies what "benefits," if any, must be repaid to Allstate, plaintiffs may not be able to prepare a notice satisfactory to the Court because, even under common law principles, they believe there is nothing to tender back.

The Memorandum (at p. 9) contemplates “*repayment* of all *sums* received in exchange for the release,” that is, any person who wants to rescind the Release (1) must *repay* to Allstate (2) any *sums* (3) received in exchange *for the Release*. (Emphasis added.) This language accords with the common law. Money is the sole medium of payment of a “tender” requirement, unless an agreement between the parties plainly indicates a contrary intent. 74 Am.Jur.2d *Tender* § 21 (1974). Plainly, there was no agreement between employee agents and Allstate on a medium for tender. Moreover, at common law, there is no provision for tender of intangible contractual rights:

Tender implies the physical act of offering the money or thing to be tendered, but this cannot rest in implication alone. The law requires an actual, present, physical offer; it is not satisfied by a mere spoken offer to pay, which, although indicative of present possession of the money and intention to produce it, is unaccompanied by any visible manifestation of intention to make the offer good. It is the general rule, too, that the money must be actually shown to the person to whom it is tendered.

Id. § 7. See also *id.* § 8 (discussing only tender of tangible property in section entitled “Tender of Property”). Plaintiffs obviously cannot manifest such physical and visible intentions to return intangible rights. The Court therefore was correct under the common law to speak of “repayment” of monetary “sums” received from Allstate .

Applying the three elements of the Court’s repayment requirement, none of the so-called “benefits” employee agents allegedly received from Allstate qualify for tender back.

Conversion bonus. Agents who signed the Release and selected the Forced Conversion or Forced Sale Option² received a “conversion bonus” in the amount of \$5,000. This payment was not made “in exchange for the Release” and, hence, is not subject to tender back, for at least

² Agents who signed the Release were required to choose one of three options: convert to so-called “independent contractor” status under the R3001S Agreement and continue in the service of Allstate (the “Forced Conversion Option”); convert to so-called “independent contractor” status under the R3001S Agreement and sell the book of business by August 1, 2000 (“Forced Sale Option”); or leave the service of Allstate (“Forced Severance Option”).

three reasons. First, agents who signed the Release and selected the Forced Severance Option did not receive the \$5,000 payment; only those who selected the Forced Conversion or Forced Sale Option received it. Second, Allstate denominated the payment a “conversion bonus,” not a “payment for signing the Release” or any such language. Finally, Allstate itself said that the purpose of the payment was “to help . . . to transition to independent contractor status.”

Sale price of business. About 2,000 employee agents selected the Forced Sale Option and sold their business to another Allstate agent on or before August 1, 2000, as part of the Mass Termination Program. Since the year 2000, an unknown number of employee agents who signed the Release and selected the Forced Conversion Option also exercised the contractual right to sell their book of business to another Allstate agent. The prices of these business sales need not be tendered to Allstate under the first and third elements of the Court’s “tender back” requirement.

In the first instance, the sale price could not be “repaid” to Allstate because it was paid by the purchasing agent, not Allstate. Additionally, the sale price was not received “in exchange for signing the release.” Rather, the sale price was received from the third party purchaser in exchange not only for the conveyance of the book of business and selling agent’s “good will,” but, in many instances, a covenant not to compete, conveyance of leasehold rights, conveyance of furniture and office equipment and/or other consideration. The right to sell the book of business, in turn, is not a “sum” received “in exchange for signing the release” but, rather, an integral provision of the R3001 Agreement itself, as it has been since the inception of the Exclusive Agent Program in 1990.

Any requirement that agents tender back the sale price attributable to the book of business built as an Allstate employee also would result in a wasteful battle of experts over the correct amount to be tendered. Plaintiffs and Allstate would be forced to attempt to come to some sort of agreement on such things as the “fair market value” of the book of business that had

been generated as an employee agent as of June 30, 2000, and amounts selling employee agents received for other assets, both tangible and intangible, conveyed as part of the sale of a book of business. Other disputes, including how to account for the fact that former employee agents who had served for less than two years under the R3001 Agreement also were given the accelerated right to sell their entire book of business as part of the Mass Termination Program, undoubtedly will arise. Indeed, certain former employee agents who had converted to the R3001 Agreement prior to November 1999 also were given the option to leave the service of Allstate under the Mass Termination Program in exchange for an enhanced severance package equal to a year's salary. (*See* discussion of enhanced severance payment, below.)

In view of the foregoing, it is clear that agents who signed the Release and selected either the Forced Conversion or the Forced Sale Option acquired nothing beyond that to which they would have been entitled had they converted to the Exclusive Agency Program prior to November 1999.

Enhanced severance payment. Enhanced severance benefits were paid through the Agents Transition Severance Plan, an ERISA plan, not directly by Allstate. Thus, the argument under *Long* that there should be no tender back requirement to enforce rights under a federal remedial statute is especially strong with respect to any argument that these ERISA-protected payments should be repaid to Allstate in the absence of any such requirement in the plan itself.

Agents who signed the Release and selected the Forced Severance Option received payments that were, as *Long* points out, both for retirement and for execution of the Release. (*See* p. 5, above.) Allstate may argue that, in this case, it can distinguish between the amount paid for retirement and the amount paid for the Release because employee agents who did not sign the Release were entitled to receive "base severance" pay. Given this fact, Allstate may try to make the case that employee agents are required to repay the difference between "base" and

“enhanced” severance. This, however, only serves to highlight the fact that employee agents who did not sign the Release were entitled to receive up to 13 weeks of compensation. For virtually every agent who selected the Forced Conversion or Forced Sale Option, this “base severance” exceeded the conversion bonus plus other *de minimis* “benefits.”³ Thus, even if those “benefits” were otherwise subject to the tender back requirement, agents who selected those options received no net benefit “in exchange for signing the release” that can be repaid.

The economic realities are, however, even more important than arguments based on the reach of the common law doctrine of tender back. In the event the sale price received for selling a book of business must be paid to Allstate, it is likely that most employee agents simply will find themselves having no wherewithal to tender the “benefit” at this time. The same is true of employee agents who received the enhanced severance payment. In addition to the fact that agents had to pay income taxes on these payments, “non-compete” and confidentiality restrictions restricted their ability to pursue careers in the insurance business after leaving the service of Allstate. Thus, enhanced severance benefits and sale proceeds were spent to pay mortgages, put food on the table and, in many instances, start new businesses and careers. *See Oubre*, 522 U.S. at 427 (“In many instances a discharged employee likely will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the [employee protection provisions], knowing it will be difficult to repay the monies and relying on ratification.”) If the Court requires tender back of book of business sale prices and enhanced severance benefits, it will present prospective class members with a “Hobson’s choice” frighteningly similar to the “take it or leave it” options

³ Allstate contends that agents received other “benefits” for executing the Release, from forgiveness of a travel advance to the right to purchase furniture and equipment. Plaintiffs do not address these so-called “benefits” in this brief, other than to note that each is subject to the same types of issues addressed above, such as their not being in exchange for execution of the Release, being conveyances of intangible rights, and being incapable of accurate valuation.

Allstate hatched prior to November 1999. Such a ruling would force agents to tender back money they no longer have or drop out of the lawsuit. Simply put, it would have the effect of eviscerated the Rule23(b)(2) class contemplated by the Court. Plaintiffs do not believe that this is the result the Court intended.

III. PLAINTIFFS REQUEST CERTIFICATION UNDER 28 U.S.C. § 1292(b) IF THE COURT ENTERS CERTAIN RULINGS AGAINST PLAINTIFFS

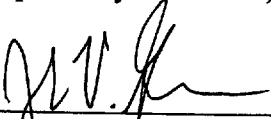
The impact on ability of plaintiffs and class members to prosecute their claims of a judicial ruling requiring tender back of sale proceeds or enhanced severance benefits is so great that, if the Court so rules, plaintiffs respectfully request certification of the issue pursuant to 28 U.S.C. § 1292(b). The applicability of *Long*, and the meaning of the common law tender back rules, involve controlling questions of law. If the Court were to rule adversely to plaintiffs on these issues, there would be substantial ground for difference of opinion. Permitting an immediate appeal would materially advance the ultimate termination of the litigation.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully submit that the Court should reconsider its ruling and modify the Declaratory Judgment to reflect that tender back is not required to invalidate an unenforceable release that does not comply with the ADEA. In the event the Court rules that tender back is required to invalidate the Release and participate in this action, it should both clarify that the conversion bonus is the only “benefit” subject to the “repayment” requirement and either delay tender back or, alternatively, allow agents to give a written commitment to pay the amount to be tendered back in a form acceptable to the Court. If, however, the Court rules adversely to plaintiffs concerning the existence of a tender back

requirement, and in particular requires tender back of sale proceeds or enhanced severance benefits, plaintiffs respectfully request that the Court certify its rulings pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PLAINTIFFS' MOTION FOR RECONSIDERATION and accompanying memorandum of law were served this 14th day of April, 2004, by United States Mail, postage prepaid, on the following counsel of record:

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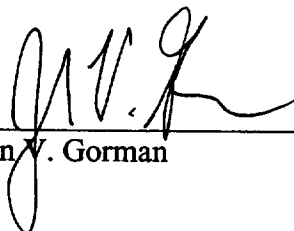
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