VOL. 38, NO. 4 WINTER 2025

BENEFITS LAW JOURNAL

Wolters Kluwer

Duress

By Barry L. Salkin

In this article, the author examines when a waiver and release of ERISA claims may be invalid because of duress.

ERISA claims may be waived by release[1] if the release was signed knowingly and voluntarily.[2] An employee may show that a waiver and release of ERISA claims was invalid because of, among other defenses, duress,[3] consistent with the general rule that absent a showing of fraud or duress,[4] parties are bound by the agreements that they sign, without regard to whether they regret their decision after the fact.[5] Duress is a defect in the formation process, resulting in an unenforceable contract.[6] An ancient common law doctrine[7] that initially operated in a manner similar to the criminal law,[8] the duress doctrine has changed significantly from its early common law origins where the defense was limited to actual imprisonment or physical harm to the offeree.[9] The court created economic duress doctrine,[10] described by at least one commentator as "fundamental in contract law,"[11] arises from the theory that "the courts will not enforce an agreement in which one party has unjustly taken advantage of the economic necessities of another and therefore threatened an unlawful injury."[12]

AN ILLUSTRATION

As an illustration of the evolution of the economic duress doctrine, under Section 492 of the Restatement (First) of Contracts, duress was defined as "(a) any wrongful act of one person that compels a manifestation of apparent assent to a transaction without his volition, or (b) any wrongful threat[13] of one person by words or other conduct that induces another to enter into the transaction under the influence of such fear as precludes him from exercising free will or judgment if the threat was intended or reasonably should have been expected as an inducement."[14] Comment f to Section 492 provides that "the fear must be a cause inducing entrance into a transaction, and though not necessarily the sole cause, it must be one without which the transaction

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would not have occurred."[15] Further, the test of what act or threat produces the required degree of fear is not objective. The threat need not be such as would put a brave man or even a man of ordinary firmness, in fear. The question is rather did it put one entering into the transaction in such fear as to preclude the exercise by him of free will and judgment."[16] Moreover, "there is no absolute demarcation between fear that deprives a party of free will and judgment, and a lesser degree of fear."[17]

The Restatement (Second) of Contracts took a different approach to defining duress than the Restatement (First).[18] Section 175 of Restatement (Second) provides that "if a party's manifestation of intent is induced by improper threats by the other party,[19] that leaves the victim no reasonable alternative[20] then the contract is voidable by the victim.[21] An improper threat, which may be expressed by words or in conduct,[22] includes a threat of crime or tort; a threat that is a crime or tort; a threat of criminal prosecution; a bad faith threat to use civil process; and a threat to breach the duty of good faith and fair dealing in a contractual relationship.[23] The Restatement (Second) of Contracts further provides that a threat is improper if the resulting exchange is not on fair terms, and:

(i) The threatened act would harm the recipient and would not significantly benefit[24] the party making the threat;

(ii) The effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat; and

(iii) What is threatened is otherwise a use of power for illegitimate ends.[25]

However, as illustrated by cases in the U.S. Court of Appeals for the Second Circuit primarily applying New York law of economic duress, some cases reference free will,[26] some cases reference no reasonable alternative,[27] and some cases reference both free will and no reasonable alternative.[28]

RARE FINDING

The tradeoff for the expansion of scope of the duress doctrine. has been academic criticism of the parameters of the doctrine.[29] However, despite what might be doctrinal inconsistencies or ambiguities, courts rarely find duress or even make a decision in favor of finding duress.[30] Duress is a "narrowly restricted defense,"[31] which courts "rightfully employ . . . sparingly,"[32] resulting in invalidation only in "extreme and extraordinary cases."[33] The duress doctrine is regarded as a "last resort"[34] to correct exploitation of business exigencies when conventional alternatives and remedies are unavailing."[35] A party seeking to avoid a contract on the basis of economic duress has a heavy burden.[36] A party seeking to avoid an agreement based upon duress must show that the alleged coercive behavior either originated with the defendant or was known to the defendants at the time the agreement was entered into.[37]A party cannot rely upon mental incompetence to establish duress.[38] A party to a contract cannot invoke a duress defense where his or her own advisor or representative pressured him or her into acceptance of a deal.[39] Mere hard bargaining power[40] or unequal bargaining power[41] or financial pressure[42] or a party's being financially vulnerable[43] or the choice between difficult or unpleasant alternatives[44] or "unnecessarily harsh"[45] language is insufficient to establish duress. In a frequently cited decision by the U.S. Court of Appeals for the Seventh Circuit,[46] Judge Posner wrote that "The mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions. Matters stand differently when the complaining party's financial distress is due to the other party's conduct."[47] Another reason that claims of duress are difficult to maintain is that courts tend to define wrongful or improper threats more narrowly than the Restatement (Second) of Contracts, holding, for example, that it is not duress to threaten to take action which is legally permissible.[48]

Additionally, what might otherwise be valid duress claims can be lost through ratification,[49] although the U.S. Court of Appeals for the Third Circuit in *Jakimas v. Hoffman La Roche, Inc*. stated that "application of the doctrine of ratification to ERISA claims may frustrate the practical operation of the protections ERISA affords."[50] The theory of ratification is that a promise can be enforced even though the underlying contract is voidable if it is ratified by the promisor.[51] A party may ratify a contract or release entered into under duress by "intentionally accepting benefits under the contract,"[52] by "remaining silent or acquiescing in the contract for a period of time after he has had the opportunity to avoid it,"[53] or by "acting upon it, performing under it, or affirmatively acknowledging it."[54] Tender back is a related concept which provides that if the promisor does not return the consideration received under the contract he has ratified it.[55] While in general to avoid enforcement of a release, the tender back requirement must be satisfied,[56] in some jurisdictions it is an open question whether tender back applies to ERISA cases,[57] although the U.S. District Court for the Eastern District of Pennsylvania stated in 2015 that "It is well established under federal law that a plaintiff's failure to return the consideration received for a release does not constitute ratification of the release as to ADEA and ERISA claims."[58]

THREE TYPES OF DURESS

The Restatement (Second) of Contracts lists three types of duress: duress by physical compulsion,[59] undue influence,[60] or duress by threat.[61] With respect to duress by threat, establishing duress makes the contract voidable,[62] not void.[63]

Pursuant to ERISA Section 515, duress is among the defenses that cannot be used as a defense in an action by trust funds to collect delinquent contributions.[64] A claim for economic duress may be preempted by ERISA.[65] A violation of ERISA's claims procedures rule could constitute duress.[66] State law may preclude a federal court from determining whether a judgment was procured by duress.[67] While duress can be alleged with respect to a designation of beneficiary[68] or with respect to an agreement to arbitrate,[69] or a forum selection clause[70] it arises most frequently in the employee benefits context in connection with the validity of releases.[71]

EFFECTIVENESS OF RELEASES

The effectiveness of releases is governed by principles of contract law.[72] With respect to the threshold question of governing law, federal courts have reached divergent results concerning whether state or federal law should govern the releases of federal statutory claims,[73] although how frequently resolution of this issue is outcome-determinative is unclear,[74] because "the federal common law of release is largely undeveloped, and federal common law is largely undistinguishable from general contract principles under state common law."[75] There is general agreement on the proposition that federal law[76] decides whether the release of a federal claim is valid.[77] However, although federal law governs, "it does not necessarily follow from the fact that federal law governs that courts must fashion a uniform federal rule of decision."[78] That is, while federal courts have the power to choose rules of decision for all federal claims, the rules of decision can be state rules of decision.[79] If a plaintiff is alleging violations of both federal and state law, the fact that certain state law defenses such as ratification and tender-back do not apply to federal claims under the federal common law does not mean that such principles are applicable with respect to state law claims.[80]

NOTES

1. Romero v. All State Insurance Co., 2014 WL 796005 (E.D. Pa. Feb. 27,2014) ("well established principle that ERISA claims may be waived by a valid release"); Joseph v.

The Chase Manhattan Bank, N.A., 751 F. Supp 31 (E.D.N.Y. 1990) (collecting cases). Cf. Under Section 303 of the Bankruptcy Code, an action is involuntary if it is performed under duress, force, or coercion. Sieber v. FDIC, 96 Bankr. Rptr. 154,157 (Bankr. C.D. Ill. 1988) In re Berger 669 Bankr. Rptr. 323, 2025 WL 1304603 (W.D. Ark. May 6, 2025).

2. Hakim v. Accenture, 718 F. 3d 675 (7th Cir. 2013); Luther v. Navistar International Corp., 2016 WL 3568809 (N.D. Ill. July 1, 2016); Cook Children's Medical Center v. New England PPO Plan of General Consol. Mgmt, Inc., 491 F. 3d 266, 273-274 (5th Cir. 2007) (ERISA claim may be waived by agreement, so long as the waiver is explicit, voluntary, and made in good faith); Manning v. Hayes, 212 F. 3d 866, 871 (5th Cir. 2000) (same).

3. Williams v. Phillips Petroleum Co., 23 F. 3d. 930, 935 (5th Cir. 1994); Davis & Associates v. Health Management Services, Inc., 168 F. Supp. 2d 109 (S.D.N.Y. 2001). Courts recognize three types of duress: duress by physical compulsion; duress by threat; and duress by undue influence. Gaughan v. Rubenstein, 261 F. Supp. 3d 390, 403 (S.D.N.Y. 2017); Taub v. Arrayit Corp., 2023 WL 8368886 (S.D.N.Y. Dec. 4, 2023). This article deals with duress by threat. See, infra, notes 59-63 and accompanying text. There are other means of characterizing duress: duress to the person or physical duress of goods and duress of goods. See, for example, Adder v. Holman Mooney 288 N.C. 484, 490 (N.C. 1975) (Duress is commonly said to be of the person if it is manifested by imprisonment, or by threats or by an exhibition of force which apparently cannot be resisted. Duress of the goods occurs "when one is obliged to submit to an illegal exaction in order to obtain possession from one who has wrongfully taken them from his possession.")

4. In United States v. Bethlehem Steel Corp., 315 U.S. 289, 300 (1942), the Supreme Court stated that "the word duress implies feebleness on one side, overpowering strength on the other." Judge Posner has described economic duress as "a situation in which one person obtains a temporary monopoly that it tries to use to obtain a benefit to which it is not entitled," discussed in Mark Seidenfeld and Murat Mungan, "Duress as Rent Seeking," 99 Minn. L. Rev. 1423, 1430, fn. 33 (2015) (hereinafter Seidenfeld and Mungan, "Duress as Rent Seeking"). This article is limited to economic duress, sometimes referred to as business compulsion. Acquaire v. Canada Dry Bottling, 906 F. Supp. 819 (E.D.N.Y. 1995).

5. Johnson v. Penn Camera Exchange, 583 F. Supp. 2d 81, 86 (D.D.C. 2008); Schmidt v. Shah, 696 F. Supp. 2d 44 (D.D.C. 2010).

6. Joseph Perillo, Calamari, and Perillo, Contracts, Section 9.2 (5th ed 2003). See also Orit Gan, "Contractual Duress and Relations of Power," Harvard Journal of Law and Gender at 171,182 (2913) (hereinafter, Gan, "Contractual Duress") ("Duress is an excuse, that says a person should not be held accountable to a contract that was imposed on him against his free will. Under this theory, duress is an exception to the freedom of contract rule, along with other defects in the formation of the contract, such as misrepresentation, mistake, or undue influence.").

7. F A Farnsworth, Contracts, Section 417 (4th Edit. 2004) ("The early common law imposed a very strict test for duress.").

8. Grace Giesel, "A Realistic Proposal for the Contract Duress Doctrine," 107 W. Va. Law. Rev. 444, 454 (2005) (hereinafter Giesel, "A Realistic Proposal,") ("Historically, 'A party could avoid a contractual obligation on the basis of duress only if the constraint on the party's decision making was in the form of a fear of death or serious bodily harm or actual imprisonment."). See also 1 Blackstone Commentaries 131, quoted in Joseph M. Perillo, Calamari and Perillo on Contracts, 9.2 at 316 (5th Ed. 2003) ("A fear of battery is no duress; neither is the fear of having one's house burned; or

one's goods taken away or destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages, but no suitable atonement can be made for the loss of life or limb.").

9. Steve W. Feldman, "Pre-Dispute Arbitration Agreements, Freedom of Contract, and Economic Duress Defense: A Critique of Three Commentaries," 64 Cleveland St. Law. Rev. 37,54 (2015) (hereinafter Feldman, "Pre-Dispute Arbitration Agreements"). See also Sam Williston and Richard Loeb, A Treatise on The Law of Contracts 9.2 (6th Ed. 2009) (economic duress doctrine "is currently being extended and expanded and bears slight resemblance to common law duress"). Cf. Orit Gan, "Contractual Duress, p. 178 ("Under traditional duress doctrine, the threat needed to be illegal . . . but under modern duress doctrine, the threat need not be illegal.").

10. United States v. Chi Tong Kuok, 671 F. 3d 931,947 (9th Cir. 2017) ("Duress is not a statutory defense but a common law defense."); Frumkin v. International Business Machines, 801 F. Supp. 1029 (S.D.N.Y. 1992) (courts recognize the avoidance of contractual liability on the grounds of economic duress); Mark Seidenfeld and Murat Mungan, "Duress as Rent Seeking," supra, n. 4 at 1429 ("Courts have created the defense of duress to a breach of contract. A defendant that successfully asserts this defense is relieved of its contractual obligations").

11. Ian J. Silverbrand, "Workplace Romance and the Economic Duress of Love Contract Policies," 54 Villanova L. Rev. 155, 171 (2009) (hereinafter Silverbrand, "Workplace Romance").

12. Scientific Holding Co. v. Plessy, Inc., 510 F. 2d 1522 (2d Cir. 1974); VKK Corp. v. National Football League, 244 F. 3d 11(2d Cir. 2001).

13. Feldman, "Pre-Dispute Arbitration Agreements," supra, n. 9 at 57 ("The wrongfulness of the pressure or threat is a matter of degree and exists on a continuum. The gravity or magnitude of the threat in relation to the contract at issue, along with the resulting degree of unfairness, is a significant consideration.").

14. Discussed at Giesel, "A Realistic Proposal," supra, n. 8 at. 457. See also Duma v. Union Provident, 770 F. Supp. 2d 308 (D.D.C. 2011).

15. Id. at 458, fn. 90.

16. Restatement (First) of Contracts, Section 492, cmt. a.

17. Id., cmt. e.

18. The U.S. Court of Appeals for the Sixth Circuit included Sections 175 and 176 of Restatement (Second) of Contracts as part of a "federal common law of releases," discussed infra at notes 71 through 80.

19. Restatement (Second) of Contracts Section 175(2) provides that if a party's manifestation of assent is induced by one who is not a party to the contract, the contract is voidable by the victim in certain circumstances," but in the employee benefits context the alleged acts of duress will generally be by the other party to the transaction.

20. Restatement (Second) of Contracts, Section 175, cmt. b. states that the free will approach is flawed because of its "vagueness and impracticability." See also Giesel, "Any Reasonable Proposal," supra, n. 8 ("Any test for duress stated in terms of the existence of free will must be scrapped in favor of a no reasonable alternatives test."). See Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 65 F. 3d 562,569 (7th Cir. 1995) (one cannot successfully claim duress as a defense to a contract where he or she had an alternative to signing the document); Zaharev. v. Hartford Life and Accident Ins. Co., 2021 WL 1431389 (D.S.C. March 16, 2021) (absent an allegation that a party had

no other alternative than to enter into an agreement, there is no claim for duress); Bekhor v. Josephthal Group, Inc., 2000 WL 1521198 (S.D.N.Y. Oct. 13, 2000) (no duress despite a "very hostile atmosphere during the negotiations," where plaintiffs "had the alternative of refusing to sign and pursuing their legal claims"); Batco Dev. Corp. v. B&R Consultants, Inc., 1999 WL 76873 at *4-5 (S.D.N.Y. Feb. 16,1999) (no claim for duress, when plaintiff could simply have walked out of the meeting). Cf. Cheung v. New York Palace Hotel, 2005 WL 2387573 (E.D.N.Y. Sept. 28, 2005) (conclusory allegations about no financial alternatives to signing the release cast some doubt on the validity of the release, so claim to dismiss the action was denied).

21. This section of Restatement (Second) of Contracts is discussed in Schmidt v. Shah, supra, n. 5, and Wright v. Foreign Service Grievance Board, 503 F. Supp. 2d 163 (D.D.C. 2007).

22. Restatement (Second) of Contracts Section 175, cmt. a.

23. Id., Section 176(1).

24. Comment f to Section 176 of Restatement (Second) of Contracts explains with respect to the "not significantly benefits exception" that "[i]f, on the [victim's] refusal to contract, the maker of the threat were to do the threatened act, it would therefore be done maliciously and unconscionably, out of pure vindictiveness." Examples of a party not obtaining significant benefit set forth in the comment are a threat to make public embarrassing information regarding the victim unless he or she assents to the contract, or an employer's threat to an employee that the employer will try to prevent the employe from obtaining employment elsewhere unless the employee signs a release. See Ian J. Silverbrand, "Workplace Romance," supra n. 11 at 172-173.

25. Restatement (Second) of Contracts Section 176(2).

26. Warnaco v. Farkas, 872 F. 2d 539,546 (2d Cir. 1989); Acquaire v. Canada Dry Bottling, supra, n. 4.

27. U.S.W. Financial Services, Inc. v. Tollman, 786 F. Supp. 333, 338 (S.D.N.Y. 1992); Great Lakes Reinsurance (UK) v. Herzog, 16 Civ 9848 (S.D.N.Y. May 18, 2023); Gulf & Western Corp. v. Craftique Productions, Inc., 523 F. Supp. 603, 610 (S.D.N.Y. 1981). See also John D. Calamari and Joseph M. Perillo, "The Law of Contracts," Section 9.2 at 162 (1977) quoted in Pocchia v. Prudential Insurance Co., 74 F. Supp. 2d 240 (E.D. N.Y. 1999) ("Where the coercion involves economic pressure rather than the threat of physical injury . . . an objective standard continues to be demanded by the courts. In the face of an either . . . or . . . does the person threatened have a reasonable third alternative. For example, is there a judicial proceeding that could provide prompt and adequate relief. If so, a case for duress cannot be made out."). Similarly, in McGuire v. Lord Corp., 456 F. Supp. 3d 729 (E.D.N.C. 2020), the district court held that a threat to withhold a bonus under an employment agreement would not constitute duress because plaintiff could have brought an action for breach of contract.

28. Nelson v. Stanley Blacker, Inc., 713 F. Supp. 107 (S.D.N.Y. 1989); Joseph v. The Chase Manhattan Bank, supra, n. 1; Harless v. Research Institute of America, 1 F. Supp. 2d 235 (S.D.N.Y. 1998); Pocchia v. Prudential Insurance Co., supra n. 27.

29. Julie Kostritsky, "Stepping Out of The Morass of Duress Cases: A Suggested Policy Guide," 53 Albany Law Rev. 581, 592 ("Confusion prevails in duress law"); Gan, "Contractual Duress," supra, n. 6 ("Duress doctrine has been criticized for its confusing nature"); Mark Seidenfeld and Murat Mungan, "Duress as Rent Seeking," supra n. 4 at 1430 ("The cases do not develop a coherent concept of what constitutes a wrongful economic threat. . . . Unfortunately, courts have not explained what distinguishes those threats that are unlawful from those that are not."); Oren Bar-Gill and

Omri Ben-Shohar, "The Law of Duress and the Economics of Credible Threats," 33 Jrnl. of Legal Studies 391-392 (2004) ("For centuries, contract law has been searching for a unifying principle that will determine when such threats will be considered improper rendering the resulting agreement unenforceable on the grounds of duress. Thus far, such general criterion has failed to emerge"); Sian E. Provost, "A Defense of Rights Based Approach to Identifying Coercion in Contract Law," 73 Tex. Law. Rev. 629, 633 (1995) ("The terminology that courts use to invalidate or alter contracts on duress grounds of coercion differ from jurisdiction to jurisdiction and even from case to case. Moreover, the law makes little effort to define the terms precisely"); Jacob Dawson, Comment, "Contract After Compulsion: Some Lessons from the State Courts," 124 Yale L. Jrnl. 233, 43 (2014) ("precise elements of economic duress claim vary from jurisdiction to jurisdiction"). Cf. Feldman, "Pre-Dispute Arbitration Agreement," supra, n. 9 at 55 ("the wording varies less than the substance and most jurisdictions follow very similar fundamental principles regarding the economic duress," and Lord and Williston, "A Treatise on the Law of Contracts, at 71:19 ("There have been numerous formulations of the elements necessary to invoke the defense of economic duress or business compulsion though all of them share certain basic characteristics.").

30. Giesel, "A Realistic Proposal," supra. n. 8 at 446.

31. Chase Manhattan Bank v. Natarelli, 73 Misc. 2d 78, 401 N.Y.S. 2d 404, 409 (N.Y. Supp. 1977). See also Gan, "Contractual Duress," supra, n. 6 at 182 (the duress doctrine "provides a narrow exception" to the grand rule of contract law, freedom of contract).

32. In re American Intl. Group Consolidated Derivatives Litigation, 976 A. 2d 872, 885 (Del. Ch. 2009).

33. VKK Corp. v. NFL, supra, n. 12; In re Lehman Bros. Holdings, Inc., 519 B.R. 47, 58 (Bankr. S.D.N.Y. 2014); Shufford v. Integon Indemnity Corp., 73 F. Supp. 2d. 1293, 1299 (M.D. Ala. 1999) (The economic duress doctrine applies "only to special, unusual, or extraordinary circumstances). See also Williams v. The Department of Education of the City of New York, 2016 WL 4574928 (S.D.N.Y. Sept. 1, 2016) ("Because an element of economic duress is . . . present when many contracts are formed or releases given, ability of a party to disown his obligation on a contract on that basis is reserved for extreme and extraordinary cases."); Murphy v. Institute of Int'l Education, 2020 WL 6561603 (S.D.N.Y. July 27, 2020, report and recommendation adopted 2020 WL 5658688 (S.D.N.Y. Sept. 23, 2020), aff'd 32 F. 4th 146 (2d Cir.. 2022) (same). See also Gan, supra, n. 6 at 182 ("Only in rare and extreme cases will courts conclude that the threat left the aggrieved party with no reasonable alternative and that he or she did not freely and voluntarily consent to the contract.").

34. Feldman, "Pre- Dispute Arbitration Agreement," supra, n. 9 at 61, characterizing economic duress as a "doctrine of last resort and a policy to safeguard freedom of contract," and contemplating the "adverse impact of readily available rescission upon the legitimate interest of vendors of goods and services, many of which are small businesses living on tight profit margins."

35. Johnson v. Intl. Bus. Machs. Corp., 591 F. Supp. 522 (N.D. Cal. 1995); Rich Willock, Inc. v. Ashton Development, Inc., 157 Cal. App. 3d 1154, 1158-1159, 204 Cal. Rptr. 86 (1984).

36. International Halliwell Mines v. Continental Copper & Steel Industries, 544 F. 2d 105, 108 (2d Cir. 1976); Orix Credit Alliance, Inc. v. Bell Realty, Inc., 1995 WL 50591 at *3 (S.D.N.Y. August 23, 1995); Nasik Breeding and Research Farm, Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001), cited in Giesel, "A Realistic Proposal," supra, n. 6, at 468, fn. 19. See also Williams v. The Department of Education of The City of New York, supra, n. 31; Mandavia v. Columbia University, 912 F. Supp. 2d. 119, 127

(S.D.N.Y. 2012); Taub v. Arrayit Corporation, supra, n. 3; In re Centric Brands, 639 B.R. 34 (S.D.N.Y. March 25, 2022); Acquaire v. Canada Dry Bottling, supra, n. 4.

37. Evan v. Waldorf Astoria Corp., 887 F. Supp. 911 (E.D.N.Y. 1995), aff'd 33 F. 3d 49 (2d Cir, 1994); Murphy v. Institute of International Education, 2020 WL 6561603 (S.D.N.Y. July 27, 2020), aff'd 32 F. 4th 146 (2d Cir. 2022).

38. Dufort v. Aetna Life, 816 F. Supp. 583 (S.D.N.Y. 1993).

39. Nikci v. Quality Building Services, 995 F. Supp. 2d 240 (S.D.N.Y. 2014); Mandavia v. Columbia University, supra. n. 36; Evans v. Waldorf Astoria Corp., 827 F. Supp. 911, 914 (E.D.N.Y. 1993), aff'd 33 F. 3d 49 (2d. Cir. 1994); Murphy v. Institute of International Education, supra, n. 33.

40. Acquaire v. Canada Dry Bottling, supra, n. 4; Chouinard v. Chouinard, 568 F. 2d 430, 434 (5th Cir. 1978); Myricks v. Federal Reserve Bank of Atlanta, 480 F. 3d 1036 (11th Cir. 2007); Lewis v. Herman, 775 F. Supp. 1137 (N.D. Ill. 1991); Del Turco v. BRB Ceramic Textiles Marble & Stone, 2006 WL 2506588 (E.D.N.Y. Aug. 18, 2006); Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63, 69 (S.D.N.Y. 1975) ("Mere hard bargaining positions, if lawful . . . will not be deemed duress"); Anderson v. Savage Decorating, Inc., 2013 WL 1196491 (N.D. Ill. March 22, 2013) ("Even if [plaintiff] and his cohorts were threatening to put defendant out of business, if he declined to sign the note, there is no evidence to suggest that this threat was wrongful"); Williams v. Dept. of Education of The City of New York, supra, n. 33; Mandavia v. Columbia University, supra, n. 36 ("A general hostile attitude in negotiations simply does not constitute wrongful threats sufficient to override a person's free will."). Cf. Thompson v. Federal Express Corporation, 808 F. Supp. 950 (M.D. Ga. 1992) ("Duress claim must be based upon acts or conduct of the opposing party which are wrongful or unlawful. . . . The conduct of Federal Express, while impersonal, was neither wrongful nor illegal."); Bekhor v. Josephthal Group, Inc., supra, n. 20 ("a very hostile atmosphere during the negotiations"). Cf. E. Farnsworth, "Contracts," 4.17, p. 263 (1982) ("Hard bargaining between experienced adversaries ought not to be discouraged").

41. Interpharm, Inc. v. Wells Fargo, 655 F. 3d 136, 142 (2d Cir. 2011); Marra v. Papondreou, 59 F. Supp. 2d 65 (D.D.C. 1999), aff'd 216 F. 3d 1119 (D.C. Cir 2000).

42. Killian v. McCullough, 873 F. Supp. 938 (E.D. Pa. 1995); Interpharm, Inc. v. Wells Fargo, supra, n. 41; Guzman v. Concavage Marine Construction, Inc. Intercoastal Water Transportation, 176 F. Supp. 3d 330 (S.D.N.Y. 2016); Chouinard v. Chouinard, supra, n. 40; Business Incentives Co. v. Sony Corp. of America, supra, n. 40; Williams v. the Department of Education of the City of New York, supra, n. 33; Goldstein v. S.A. Restaurant Corp., 622 F. Supp. 139, 145 (D.D.C. 1989) ("Financial pressure, even in the context of unequal bargaining power, does not constitute economic duress"). Cf. Grant v. Potter, 2002 WL 535093 at *6 (N.D. Ill. April 10, 2002) ("fact that[plaintiff] needed a job to meet her financial obligations does not establish the defense of duress") and Davis & Associates v. Health Management Services, Inc., supra, n. 3 (sophisticated party seeking to void a contract because of economic duress must "do more than merely claim that the other party knew about and used his poor financial conditions to obtain an advantage in contract negotiations").

43. Newage Garden Grove, LLC v. Wells Fargo Bank, 2023 N.Y. Slip Op. 32447 (Sup. Ct., New York City, July 4, 2023.

44. EEOC v. American Express Publishing Corp., 681 F. Supp. 2d 216, 219 (S.D.N.Y. 1988); Parker v. Chevrolet Corp., 929 F. Supp. 162 (1996); Stone v. University of Maryland Med. System, 855 F. 2d 167,173 (4th Cir. 1998). See also Laymon v. The Kroger Company, 924 F. 2d 1052 (per curiam) (4th Cir. 1991) ("The mere fact that Mr.

Laymon would have preferred a job other than the one offered to him is not sufficient to establish duress in the signing of the separation agreement."). Cf. Henn v. The National Geographic Society, 819 F. 2d 824 (7th Cir. 1987) ("An employer's communication of the risks of the job does not spoil the employee's decision to avoid those risks by quitting.").

45. Dufort v. Aetna Life, supra, n. 38.

46. Selmer Co. v. Blakeslee Midwest Co., 704 F. 2d 924 (7th Cir. 1983).

47. Id. at 928. See also Brian Bix, "Epstein, Gaswell, Economics, Unconscionability and Morals," 19 Quinnipiac L. Rev. 715, 718, n. 19 (2000), citing Blakeslee-Midwest as "rejecting the argument that financial distress [due to a threat] alone is sufficient to rescind a contract for duress" and Hila Keren, "Consulting under Stress," 64 Hastings Law Jrnl. 679, 686 (2013), characterizing Blakeslee-Midwest as "a leading case for the proposition that the duress defense necessitates fault," both cited in Seidenfeld and Mungan, "Duress as Rent Seeking," supra, n. 4 at 1430-1431, fn. 37.

48. Kamerman v. Steinberg, 891 F. 2d. 424, 432 (2d Cir. 1989); Continental Airlines, Inc. v. Celakis, 943 F. Supp. 300, 307 (S.D.N.Y. 1996), aff'd 129 F. 3d 113 (2d Cir. 1997) ("A party's threat to take action which it is legally entitled to take is not wrongful, nor is it a threat to insist upon one's legal rights"). Thelin v. Edward K. Mitchell Construction Co., 576 F. Supp. 1404 (N.D. Ill. 1983) (to institute or threaten to institute legal action where a party has the legal right to take such action does not constitute duress.); Business Incentive Co. v. Sony Corp. of America, supra, n. 40 at 69) ("If the defendant's actions are within his legal rights, plaintiff cannot make out a claim of economic duress"); Interpharm v. Wells Fargo Bank, N.A., 2010 WL 1257300 (S.D.N.Y. March 31, 2010), aff'd 655 F. 3d 136 (2d Cir. 2011) ("threats to enforce a party's legal rights under a contract-or even that party's interpretation of its rights under the contract-cannot constitute a wrongful threat sufficient to establish a claim of economic duress"); PNC Bank v. Dana Transport, Inc., 2022 WL 3701441 at *6 (S.D.N.Y. Aug. 6, 2022) (same); Anderson v. Savage Decorating, Inc. supra, n. 40 ("Even if[plaintiff] and his cohorts were threatening to put defendant out of business, if he refused to sign the note, there is no evidence to suggest that this conduct was unlawful); John R. Dawson, "Duress Through Civil Litigation," 45 Mich. L. Rev. 571, 579 (1947) (collecting cases for the proposition that it cannot be duress to threaten to do that which one has a legal right to do). In some states, to constitute economic duress, the conduct must be unlawful. For example, in Michigan, providing a party with an ultimatum of either agreeing to a proposed modification of a contract or suffer the other party's breach of the contract is not unlawful or illegal, because breaching a contract is neither unlawful nor illegal. Vigiletti v. Chowning, Edgar and Wagner, P.C., 2014 WL 2816748 (E.D. Mich. June 23, 2014). In contrast, under New York law, a threat to withhold performance that one is contractually obligated to provide to compel the other party to submit to new demands can constitute a wrongful threat. Interpharm, Inc. v. Wells Fargo Bank, N.A., supra, n. 41. With respect to the issuance of a notice of deficiency by IRS if a taxpayer fails to extend the statute of limitations, in Leroy C. Griffiths, IC Memo 1988-445, the Tax Court stated that threatening a lawful action, even if contrary to policy, does not constitute duress. See also Burnet v. Chicago Railway Co., 282 U.S. 295 (1931).

49. Restatement (Second) of Contracts (Second) Section 381 (1981) cited in McLellan v. Midwest Machining, Inc. 900 F. 3d 297 (6th Cir. 2018) states that "The power of a party to avoid a contract for duress . . . is lost if, after the circumstances that made it voidable have ceased to exist, he does not within a reasonable period of time manifest to the other party his intention to avoid it."); Faris v. Williams, 332 F. 3d 316,322 (5th Cir. 2003) (under federal common law a party ratifies a contract by failing to return or offer to return the consideration received for signing the contract); Schmidt v. Shah,

supra, n. 5 ("It is well established that a victim of duress may be held to have ratified the agreement by accepting its benefits"); Hogan v. Eastern Enterprises/Boston Gas, 165 F. Supp. 2d 55 (D.Mass. 2005) ("Hogan's assertion of duress is unavailing. . . . He has retained the benefits of his bargain with the defendant. He waited almost exactly two years before he sought to avoid the release. This was too little, too late. By his conduct, Hogan has ratified the release."); In re Boston Shipyard Corp., 886 F. 2d. 451, 455 (1st Cir. 1989), quoting DiRose v. PK Management Corp., 691 F. 2d 628, 633-634 (2d Cir. 1982) ("It is well settled that" [a] contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so."); Kovian v. Fulton County National Bank & Trust Co., 857 F. Supp. 1032, 1039 (N.D.N.Y. 1994) ("Once the duress is removed, the party claiming duress must choose either to promptly repudiate the contract or to acquiesce in its terms pursuant to the doctrine of ratification); Gregory v. Allstate Insurance Co., 2016 WL 4617404 (S.D. Tex. Sept. 2, 2016) ("Under federal common law, a party ratifies a contract by failing to return or offer to return the consideration for signing the contract"); Roberts v. All State Insurance Co., 2016 WL 4619287 (S.D. Tex. 2016) (same); DePalma v. Realty 10 Corp., 2002 WL 461647 at *4 (S.D.N.Y. March 25, 2002) ("The simple act of retaining consideration after learning that a release is voidable operates to ratify the contract."); New Orleans Flooring Supply v. Kentile Floor, Inc., 1994 WL 97505 at *2 (S.D.N.Y. March 18, 1994) ("A contract signed under duress is not void but voidable, and a party must move quickly or the defense is deemed waived and the contract ratified."); Acquaire v Canada Dry, supra, n. 4 ("A party who fails to promptly challenge an agreement on the grounds of duress waives the defense"); Wright v. Foreign Services Grievance Board, supra, n. 19 ("Because economic duress renders a contract voidable – as opposed to void – a plaintiff who accepts the benefits of a contract entered into under duress cannot later seek to have the contract rescinded"); Anselmo v. Manufacturers Life Ins. Co., 771 F. 2d 417, 420 (8th Cir. 1985) (a party who signed a severance agreement under the threat of losing his severance pay, then claiming duress, had his claim denied, because his acceptance of the benefits ratified the contract). Delays as short as six months have been held sufficient to waive he right to challenge releases. DiRose v. PK Management Corp., supra. For a discussion of the factors to be taken into account in determining whether a party acted within a reasonable period of time after the duress ceases, see Restatement (Second) of Contracts, Section 381(3), discussed in Romero v. Allstate Insurance Co., 2015 WL 7014576 (E.D. Pa. Nov. 12, 2015). See also Dever v. Digital Equipment Corp., 61 F. 3d 1 (1st Cir. 1995) (collecting cases in which ratification by a multiyear delay waived the duress defense).

50. Jakimas v. Hoffman La Roche, Inc., 485 F. 3d 770 (3d Cir. 2007).

51. Id. at 782.

52. In re Boston Shipyard Corp., supra, n. 49.

53. Id.

54. Id. See also Goldstein v. S & A Restaurant Corp., supra, n. 42 ("While a delay in disaffirming a contract may preclude avoidance of the contract's operation, the acceptance of benefits under the contract necessarily bars denial of its validity.").

55. Jakimas v. Hoffman La Roche, Inc. supra, n. 50.

56. Harless v. Research Institute of America, supra, n. 28; Reid v. IBM, 21 EBC 1953, 1997 WL 357969 (S.D.N.Y. 1997).

57. Deven v. Digital Equipment Co., supra, n. 49 (not deciding whether tender back requirement applies in ERISA cases); Hogan v. Eastern Enterprises, Boston Gas, fn.

supra, n. 49 (First Circuit has not yet decided whether tender back is required in ERISA cases).

58. Tabor v. Allstate Insurance Co., 2015 WL 7756189 (E.D. Pa. Dec. 1, 2015); Romero v. Allstate Insurance Co., 143 F. Supp 3d 271 (E.D. Pa. 2015) (well established principle that "state law doctrines of tender back and release do not apply to releases that purport to release federal claims-particularly claims under the ADEA and ERISA.").

59. With respect to this situation, the conduct of signing the document is not the intentional act to the manifestation of intent by physical compulsion, Section 174 of the Restatement (Second) of Contracts this type of duress as a physically or mentally stronger party placing another person's hand on the pen and then guiding that other person's signature. In such a situation, the conduct of signing the document is not the intentional act of the contracting party and is therefore not a manifestation of assent. Unlike duress by threat, duress by physical compulsion results in a void, rather than a voidable contract. Restatement (Second) of Contracts Section 174, discussed in Schmidt v. Shaw, supra, n. 5 at fn. 14. See Giesel, "A Realistic Proposal," supra, n. 8 at 444. Duress by physical compulsion is highly unlikely in the employee benefits context.

60. For a fuller discussion of undue influence in the employee benefits context, see Salkin, "Undue Influence Claims Under ERISA," 37 Benefits Law Journal (Summer 2024), and is not discussed further herein). For a discussion of why undue influence should not be treated as a form of duress, see Giesel, "A Realistic Proposal," supra, n. 8 at 478-479.

61. See Parker v. Chrysler Corporation, supra, n. 44; Reid v. IBM, supra, n. 56; Evans v. Waldorf Astoria, supra, n. 39 Joseph v. The Chase Manhattan Bank, N.A., supra, n. 1; Frumkin v. IBM, supra, n. 10; Taub v. Arriyat Corp., supra, n. 3; Gaughan v. Rubinstein, supra. n. 3.

62. A voidable contract is one under which a party may elect to avoid any legal obligation under the contract or by ratification of the contract, to extinguish the power of avoidance. United States ex rel. Siewick v. Jamieson Sci. & Eng'g Inc., 214 F. 3d 1372, 1377-1378 (D.C. Cir. 2000); Reid v. IBM, supra, n. 56.

63. Restatement (Second) of Contracts 175; Hogan v. Eastern Enterprises/Boston Gas, supra, n. 49; Pocchio v. Prudential Insurance Co., supra, n. 27; In re Boston Shipyards, supra, n. 49; Devan v. Digital Equipment, supra, n. 49; Knoll v. Equinox Fitness Club, 2003 WL 23018887 (S.D.N.Y. Dec. 22, 2003); Nelson v. Stanley Blacker, Inc., supra, n. 28; Harless v. Research Institute of America, supra, n. 28; U.S. West Financial Services Inc. v. Tollman, supra, n. 27 at *2 (S.D.N.Y. 1992); Reid v. IBM, supra, n. 56.

64. Thelin v. Edward K. Mitchell Construction Co., supra, n. 48; Construction Ins. Laborers Pension Fund v. MWE Servs., Inc, 2006 WL 8438364 (W.D. Mo. Oct. 18, 2006); Boilermaker-Blacksmith National Pension Trust v. Elite Mechanical Welding, LLC, 2020 WL 2843230 (W.D. Mo. Aug. 1, 2020); Agathos v. Starlite Motel, 977 F. 2d 1500 (3d Cir. 1992).

65. Trundle & Co. Pension Plan v. Emanuel, 2020 WL 4218273 (S.D.N.Y. July 3, 2020).

66. Compare Pennsylvania Chiropractic Association v. Blue Cross Blue Shield Association, 2010 WL 1979569 (N.D. Ill. May 17, 2010) (finding duress) with Premier Health Center, P.C. v. United Health Group, fn. 29, 56 EBC 2050, 2013 WL 3943516 (D.N.J. August 1, 2013) (finding no duress).

67. Lincoln National Life Ins. Co. v. Subramaniam, 2023 WL 2203396, fn. 1 (E.D. Mich. Jan. 13, 2023) (court had no jurisdiction under Michigan law to determine whether a

divorce judgment was procured by fraud or duress.); Bachi-Reffitt v. Reffitt, 2017 WL 5998112 (W.D. Mich. Dec. 4, 2017), aff'd 802 Fed. App'x 913 (6th Cir. 2020).

68. See Iron Workers Mid-America Pension Fund v. Nevers, Case No. 05 C 347 (N.D. Ill. Nov. 10, 2015), discussed in B. Salkin, "Challenges to Beneficiary Designations in ERISA," 27 Benefits Law Journal 1 (Summer 2015). A duress type claim was also made in Samuelson v. Covenant HealthCare Systems, 2011 WL 5143156 (E.D. Mich. June 8, 2011), in which plaintiff alleged a breach of fiduciary claim because she was forced to retire.

69. Hellenic Lines, Ltd. v. Louis Dreyfuss Corp., 372 F. 2d 753, 756 (2d Cir. 1994). Rent-A-Car W. v. Jackson, 561 U.S. 63, 66 (2020); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Zaborowski v. MHN Govt. Services, Inc., 936 F. Supp 2d 1145, 1150 (2013); Platt v. Sodexo, 2023 WL 4832660 (C.D. Cal. July 25, 2003). An arbitrator must resolve claims that an entire agreement containing an arbitration clause was executed by duress. Acquaire v. Canada Dry Bottling, supra, n. 4 (collecting cases), Jaramillo v. North Restaurant, 2024 WL 3360498 (D. Kan. July 10, 2024); Cedeno v. Sasson, 100 F. 4th 386 (2d Cir. 2024); Cir. City Stores v. Adams, 279 F. 3d 889 (9th Cir. 2002); Robertson v. Argent Trust Co., 2022 WL 2967710 (D. Ariz. July 27, 2022).

70. Sec. Watch, Inc. v. Sentinel Systems, Inc., 176 F. 3d 369 (6th Cir. 1999); Wong v. PartyGaming Ltd., 589 F. 3d 827 (6th Cir. 2009); Burdine v. Burdine, 2023 WL 8539427 (S.D. Ohio Dec. 11, 2023); Southern District at London v. Liberty Life Assurance Co., 2018 WL 558643 (E.D. Ky. Jan. 25, 2018); In re Ricoh, 870 F. 2d 570 (11th Cir. 1989); P & S Business Machine, Inc., v. Canon USA, Inc. 331 F. 3d 804 (11th Cir. 2003); Marra v. Papandreou, supra, n. 41.

71. Seward v. BOC Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1993) ("a release to be valid must be free from claims of fraud or duress"); In re Boston Shipyards, supra, n. 49; Devan v. Digital Equipment, supra, n 49.

72. Bank of America National Trust and Savings Association v. Gillaizeau, 766 F. 2d 709,715 (2d. Cir. 1985); Joseph v. Charles Manhattan Bank, N.A., supra, n. 1. Cf. Lopez v. Kempthorne, 2020 WL 4639046 at *4 (S.D. Tex. Nov. 5, 2010) (under federal law, a settlement agreement is a contract).

73. Choice of Law for Construing Releases of Federal Statutory Claims, 41 Wash. and Lee L. Rev. 1555, 1556-57 (1989); Daniel C. Cohn, "Displacement of State Rules of Decision in Construing Releases of Federal Claims," 63 Cornell Law Review 339, 343-345 (1978) (hereinafter Cohn, "Displacement of State Rules of Decision"). Compare In re Centric Brands, supra, n. 36 ("The rules governing interpretations of contracts under New York Law generally apply to releases of claims under federal civil rights law."); Makins v. District of Columbia, 277 F. 3d 544, 547-548 (D.C. Cir. 2002) ("joining the Seventh, Eighth, Tenth, and Eleventh Circuits and perhaps the Third, Fourth, and Ninth Circuits" in "look[ing] to state law [to determine] if a party validly settled the federal claim") and Kendall v. City of Chesapeake, 174 F. 3d 437, 441 (4th Cir. 1999) ("Some federal courts have misleadingly referred to the federal common law of releases") with Morais v. Central Benefits Corp. Union Employees Supplemental Retirement Plan, 167 F. 3d 707,711 (1st Cir. 1999), citing Rodriguez-Abreu v. Chase Manhattan Bank, N.A. 86 F. 2d 580, 585, 587 (1st Cir. 1993) ("It is well settled that federal common law applies both to interpret the provisions of an ERISA benefit plan and to resolve issues of 'relinquishment of rights and waiver' when such side agreements affect the benefits provided by an ERISA plan"); Streit v. J. C. Bradford & Co., 886 F. 2d 1472, 1481 (6th Cir. 1989) (applying a federal common law of release to determine whether a release obtained by a fiduciary from a beneficiary was valid.); Sullivan v. AT &T, 48 EBC 2281, 2010 WL 905567 (N.D. Tex. March 12, 2010) (federal common

law governs the interpretation of the waiver and the release of ERISA claims); Rosser v. Raytheon Excess Benefit Plan, 2008 U.S. Dist. LEXIS 89595 (N.D. Tex. Nov. 4, 2008); Guardian Life Ins. Co. of America v. Finch, 395 F. 3d 238, 240 (5th Cir. 2004).

74. See, for example, McGuire v. Lord Corp., 456 F. Supp. 3d 729 (E.D.N.C. 2020) (outcome of economic duress claim would be the same under state or federal common law).

75. In re Deepwater Horizon, 786 F. 3d 344, 354-355 (5th Cir. 2015). See also Hisel v. Upchick, 797 F. Supp. 1509 (D. Ariz. 1992). Consequently, courts rely on state law, federal cases, and treatises to the extent they find those sources persuasive.

76. The federal law of contracts uses the core principles of the common law of contracts, that are in force in most states. Smith v. United States, 328 F. 3d 760, n. 8 (5th Cir. 2000).

77. Reid v. IBM Corp., supra, n. 56; Harless v. Research Institute of America, supra, n. 28; Olin Corp. v. Consolidated Aluminum Corp., 5 F. 3d 10, 15 (2d Cir. 1993); Griswold v. E.F. Hutton Co., 622 F. Supp. 1397 (N.D. Ill. 1985) ("The validity of a release of federally created rights are a question of federal law"); Petro Ventures v. Takessian, 967 F. 2d. 1337 (9th Cir. 1992); Locafrance US Corp. v. Intermodal Systems Leasing, Inc., 558 F. 2d. 113, 115 (2d Cir. 1971) ("It is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action."); Prince-Moore v. Texas Dow Employee Credit Union 2021 WL 5709880 (5th Cir. Dec. 1, 2021), cert. den. 143 S. Ct. 575 (2023); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) ("Where a release or settlement agreement impacts upon significant federal rights or interests, federal common law controls"); Jones v. Taber, 648 F. 2d 1201, 1203 (4th Cir. 1981) ("Conditions affecting the validity of a release of significant federal rights are eminently a matter of federal law"); Fulgence v. McDermott, Co., 662 F. 2d. 1207, 1209 (5th Cir. 1981) ("Creation of a federal rule . . . is appropriate where, as here, the rights of the litigants and the operative federal policies derive from a federal source"); Coleman v. Inspector General of Department of Defense, 721 F. Supp. 763 (E.D. Va. 1989); Gamewell Manufacturing, Inc. v. HVAC Supplies. 715 F. 2d 112 (4th Cir. 1983); Ingram Corp. v. J. Ray McDermott & Co., 698 F. 2d 1295, 1316, n. 27 (5th Cir. 1983); Chaplin v. Nations Credit Corp., 307 F. 2d 368, 372 (5th Cir. 2002); McLellan v. Midwest Machining, supra, n. 49; Streit v. JC Bradford & Co. supra, n. 73; Gascho v. Scheuer Hosp., 400 Fed. Appx. 978, 981 (6th Cir. 2020); Ward v. Shelby County (6th Cir., April 11, 2024); Goodman v. Smart Modular Technologies, Inc., Civil Act. H-14-1380 (S.D. Tex, Aug. 30, 2016) (when considering the validity of a settlement agreement in a case involving federal law, a court applies federal law); Mid-S Towing Co. v. Har-Win, Inc., 733 F. 2d 386, 389 (5th Cir. 1984) ("Questions regarding the enforceability and validity of [settlement] agreements are determined by federal law, at least where the substantive rights and liabilities of the parties derive from federal law"); Michaud v. Michaud, 932 F. 2d 277 (1st Cir. 1991); Malave v. Carney Hospital, 170 F. 3d 217 (1st Cir. 1999); Fennell v. TLB Kent Co., 865 F. 2d 498, 501 (2d Cir. 1989).

78. VKK v. NFL, supra, n. 12; cf. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (The instances in which courts are authorized to fashion federal common law are restricted to "those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.").

79. See Cohn, "Displacement of State Rules of Decision," supra, n. 73 at 347.

80. Romero v. All State Ins. Co., 2015 WL 7014576 (E.D. P.a. Jan. 13, 2015).