

Client Alert

Second Circuit Hears Argument on Whether All FLSA Settlements Require Court Approval

October 17, 2018 – Three years after a federal appellate court’s decision in *Cheeks v. Freeport Pancake House, Inc.*,¹ the United States Court of Appeals for the Second Circuit will decide whether another provision of the Federal Rules of Civil Procedure (“FRCP”) lends support through which claims asserted under the Fair Labor Standards Act (“FLSA”) may be settled without the need for court approval.

By way of background, *Cheeks* involved a restaurant employee who filed a stipulation of settlement dismissing his FLSA and New York Labor Law claims against his former employer with prejudice under FRCP 41.² The district court rejected the proposed dismissal and instead held that all FLSA settlements must be reviewed and approved by a court after the holding of a “fairness hearing”—this in order to ensure that FLSA plaintiffs obtain adequate results from negotiated settlements which effectuate the purposes of the FLSA and, in some instances, to ensure that the settlement proceeds split between such plaintiffs and their retained counsel are fair. On appeal, the Second Circuit affirmed the district court’s ruling and found that stipulated dismissals settling FLSA claims with prejudice “require approval of the district court or the [U.S. Department of Labor (“DOL”) in order] to take effect.”³ This holding has since been narrowed (albeit slightly) when one Judge in the Southern District of New York held that a pre-litigation settlement agreement providing the employer with a general release was fully enforceable without approval by a court or the DOL.⁴ The court explained that a *Cheeks* fairness hearing is required “only [for] settlement agreements that occur within the context of [FRCP] 41,” or when a case is already pending, and not those entered into before an action is filed in court.⁵

On October 10, 2018, the Second Circuit heard argument in connection with a potential workaround to the FLSA fairness hearing requirement under *Cheeks*. Following a lower court ruling that a \$20,000 settlement between a sushi chef and his employer for FLSA underpayment claims was subject to *Cheeks* approval, the defendant employer in *Yu v. Hasaki Restaurant Inc. et al.* (“*Hasaki*”) (Case No. 17-3388) appealed the ruling to the Second Circuit, arguing that such review

¹ 796 F.3d 199 (2d Cir. 2015).

² FRCP 41(a) governs the “voluntary dismissal” of an action by a plaintiff.

³ 796 F.3d at 206.

⁴ *Gaughan v. Rubenstein*, 261 F. Supp. 3d 390 (S.D.N.Y. July 11, 2017).

⁵ *Id.* at 400. The holding in this case has, quite naturally, motivated some employers to resolve potential FLSA claims prior to the institution of formal proceedings.

was improper because the settlement was reached pursuant to FRCP 68, and not FRCP 41.⁶ FRCP 68 provides a discrete mechanism for a defending party to settle a claim against it via an “offer of judgment” to the opposing party. If the opposing party accepts the offer of judgment, the clerk of court is obligated to enter judgment pursuant to the agreed upon terms and after the judgment has been effectuated, dismiss the case. If the offeree (claimant) does not accept the offer and thereafter does not prevail or obtains a less favorable judgment than the unaccepted offer, it must then pay the costs incurred by the offeror (defendant) after the offer was made and rejected.

In *Hasaki*, the employer’s counsel contended that, under FRCP 68, an agreement reached under its terms must be entered as a judgment and, thus, the need to for it to be reviewed by a court or the DOL is not required (nor even appropriate). In support of her position, counsel for Hasaki argued, among other things, that the length of time it often takes district courts to approve FLSA settlements already agreed upon by the parties and their respective counsel, militated against requiring such a process in a non-Rule 41 situation. On the other side, The Public Citizen Litigation Group, argued in support of maintaining a *Cheeks* standard of review, and noted that review of FLSA settlements should not be taken lightly under any circumstances.

The three-judge panel had mixed questions for the advocates. Circuit Judge Guido Calabrese was dubious of Marquez’s contention that Rule 68 settlements must be entered as judgment. He suggested that the Rule was not being used in the way it was intended. At the same time, Circuit Judge Debra Ann Livingston questioned *Cheeks*’ applicability, noting that FRCP 68 settlements were publicly filed, whereas FRCP 41 settlements could be reached privately (thus appearing to favor the notion of settlements that did not require a fairness hearing). Counsel for the Public Citizen Litigation Group agreed that this was an “important distinction.” Finally, Circuit Judge John Walker seemed focused on the factual issues of the case and the lower court’s reasoning for upholding the *Cheeks* standard of review.

The Second Circuit’s decision in this case could have a lasting effect on the manner in which employers attempt to negotiate settlements of FLSA claims. If the lower court’s decision is overturned and it is determined that FRCP 68 settlements are not subject to *Cheeks* approval, it follows that parties will attempt to seek and obtain settlements pursuant to this Rule as a favorable alternative to the potential hurdles associated with a fairness hearing. This would avoid delay for plaintiffs eager to receive funds and uncertainty for defendants seeking prompt resolution of FLSA claims without court scrutiny. While it is unclear how the Second Circuit will come out on this contentious procedural issue, we will alert you once a decision has been rendered.

If you require any additional information concerning FLSA claims or settlements related thereto, or any other employment-related issue, please feel free to contact:

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⁶ Although Plaintiff Yu did not file an opposition to the appeal filed by Hasaki, The Public Citizen Litigation Group filed an *amicus* brief in support of their position against Defendant Hasaki with the Second Circuit.