Judicial Approval of FLSA Back Wages Settlement Agreements

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This article provides a new framework for supervising Fair Labor Standards Act ("FLSA") settlement agreements for back wages. It explains the historical context that led to the development of a requirement that FLSA settlement agreements for back wages be supervised, and critiques the various district court methods of supervising these agreements. This article outlines the contours of the contemporary split in the circuit courts regarding supervisory requirements, and then concludes with a new approach that may be utilized to supervise FLSA settlement agreements for back wages. This approach contends that the language of "fairness" and "reasonableness" be abandoned and instead that FLSA settlement agreements for back wages should be examined by using traditional public policy considerations. This article proposes that supervision is necessary and that FLSA settlement agreements for back wages should be subject to a rebuttable presumption of enforceability when certain policy-derived prerequisites are satisfied.

INTRODUCTION

The Fair Labor Standards Act of 19381 was passed to remedy the poor working conditions that mired the Great Depression, including the deleterious effects of the industrial age, consequent low wages, and proliferating child labor.2 The FLSA's justificatory policies include reducing the poor working conditions that burden commerce, create unfair competition, result in labor disputes, and interfere with the orderly

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marketing of goods in commerce. These overarching policies of the FLSA were intended to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers..." The FLSA's provisions intended to provide for a living wage, motivate employers to hire more employees, and disperse the work among a broader population of workers. Among the mechanisms for effectuating its purposes, the FLSA provides minimum wage and overtime requirements. When back wages are sought for violations of minimum wage or overtime requirements, injured employees may file a complaint in state or federal court, or with the Secretary of Labor. Once that complaint is filed in court, however, injured employees enter into a system of considerable uncertainty that is incited by contradictory district and circuit court opinions and inconsistent methods of reviewing FLSA back wages settlement agreements.

This Article contends that judicial supervision of FLSA settlement agreements for back wages should be relaxed. Rather, courts should instead adopt a rebuttable presumption that settlement agreements resolving disputes over whether back wages are owed to FLSA covered employees, which satisfy certain criteria, do comport with public policy. A new framework is needed for addressing what has become an inconsistent, nuanced, and overall murky area of wage and hour law. To begin a sketch of this new framework, this Article starts, in Section one, by explaining the combination of historical factors that led to judicial supervision of private FLSA settlement agreements. In Section two, this article turns to the various approaches to analyzing FLSA settlement agreements in the district courts across the United States. Section three

4. Id.
5. See Debra D. Burke & N. Leroy Kauffman, The Bona Fide Professional Exemption of the Fair Labor Standards Act as Applied to Accountancy, 14 J. EMP. & LAB. L. 1, 1 (2013) ("The provisions intended to guarantee a living wage, as well as to encourage employers to hire more workers and spread the available work, in an effort to avert the additional salary burden imposed if their workers qualified for overtime.").
7. See 29 U.S.C. § 207. The FLSA has other mandates, besides ensuring minimum wage and overtime requirements are met, although some argue that it does not go far enough. See Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, Stabilizing Low-Wage Work, 50 HARV. C.R.-C.L. L. Rev. 1, 14-15 (2015) (noting that the FLSA "mandates a minimum hourly wage, requires premium overtime pay for work exceeding forty hours per workweek, prohibits child labor, and requires employers to keep accurate time records" in arguing for failures in the FLSA).
analyzes the conflicting interpretations that led to a split in the federal circuits regarding judicial supervision of FLSA back wages settlement agreements. Section four considers the arguments against the FLSA supervisory requirement and provides a justification for supervision. Section five proposes a new framework, based on a rebuttable presumption, for analyzing and supervising FLSA settlement agreements for back wages.

I. A UNIQUE COMBINATION OF HISTORICAL FACTORS

The idea that judges must supervise all FLSA back wage settlement agreements arose as a function of the judiciary’s good-hearted attempts to effectuate the legislative intent of the FLSA. The idea, over time, became a requirement within some circuits, and district courts in many other circuits (having no guidance from their own circuits) cautiously followed the rulings of those circuits that mandated supervision. This contemporary setting began in the 1940s with a series of U.S. Supreme Court cases. Most pertinent of these is *Brooklyn Savings Bank v. O’Neil*, in which the U.S. Supreme Court decided that the lack of an express prohibition against waivers of FLSA liquidated damages did not prevent a litigant, who waived liquidated damages in a private settlement, from recovering them. The Court examined the lack of an


10. See infra Section III.

11. This series of cases began with *Overnight Motor Transp. Co. v. Missel*, 316 U.S. at 577 (“If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions from the reach of dominant constitutional power.” (internal citations and quotations omitted)), which continued with *Walling v. Helmerich & Payne*, 323 U.S. at 42 (“The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of forty. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.”), and then came *Brooklyn Savings Bank v. O’Neil*, 324 U.S. at 715. A line of case law from the Supreme Court also holds that FLSA rights supersede conflicting provisions of collective bargaining agreements. See, e.g., *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173, 177-78 (1946); *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430-32 (1945); *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 166-67, 170 (1945); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 601-03 (1944).

express provision, as well as the lack of specific legislative intent, before concluding that the overarching policies of the FLSA and congressional history "clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages."\(^{13}\) It was within the analysis of these policies that circuit courts later found justification for mandating judicial supervision of all FLSA back wages settlement agreements.\(^ {14}\)

The policies examined in *Brooklyn Savings Bank* by the Supreme Court were broadly construed to ensure the purpose of the FLSA was met.\(^ {15}\) First, prohibiting waivers of liquidated damages is necessary to protect the vulnerable employee population that is subjugated by the more powerful employer class.\(^ {16}\) Second, liquidated damages constitute "a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."\(^ {17}\) Third, FLSA rights are of a private-public nature, and "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."\(^ {18}\) Fourth, prohibiting waivers of liquidated damages promotes the policy of "uniformity in the application of the provisions of the Act."\(^ {19}\) These policies allowed the Supreme Court to determine that Congress did not intend to allow waivers of liquidated damages in FLSA claims.\(^ {20}\)

One year after *Brooklyn Savings Bank*, the U.S. Supreme Court decided in *D. A. Schulte, Inc. v. Gangi* that private settlements, which resolve the issue of whether employees are covered by the FLSA, also violate these policies.\(^ {21}\) The Court noted that the "reasons which lead us to conclude that compromises of real disputes over coverage which do not require the payment in full of unpaid wages and liquidated damages do not differ greatly from those which led us to condemn the waivers of

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13. *Id.* at 706.
14. *See id.*
15. *Id.*
16. *Id.* at 706-07.
17. *Id.* at 707 (internal quotations omitted).
18. *Id.* at 704; *see also id.* at 710. ("To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy.").
19. *Id.* at 710.
20. *Id.*
liquidated damages . . . "22 Justice Frankfurter dissented to this opinion contending that "the 'policy' of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air."23 Further, Justice Frankfurter's dissent revealed the concern that the Supreme Court was reaching beyond legislative intent in deciding these cases, stretching the language of the FLSA to support its proffered view.24 Despite Frankfurter's admonitions, thirty-five years after Gangi, the Supreme Court again asserted that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate."25 By this time, the prohibition against contravening FLSA policies via contract was well-engrained in decades of jurisprudence.

Thus, in 1982, when the Eleventh Circuit Court of Appeals was tasked with deciphering whether an FLSA settlement agreement involving a bona fide dispute over whether back wages were owed was subject to judicial scrutiny, a body of judicially constructed policies and precedent laid at its fingertips.26 In Lynn's Food Stores, Inc. v. United States, a Department of Labor ("DOL") investigation revealed that Lynn's Food Stores, Inc. ("Lynn's") violated FLSA requirements including the overtime, minimum wage, and record-keeping provisions.27 Consequently, the DOL found Lynn's liable for both back wages and liquidated damages.28 Following failed negotiation attempts with the DOL, Lynn's attempted to negotiate directly with its employees.29 Fourteen employees agreed to settle directly with Lynn's for a pro rata share of $1000.00, which was offered as compensation for an estimated $10,000.00 of unpaid back wages.30 The DOL proceeded to bring suit against Lynn's, claiming that the settlement agreement was void. Subsequently, Lynn's filed an action for declaratory relief seeking to have the settlement agreement declared enforceable.31 The district
court found that the settlement agreement violated the policies and provisions of the FLSA, and the Eleventh Circuit affirmed.\textsuperscript{32}

In analyzing the enforceability of Lynn’s settlement, the Eleventh Circuit relied on the same policies that Justice Frankfurter, decades before, described as being pulled “out of the air,” in his dissent in \textit{Gangi},\textsuperscript{33} which were originally construed by the majority in \textit{Brooklyn Savings Bank}.\textsuperscript{34} In particular, the Eleventh Circuit reiterated that because “there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA’s provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees.”\textsuperscript{35} Further, after a stringent reading of 29 U.S.C. § 216, the Eleventh Circuit narrowly carved out only two methods by which settlement for back wages can be achieved under the FLSA.\textsuperscript{36} The Eleventh Circuit concluded that parties may only settle FLSA back wages claims in the following ways: (i) under the supervision of the Secretary of Labor; or (ii) under the scrutiny and supervision of the courts.\textsuperscript{37} Yet nowhere in the text of 29 U.S.C. § 216, which the Eleventh Circuit cites in support of these exclusive methods of settling FLSA disputes, does the language expressly suggest that private parties cannot settle FLSA disputes without the government supervising private contractual affairs, nor does the statute expressly require a court to scrutinize stipulated settlements brought before it.\textsuperscript{38} Nevertheless, the Eleventh Circuit held that “to approve an ‘agreement’ between an employer and employees outside of the adversarial context of a lawsuit brought by the employees would be in clear derogation of the letter and spirit of the FLSA.”\textsuperscript{39} Accordingly, the Eleventh Circuit refused to approve Lynn’s agreement because it was neither supervised by the Secretary of Labor nor was it devised in the context of judicial oversight.\textsuperscript{40}

\begin{thebibliography}{9}
\bibitem{32}Id.
\bibitem{33}See \textit{id.} at 1354 (citing D. A. Schulte, Inc., v. Gangi, 328 U.S. 108, 121-22 (1946)).
\bibitem{35}\textit{Lynn’s Food}, 679 F.2d at 1352 (citing \textit{Brooklyn Sav. Bank}, 324 U.S. at 697).
\bibitem{36}Id. at 1352-53.
\bibitem{37}Id.
\bibitem{38}See \textit{id.} at 1353. For these propositions, the court cites to 29 U.S.C. § 216(b) and 29 U.S.C. § 216(c), which creates a right to file in state or federal court or with the Secretary of Labor for violations of the FLSA. \textit{Id.} (citing 29 U.S.C. § 216(b)-(c)). These provisions do contain mandatory language for clear and unambiguous violations of the FLSA, but do not contain vivid language regarding judicial supervision of unclear or potential violations of the FLSA. \textit{Id.}
\bibitem{39}Id. at 1354.
\bibitem{40}Id. at 1355 (“Other than a section 216(c) payment supervised by the Department of Labor, there is only one context in which compromises of FLSA back wage or liquidated damage claims

https://scholarlycommons.law.hofstra.edu/hlelj/vol35/iss1/4
Supreme Court jurisprudence to prohibit an employer and FLSA covered employee from negotiating a settlement regarding a bona fide dispute over back wages without court or DOL supervision.  

The invalidation of the settlement agreement in *Lynn's* under the unique factual circumstances was the correct outcome, although the *Lynn's* mechanism for invalidating the settlement, by finding it unfair and unreasonable, has led to practical difficulties in district courts that have followed in its progeny. In *Lynn's*, the Eleventh Circuit reviewed a transcript of the settlement negotiations that was submitted by the employer and found the transcript to reflect a "virtual catalog" of the kinds of insidious employer tactics that the FLSA was created to prevent.  

The transcript was submitted to show that the employees were not pressured into the agreement, but (ironically) the Court found, to the contrary, that the transcript revealed that Lynn's representative implied that back wages were not really due to the employees; said that if wages were due, they would be much less than the DOL suggested; said that most people who received back wages from the DOL returned the wages to the employer (suggesting that only "malcontents" would keep their employer's money); and also revealed that employees who expressed discontent with the amount offered were not given the opportunity to be heard.  

The content of the transcript convinced the Eleventh Circuit "of the necessity of a rule to prohibit such invidious practices." Consequently, the Eleventh Circuit declared that settlement agreements between an employer and a FLSA covered employee involving back wages must be supervised by the DOL or a court to ensure both fairness and reasonableness.  

Purportedly, the evidence set forth in the transcript could have revealed that the settlement agreement violated public policy. Additionally, procedural unconscionability might have been a basis for voiding the agreement, insofar as the process by which the employers attained the
II. THE AFTERMATH OF LYNN'S FOOD

Following the 1982 decision in Lynn's Food, courts in the Eleventh Circuit and across the country have struggled to decipher the amorphous contours of a fair and reasonable, judicially approvable settlement. The language in Lynn's Food that indicates when a settlement should be approved by a district court includes concepts such as a "reasonable compromise" of a "bona fide dispute," which may be approved "to promote the policy of encouraging settlement of litigation."50 This language led to many lower courts devising a variety of tests to determine if settlement agreements resolving bona fide disputes over back wages should be approved.

Through the 1980s, most references to the Lynn's Food decision involved questions of its applicability to unique circumstances.51 By

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settlement with the employees reflected advantage-taking over a vulnerable population. This, combined with the unfair terms of the settlement, could have led to the contract being voided on the grounds of unconscionability. See Keith William Diener, The Doctrine of Unconscionability: A Judicial Business Ethics, 8 U.P.R. Bus. L.J. 103, 128 (2017). Other common law defenses, such as duress or fraud may have also been available.

50. Lynn's Food, 679 F.2d at 1354 ("Settlements may be permissible in the context of a suit brought by employees under the FLSA for back wages because initiation of the action by the employees provides some assurance of an adversarial context. The employees are likely to be represented by an attorney who can protect their rights under the statute. Thus, when the parties submit a settlement to the court for approval, the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching. If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute; we allow the district court to approve the settlement in order to promote the policy of encouraging settlement of litigation. But to approve an 'agreement' between an employer and employees outside of the adversarial context of a lawsuit brought by the employees would be in clear derogation of the letter and spirit of the FLSA.")

51. See Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) ("Ordinarily there would be no need for a statute allowing settlement of a dispute between employer and employees—people may resolve their own affairs, and an accord and satisfaction bars a later suit. Yet the Fair Labor Standards Act is designed to prevent consenting adults from transacting about minimum wages and overtime pay. Once the Act makes it impossible to agree on the amount of pay, it is necessary to ban private settlements of disputes about pay. Otherwise the parties' ability to settle disputes would allow them to establish sub-minimum wages. Courts therefore have refused to enforce wholly private settlements, . . . Yet a prohibition of settlement ensures costly litigation, even though the parties might be able to compromise their dispute without subverting the principles of the statute. Section 16(c) creates the possibility of a settlement, supervised by the Secretary to prevent subversion, yet effective to keep out of court disputes that can be compromised honestly."); Barker v. Billo, No. 82-C-1548, 1984 WL 3171, at *6-7 (E.D. Wis. May 1, 1984) (holding that accepting a check from employer in partial payment of unpaid wages does not constitute a waiver of FLSA rights); Black v. Standard Oil Co., No. C83-220, 1983 WL 131195, at *3 (N.D. Ohio Oct. 8, 1983) (finding that the situation in this case was not analogous to Lynn's because the DOL did sufficiently supervise the settlement); Cedotal v. Forti, 516 So. 2d 405, 410
1991, however, the Alaska Supreme Court utilized the reasoning of
*Lynn's Food* to require the supervision of liquidated damages claims
arising under its state laws.\(^{52}\) Similar to *Lynn's Food*, the Alaska
Supreme Court examined the policies behind the Alaska Wage and Hour
Act ("AWHA") in deciding that private settlements of AWHA liquidated
damages claims are void as against public policy.\(^{53}\) However,
unlike *Lynn's Food*, the Alaska Supreme Court acknowledged that the
liquidated damages provisions were intended to promote the policy of
punishing employers for violating the law.\(^{54}\) This policy is in distinct
opposition to the policy for liquidated damages articulated in *Brooklyn
Savings Bank*, which is to compensate injured employees for those
losses that are not easily quantifiable.\(^{55}\) Despite the conflicting policies,
the end result was the same—the mandated judicial supervision of
settlement agreements for back wages.

The Court of Appeals of Utah soon after followed the reasoning of
*Lynn's Food* to conclude that a private waiver of FLSA rights was
void.\(^{56}\) Specifically, the court held that "waivers of FLSA rights which
are neither administratively supervised nor judicially approved are not
enforceable to bar a cause of action for unpaid overtime compensation.
Such waivers are against public policy and are unenforceable as a matter
of law."\(^{57}\) Thus, the progeny of *Lynn's Food* continued to bar private
settlements of FLSA claims,\(^{58}\) but little guidance was available at the

private settlement of liquidated damages claims under the AWHA is contrary to the strong policy
behind the AWHA and its liquidated damages provisions.").

\(^{53}\) *Id.*

\(^{54}\) *Id.* at 1070-71.

\(^{55}\) *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("[T]he liquidated damage
provision is not penal in its nature but constitutes compensation for the retention of a workman's
pay which might result in damages too obscure and difficult of proof for estimate other than by
liquidated damages." (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942)).


\(^{57}\) *Id.* at 1080.

\(^{58}\) *See Hampton v. Am. Plumbing & Sewer, Inc.*, No. 95 C 1836, 1996 WL 3966, at *1 (N.D.
Ill. Jan. 3, 1996), aff'd, 95 F.3d 1154 (7th Cir. 1996). In this case, an employer alleged that he
called the employee after the FLSA lawsuit was filed and that they agreed the suit would be dropped
in exchange for the employer forgiving money the employee allegedly owed him. *Id.* As a result,
the employer did not respond to the complaint, and the employee attained a default judgment. *Id.* at
*1-2.* The employer could not vacate the default judgment on the basis of his purported defense of
time to instruct lower courts as to when a judicially supervised settlement of a bona fide dispute over back wages should be approved.

Through the 1990s and the 2000s, courts across the country continued to struggle with deciphering the contours of a fair and reasonable settlement as per Lynn's Food's instructions. Throughout this period, courts saw a substantial uptick in the number of FLSA claims filed, a trend that continued into the subsequent decades.59 As the case load increased, more and more courts grappled with the ambiguous language left by the Lynn's Food decision, which led courts to devise inconsistent rules for analyzing the reasonableness and fairness of FLSA settlement agreements.60 As the case law developed, albeit inconsistently across the nation, four aspects of a settlement agreement became the key areas of scrutiny in the approval of FLSA back wages settlements for FLSA covered employees: (i) the existence of a bona fide dispute; (ii) the reasonableness and fairness of the settlement to the employee; (iii) the potential the settlement will frustrate the implementation of the FLSA in the workplace; and (iv) the reasonableness of attorney's fees and costs.61

A. The Existence of a Bona Fide Dispute

Judicial approval of a settlement agreement for FLSA back wages, that does not include a provision mandating payment of the entire


61. See Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982); Hampton, 1996 WL 3966, at *2.
amount of wages and liquidated damages, must be the result of a bona fide dispute over whether those back wages are owed.62 This requirement arises directly from the mandatory language of 29 U.S.C. § 216, which mandates employers to pay the full amount of back wages owed and liquidated damages to injured employees.63 Consequently, a bona fide dispute may involve either: (i) a dispute over whether any back wages are owed to FLSA covered employees; or (ii) a dispute over the amount of back wages that are owed to FLSA covered employees.64 Although Brooklyn Savings Bank left this question open, in Gangi, the Supreme Court answered it in part by holding that private settlements that resolve the issue of whether employees are covered by the FLSA are impermissible, but the court did not resolve the related question of whether private settlements of bona fide disputes between an employer and a FLSA covered employee are permissible without court or DOL supervision.65 The Eleventh Circuit answered this question in Lynn's Food by holding that such settlements of bona fide disputes must be supervised by a court.66 However, Lynn's Food did not define a "bona fide" dispute. Thus, district courts throughout the country were left to determine on their own when a dispute was bona fide.

An employer that challenges liability or the amount of liability under the FLSA simply to avoid payment to an employee does create a dispute, but not a bona fide dispute. A "bona fide" dispute is a disagreement that is genuine, legitimate, and made in good faith; it is not merely the by-product of an employer trying to skirt well-established laws or insincerely reduce the money it owes its employees.67 According to the Eastern District of Pennsylvania, “[i]n essence, for a bona fide dispute to exist, the dispute must fall within the contours of the

63. Id. (“Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.”) (emphasis added)).
64. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 703 n.12 (1945) (referencing that there was no bona fide dispute and noting that “there was no discussion or dispute... either as to the existence of liability under the Act or as to the amount of such liability.”); see also Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 530 (E.D. Pa. 2016) (“In essence, for a bona fide dispute to exist, the dispute must fall within the contours of the FLSA and there must be evidence of the defendant’s intent to reject or actual rejection of that claim when it is presented.”).
66. Lynn’s Food, 679 F.2d at 1352.
FLSA and there must be evidence of the defendant's intent to reject or actual rejection of that claim when it is presented.”

Thus, there must be some legitimate controversy over whether money is owed or the amount of money owed (that does not relate to whether the employee is covered by the FLSA) in order for a dispute to be bona fide.

In *Martinez v. Bohls Bearing Equip. Co.*, the Western District of Texas began to move away from the holding in *Lynn's Food*. After an exhaustive analysis of the statutory and case history of the issue, the *Martinez* court diverged from the majority in deciding that “parties may reach private compromises as to FLSA claims where there is a bona fide dispute as to the amount of hours worked or compensation due. A release of a party’s rights under the FLSA is enforceable under such circumstances.” In *Martinez*, the defendants provided a means of calculating the amount of money owed to the plaintiff, and deemed that amount at a little over $500.00, yet the plaintiff claimed that he was owed over $3000.00 in unpaid overtime compensation. The parties settled the disagreement, without court or DOL supervision, for $1000.00. The disagreement as to the amount owed was enough for the *Martinez* court to deem the dispute as bona fide, and thus enforce the settlement agreement. The private settlement that was agreed to without DOL supervision and outside the boundaries of litigation was deemed enforceable in *Martinez* because it was the product of a bona fide dispute, and did not otherwise contravene the FLSA.

Following *Martinez*, some attorneys attempted to argue that their private FLSA settlements no longer required court approval. For example, in *Dees v. Hydradry, Inc.*, the Middle District of Florida grappled with the progeny of *Martinez* in light of *Lynn's Food*. The

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72. *Id.* at 631-32.

73. *Id.* at 612.

74. *Id.* at 632.

75. *Id.*

court commented that "[a]lthough leaving the definition of 'bona fide dispute' unstated, Martinez decides that only a 'bona fide dispute' under the FLSA is subject to private compromise and that, apparently, a category of non 'bona fide' FLSA disputes requires approval by the Department of Labor or the district court." The Dees court went on to say that "[o]n the other hand, Lynn's Food requires approval of each FLSA compromise, regardless of the issue that underlies the compromise. In practice, leaving an FLSA settlement to wholly private resolution conduces inevitably to mischief." The Dees court rejected the reasoning of Martinez, calling it "dicey" and adopted the requirement per Lynn's Food that FLSA settlement agreements require either DOL or judicial supervision. In so doing, the district court acknowledged a truism which remains today, namely, that "an employer undertakes the private resolution of an FLSA dispute at his peril."  

In 2012, thirty years after the monumental Lynn's Food decision, the Fifth Circuit Court of Appeals approved the reasoning in Martinez, creating a split in the circuits as to the requirement of judicial approval of bona fide disputes involving FLSA back wages. In Martin v. Spring Break '83 Prods., L.L.C., a union negotiated compensation for alleged monies not paid to film set workers. In deciding that the settlement agreement was enforceable, the Fifth Circuit concluded that bona fide disputes over wages can be privately settled without court supervision. It determined that this was a bona fide dispute because there was disagreement about the number of hours owed and proof-issues relating to whether the workers had worked on the days they alleged. The Fifth Circuit not only applied the rationale of Martinez but also relied on its 1976 decision holding that private settlement agreements that give the employees everything they are entitled to under the FLSA, as enforceable. The union and defendants had agreed in their settlement

77. Id. at 1236 (citing Martinez, 361 F. Supp. 2d at 632).
78. Id. at 1236-37.
79. Id. at 1237.
80. Id.
81. Id.
82. See Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 255 (5th Cir. 2012) ("Approving of this rationale, we hold that the payment offered to and accepted by Appellants, pursuant to the Settlement Agreement, is an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves.").
83. Id. at 249, 256.
84. Id. at 257.
85. Id. at 255.
86. Id. at 255-56; see also Thomas v. Louisiana, 534 F.2d 613, 615 (5th Cir. 1976)
agreement that the amount paid was the amount owed. Thus, Martin, in its adoption of the Martinez reasoning, provided an alternative to the traditional Lynn's Food approach.

The district courts, whether adopting the Lynn's Food standard or the more lenient standard of Martin, must require evidence that a dispute is bona fide and that a plaintiff is not waiving his or her FLSA rights through settlement. In Archer v. TNT USA, Inc., for example, the Eastern District of New York refused to approve a FLSA settlement agreement because the parties had not submitted evidence of a bona fide dispute. Even though the settlement agreement was reached during litigation and the employees were represented by counsel, there was no evidence of a bona fide dispute, and therefore, the judge refused to approve the settlement. The court clearly articulated that even under the Martin standard, there must still be evidence of a bona fide dispute. However, the court granted leave to file the settlement agreement and a memorandum of law in support of the approval of the settlement. In Carillo v. Dandan Inc., on the other hand, the D.C. District Court determined a dispute was bona fide because there was disagreement over

("Settlement agreements have always been a favored means of resolving disputes. When fairly arrived at and properly entered into, they are generally viewed as binding, final, and as conclusive of rights as a judgment. We see no reason here to depart from the general rule. There is no problem of disproportionate bargaining power when a settlement gives employees everything to which they are entitled under the FLSA at the time the agreement is reached. Thus, the agreement is enforceable [sic], and the lower court erred in setting it aside." (footnotes omitted)).

87. Martin, 688 F.3d at 256.
89. See, e.g., Sarceno v. Choi, 66 F. Supp. 3d 157, 170 (D.D.C. 2014) ("The Court concurs with the reasoning of the Fifth Circuit in Martin that a private settlement of FLSA claims may be enforceable, even if the settlement was reached without United States Department of Labor or judicial supervision or approval, but only when the agreement resolves a bona fide dispute between the parties and the terms of the settlement are fair and reasonable.").
91. Id. at 387.
92. Id.
93. Id.
the accuracy of the employees' time slips, whether on-the-job travel was compensable, and if money was advanced to the employees.94 These factors were sufficient for the court to deem the dispute bona fide and not a mere waiver of statutory rights.95

Similarly, in Kraus v. PA Fit II, LLC, the plaintiff, a personal trainer, alleged that she was not paid overtime for working over forty hours per week and that she was also not compensated for her time assessing potential clients who ultimately chose not to hire her.96 The case settled without the defendants explicitly denying her allegations, and so the court examined evidence proffered by the plaintiff to determine if there was a bona fide dispute.97 The court described the issue of a bona fide dispute as one that was "not obvious," but found evidence of denial in the defendants' answer filed in a related administrative hearing, and the terms of the settlement agreement itself.98 Accordingly, the court deemed the dispute to be bona fide.99

The preliminary determination of a bona fide dispute is necessary to ensure that the statutory rights under the FLSA are not abrogated through an insincere dispute and consequent settlement of claims for back wages.100 The district court must make the initial determination about whether a dispute is bona fide before approving a settlement agreement, and only if bona fide, when applying the majority rule of Lynn's Food, should a court go on to analyze the reasonableness and fairness of the agreement.101

95. See id.
97. See id. at 530-31.
98. Id. at 531-32 (finding that the combination of (i) the defendants' contentions that the plaintiff was paid more than other personal trainers in the administrative hearing, and (ii) the statement in the settlement agreement that "[d]efendants believe they acted lawfully and properly at all times and in all respects and specifically deny any and all liability for the claims alleged by Kraus, but desire to avoid further legal fees and expenses that necessarily will result from prolonged litigation," to be sufficient evidence for a finding that the dispute was bona fide).
99. Id.
100. See Nall v. Mal-Motels, Inc., 723 F.3d 1304, 1307 (11th Cir. 2013) ("[T]he rule of Lynn's Food applies to settlements between former employees and employers."); Silva v. Miller, 307 F. App'x 349, 351 (11th Cir. 2009) (declining to consider what level of judicial oversight applies when there is full satisfaction of a FLSA claim made, because, in this case, the settlement involved attorney's fees to be deducted from the settlement, and so the claim was compromised, and not fully satisfied under the FLSA); Niland v. Delta Recycling Corp., 377 F.3d 1244, 1248 (11th Cir. 2004) (confirming that judicial supervision is not needed when the DOL adequately supervises a settlement); see also Rodrigues v. CNP of Sanctuary, LLC., 523 F. App'x 628, 629 (11th Cir. 2013) (denying interlocutory review and requesting clarification of standards of fairness relating to scrutiny of FLSA settlement agreements, particularly non-monetary provisions).
B. The Reasonableness and Fairness of the Settlement to the Employee

The amorphous concept of "reasonableness" has stumped the finest of judicial minds for centuries. As the Arkansas Supreme Court recognized, "[i]t is common knowledge that sometimes human actions and reactions defy logical explanations." In line with the complexities of human rationality, a complex and diverse body of case law exists across the district courts that addresses the reasonableness (and/or fairness) of FLSA settlement agreements. The aim of this body of law is to ensure that the more vulnerable employee-party to the agreement is not taken advantage of by the more powerful employer-party when compromising a settlement. This is assured by judicial scrutiny of the terms of the settlement agreement. At a minimum, settlement agreements involving a compromise over a bona fide dispute involving back wages claims must be fair and reasonable to the employee. The frameworks for deciphering reasonableness and associated applications of those frameworks are varied, yet three generalized approaches are present across the circuits: (1) multi-factored tests; (2) totality of the circumstances tests; and (3) relevant circumstances tests.

1. Multi-Factored Tests

Many of the FLSA multi-factored tests are rooted in tests adopted by courts to examine the fairness or reasonableness of class or collective

2990720, at *5 (D. Md. May 20, 2016) (deciding, although not in the context of settlement approval, that a lack of good faith on the part of the employer in failing to adequately attempt to calculate payment amounts in accordance with the requirements of the FLSA resulted in a finding that the dispute was not bona fide); Rogers v. Sav. First Mortg., LLC, 362 F. Supp. 2d 624, 638 (D. Md. 2005); see also Wright v. Carrigg, 275 F.2d 448, 449 (4th Cir. 1960) ("[P]lain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." (quoting Rothman v. Publicker Indus., Inc., 201 F.2d 618, 620 (3d Cir. 1953))).

104. Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982).
105. The distinction between these three general categories of tests is utilized in this article solely for ease of reference, and not to draw a firm analytic distinction. There is some overlap among them, but also noteworthy differences.
action settlements. In single or multi-plaintiff cases, the multifactored tests employed in class or collective actions are often modified by district courts for the purposes of analyzing single or multi-plaintiff settlement agreements. District courts in the second and third circuits regularly utilize modified renditions of the class action factors, which eliminate the factors irrelevant to non-class or collective cases. In the Third Circuit, the factors arise under Girsh, and are:

1. The complexity, expense and likely duration of the litigation . . . ;
2. the reaction of the class to the settlement . . . ;
3. the stage of the proceedings and the amount of discovery completed . . . ;
4. the risks of establishing liability . . . ;
5. the risks of establishing damages . . . ;
6. the risks of maintaining the class action through the trial . . . ;
7. the ability of the defendants to withstand a greater judgment;
8. the range of reasonableness of the settlement fund in the light of the best possible recovery . . . ;
9. the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .

These nine factors are often utilized by courts in the Third Circuit to analyze the reasonableness of FLSA settlement agreements. However, some district courts in the third circuit have expressed a distaste for mechanically applying these factors in the single plaintiff context because some of the factors are irrelevant. As a result, some
district courts within the third circuit apply a version of the relevant circumstances test to decipher whether FLSA settlement agreements are reasonable.\textsuperscript{111}

Many courts in Florida and elsewhere utilize a six-factored test, which is often applied to decipher the reasonableness of class action settlements under the Federal Rule of Civil Procedure ("FRCP") 23(e)(2):

(1) the existence of collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of counsel.\textsuperscript{112}

Courts are already devising a variety of multi-factored tests to utilize in deciphering the reasonableness of FLSA settlement agreements, resulting in inconsistent standards that apply to scrutinize FLSA settlement agreements.

2. Totality of the Circumstances Tests

Some district courts within the second circuit similarly enunciate a list of factors that are relevant to the reasonableness or fairness of the settlement agreement. In the aftermath of Cheeks v. Freeport Pancake House, Inc., a 2015 Second Circuit decision, which effectively required parties to seek judicial or DOL approval of bona fide disputes over back wages, significant uncertainty arose regarding the enforceability of settlement agreements.\textsuperscript{113} Consequently, many district courts in the second circuit have since used the Wolinsky v. Scholastic factors to determine the fairness of FLSA settlements.\textsuperscript{114} Wolinsky, although

\textsuperscript{111} Id. For discussion of the relevant circumstances tests, see infra Section II.B.3.


\textsuperscript{113} Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 203, 206 (2d Cir. 2015), cert. denied, 136 S. Ct. 824 (2016).

\textsuperscript{114} Wolinsky v. Scholastic, 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012).
technically a "totality of the circumstances test," analyzes a list of factors.\textsuperscript{115} It also cites to a case utilizing the \textit{City of Detroit v. Grinnell} factors, the case from which the \textit{Girsh} factors originated.\textsuperscript{116} \textit{Wolinsky} also incorporates other factors, and in particular, the court instructed that:

In determining whether the proposed settlement is fair and reasonable, a court should consider the totality of circumstances, including but not limited to the following factors: (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.\textsuperscript{117}

\textit{Wolinsky} clearly provides that these factors are not exclusive, but instead that all relevant circumstances should be considered.\textsuperscript{118} \textit{Wolinsky} thus provides something of a hybrid of a multi-factored test and a totality of the circumstances test because it lists key factors, yet indicates that the totality of circumstances should be considered.\textsuperscript{119}

\textsuperscript{115.} \textit{Id.} at 335.

\textsuperscript{116.} Girsh v. Jepson, 521 F.2d 153, 157, 159 (3d Cir. 1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) ("(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a larger judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."); \textit{see also} Alleyne v. Time Moving & Storage Inc., 264 F.R.D. 41, 54 (E.D.N.Y. 2010).

\textsuperscript{117.} \textit{Wolinsky}, 900 F. Supp. 2d at 335 (internal citations and quotations omitted).

\textsuperscript{118.} \textit{Id.} The court goes on to note that

"[g]iven the purposes of the FLSA, factors that weigh against approving a settlement also include the following: (1) the presence of other employees situated similarly to the claimant; (2) a likelihood that the claimant's circumstance will recur; (3) a history of FLSA non-compliance by the same employer or others in the same industry or geographic region; and (4) the desirability of a mature record and a pointed determination of the governing factual or legal issue to further the development of the law either in general or in an industry or in a workplace."

\textit{Id.} at 336 (internal citations and quotations omitted).

\textsuperscript{119.} \textit{See} \textit{id.}
Although, Wolinsky provides some guidance as to what circumstances should be considered in a totality of the circumstances analysis, in addition to the Girsh factors, some courts take a more liberal approach to the totality of the circumstances, generally identifying in a non-mechanical way the relevant considerations, if any, regarding the reasonableness of the FLSA settlement agreement. The D.C. District Court, for example, examined both the multi-factored approach to deciphering fairness and reasonableness, and the totality of the circumstances approach, and opted to utilize the totality of the circumstances approach because the "flexibility in this approach gives courts the ability to examine a settlement globally, rather than adhering to a list of enumerated factors compiled to effectuate another regime and designed to protect absent members of a class . . . ." In determining reasonableness, however, and in consideration of the totality of the circumstances, the D.C. District Court analyzed, among other things, whether the settlement was the result of the employer’s overreaching, if it was a product of arm’s length negotiations between attorneys, and whether there were any “serious impediments” to the plaintiff’s ability to collect the judgment. These factors, however, are just a starting point, and not an end point, to the analysis of whether a FLSA settlement is fair and reasonable.

3. Relevant Circumstances Tests

The relevant circumstances test is a variation of the totality of the circumstances test insofar as it suggests that any circumstances that are relevant to the fairness and reasonableness of the agreement should be considered. However, unlike the totality of the circumstances test, this test does not include an enunciation of factors for consideration. At least one district court sitting in the Third Circuit has adopted this test through an order signed on January 11, 2016, the same day that the Supreme Court denied certiorari in Cheeks. On this day, the Eastern Circuit Court of Pennsylvania held that a court cannot solely

121. Id. at 132-35.
122. Compare Girsh v. Jepson, 521 F.2d 153, 157, 159 (3d Cir. 1975) (finding that the application of the “relevant factors” used to approve the settlement was nonetheless relevant to determine whether the proposed settlement was fair, adequate and reasonable), with Wolinsky, 900 F. Supp. 2d at 335 (“In determining whether the proposed settlement is fair and reasonable, a court should consider the totality of circumstances . . . .”).
123. Wolinsky, 900 F. Supp. 2d at 335.
124. See Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 530, 532-33 (E.D. Pa. 2016) (holding that in evaluating the fairness and reasonableness of a proposed settlement agreement, a court cannot solely
District of Pennsylvania signed an order requiring the judicial approval of FLSA settlement agreements through a test that is still developing in its jurisprudence. The Eastern District of Pennsylvania explicitly rejects the mechanical application of the multi-factored tests, such as those found in Girsh, and instead focuses its inquiry on whatever may be relevant to the instant case. Some such relevant considerations include whether the compensation terms are “significant,” whether representing counsel understands the merits and risks of the case, and the “balancing the likelihood of success against the benefit of a certain settlement.” In essence, the relevant circumstances test identifies those factors that are relevant to the particular settlement, and analyzes them without mechanically considering all factors of a multi-factored test.

Some district courts sitting in the sixth circuit similarly apply a relevant circumstances test to decipher the fairness and reasonableness of FLSA settlement agreements. Of these circumstances, some courts have given significant credence to the representations of counsel involved in the litigation, because they have a unique understanding of the complexities and merits of the case. As in the Eastern District of Pennsylvania, these district courts typically identify the relevant factors from a pre-existing multi-factored test, and only apply those factors pertinent to the case at hand.

address whether “[a] proposed settlement resolves a bona fide dispute” but, must also examine the entire record to determine whether or not the proposed settlement is fair to all of the parties involved and does not “run contrary” to the “legislative intent, purpose and context of the FLSA.”); see also Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824 (2016).

125. Kraus, 155 F. Supp. 3d at 524.


127. Kraus, 155 F. Supp. 3d at 523 n.3.

128. Howard, 197 F. Supp. 3d at 778 (“Here, the Court finds that the compensation terms are fair and reasonable because the settlement amount is significant in light of Plaintiff’s claim.”).

129. Gentrup v. Renovo Servs., LLC, No. 1:07-CV-430, 2011 WL 2532922, at *3 (S.D. Ohio June 24, 2011) (“The court may choose to consider only factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case.”); Redington v. Goodyear Tire & Rubber Co., No. 5:07-CV-1999, 2008 WL 3981461, at *11 (N.D. Ohio Aug. 22, 2008) (“The Court may choose to consider only those factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case.”); see also Granada Investments, Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992) (“Relevant factors framing our inquiry include the likelihood of success on the merits, the risk associated with the expense and complexity of litigation, and the objections raised by class members.”).


131. See id. at *3.
The variety of tests employed by district courts reveals how the language imposed by *Lynn’s Food* has been interpreted in a variety of ways across the U.S., leading to inconsistent standards and thus diminishing predictability when it comes to the approval of the terms of FLSA settlement agreements for back wages.

*C. The Potential the Settlement Will Frustrate the Implementation of the FLSA in the Workplace*

This factor largely relates to the non-monetary provisions and circumstances of a FLSA settlement agreement for back wages. When examining whether a settlement agreement will frustrate the implementation of the FLSA in the workplace, courts often review the confidentiality provisions of settlement agreements, waiver of claims (release) provisions of settlement agreements, and any other provisions and external circumstances that might undermine the purposes of the FLSA.132

Courts regularly hold confidentiality provisions in FLSA settlement agreements to frustrate the purposes of the FLSA. The general rule is that FLSA settlement agreements cannot contain confidentiality provisions because a confidentiality agreement, if enforced, (1) empowers an employer to retaliate against an employee for exercising FLSA rights, (2) effects a judicial confiscation of the employee’s right to be free from retaliation for asserting FLSA rights, and (3) transfers to the wronged employee a duty to pay his fellow employees for the FLSA wages unlawfully withheld by the employer. This unseemly prospect vividly displays the inherent impropriety of a confidentiality agreement in settlement of an FLSA dispute.133

Although the general rule holds, some courts have allowed confidentiality provisions when such provisions are uniquely crafted. Thus, there are a few exceptions to the general rule that have developed in common law. For example, confidentiality agreements tailored to

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ensure that the employer has no means of retaliating against the employee for breaching the confidentiality provision have been held permissible.\textsuperscript{134} Further, reasonably tailored non-disparagement clauses have been held not to frustrate the purposes of the FLSA.\textsuperscript{135} In one case, a confidentiality provision was upheld when it only prohibited the plaintiff from discussing the case with the press and the media, while simultaneously leaving the agreement in public record and permitting the employee to discuss the agreement with other employees.\textsuperscript{136} In other cases, settlement agreements are approved regardless of confidentiality provisions, and the court \textit{sua sponte} severs the provision when approving the agreement.\textsuperscript{137}

Releases of claims in FLSA settlement agreements are also often scrutinized by courts. Courts recurrently hold general releases of all claims to be impermissibly broad.\textsuperscript{138} FLSA settlement agreements should typically only provide for a release of the wage and hour claims at issue (\textit{e.g.}, FLSA claims and, when appropriate, any equivalent state law wage claims).\textsuperscript{139} The narrow waiver of FLSA claims, however, cannot be prospective, but can only waive past claims.\textsuperscript{140} In essence, the release of claims must only relate to past claims arising under the FLSA, within the scope of the instant lawsuit.

Aside from releases and confidentiality provisions, courts may examine other provisions or circumstances that may indicate that the purposes of the FLSA may be undermined. These circumstances may include whether this employer or this particular industry has a "history

\begin{thebibliography}{99}
\bibitem{135} Mabry v. Hildebrandt, No. CV 14-5525, 2015 WL 5025810, at *3 (E.D. Pa. Aug. 24, 2015) ("[T]he Court notes that the non-disparagement clause of the Settlement Agreement does not frustrate the purposes of the FLSA.").
\bibitem{136} In re Chickie's & Pete's Wage & Hour Litig., No. 12-6820, 2014 WL 911718, at *3 (E.D. Pa. Mar. 7, 2014); cf. Diclemente v. Adams Outdoor Advert., Inc., No. CV 3:15-0596, 2016 WL 3654462, at *4 (M.D. Pa. July 8, 2016) (finding the confidentiality provision permissible when it allowed communications with "spouse, significant other, immediate family, attorney, accountant and/or tax consultant, or as otherwise required by law" but the plaintiffs could also "disclose that this case has been resolved without referencing the terms of the agreement"); \textit{Mabry}, 2015 WL 5025810, at *2-3 (holding confidentiality provisions that allowed plaintiff to talk only with spouse about settlement agreement too extreme, even though not fully restrictive).
\bibitem{137} See, e.g., Altenbach v. Lube Ctr., Inc., No. 1:08-CV-02178, 2013 WL 74251, at *3 (M.D. Pa. Jan. 4, 2013) (granting joint motion for approval of settlement agreement excepting the confidentiality provision because it frustrates the implementation of the FLSA in the workplace).
\bibitem{139} See, e.g., \textit{Howard}, 197 F. Supp. 3d at 779-80; \textit{Kraus}, 155 F. Supp. 3d at 532-33.
\bibitem{140} Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1243 (M.D. Fla. 2010).
\end{thebibliography}
of noncompliance,” or if there are other “similarly situated” employees.\textsuperscript{141} Additionally, some courts have further considered "whether there is a likelihood that the circumstances giving rise to this action will recur.”\textsuperscript{142} There is relatively broad discretion attributed to the district courts to scrutinize settlement agreements and the surrounding circumstances to ensure that the purposes of the FLSA are not contravened.\textsuperscript{143} Accordingly, there is no provision in a FLSA settlement agreement for back wages that is immune to the potential that it will delay or even undermine a proffered settlement.\textsuperscript{144}

\textbf{D. The Reasonableness of Attorneys’ Fees and Costs}

District courts regularly scrutinize settlement agreement provisions regarding attorneys’ fees and costs. The FLSA contains a fee-shifting statute to ensure that a prevailing plaintiff can recover reasonable fees and certain costs.\textsuperscript{145} What constitutes a reasonable attorney fee is regularly an issue of contention,\textsuperscript{146} and this perennial concern is magnified in the context of FLSA settlements.\textsuperscript{147} District courts across the circuits utilize a variety of nuanced tests to decipher if attorney’s fees are reasonable in the context of a specific case. Costs, however, for federal court actions, are generally deemed to be those costs enumerated

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143. \textit{See cases cited infra note 144}.

144. \textit{See Guareno v. Vincent Perito, Inc., No. 14cv1635, 2014 WL 4953746, at *2 (S.D.N.Y. Sept. 26, 2014)} (finding a settlement agreement unenforceable, in part, because plaintiff’s attorney must pledge not to “represent any person bringing similar claims against Defendants,” noting that “[s]uch a provision raises the specter of defendants settling FLSA claims with plaintiffs, perhaps at a premium, in order to avoid a collective action or individual lawsuits from other employees whose rights have been similarly violated”); \textit{see also} Nall v. Mal-Motels, Inc., 723 F.3d 1304, 1306 (11th Cir. 2013) (involving an employee who was pressured to accept settlement because “she trusted [the employer] and she was homeless at the time and needed money” (internal quotation marks omitted)); Walker v. Vital Recovery Servs., Inc., 300 F.R.D. 599, 600 n.4 (N.D. Ga. 2014) (“According to Plaintiff’s counsel, twenty-two plaintiffs accepted the offers of judgment—many for $100—because ‘they are unemployed and desperate for any money they can find.’”).

145. 29 U.S.C. § 216(b) (2012) (“The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”).


147. \textit{See cases cited infra note 157}.
\end{footnotesize}
in 28 U.S.C. § 1920. Thus, while the determination of reasonable costs is typically governed by clear-cut rules, the determination of reasonable fees is governed by more flexible standards.

There are five major ways attorneys can charge clients’ fees: the percentage of recovery (contingency) fee, lodestar fee, hourly fee, flat rate fee, or hybrid fee (some combination of the preceding, such as part percentage and part hourly). Regardless of the agreement terms between the client and attorney, the fee must, in all circumstances, satisfy the reasonableness standards prevailing in the relevant jurisdiction. These reasonableness requirements must presumably be equivalent to or stricter than the reasonableness requirements of Model Rule of Professional Conduct 1.5 (or the state promulgated equivalent of this standard).

The contingency fee is often utilized in FLSA and non-FLSA contexts. In non-FLSA employment law contexts, contingency fees that exceed a reasonable hourly rate are often permissible. For example, for claims brought pursuant to 42 U.S.C. § 1988, the U.S. Supreme Court held that there is no per se ceiling on attorney compensation arising from that statute, and so an attorney and client can contract for

148. 28 U.S.C. § 1920 (2012) ("A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."); see also Mock v. Bell Helicopter Textron, Inc., 456 Fed. App’x. 799, 802 (11th Cir. 2012) (citing Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1575 (11th Cir. 1988) (finding that costs pursuant to 29 U.S.C. § 216(b) are those set forth in 28 U.S.C. § 1920); Patel v. Shree Jalaram, Inc., No. 12-0224-KD-M, 2013 WL 5175949, at *7 (S.D. Ala. Sept. 13, 2013) (finding, however, when the defendant agrees to pay costs in excess of those set forth in 28 U.S.C. § 1920, then a court may find the costs reasonable "in consideration of the overall agreement by the parties and the amount sought").


150. See infra note 151 and accompanying text.

151. MODEL RULES OF PROF’L CONDUCT r. 1.5 (2009) (providing eight non-exclusive factors for considering the reasonableness of a fee: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent."); see also Diener, supra note 146, at 147-48.

contingency fees that may exceed a reasonable hourly rate. The Supreme Court explicitly held that

[section] 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the “reasonable attorney’s fee” that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.

Although section 1988 itself does not limit a contingent fee, the state rules of professional conduct do place the outermost limits upon permissible fees arising under this statute. Although outside of FLSA contexts such contingency fee arrangements are often permissible, the FLSA places limits upon this contracting.

The freedom of an attorney and client to contract for contingency fees that exceed the reasonable fee award under the FLSA is limited. Courts that have considered the question have repeatedly held that prevailing plaintiffs should receive full compensation, including back wages and liquidated damages, without having to pay fees out of their recovery. To force the employee to pay attorneys’ fees would undermine the purpose of the FLSA and congressional intent.

154. Id. at 90.
155. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.5 (2009).
156. See infra note 157 and accompanying text.
157. Zegers v. Countrywide Mortg. Ventures, LLC, 569 F. Supp. 2d 1259, 1267 (M.D. Fla. 2008) (“Because the FLSA was intended to provide workers with the full compensation they are due under the law, requiring a plaintiff to pay his or her attorney a fee in addition to what the Court determines is a reasonable fee for the attorneys’ services is contrary to Congressional intent.”); see Maddrix v. Dize, 153 F.2d 274, 275-76 (4th Cir. 1946) (“Obviously Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs.”); see also United Slate, Local 307 v. G & M Roofing and Sheet Metal Co., 732 F.2d 495, 502 (6th Cir. 1984) (citing Maddrix, 153 F.2d at 275-76); Skidmore v. John J. Casale, Inc., 160 F.2d 527, 531 (2d Cir. 1947) (“We have considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that an employee’s recovery should be net, and that therefore the lawyer’s compensation should come solely from the employer.”); Burke v. Mesta Mach. Co., 79 F. Supp. 588, 615 (W.D. Pa. 1948) (“Any agreement between the plaintiffs and their counsel for an additional fee on a contingent basis, or any other understanding, would be contrary to the purpose of Congress to have the employee collect and return unpaid wages and liquidated damages.”).
Eleventh Circuit has even taken this analysis a step further, concluding that contingency arrangements that are deducted from FLSA settlements create a claim that is compromised, and thus subject to judicial supervision. In other words, for an injured employee to receive full compensation in accordance with the FLSA, the employee must not be forced to pay fees out of his statutorily mandated recovery, but instead the employer should pay the fees (over and above the payment of back wages and liquidated damages paid to the employee).

To decipher the reasonableness of a percentage of recovery method, some courts employ a multi-factored test. Some courts in the third circuit, for example, apply the Gunter v. Ridgewood Energy Corp. factors for common fund cases:

(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs’ counsel; and (7) the awards in similar cases.

Although, the Gunter factors need not be “applied in a formulaic way” and, “[e]ach case is different, and in certain cases, one factor may outweigh the rest.” These are nonetheless some of the relevant factors that may be used to decipher the reasonableness of an attorney fee. In lieu of a percentage of recovery fee, some courts employ the lodestar method of calculating fees, or utilize the lodestar method as a cross-check upon a contingency-based fee award, although this cross-check is sometimes argued as outdated and inaccurate. Regardless of the terms

158. Silva v. Miller, 307 F. App’x 349, 351 (11th Cir. 2009).
161. Id.
162. Altnor v. Preferred Freezer Servs., Inc., 197 F. Supp. 3d 746, 766-67 (E.D. Pa. 2016). ("The lodestar crosscheck is performed by calculating the ‘lodestar multiplier,’ which is determined by dividing the requested fee award by the lodestar. To determine the lodestar method’s suggested total, the court multiplies ‘the number of hours reasonably worked on a client’s case by a reasonable hourly billing rate for such services.’" (internal citations omitted)); see also Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U.S. 546, 563-68 (1986), supplemented, 483...
of the attorney-client fee agreement, a district court supervising a FLSA settlement must ensure that the fee is reasonable and that it is paid over and above the employee’s statutory entitlements, and not out of it.\textsuperscript{163}

In summary, in the aftermath of \textit{Lynn’s Food}, the district courts across the circuits have devised a variety of approaches to deciphering the existence of a bona fide dispute, the reasonableness and fairness of settlements, whether a settlement agreement frustrates the implementation of the FLSA in the workplace, and whether attorneys’ fees and costs are reasonable.\textsuperscript{164} The variety of methodologies utilized particularly to decipher the fairness and reasonableness of agreements has led to inconsistencies in the application of FLSA provisions, diminishing predictability as to the potential for enforcement of FLSA settlement agreements, and, disharmony in the application of the FLSA across the United States. Thus, while attempting to ensure that one of the policies identified in \textit{Brooklyn Savings Bank} is fulfilled, that is, the protection of the vulnerable employee population, courts have contravened another policy identified, namely, the “uniformity in the application of the provisions of the Act.”\textsuperscript{165} The next section discusses how these, and related policies have similarly played a role in creating a circuit court split.

\section*{III. The Circuit Court Split: Policies in Conflict}

In framing the controversy over the requirement of judicial supervision of FLSA settlement agreements for back wages, one must be cautious not to over-extend the contours of the circuit court split or exaggerate its scope. The question left open by the U.S. Supreme Court is a narrow one. Although a narrow question, it is one with vast implications for FLSA practice, \textit{viz.}, whether private settlements of bona fide disputes for back wages between an employer and a FLSA covered employee are enforceable when reached without court or DOL supervision?\textsuperscript{166} The Eleventh Circuit in \textit{Lynn’s Food} answered this

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\textsuperscript{U.S. 711 (1987).}
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\textsuperscript{163.} See, e.g., \textit{Silva}, 307 F. App’x at 351.
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\textsuperscript{166.} \textit{Id.} at 714 ("Our decision . . . has not necessitated a determination of what limitation, if any, § 16(b) of the [FLSA] places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement."); see \textit{D. A. Schulte, Inc. v. Gangi}, 328 U.S. 108, 114-15 (1946) ("Nor do we need to consider here the possibility of compromises in other situation which may arise, such as a dispute over the number of
question in the negative, holding that all FLSA settlements for back wages must be supervised by either a court or the DOL. The Fifth Circuit accepted the general rule expressed by *Lynn's Food*, but carved out an exception to it. It is this exception that has created a split in how the circuits treat certain FLSA settlement agreements. The exception essentially holds that when a dispute is bona fide, if both parties are represented by counsel and the agreement does not otherwise contravene the FLSA, then private settlement agreements for FLSA back wages are enforceable even without court or DOL supervision.

The current landscape is one leaning heavily in favor of the blanket rule imposed by *Lynn's Food*. The Eleventh and Second Circuits require judicial supervision of FLSA settlement agreements for back wages; the Fifth Circuit carves out a narrow exception to the supervisory requirement; the Fourth, Seventh, Eighth, and Ninth Circuits have not expressly decided the issue, but have (in dicta)...

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hours worked or the regular rate of employment."); see also *Barrentine v. Arkansas-Best Freight Sys.*, Inc., 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.").

167. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982).
169. *Id. at 256 & n.10.*
170. *Lynn's Food*, 679 F.2d at 1355.
171. *Id. at 1350.
174. Although the Fourth Circuit has not expressly decided the issue, it has acknowledged the prohibition in *Taylor v. Progress Energy, Inc.* 493 F.3d 454, 460 (4th Cir. 2007) ("[U]nder the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims."). However, *Taylor* was overruled by regulation as stated in *Whiting v. Johns Hopkins Hospital*. 416 Fed. App'x. 312, 314-15 (4th Cir. 2011).
175. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 308 (7th Cir. 1986). The Seventh Circuit declined to address, for lack of need in *DeBraska v. City of Milwaukee*. 189 F.3d 650, 653 (7th Cir. 1999) ("[T]he Supreme Court has not decided 'what limitation, if any, § 216(b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties.'" (second alteration in original) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 714 (1945))).
176. The Eighth Circuit cited *Lynn's Food* approvingly in *Copeland v. ABB, Inc.*. 521 F.3d 1010, 1014 (8th Cir. 2008) ("[T]here are only two statutory exceptions to this general rule. First, an employee may accept payment of unpaid wages under the supervision of the Secretary of Labor and if the back wages are paid in full. Second, if an employee brings suit directly against a private employer pursuant to § 216(b) of the statute, and the district court enters a stipulated judgment, it will have res judicata effect on any subsequent claim for damages." (internal citations omitted)).
177. The Ninth Circuit cited *Lynn's Food* approvingly in *Seminiano v. Xyris Enterprise, Inc.* 602 F. App'x 682, 683 (9th Cir. 2015) ("[T]he record also supports the district court's denial of Seminiano's request to settle and dismiss his FLSA claims. FLSA claims may not be settled..."
acknowledged the requirement of supervision; and the First, Third, Sixth, Tenth, and District of Columbia Circuits having not yet expressly addressed the issue. Although, cutting against this trend, the Federal Circuit announced a rule that relaxes the supervisory requirements for public (federal) employees. Thus, across the circuits there is considerable room for the existing circuit court split to widen as more circuits explicitly address the issue. The current landscape is summarized in Table I, and the conflicting policies that led to this split are examined in the paragraphs that follow.

without approval of either the Secretary of Labor or a district court.

178. City P’ship Co. v. Atl. Acquisition Ltd. P’ship, 100 F.3d 1041, 1043 (1st Cir. 1996). While not explicitly addressing FLSA settlement, the general rule in the First Circuit is that "[a] district court can approve a class action settlement only if it is fair, adequate and reasonable. When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." Id. (internal citations omitted). Nevertheless, some district courts in the First Circuit do supervise FLSA settlements. See Prescott v. Prudential Ins. Co. of Am., No. 2:09-cv-00322-DBH, 2011 WL 6662288, at *1 (D. Me. Dec. 20, 2011) ("[I]n the FLSA context, for an employee’s waiver of his rights to unpaid wages and liquidated damages to be binding, either the U.S. Secretary of Labor must supervise the settlement or a court must approve it."); see also Singleton v. AT&T Mobility Servs., LLC, 146 F. Supp. 3d 258 (D. Mass. 2015).

179. Stickel v. SMP Servs., LLC, No. 1:15-cv-00252, 2016 WL 827126, at *2 (M.D. Pa. Mar. 1, 2016) ("The United States Court of Appeals for the Third Circuit has not addressed the factors district courts should weigh when evaluating FLSA settlements. However, courts within this circuit have relied on the considerations set forth in Lynn’s Food Stores.").

180. Steele v. Staffmark Investments, LLC, 172 F. Supp. 3d 1024, 1026 (W.D. Tenn. 2016) ("The Sixth Circuit has yet to rule definitively on the question. [T]his Court finds that FLSA settlements require approval.").


182. Carrillo v. Dandan Inc., 51 F. Supp. 3d 124, 129 (D.D.C. 2014) ("The D.C. Circuit has not opined about whether judicial approval is required of FLSA settlements reached after an FLSA suit has been filed or the related issue of whether such approval is a prerequisite for subsequent judicial enforcement of a private settlement.").

183. See O’Connor v. United States, 308 F.3d 1233, 1244 (Fed. Cir. 2002); McCall v. U.S. Postal Serv., 839 F.2d 664, 668-69 (Fed. Cir. 1988).

184. There is a bit of grey area between the last two categories, regarding whether or not a court has acknowledged the requirement for supervision or not expressly decided the issue. For example, some circuits have affirmed district court cases that have supervised settlement agreements, when the question of whether supervision is required was not before them. Thus, the last two categories may overlap to some degree. See, e.g., Lenahan v. Sears, Roebuck & Co., No. 02-0045, 2006 WL 2085282, at *12 (D.N.J. July 24, 2006), aff’d, 266 F. App’x 114 (3d Cir. 2008).
TABLE 1:

<table>
<thead>
<tr>
<th>Supervision of FLSA settlement agreements required in all circumstances</th>
<th>Supervision of FLSA settlement agreements not always required</th>
<th>Acknowledged the requirement of supervision but have not expressly decided the issue</th>
<th>Have not expressly decided the issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eleventh Circuit</td>
<td>Fifth Circuit</td>
<td>Fourth Circuit</td>
<td>First Circuit</td>
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<td>Second Circuit</td>
<td>Federal Circuit</td>
<td>Seventh Circuit</td>
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<td>DC Circuit</td>
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A. The Martin Exception to the Supervisory Requirement

In Martin, the Fifth Circuit intricately analyzed the U.S. Supreme Court’s jurisprudence pertaining to FLSA settlement agreements and determined that the Supreme Court does not mandate the supervision of all FLSA settlement agreements for back wages.\(^*\)\(^\text{185}\) To the contrary, the Supreme Court expressly left open the question of whether bona fide disputes between covered employees and employers over back wages (such as disputes over the number of hours worked or the regular rate for employees) require supervision.\(^*\)\(^\text{186}\) The Lynn’s Food court looked to the policies identified by the Supreme Court to impose such a requirement, but the Martin court did not perceive those policies to be implicated when FLSA rights are not abrogated through contract. The Martin court reiterated “that FLSA substantive rights may not be waived in the collective bargaining process, however, here, FLSA rights were not waived, but instead, validated through a settlement of a bona fide dispute....”\(^*\)\(^\text{187}\) In such cases, judicial scrutiny of settlement agreements is not required prior to those agreements becoming enforceable and binding upon the parties.\(^*\)\(^\text{188}\)

The Martin ruling implies that agreements involving bona fide

\(^*\)\(^\text{185}\) Martin v. Spring Break ’83 Prods., LLC, 688 F.3d 247 (5th Cir. 2012).
\(^*\)\(^\text{186}\) Id. at 255 (citing D. A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114-15 (1946)).
\(^*\)\(^\text{187}\) Id. at 257.
\(^*\)\(^\text{188}\) Id. at 253-54.
disputes become binding prior to receiving court approval, so long as FLSA rights are not abrogated via agreement.\textsuperscript{189} Thus, under Martin, when competent parties represented by counsel agree to a settlement of a bona fide FLSA dispute over back wages, the parties need not go through the additional (sometimes tumultuous) process of seeking court or DOL approval prior to effectuating the settlement.\textsuperscript{190} However, if one party later realizes the terms of the agreement are unfair, that party may purportedly still bring claims to court to decipher whether such an agreement was fair and reasonable (likely, either by filing a FLSA action or by requesting declaratory relief).\textsuperscript{191} Thus, the Martin ruling’s consequence is largely the modification of the procedures for the approval of FLSA settlements of bona fide disputes within the Fifth Circuit. Instead of parties being required to seek approval prior to effectuating the settlement of bona fide disputes, parties may instead effectuate settlement, and subsequently, if necessary, bring an action to court to decipher whether that agreement was fair, reasonable, and thus enforceable. The risk for private FLSA settlements, even in the Fifth Circuit, however, is that the agreement could eventually be scrutinized and if FLSA rights were waived, even inadvertently through the private settlement, then the agreement could be held void as against public policy.\textsuperscript{192} In this way, the Fifth Circuit has partially restored the traditional common law methods for challenging a contract (via public policy), and disposed of procedural hurdles for agreements that validate FLSA rights. This, in turn, creates the potential for the reduction of filings of FLSA cases and agreements in district courts.

The Martin court approved of the reasoning set forth by the Western District of Texas in Martinez,\textsuperscript{193} and, in doing so, embraced the freedom of contractual parties to craft their own agreements for bona fide disputes, so long as such agreements do not violate the public policies embedded in the FLSA (e.g., preventing the exploitation of vulnerable employees by avoiding overtime or minimum wage requirements). The Fifth Circuit gave primacy to party autonomy and freedom of contract in lieu of the supervisory mechanisms set forth in Lynn’s Food, while still preserving the common law mechanisms for voiding contracts that violate the FLSA’s policies.\textsuperscript{194} The procedure

\textsuperscript{189.} Id. at 257.
\textsuperscript{190.} Id.
\textsuperscript{191.} Id. at 254.
\textsuperscript{192.} See supra note 18 and accompanying text.
\textsuperscript{194.} Martin, 688 F.3d at 256 n.10.
resulting from the *Martin* decision prevents courts from disrupting settlements of consenting parties who agree to a resolution of a bona fide dispute that they, the parties (as represented by counsel), think is fair and reasonable, as opposed to an agreement that a presiding judge (who is not intimately familiar with the circumstances, needs, and desires of the parties) believes to be fair and reasonable.\(^{195}\) Such compromises could conceivably fall within a broad range of potential settlements, so long as FLSA rights are not waived in the process of settlement, and the policies embedded therein are not abrogated.

Through the restoration of the traditional common law procedure for voiding contracts when violative of public policy (i.e., the public policies embedded in the FLSA), the *Martin* court has assured that vulnerable employees are protected while reducing the strain on district courts.\(^{196}\) All the while, competent attorneys that craft private settlements outside of the purview of court supervision, will regardless require such agreements to validate the FLSA lest they shall face having those agreements voided if subsequently challenged.\(^{197}\) Thus, although courts in the fifth circuit may not have immediate opportunity to review FLSA settlement agreements, they will ultimately be able to review them if challenged at a subsequent time.

A few years after *Martin*, the Fifth Circuit declined to extend the narrow exception to the general rule set forth in *Lynn's Food*.\(^{198}\) In *Bodle*,\(^{199}\) the Fifth Circuit considered whether a general waiver of claims resulting from a non-FLSA action between employees and employer could bar subsequent FLSA claims.\(^{200}\) The district court enforced the release relying on the reasoning of *Martin*, but the Fifth Circuit reversed, and, in doing so, declined to extend the rule of *Martin*.\(^{201}\) The *Bodle* court reasoned that the release was obtained as part of a settlement of a previous state court claim involving a covenant not to compete.\(^{202}\) This claim did not involve unpaid wages, and because the court was not "assured under these facts that the release resulted from a bona fide dispute regarding overtime wages," it declined to enforce the release.

\(^{196}\) See *Martin*, 688 F.3d 247, 254 n.6; see also infra Section IV.C.
\(^{197}\) See supra note 50 and accompanying text.
\(^{198}\) *Bodle* v. TXL Mortg. Corp., 788 F.3d 159, 165 (5th Cir. 2015).
\(^{199}\) Id. at 161.
\(^{200}\) Id.
\(^{201}\) Id.
\(^{202}\) Id. at 164.
against claims arising under the FLSA.  

In deciding this issue, the *Bodle v. TXL Mortg. Corp.* court clarified that the ruling in *Martin* carved out a narrow exception to the general rule that FLSA settlement agreements for back wages must be supervised by a court or the DOL.  

The Fifth Circuit reinforced the key component of this exception’s applicability, viz., that there is sufficient evidence of a “bona fide” dispute. The exception did not apply in *Bodle*, because there was no evidence presented that, prior to entering into the general release in the state court action, the parties discussed overtime compensation, nor was there a factual determination at that time about the number of hours of unpaid overtime due. Thus, the court reasoned, there is no evidence that there was a bona fide dispute over overtime wages, and the “general prohibition against FLSA waivers” did apply to bar the enforcement of the general release against the FLSA claims. The Fifth Circuit’s ruling in *Bodle* more precisely defined the narrow circumstances of the *Martin* exception, and the contours of a bona fide dispute.

**B. The Second Circuit’s Rejection of the Martin Exception**

In the years that followed the *Martin* case, many innovative attorneys in other circuits attempted to rely on its reasoning to persuade district courts that bona fide FLSA disputes for back wages do not require judicial supervision. Some district courts rejected the *Martin* rule. Yet other district courts concurred with the *Martin* rule. The

203. *Id.* at 161.
204. *Id.* at 165.
205. *Id.*
206. *Id.*
207. *Id.*
208. Grahovic v. Ben’s Richardson Pizza Inc., No. 4:15CV01659 NCC, 2016 WL 1170977, at *1 (E.D. Mo. Mar. 25, 2016) (stating the common practice in the Eastern District of Missouri) ("[B]ecause declining to review the proposed settlement agreement would leave the Parties in an uncertain position, the Court ... [did] review the settlement’s FLSA-related terms for fairness."); Steele v. Staffmark Investments, LLC, 172 F. Supp. 3d 1024, 1026 (W.D. Tenn. 2016) ("[B]ased on the unique purpose of the FLSA and the unequal bargaining power between employees and employers, this Court finds that FLSA settlements require approval by either the Department of Labor or a court."); Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 528 (E.D. Pa. 2016) ("[T]his Court rejects the *Martin* standard in favor of *Lynn’s Food* ...."); Bettger v. Crossmark, Inc., No. 1:13-CV-2030, 2015 WL 279754, at *3 (M.D. Pa. Jan. 22, 2015) ("Although the Third Circuit has not addressed whether such § 216(b) actions claiming unpaid wages may be settled privately without first obtaining court approval, district courts within the Third Circuit have followed the majority position and assumed that judicial approval is necessary."); Archer v. TNT USA, Inc., 12 F. Supp. 3d 373, 386-87 (E.D.N.Y. 2014) (discussing *Martin* and finding that even under its
Second Circuit Court of Appeals was the first circuit court to expressly consider the question of whether the Martin rule applies, and it declined to follow the rule, siding instead with the traditional supervisory requirements of Lynn's Food. In reaching its resolution, the Second Circuit widened the existing circuit split, siding with the Eleventh Circuit instead of the Fifth. Despite this split, the U.S. Supreme Court has twice denied certiorari on this issue.

The precise issue before the Cheeks court was whether parties are permitted to consent to a stipulated dismissal of a FLSA back wages claim under FRCP 41(a)(1)(A)(ii), that is, whether the FLSA is an "applicable federal statute" within the meaning of the rule. The interrelated issue raised by Cheeks was "whether parties may settle FLSA claims with prejudice, without court approval or DOL supervision . . . ." In Cheeks, the district court held, and the Second Circuit affirmed, that parties must have approval of either a court or the DOL to settle FLSA claims for back wages, and thus are not permitted to enter into a stipulated dismissal under FRCP 41(a)(1)(A)(ii) because

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209. Schneider v. Habitat for Humanity Int'l, Inc., No. 5:14-CV-5230, 2015 WL 500835, at *3 (W.D. Ark. Feb. 5, 2015) ("[T]his Court believes that the risk is minimal that an unreasonable settlement will result from 'unequal bargaining power as between employer and employee' in FLSA lawsuits where [certain] criteria is met . . . ."); Sarceno v. Choi, 66 F. Supp. 3d 157, 170 (D.D.C. 2014) ("The Court concurs with the reasoning of the Fifth Circuit in Martin that a private settlement of FLSA claims may be enforceable, even if the settlement was reached without United States Department of Labor or judicial supervision or approval, but only when the agreement resolves a bona fide dispute between the parties and the terms of the settlement are fair and reasonable."); Duprey v. Scotts Co. LLC, 30 F. Supp. 3d 404, 410-11 (D. Md. 2014) (citing Martin approvingly); Fernandez v. A-1 Duran Roofing, Inc., No. 12-CV-20757, 2013 WL 684736, at *1 (S.D. Fla. Feb. 25, 2013) (finding approval of the settlement agreement unnecessary); Picerni v. Bilingual S& Preschool Inc., 925 F. Supp. 2d 368, 374 (E.D.N.Y. 2013) (having been virtually overruled by Cheeks).

210. As of this writing, the Second Circuit is the only circuit court to expressly consider the applicability of the Fifth Circuit's decision in Martin.


212. Martin v. Spring Break '83 Prods., LLC, 688 F.3d 247 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 795 (2012); *see also* Cheeks, 136 S. Ct. at 824.

213. *Cheeks*, 796 F.3d at 204.

214. *Id.* at 201, 204 ("The question before us, however, asks whether the parties can enter into a private stipulated dismissal of FLSA claims with prejudice, without the involvement of the district court or DOL, that may later be enforceable.").
FLSA is not an “applicable federal statute” within the meaning of the rule.\textsuperscript{215} The \textit{Cheeks} court exhaustively analyzed the case law on the issue of court supervision of FLSA settlement agreements for back wages and although recognizing the differing policy interests, including the consideration that “the vast majority of FLSA cases . . . are simply too small, and the employer’s finances too marginal, to have the parties take further action if the Court is not satisfied with the settlement.”\textsuperscript{216} Although sympathizing with this salient concern, the Second Circuit determined that this concern “must be balanced against the FLSA’s primary remedial purpose: to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees.”\textsuperscript{217} Accordingly, the Second Circuit concluded by requiring the judicial or DOL supervision of FLSA settlement agreements for back wages.\textsuperscript{218}

The \textit{Cheeks} decision, like \textit{Lynn’s Food} before it, gave significant credence to the policies underlying the FLSA in coming to its decision that effectively bans private settlements of bona fide disputes for back wages without the supervision of the courts or DOL. The \textit{Cheeks} court emphasized the importance of protecting vulnerable employees from substandard wages, and found that this policy supersedes other relevant considerations.\textsuperscript{219} While not addressing specifically the interests of party autonomy and freedom of contract, the primacy nevertheless lies with the remedial purposes of the FLSA.\textsuperscript{220} The \textit{Cheeks} court’s decision, however, flies in the face of a corresponding policy identified by the Supreme Court seventy years prior, namely, the “uniformity in the application of the provisions of the Act.”\textsuperscript{221} The Second Circuit solidified a split in the circuits through its explicit rejection of the \textit{Martin} rule, which the Fifth Circuit previously described merely as an exception to the supervisory requirements. Thus, while attempting to promote the policy of employee protection, the Second Circuit simultaneously undermined the policy of uniform application.

\textsuperscript{215} Id. at 201.
\textsuperscript{216} Id. at 205 (omissions in original) (quoting Picerni v. Bilingual Seitz & Preschool Inc., 925 F. Supp. 2d 368, 377 (E.D.N.Y. 2013)).
\textsuperscript{217} Id. at 206-07.
\textsuperscript{218} Id. at 207.
\textsuperscript{219} Id. at 202.
\textsuperscript{220} Id. at 206.
C. The Progeny of Cheeks

The Cheeks decision had immediate repercussions both within and outside of the Second Circuit. For example, on January 11, 2016, the same day that the Supreme Court denied certiorari in Cheeks, the Eastern District of Pennsylvania, a court sitting in the Third Circuit, signed an order requiring the judicial approval of FLSA settlement agreements. Beyond solidifying a circuit court split and the resulting reaction by district courts, Cheeks also led to new issues relating to: (1) the impact of Cheeks on offers of judgment arising under FRCP 68; and the revitalization of older issues post-Cheeks relating to; (2) the factors to be employed when deciphering a fair and reasonable FLSA settlement.

1. The Impact of Cheeks on Offers of Judgment

The month after the Second Circuit decided Cheeks, Judge Cogan, whose opinion in Picerni was expressly overruled in Cheeks, responded to the ruling. Judge Cogan distinguished FRCP 41 stipulated dismissals from FRCP 68 offers of judgment and concluded that Cheeks does not apply to FRCP 68 offers of judgment. In Barnhill, the plaintiffs filed a “Notice of Acceptance” of a FRCP 68 offer of judgment which indicated they accepted the defendant’s offer to provide them full compensation for their FLSA claims. Without scrutinizing the settlement, Judge Cogan ordered the clerk to enter the judgment.

222. Westlaw’s “Citing Resources” feature shows that Cheeks has been cited 189 times by District Courts sitting in Connecticut, Florida, Hawaii, Illinois, Massachusetts, Michigan, Mississippi, New York, Ohio, Pennsylvania, and Tennessee. Of these 189 citations, 167 of them are from New York (“Citation Resources” search conducted on October 20, 2017).
226. This notice stated that defendants shall pay to Plaintiffs the sum of sixty thousand dollars ($60,000.00), representing full payment for all the Plaintiff’s claims, including but not limited to their claims for lost income, unpaid wages, liquidated damages, penalties, and interest, and inclusive of all reasonable costs and fees (such as attorneys’ fees) incurred up to the date of this offer of judgment. The Plaintiffs may divide this sum as they see fit. If they cannot agree, the sum is to be divided equally among the Plaintiffs.
227. Id. at *3.
does not defer to "any applicable federal statute" but "subject to its stated qualifications, permits dismissal for any or no reason"; 228 (2) FRCP 68 requires an entry of a judgment by the clerk of the court; (3) the policy considerations underpinning the FLSA cannot be taken too far as all federal statutes have legitimate policies underlying them and a judicial ranking of the importance of these policies would be an overreaching of judicial powers; (4) there are a large number of FLSA cases filed each year; and (5) FRCP 68 judgments are matters of public record, so secret settlements will be impossible in this context. 229 Through this rationale, Judge Cogan has allowed the utilization of a different procedural mechanism for the dismissal of FLSA cases without judicial scrutiny, thereby side-stepping the decision in Cheeks. Barnhill led to a split of opinions within the Second Circuit, with some judges sitting on district courts in the second circuit agreeing that FRCP 68 judgments do not need judicial scrutiny 230 and yet others contending that they do need scrutiny. 231 Those who contend FRCP 68 judgments need supervision for fairness and reasonableness surmise that concluding otherwise would undermine the overarching policy of protecting vulnerable workers by creating a canyon-sized exception to the requirement of judicial supervision that unscrupulous employers could leverage to their advantage. 232 These judges reason that there are narrow exceptions to the mandatory nature of entering FRCP 68 offers of judgment, including supervisory requirements over class actions, bankruptcy claims, qui tam actions under the False Claims Act, and

228. Id. at *1.

229. Id. at *1-3.


232. See cases cited supra note 231; see also supra Section III.C.1.
BACK WAGE SETTLEMENT AGREEMENTS

This question was recently submitted to the Second Circuit via interlocutory appeal. Regardless of how the Second Circuit decides this appeal, similar questions will inevitably arise regarding the scope and extent of judicial supervisory requirements of FLSA settlement agreements.

2. The Factors for a Fair and Reasonable Settlement

Cheeks, like Lynn's Food before it, mandated the judicial supervision of FLSA settlement agreements for back wages, but similarly did not endorse a framework for district courts to follow when making determinations about whether settlement agreements are fair and reasonable. This has led to considerable uncertainty within the Second Circuit given the lack of clear standards and guidance for what constitutes a fair and reasonable settlement. As a result, practitioners are left with a significant degree of doubt as to boundaries of reasonableness even in a post-Cheeks environment.

Although some district courts in the second circuit have embraced the Wolinsky factors as part of a “totality of the circumstances” test, the second circuit has yet to explicitly endorse these factors. Given the array of tests utilized by district courts across the nation, the decision in Cheeks compounds the level of uncertainty and diminishing predictability of the potential for judicial enforcement of FLSA settlement agreements for back wages.

The lack of clear guidance in this area has consequent practical implications for counsel who desire approval of FLSA settlement agreements. At times, counsel in FLSA cases are required to submit multiple motions or stipulations to a court in order to have a settlement approved, even if both parties, and all counsel, agree it is fair and reasonable, in order to convince a presiding judge to approve the settlement. While the parties may want a lawsuit to end, the judicial

234. Notice of Interlocutory Appeal at 1, Mei Xing Yu, 319 F.R.D. 111 (No. 16-CV-06094 (JMF)).
235. For example, in Cheeks, the Second Circuit declined to decide “whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice.” Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 201 n.2 (2d Cir. 2015) cert. denied, 136 S. Ct. 824, (2016).
236. See supra Section III.C.1.
238. See discussion supra Section II.B.
239. See, e.g., Hughes v. Twp. of Franklin, No. 13-3761 (AMD), 2015 WL 9462965, at *2 (D.N.J. Dec. 23, 2015) (requiring, subsequent to this decision on summary judgment, multiple motions for approval prior to the settlement agreement being approved).
supervision of FLSA settlements for back wages may prevent parties from concluding a litigation, extend the time and expense of it, and, at times, even undermine the delicate negotiation process and the otherwise desirable settlements reached between parties. Unexpected time and costs arise when judges require settlement agreement revisions or additional filings by attorneys subsequent to the initial request for the approval of a settlement, and often these costs are not anticipated by the initial fee amount agreed to via the settlement. The rules of court, and risks of additional costs, often deter practitioners from requesting interlocutory appeals of the non-final orders denying such motions or stipulations requesting approval of settlement agreements. In light of these, and related, consequences of the judicial supervision of FLSA settlement agreements for back wages, a new framework is needed to resolve the increasingly complicated issues spurring from these supervisory requirements.

IV. WHY THE SUPERVISORY REQUIREMENT IS NECESSARY

The necessity of the supervisory requirement of FLSA settlement agreements for back wages is not immediately obvious, and it is tempting to argue that FLSA settlement agreements for back wages should not be supervised. Concerns for individual liberty and autonomy, freedom of contract, and anti-paternalism immediately pour to the forefront when considering governmental intrusion into the private contractual affairs of its citizens. Indeed, throughout history, the importance of preserving human liberty and autonomy are recurrently stressed by philosophers, politicians, and jurists. In the eighteenth century, the French Declaration of the Rights of Man ("French Declaration") and the U.S. Declaration of Independence, both products of enlightenment thought, emphasized individual liberty and mandated the need for freedom from oppression. In the late nineteenth and early twentieth century, presiding judges often gave primacy to client's
control and autonomy over other worthwhile policies. In the twentieth century, F. A. Hayek and others argued that governmental interference with the private economic affairs of its citizens disrupts the economy. Individual autonomy and liberty have recurrently been identified as paramount moral rights throughout the modern era.

Although liberty and autonomy require that individuals be permitted to contract in the private marketplace as they see fit, these rights do not provide a blank moral check to do anything one desires. To the contrary, one widely acknowledged limitation to individual liberty is John Stuart Mill's "harm principle," an early variation of which is encapsulated in Article 4 of the French Declaration, which provides that "Liberty consists in the power to do anything that does not injure others." As stated more precisely by Mill, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." The supervision of FLSA settlement agreements for back wages is intended to prevent harm to vulnerable employees who may be taken advantage of by their employers. The DOL supervision of settlement agreements is similarly intended to prevent employers from exploiting employees. The FLSA itself was promulgated to ensure this aim is accomplished, and that employees in the U.S. are protected from potential harm on a broad basis. Accordingly, insofar as the supervision of FLSA settlement agreements for back wages is viably preventing harm to the working classes, it places a legitimate restraint upon the liberty and autonomy of contractors.

Aside from the central concern for paternalistic interference with individual liberty and autonomy, there are at least four other reasons why one might oppose the supervision of FLSA settlement agreements:

244. JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: THE RISE, FALL, AND FUTURE 20 (2015) ("Even if the client were breaching the fee agreement, public policy required that the client remain in control (and in any event settlements of disputes were favored"); see Spaelding v. Beidleman, 160 P. 1120, 1123 (Okla. 1916); see also Lochner v. New York, 198 U.S. 45, 53 (1905), abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940, 47 DEPAUL L. REV. 231, 243-48 (1998).


247. MILL, supra note 246, at 68.


(1) the policies that were utilized to develop the supervisory requirement are not found in the express language of the FLSA; (2) supervising FLSA settlement agreements for back wages, but not all types of settlement agreements, represents a judicial prioritization of FLSA rights over others; (3) the increasing FLSA case load is creating a significant burden on the courts that are tasked with supervising the agreements (as well as the attorneys who are subject to supervision); and (4) in many cases, FLSA agreements are routinely approved by presiding judges, and not seriously scrutinized. These considerations are considered and weighed in the following paragraphs.

A. The Policies Underlying the FLSA are Not in the Act

The four policies set forth by the U.S. Supreme Court in *Brooklyn Savings Bank*, that were relied upon by the *Lynn’s Food* court when mandating the judicial supervision of FLSA settlement agreements for back wages, have been criticized because they were not expressly stated in the FLSA. This critique is explained in Judge Rifkind’s district court opinion in *Gangi* which held that when FLSA coverage is a genuine issue, an employer could agree to pay overtime compensation, but not liquidated damages, by utilizing the mechanisms of an accord and satisfaction. Judge Rifkind reasoned that:

[T]here is no conflict between the public policy of the statute and the equally well-established policy of the law to encourage the amicable adjustment of disputes by arms’ length negotiation. I find nothing in the statute which prohibits the settlement of such a past-due claim, especially if the amount paid in settlement is at least equal to the unpaid over-time compensation.

250. See infra Section IV.A-D.

251. *Gangi v. D. A. Schulte, Inc.*, 53 F. Supp. 844, 846 (S.D.N.Y. 1943), rev’d, 150 F.2d 694 (2d Cir. 1945), aff’d, 328 U.S. 108 (1946). However, the criticism that these policies are not expressly in the statute preceded Judge Rifkind’s opinion, as declared previously in the dissenting opinion of Justices Stone, Roberts, and Frankfurter in *Brooklyn Savings Bank v. O’Neil*. 324 U.S. 697, 718 (1945) (Stone, C.J., dissenting) (“If such an undeclared policy is to be inferred, it must be inferred from the statute, read in its appropriate setting.”).

252. *Gangi*, 53 F. Supp. at 846. (“The parties had a genuine dispute and having settled it, the plaintiffs repudiate the settlement, but tenaciously hold on to the benefits received. If they win, they will collect the liquidated damages. If they lose, they, nevertheless, retain the over-time compensation to which they are not entitled. I do not believe that it is the intention of the statute to drive so wide a breach between law and morals.”).
Judge Rifkind’s opinion was overruled by the Second Circuit Court of Appeals, which reasoned that the policies set forth in *Brooklyn Savings Bank*, and the deterrent effect of the liquidated damages clause, would be undermined if an accord and satisfaction could be utilized to release an employer from the liquidated damages requirement.\(^{253}\) Finally, upon certiorari, the employer argued that “the congressional intent to forbid compromises of such claims is not clear” and so departing from the longstanding policy of encouraging the settlement of disputes should not be inferred to promote policies that are not clearly stated in the FLSA.\(^{254}\) The majority of the Supreme Court rejected this argument by referencing the same policies from *Brooklyn Savings Bank*, and particularly mentioning that “the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made” and that “inequality of bargaining power” between employers and vulnerable employees requires the court to forbid such waivers.\(^{255}\)

Although the majority did reject the employer’s argument, Justice Frankfurter, with whom Justice Burton concurred, dissented to the opinion, clearly articulating that they believed the reasons stated in Judge Rifkind’s district court opinion to be substantially correct.\(^{256}\) Moreover, in response to the employer’s claims that the policies were unclear, the dissenting judges stated that these polices were “like nitrogen” pulled from thin “air” and that before a “familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress.”\(^{257}\) The dissenting judges contended that a clear statement from Congress should be issued before a longstanding policy, such as encouraging the settlement of disputes, should be overturned.\(^{258}\) The crux of these arguments is that it is not the judiciary’s role to devise policies underlying legislation, but it is Congress’s role to instruct the courts as to which policies underlie its legislation.\(^{259}\) Thus, when the Eleventh Circuit referred back to these

\(^{253}\) *Gangi*, 150 F.2d at 695-696.

\(^{254}\) *Gangi*, 328 U.S. at 113.

\(^{255}\) *Id.* at 115 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 708).

\(^{256}\) *Id.* at 121.

\(^{257}\) *Id.* at 121-22.

\(^{258}\) *Id.* at 122.

\(^{259}\) *Id.*
policies, when mandating the judicial supervision of FLSA settlement agreements for back wages, it relied on policies that were at-best, unclear, and at-worst, imaginary.  

This central debate regarding the validity of the implementation of judicially construed policies as a basis for deciding cases is longstanding. Nevertheless, in the over seventy years since the Brooklyn Savings Bank decision, these same policies have become so engrained in the FLSA case law that challenging them today would prove a significant task. Insofar as these policies are now broadly accepted, it provides support for the assessment that “in a democracy, if enough people believe something, then it is true.” Moreover, the manner by which the common law developed is widely reflected in the reiteration of these policies over the decades that followed their enunciation by the Supreme Court.

A close look at the four policies themselves, although not all explicitly stated in the FLSA, do represent the court’s attempt to ensure the intent of Congress is attained. The four policies are: (1) protecting vulnerable employees; (2) ensuring the minimum standard of living for workers within the free flow of commerce; (3) ensuring that rights conferred to private parties, but impacting the public interest, are not waived; and (4) promoting the uniform application of the FLSA. The Brooklyn Savings Bank court identified each of these policies by references to case law, legislative history, and/or the FLSA itself. The policies were not pulled solely from “air” but rather from an intricate analysis of the resources that were available to the judiciary at the time. The first two policies can be gleaned from the FLSA itself, specifically, 29 U.S.C. § 202, which is cited by the Supreme Court in its opinion (and are further supported by FLSA legislative history). The second two policies arise from legislative history and case law. It is not unclear that these policies exist, but rather it is unclear how they apply to specific circumstances, such as the waiver of liquidated damages, agreements regarding coverage, and the supervision of settlement agreements for back wages. The policies themselves are today rarely

260. Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982).
264. Id. at 704-10.
265. Id.
266. Id.
questioned, although in their early days, were challenged as controversial.

B. The Judiciary is Prioritizing the Importance of FLSA Rights

A more potent critique, one that has been recently reiterated in the New York district courts in a post-Cheeks environment, similarly relates to judicial priorities. Namely, that requiring FLSA settlement agreements to be supervised, but not other types of settlement agreements to be supervised, amounts to a judicial prioritization of the importance of FLSA rights over others. As district court Judge Cogan argues:

[T]he statute was enacted to protect against "the evil of overwork" without statutorily required compensation. But surely, that evil is no greater than a case where a police officer gratuitously beats a suspect (42 U.S.C. § 1983), or a debt collector threatens children that their father will be imprisoned if he does not pay his bill (Fair Debt Collection Practices Act), or a consumer's credit is ruined because of a falsely reported debt (Fair Credit Reporting Act), or an employee is forced to submit to unwanted sexual advances or face termination (Title VII). These, and many others, are federal cases for a reason. They are all important, and the statutes and constitutional provisions under which they arise all protect unique interests based on unique policy considerations. For the courts to begin ranking the wrongs addressed by Congress where Congress has not would be to assume a legislative role.267

Judge Cogan's point that there are many evils in this world, some of which federal legislation is designed to prevent, is well-taken. Although well-taken, his argument is based on the assumption that supervising FLSA settlement agreements is performed because FLSA rights are ranked by judges as more important than the policies embedded in other statutes.268 To the contrary, when Congress has

268. See id.
enlisted private citizens to engage in the preservation of public rights, such as the preservation of overtime and minimum wage rights, there must be mechanisms in place to ensure that those whom Congress enlists do not game the system.\(^{269}\) The need for oversight is analogous to giving an office manager complete control over a business's bank accounts, payroll, and lines of credits without occasionally auditing the manager's work. The tendency of some, if unaudited, would inevitably be to manage the accounts in their own interests instead of in the interests of the business for which they were hired to account. Others may even go so far as to steal, embezzle, or cheat the business which they were hired to run. Without the occasional check on those appointed in trust, significant damage could be done to those who should be protected.

The FLSA is inherently paternalistic. It limits the freedom of contract of employers and employees to minimum requirements, and forbids individuals from agreeing to less than the statutory entitlements, even if individuals desire to work for less than minimum wage so as to give themselves a competitive advantage in the marketplace.\(^{270}\) When mandating certain requirements that infringe liberty, there is considerable concern that some will attempt to skirt these requirements in the name of promoting individual liberty. Nevertheless, mandated supervision is deemed necessary not only in FLSA contexts but also in other contexts including: class actions, bankruptcy claims, qui tam actions under the False Claims Act, and, in some jurisdictions, the settlement of actions "commenced by or on behalf of a minor."\(^{271}\) There are also supervisory mechanisms over shareholder derivative suits.\(^{272}\) The late nineteenth and early twentieth century arguments that individual liberty and freedom of contract reign supreme have largely been repudiated.\(^{273}\) As the U.S. Supreme Court recognized,

\(^{269}\) COFFEE, supra note 244, at 174-235 (utilizing the concepts of the "private attorney general" and the "semiprivate attorney general" to represent those private or semiprivate individuals who enforce public rights); see also FARHANG, supra note 59, at 8-9 (2010) (discussing the private citizen's role as an enforcer of public policies, including those of the FLSA, and noting that "[p]rivate litigants and their attorneys represent a core dimension of the American regulatory state's infrastructural power").


\(^{272}\) See generally Mark J. Loewenstein, Shareholder Derivative Litigation and Corporate Governance, 24 DEL. J. CORP. L. 1, 2, 13, 15, 22 (1999).

Freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.\(^{274}\)

Such notions have proceeded through the twentieth and twenty-first century to justify the inherent paternalism of laws such as the FLSA.

The contemporary legal landscape provides additional reason for supervisory requirements. One commentator, John Coffee, identifies five shortcomings of “entrepreneurial litigation” (which includes plaintiff’s FLSA work): overzealousness, disloyalty and collusion, overaggregation, lack of political accountability, and symbolic justice.\(^{275}\) Such concerns for entrepreneurial litigation pervade the bar, and the migration of plaintiff’s attorneys towards FLSA practice, along with the rise in incidents of FLSA claims, is a documented phenomenon that should urge even greater caution.\(^{276}\) In sum, albeit there are unquestionably a variety of important policy objectives that federal legislation is designed to attain, the unique confluence of factors that combine to form the current FLSA landscape require the judicial supervision of FLSA settlement agreements in order to ensure, not the priority of FLSA rights over others, but instead, the minimum adherence to the rights afforded by the statute by those who are entrusted to enforce it. There is just no other practical mechanism currently available for ensuring that these rights are not derogated.

**C. The Increasing FLSA Case Load is Creating a Burden**

The process for dismissing a pending litigation due to a settlement varies by jurisdiction, but in most cases of settlement of claims, dismissing the case is a routine matter. Once a settlement is properly reached, little time and effort are required for attorneys and courts to

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275. COFFEE, supra note 244, at 220-27.

dismiss any pending litigation associated with the settled case. In shorthand, it is generally merely a matter of paperwork. In the case of FLSA settlement agreements for back wages, and certain other legal claims, judges are required to scrutinize the settlement agreements prior to approving the settlements. The time that is required for a judge to meticulously examine every provision of a settlement agreement particularly in jurisdictions that have high FLSA filings, may indeed be considerable. The murkiness of the current FLSA landscape, and the amorphous standards that are proffered by courts to guide the attorneys drafting the settlement agreements (e.g. “fair” and “reasonable”) often result in courts rejecting motions to approve the agreements simply because the attorneys do not employ the correct standards in their motions for approval or have not convinced the court that the relevant agreement should be approved. This too can result in delays of several months, if not longer, before a settlement is finally approved (if it is approved at all). As a result, there are more than an inconsiderable amount of cases involving courts, at least initially, refusing to approve FLSA settlement agreements, and requesting more information or support for the agreement by the settling attorneys, which, in turn, delays the approval of the settlement, and places a burden on both courts and practitioners (as well as those employees eagerly awaiting their long overdue back wages).


278. Seyfarth Shaw LLP, supra note 59 (tracing the increase in FLSA filings); see also Alexander, supra note 276 (identifying an approximately 400% increase of FLSA filings by private plaintiffs in federal courts between the years 2000 and 2016).


280. See cases cited supra note 279.

281. See cases cited supra note 279.
D. FLSA Settlement Agreements are Routinely Approved Without Scrutiny

The burden being created by FLSA settlement agreement supervision is resulting in some courts merely “rubber stamping” agreements, instead of going through the arduous process of scrutinizing every provision of a FLSA settlement agreement. The burden has led to both attorneys and judges developing creative methods for circumventing the supervisory requirement, such as the use of stipulated dismissals or offers of judgment. Aside from the burden that rejecting a settlement agreement creates, there may be other motivations involved in “rubber stamping” the settlement agreements. These may include the realization that the practical implications of rejecting an agreement mandates further work by the court, and possibly even trial. The political or social associations of members of the bar may also play a role in these decisions. All of these factors may combine to lead some judges to merely approve these agreements as a matter of course, and without serious scrutiny.

Although at times the approval of FLSA settlement agreements for back wages may be burdensome, these occasional burdens upon the court, practitioners, and parties are outweighed by utilitarian concerns for promoting the greater good by ensuring that the basic subsistence rights and basic minimum wage needs of all societal members are not undermined. The burden on practitioners (and possibly courts) can be eased by providing clear criteria regarding what should be incorporated into FLSA back wages settlement agreements. The next section begins a sketch of how this system may be streamlined, and makes suggestions for how clearer guidance can be provided to practitioners.

V. A Rebuttable Presumption That the Contract Accords with Public Policy

Although district courts across the United States have employed a variety of approaches to analyzing the fairness and reasonableness of

284. Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 (1945) ("[A] Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers'.").
FLSA settlement agreements for back wages, little scholarly work has been produced on this topic to-date. In this section, this article outlines a model for analyzing FLSA settlement agreements for back wages. It suggests, first, that courts abandon the language of Lynn’s Food pertaining to “reasonableness” and “fairness.” It then provides five prerequisites of a FLSA settlement agreement for back wages, which, if met, should give rise to a rebuttable presumption that the agreement accords with the public policies underpinning the FLSA. Third, it discusses the circumstances by which the presumption may be rebutted, and then what happens when the presumption is not met, and, finally, the benefits and burdens of this new framework. This section is followed by a brief conclusion.

Both “reasonableness” and “fairness” are amorphous concepts that exist on spectrums. Both provide for a limited range of circumstances that fall within their spectrums as displayed in Figure I. The exact contours of the spectrums are dubious but there are unquestionably certain things that are “fair” or “reasonable” and other things that are not. If falling within a permissible range of actions (or, in the case of contracts, “terms”), then the actions or terms fall within the spectrum of things that are considered reasonable or fair. Yet, certain other actions or terms do fall outside of this spectrum, and, if extending too far from the center, become unfair or unreasonable. The ranges existing between the two lines in Figure I represent the ranges of possible terms that may be considered fair and reasonable, and the ranges extending on either side of the two lines represent those things that are not. While there is a theoretical center for both fairness and reasonableness, there is some room for leeway, that is, to extend away from the center towards the lines, but once those lines are crossed, something becomes unfair or unreasonable. The exact location and contours of the lines themselves are unquestionably controversial.

**Figure I:**

\[ \begin{align*}
\text{Unreasonable} & \quad \text{Reasonable} & \quad \text{Unreasonable} \\
\text{Unfair} & \quad \text{Fair} & \quad \text{Unfair}
\end{align*} \]

The task, under Lynn’s Food, is for a court to identify those contractual terms that would presumptively place a FLSA settlement

https://scholarlycommons.law.hofstra.edu/hlelj/vol35/iss1/4
agreement between the two lines of fairness and reasonableness, without extending too far outwards so as to become unfair or unreasonable terms. This framework of analyzing what is "fair and reasonable" has led to at least three major approaches to deciphering fair and reasonable settlement agreements within the district courts: the totality of the circumstances approach, the multi-factored approach, and the relevant circumstances approach to deciphering if a contract is fair and reasonable. First, these different approaches have led to disharmony in the application of the FLSA. Second, "fair and reasonable" has become a fused concept within most FLSA settlement agreement analyses, with courts giving little consideration to the differences between what is "fair" and what is "reasonable," but treating them as one and the same (presuming that what is fair is reasonable and vice-versa). Third, the amorphous nature of these terms do not give specific guidance to district court judges who are tasked with approving these settlement agreements. Such guidance is also lacking for practitioners who negotiate FLSA settlement agreements. Fourth, the "fair and reasonable" standards were judicially imposed by the Eleventh Circuit and have neither a basis in statute nor in traditional common law. To the contrary, traditional common law principles, as discussed in Brooklyn Savings Bank, instruct judges to analyze FLSA settlement agreements to decipher if they are void for violating public policy (and not to analyze them for fairness or reasonableness). In sum, the "fair and reasonable" language spurring from Lynn's Food undermines certain of the policies it was promulgated to preserve. Accordingly, this language should be abandoned in favor of a framework that provides improved guidance to practitioners and judges, better balances the policies underpinning the FLSA, and accords with traditional Supreme Court jurisprudence.

A. The Five Prerequisites of the Presumption

This article proposes a burden-shifting framework that begins with
a simple showing by a party seeking approval of a FLSA settlement for back wages that the FLSA settlement agreement is in accordance with the public policies underpinning the FLSA. There are five prerequisites to a *prima facie* showing that the agreement comports with public policy which, when taken in tandem, create a framework less rigorous than that of *Lynn’s Food*, but more stringent than *Martin*. This “middle-way” method of examining FLSA settlement agreements, if adopted, will promote harmonization in the application of the FLSA provisions, protect the vulnerable employee population, ensure that FLSA rights are not abrogated, improve the predictability of the enforcement of FLSA settlement agreements, and has the potential to reduce the time and expense of post-settlement FLSA proceedings. In other words, it ensures the policies identified in *Brooklyn Savings Bank* are fulfilled while simultaneously balancing them against legitimate considerations of FLSA legal practice. These five prerequisites to the presumption of enforceability are derived from the case law and practice of courts which began developing with *Brooklyn Savings Bank*. The five prerequisites of this “middle way” method are explained in the following paragraphs. In order for a FLSA settlement agreement for back wages to be presumed to be in accordance with public policy, all of these considerations must be satisfied. However, as discussed next, this presumption is rebuttable.

1. Employees Must be Given Full Compensation

In order for a FLSA settlement agreement for back wages to be presumed to accord with public policy, the injured employee must receive full compensation through the settlement agreement. In order to decipher if full compensation is being paid, an initial determination regarding the status of the case must be made by the presiding judge. A FLSA case for back wages may be dissected into four types: an undisputed case, a bona fide dispute, a non-bona fide dispute, and a dispute over coverage. The measure for calculating “full compensation” is different for bona fide disputes, than it is for undisputed cases and non-bona fide disputes. In any case, however, the U.S. Supreme Court jurisprudence dating back to the 1940s articulates unquestionably that FLSA rights cannot be waived by contract, full compensation must be provided to injured employees, and that full compensation includes back pay and liquidated damages.291

An undisputed case is one within which the employer and employee

291. See discussion supra Section I.
agree that back wages are owed, and they also agree as to the amount of back wages owed. Such a case is quite likely to settle, and if it does, full compensation must be paid to the injured employee. For undisputed cases, full compensation is calculated pursuant to 29 U.S.C. § 216. That is, the employee is due the amount of back wages (unpaid overtime and/or unpaid minimum wage) and an equal amount in liquidated damages. Thus, if an employee is owed $1000 for unpaid overtime, that employee is entitled to another $1000 for liquidated damages, for a total of $2000. The reasonable attorneys’ fees and costs must be paid by the employer above this amount, and not taken out of it.

In the case of a bona fide dispute, there is some legitimate (good faith) dispute between the employer and employee regarding (i) whether back wages are owed at all, or (ii) the amount of back wages owed. As in most cases that arrive in a courtroom, an employer does provide some basis for not providing the requested monies to the injured employee. If these reasons are legitimate and may, in fact, reduce the amount of a judgment to the employee (e.g., disputes over rate of pay, number of hours worked, or if the employee was already compensated for certain work), then such reasons could give rise to a bona fide dispute between the employer and employee. Even in the case of a bona fide dispute, the injured employee is still entitled to full compensation, but the measure of calculating full compensation for bona fide disputes is different than for undisputed cases.

Settlements of bona fide disputes conform to public policy when such settlements fall into a range of potential settlements, somewhere between the employee’s best possible recovery and the employer’s lowest possible payout, if all cards were to, so to speak, fall in favor of one or the other if the case were to be tried on its merits. Ironically, and a fact that opens a wide door for employer compulsion, given the inherent unpredictability of trials, in some cases, full compensation for bona fide disputes could range anywhere from zero to one hundred percent of the requested back wages and liquidated damages. This could be the case if an employer were to have a defense that would alleviate it

292. 29 U.S.C. § 216(b) ("The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees. . . .").
293. Id. ("The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.").
294. See Brooklyn Sav. Bank, 324 U.S. at 703 n.12 ("[T]here was no discussion or dispute . . . either as to the existence of liability under the Act or as to the amount of such liability.").
295. See id. at 714.
completely from any FLSA liability, such as if firefighters or police were on a 28 day work period under 29 U.S.C. § 207(k), and thus any disputed hours were not due overtime payments.

Yet, in other cases, the range of full compensation for a bona fide dispute is much smaller. For example, a case wherein the employee claims she is owed overtime wages for one hundred hours of work, and the employer claims the wages are only owed for eighty hours of work. If the rate of pay in this example were $20.00 per hour, then full compensation for the back wages would be somewhere between $1600 and $2000, plus liquidated damages in an equal amount (totaling $3200 to $4000). Thus, a settlement in the amount of $1000 for these injuries would not provide full compensation, because it is below the employer’s lowest possible payout, but a settlement at $3200, or above, would provide full compensation because it is at or above the employer’s lowest possible payout. In any case, an employee must be provided full compensation. For bona fide disputes, full compensation will fall within a case-specific range.

Non-bona fide disputes also require full compensation, but, like the undisputed cases, these claims require the employer to pay the employee full compensation in the full amount owed. The category of non-bona fide disputes purportedly includes cases wherein an employer makes bad faith or illegitimate claims in a dishonest attempt to leverage a lower settlement or judgment than an employee would otherwise merit. If a judge makes the initial determination that a dispute is non-bona fide, then nothing less than full compensation will be calculated as the employee’s best possible recovery (including liquidated damages), which will suffice to avoid violating public policy. Alternatively, one could have a trial on the merits.

As the Supreme Court held in Gangi, disputes over FLSA coverage cannot be settled by private agreement without violating the public policies embedded in the FLSA. Gangi held that private settlements that resolve the issue of whether employees are covered by the FLSA violate public policy. However, if an employer desired to avoid continued litigation when coverage is an issue, an employer could purportedly concede FLSA coverage, and provide full compensation to the injured

296. See e.g., Singer v. City of Waco, 324 F.3d 813, 818 (5th Cir. 2003) (involving dispute over whether 29 U.S.C. § 207(k) exception applied); Birdwell v. City of Gadsden, 970 F.2d 802, 805 (11th Cir. 1992).


employee without violating any public policies. Such a case would be better classified as an undisputed FLSA case, requiring full compensation per 29 U.S.C. § 216(b).

In sum, the first prerequisite of a presumption that a FLSA settlement agreement for back wages accords with public policy is that the employee is given full compensation for the back wages owed, and such calculation of back wages should depend on the classification of the case as: (1) an undisputed case; (2) a bona fide dispute; (3) a non-bona fide dispute; or (4) a dispute over coverage. In any case, however, full compensation must be provided to the employee.

2. Employees Must Be Represented by Counsel

In order for a FLSA settlement agreement for back wages to be presumed to be in accordance with public policy, for all types of claims (whether bona fide or not), the injured employee must be represented by counsel during the settlement of the claims. Although the Fifth Circuit’s ruling in Martin fell short of initiating a per se requirement of attorney representation prior to deeming a settlement of a bona fide dispute for back wages enforceable, the court did emphasize that the parties were represented by counsel during settlement. Subsequent cases have honed in on this language, signifying the importance of party representation in bona fide disputes over FLSA back wages. In order to ensure that an injured employee does not unknowingly waive FLSA rights, and is fully informed of the merits of a case, and the range of possible recoveries, representation is required for the presumption to come into effect. In other words, for a FLSA settlement for back wages to be presumed to accord with public policy, the party seeking approval must show the judge that the injured employee was represented by counsel during settlement.

While it is tempting to permit a waiver of this right, for any type of claim and particularly an undisputed claim, a waiver would not sufficiently protect the rights of the parties. Thus, for any type of FLSA dispute over back wages, in order for the presumption to come into

299. Martin v. Spring Break '83 Prods., LLC, 688 F.3d 247, 249 (5th Cir. 2012).
300. The Second Circuit commented that the Fifth Circuit’s ruling in Martin “cannot be read as a wholesale rejection of Lynn’s Food: it relies heavily on evidence that a bona fide dispute between the parties existed, and that the employees who accepted the earlier settlement were represented by counsel.” Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 204 (2d Cir. 2015), cert. denied, 136 S. Ct. 824 (2016).
301. Id. at 205-06.
effect, there must be a showing of employee representation by counsel. This does not mean that an agreement could not be enforced if an employee is not represented by counsel, but only that the presumption does not come into effect, and, if not represented by counsel, further scrutiny of the agreement by the presiding judge is necessary. Particularly in the case of a bona fide dispute, when there is a range of potential recovery, party representation by competent counsel is necessary because unrepresented parties would undeniably be disadvantaged by proceeding through such negotiations without counsel to advise the employee as to the range of possible recoveries, and likelihood of success if such a case were tried on its merits. It is further conceivable that a particularly vulnerable employee without counsel (such as a migrant worker), even in an undisputed case, could be hoodwinked by a sophisticated employer.

3. Attorneys’ Fees and Costs Must Be Reasonable

Going hand-in-hand with the notions of full compensation and employee representation by counsel, in all cases, the party seeking approval of a FLSA settlement agreement must show that the attorneys’ fees and costs paid through settlement are reasonable, and that such reasonable fees and costs are paid directly by the employer over and above the full compensation to the employee, and not paid out of it. Title 29 U.S.C. § 216(b) provides that for proceedings brought in court to recover unpaid overtime or unpaid minimum wages, that the court “shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” The statute is unambiguous that such fees and costs shall (mandatorily) be paid “in addition to any judgment” and not out of such a judgment. For fee awards via settlement, so long as full compensation is paid, attorneys should be permitted to negotiate any reasonable fee that does not otherwise violate the pertinent rules of professional conduct in the relevant jurisdiction. Thus, the reasonableness of fees in settlements should not be limited beyond those that are permissible under the rules of professional conduct in the relevant jurisdiction, so long as the employee is paid full compensation.

302. See infra Section V.C.
304. Id.
305. Id.
306. See MODEL RULES OF PROF’L CONDUCT r. 1.5 (2009).
for any back wages under the FLSA (including liquidated damages), and fees are paid by the employer over and above such full compensation.\textsuperscript{307}

4. There Must Be No Confidentiality Provisions

The importance of making FLSA settlement agreements public, and thus preventing their confidentiality, is a well-recognized prerequisite to ensuring the public policies of the FLSA are not undercut. One commentator, Elizabeth Wilkins, argues that allowing parties to maintain the confidentiality of FLSA settlement agreements for back wages is repugnant to and undermines the FLSA.\textsuperscript{308} Wilkins is predominately concerned with ensuring transparency in the FLSA settlement process, so that unscrupulous employers cannot remove their misdeeds from the public eye. Allowing confidential FLSA settlements, she argues, would fly in the face of the quasi-public rights of the FLSA, promote the potential for power imbalances produced by unequal worker-employer bargaining, and are not sensible in light of the "actual dynamics" of FLSA lawsuits "in today's economy" and particularly those barriers faced by low wage workers who attempt to vindicate their rights.\textsuperscript{309} Wilkins provides greater depth to the justifications for prohibiting broad confidentiality provisions within FLSA contexts, a prohibition that is generally accepted across the district courts.\textsuperscript{310}

Confidentiality provisions have been utilized in a variety of ways within FLSA settlement negotiations. Although some courts have allowed limited confidentiality provisions, such as promises not to discuss the case with the press or media, or provisions that provide no retaliatory mechanisms for the employer if violated, as a general rule, a party seeking a presumption that a settlement agreement accords with public policy must show that there is no confidentiality provision in the FLSA settlement agreement for back wages.\textsuperscript{311} Even if limited, or crafted carefully to have no means of sanctioning violations, confidentiality provisions have the potential to undercut the FLSA, and

\textsuperscript{307} Limitations on fees pursuant to the fee-shifting statute, if applied after the entry of a judgment in the employee's favor, are in the discretion of the trial court. Agreements as to fees pursuant to settlement, however, presuming full compensation, should only be limited by the relevant rules of professional conduct in the jurisdiction at issue.\textsuperscript{308} Wilkins, supra note 2, at 112.\textsuperscript{309} Id. at 135.\textsuperscript{310} See id. at 113-18.\textsuperscript{311} See discussion supra Section II.C.; cf. Williams v. Aramark Sports, LLC, No. 10-1044, 2011 WL 4018242, at *2-3 (E.D. Pa. Sept. 8, 2011); Trinh v. JPMorgan Chase & Co., No. 07-CV-01666 W(WMC), 2009 WL 532556, at *1-2 (S.D. Cal. Mar. 3, 2009).
so should be further scrutinized.\footnote{312. Although beyond the scope of this paper, a future area of research or initiative would be to consider the benefits and burdens of the Department of Labor requiring the mandatory filing of all FLSA settlement agreements for back wages with their office. Then, the DOL could maintain a repository of all agreements and make them available to the public. This, or a similar mechanism, without fully exploring the notion, would seem to ensure public access.}

5. There Must Be No General Releases of Claims

Finally, the fifth prerequisite is that there are no overly broad waivers of claims (releases) in the FLSA settlement agreement for back wages. Releases should only waive the right to bring FLSA claims (and, when appropriate, the state law equivalent wage and hour claims), and should not be general in nature. Accordingly, for some disputes that may involve FLSA claims and other causes of action (e.g., breach of contract or discrimination), it may be necessary for the parties to enter into two separate settlement agreements—one to dispose of the FLSA claims and the other to dispose of any other claims. Prohibitions against general releases is key to ensuring that vulnerable employees are not compelled to bargain away other rights beyond those subject to FLSA litigation, in exchange for wages that they are already entitled to under law. Parties seeking a presumption that a settlement agreement accords with public policy should be required to show that any release or waiver of claims is only retroactive (not prospective), and is narrowly tailored to release only those FLSA claims at issue in the instant action.

In summary, if these five prerequisites are satisfied, then a court may \textit{ipso facto} presume that a FLSA settlement agreement does not violate public policy. Once a settlement is presented to a court that satisfies these five prerequisites, it should be presumed to accord with the policies underpinning the FLSA. Once this presumption attaches, the burden falls on a challenging party to prove that, despite these five criteria being satisfied, that the agreement, or a provision therein, is nevertheless void. After the presumption attaches, the burden of persuasion falls to a contractual party who wishes to challenge the agreement. In the case of single-plaintiff cases, it is unlikely that a challenge will arise. However, in the case of collective or class actions, certain parties may wish to challenge the agreement. These agreements may be entitled to further supervision pursuant to the class action rules prevailing in the relevant jurisdiction. This burden-shifting framework will also ensure that the supervision of FLSA settlement agreements for
back wages is not subsumed by or ignored in class action cases. Once the five prerequisites are shown, the presumption that the agreement accords with public policy shall come into effect, and the burden of persuading the judge that the agreement nevertheless violates public policy (or is void for another reason) lies with the challenging party. If no party challenges the agreement, it shall be presumed to accord with public policy, and be approved by the presiding judge without further inquiry or analysis. However, all parties shall have a right to attempt to rebut the presumption.

B. How the Presumption May Be Rebutted

Once a party shows that the five prerequisites are satisfied, the presumption that the settlement agreement accords with public policy does come into effect, and the burden shifts to the challenging party (if any) to attempt to rebut the presumption that the contract accords with public policy, and thus is presumably enforceable. A challenging party may rebut this presumption by showing that some other aspect of public policy is violated pursuant to the relevant agreement. The challenging party could argue that a certain provision of the agreement violates public policy or that the agreement as a whole does, by pointing to, among other things, the FLSA, its history, related rules or regulations, or other judicial decisions. In the event that a party successfully shows that a provision of the FLSA settlement agreement violates public policy, the judge may sever that provision and approve the rest of the agreement. Alternatively, if the provision or agreement as a whole violates public policy, the judge may choose not to approve it, and force the parties to renegotiate the agreement. This latter scenario will rarely come into play if the five prerequisites are satisfied, as they are the material terms of the agreement, and most other terms could


315. Id. ("The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient. Absent legislation, the judiciary must define the cause of action in case-by-case determinations.").

316. Id.
likely be severed without impacting these material terms. Thus, in most cases, when a challenging party is able to show a provision of a FLSA settlement agreement violates public policy, after the five prerequisites are satisfied, the appropriate course of action would typically be for a judge to sever the provision and enforce the rest of the agreement.\[317\]

C. If the Five Prerequisites are Not Satisfied

In the event that the five prerequisites are not satisfied, then a presumption of enforceability is not created. Nevertheless, a judge may then scrutinize the entire settlement agreement for public policy violations, to determine whether or not the agreement may be approved.\[318\] For example, if the second prerequisite is not satisfied, that is, if an employee is not represented by counsel during settlement, no presumption will take effect, and the judge will be required to scrutinize the entire agreement. Depending on the terms of the agreement, the agreement may still conform to public policy requirements, or it may not. Similarly, if there is a confidentiality clause of any kind, in violation of prerequisite four, then the judge would need to scrutinize that confidentiality clause and the rest of the agreement for potential public policy violations.\[319\] In certain cases, even if the presumption does not come into effect, a FLSA settlement agreement for back wages may still be approvable as according with public policy.

In other cases, however, the non-fulfillment of a prerequisite may require a judge to reject a FLSA settlement agreement for back wages. For instance, if full compensation is not provided (in violation of prerequisite one), or if there is a general release of claims (in violation of prerequisite five), then the settlement agreement violates public policy.\[320\] In these cases, additional scrutiny may still be required to review the agreement for other potential policy violations before instructing the parties to return to negotiations. In other words, if the five prerequisites are not satisfied, then additional scrutiny is generally required, which may lead to approval in some cases, or, in others, the rejection of the agreement.

\[317\] If a judge desires to scrutinize an agreement further, for example, even if all prerequisites are met, but there appears to be an attempt at making an end run around the statutory purposes, the judge may (nay, should) \textit{sua sponte} analyze the agreement for further potential public policy violations.

\[318\] \textit{See} Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982).

\[319\] \textit{See} discussion \textit{supra} Sections II.C., V.A.4.

\[320\] \textit{See} discussion \textit{supra} Sections V.A.1, V.A.5.
D. Benefits and Burdens of the Rebuttable Presumption Framework

Through good-hearted attempts to promote the FLSA's policy of protecting vulnerable employees, courts have simultaneously undercut the competing FLSA policy of promoting uniformity in the application of the FLSA. The framework set forth in this article rebalances these policies by providing an approach that can be applied uniformly across the circuits, without resorting to increasingly complex and inconsistent analyses of fairness and reasonableness. This framework returns the central inquiry of FLSA settlement agreements for back wages to their common law roots, of considering whether or not the agreements violate public policy. It modifies the central inquiry from one of fairness and reasonableness, and instead refocuses the inquiry on its original center, that is, upon whether or not the contract accords with public policy. In doing so, this framework increases the potential for parties to contract freely and autonomously subject to certain prerequisites. By clearly articulating these prerequisites, moreover, both judges and practitioners are offered improved guidance in their drafting of and supervising of FLSA settlement agreements for back wages.

The rebuttable presumption framework reduces the burden on FLSA practitioners, who will be offered the much-needed guidance as to what to include in FLSA settlement agreements. So long as practitioners are fully informed of the five prerequisites, and this approach is applied consistently across the circuits, there is no non-mischievous reason that every FLSA settlement agreement should not be approved upon its first submission. This will reduce the need for courts to scrutinize every detail of a FLSA settlement agreement, it will reduce the post-settlement workload of attorneys, and it will expedite settlement terms and payments to the injured employees who often require swift resolution to recover much-needed back wages. This framework simultaneously provides a mechanism for parties to challenge agreements that may otherwise be against public policy despite satisfying the initial prerequisites. By doing so, it balances the needs to protect the vulnerable employee population with the interests of decreasing the burden on these parties, and the attorneys who represent them.

The rebuttable presumption framework, however, does have its limits. The framework's aim is to ensure that FLSA settlement agreements for back wages do not violate public policy. This framework does not address the other mechanisms by which a contract could

otherwise be held void or voidable. Presumably, a party seeking to void a FLSA settlement agreement on other grounds (such as duress, undue influence, fraud, or unconscionability) could do so through the normal procedures of the court regardless of this framework. Alternatively, evidence supporting any of these common law doctrines could be presented after the burden shifts to a challenging party to show why the agreement should not be enforced. Finally, although this framework provides enhanced guidance to practitioners regarding the content of FLSA settlement agreements, litigation will inevitably result from abuses of the prerequisites, and so while this framework has the potential to reduce the burden on the courts, whether or not it does depends on its good faith implementation by those who have been enlisted by Congress to preserve these public rights.

VI. CONCLUSION

The Lynn’s Food framework has led to the inconsistent application of the FLSA, and a circuit court split regarding supervisory requirements of FLSA settlement agreements involving bona fide disputes for back wages. This article suggests that a new framework is needed to rebalance the public policies enunciated by the U.S. Supreme Court in Brooklyn Savings Bank, with the practical necessities of contemporary FLSA practice. This article began by tracing the unique historical factors that led to judicial scrutiny of FLSA settlement agreements for back wages. It argued that the supervisory requirement is necessary to ensure the greater public good, and to place a check upon those private individuals entrusted with ensuring public rights. This article also revealed the inconsistencies and circuit court split spurring from the open question left by the U.S. Supreme Court regarding whether private settlements of bona fide disputes for back wages between an employer and a FLSA covered employee are enforceable when reached without court or DOL supervision. It categorized and analyzed the methods by which the district courts decipher reasonableness and fairness, and how these varying methods have resulted in inconsistent and inharmonious applications of the FLSA. To remedy the lack of unification, practitioners should ensure that the five prerequisites to the presumption outlined in this article’s burden shifting framework are fully satisfied in all FLSA settlement agreements, and courts should consider a new “middle way” approach to judicial supervision of FLSA settlement

322. See discussion supra Section II.B.
agreements for back wages. Doing so will provide the much needed movement towards a more uniform, national approach to the supervision of FLSA settlement agreements for back wages.