A Facial Reconstruction of Settlements: Analyzing the Cheeks Decision on FLSA Settlements

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A FACIAL RECONSTRUCTION OF SETTLEMENTS: ANALYZING THE CHEEKS DECISION ON FLSA SETTLEMENTS

The Fair Labor Standards Act of 1938 ("FLSA") was established as a means to protect the United States' poor and disenfranchised. In recent years, courts have engrafted additional procedural requirements upon the settlement of FLSA claims and, in doing so, sparked a debate about the very nature and purpose of the FLSA. This paper will examine the Second Circuit's decision in Cheeks v. Freeport Pancake House Inc., and the Cheeks approval that now must accompany any Second Circuit settlement of a FLSA claim. This will require a closer analysis of the legislative history of the FLSA, the Federal Rules of Civil Procedure, a detailed examination of settlements in the United States, and the case law that has accompanied FLSA settlements. Rule 41 and Rule 68 of the Federal Rules of Civil Procedure are of particular importance to the determination of the practical effects of the Cheeks approval.

I. INTRODUCTION

Chris Rock once famously quipped, "I used to work at McDonald's making minimum wage. You know what that means, when someone pays you minimum wage? You know what your boss is trying to say? It's like, 'Hey, if I could pay you less, I would, but it's against the law.'" Modern wage law is governed by the Fair Labor Standards Act of 1938 (hereinafter "FLSA" or "the Act"). Initially, "the employment relationship in this country was largely one of master-servant before Emancipation." Emancipation marked the turning point in American labor ideology, with Reconstruction values, at-will employment, the Lochner era and the New Deal all heavily influencing post-Emancipation labor law. The foray of today's legal ideological war involves influences from all of these periods in American labor law. If

4. See id. (discussing major events and eras in history that influenced the modern employer-employee relationship and their effect).
labor ideology is a war, then the settlement and voluntary dismissal of wage claims are the figurative Tet Offensive; just when peace seems to be within grasp, the belligerents resume their militant ways.

Voluntary dismissals through settlement are imperative to federal civil practice, seeing as ‘‘[i]t is no exaggeration to say that most actions are resolved by dismissal.’’ With this in mind, ‘‘[m]any litigants are understandably reluctant to publicly disclose the terms of their settlement agreements.’’ This reluctance embodies the source of conflict for many wage claims under the FLSA. In order to understand modern settlement law under the FLSA, it is necessary to delve into the influence contract law has had upon settlements in America.

One of the earliest and most influential proponents of social contract theory, Thomas Hobbes, exalted man’s ability to contract in his classic book Leviathan. Even when the benefits afforded by contract were not entirely level, Hobbes posited that ‘‘[a]s if it were injustice to sell dearer than we buy, or to give more to a man than he merits. The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give.’’ Hobbes’ idea on the proliferation of independent contracting comes into clash within the very spine of Leviathan. According to Hobbes’ social contract theory, the covenant to form the commonwealth results from subjects relinquishing to the sovereign the right to act on their behalf. When does man’s social contract to his sovereign supersede the freedom of man’s contractual capacities with himself? Four centuries later, this question remains unanswered.

The confusion and ability of a party to settle traces its origins back to premodern societies. This ability is derived from the individual’s ability to freely contract with another; ‘‘[i]n a society that adopts the

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7. See Nicholas M. Reiter & Brian J. Turoff, Employers May Rethink Settlement Agreements In 2nd Circ., LAW360 (Aug. 31, 2015, 12:05 PM), https://www.law360.com/appellate/articles/696313 (discussing the reluctance that employers have with releasing the terms of a settlement agreement and the detrimental effects it may have on the employer).
8. THOMAS HOBBES, LEVIATHAN 92 (Rod Hay ed., 1651).
9. See id. at 105-06.
10. See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 821 (1985) (discussing the lack of a uniform body of contract law, in Roman and Medieval times, that would enforce or control contractual relationships).
criterion of contract as justice, no one is entitled to impose his or her own views on others, and no one can be compelled to do anything which he or she has not previously agreed to do.”

This liberal idea of autonomy to contract governs to the private sphere, while the social contract governs the public sphere. The simultaneous application of these two contract theories permits neutrality, with respect to an individual’s visions of personal benefit, and limits the realm of individual obligations.

One skeptical legal thesis, crafted by Grant Gilmore, asserts that the contemporary legal contract is in the process of losing its separate identity and is being absorbed into the law of torts. Inherent in this thesis “is the rejection of the proposition that legal contracts are intrinsically just.” One countervailing viewpoint has advanced the position that the social contract was experiencing a rebirth. Legal scholar, Richard H. Coase, asserts that this paradigm shift towards the legal disposition of freedom to contract is in part due to the rise of corporate giants:

Corporate accumulation of wealth and power eroded consensual freedom for outsiders contracting with corporate behemoths. A neo-feudal corporate system of relations based on superiors and inferiors replaced a former system of bargained exchanges based on the freedom of equal contracting parties. An employee had no choice regarding contract terms and often had to contract with an impersonal corporation instead of a human being.

According to Ronald H. Coase, in The Nature of the Firm, corporations could internalize contracts and thus eliminate the individual consent that accompanied classical contract theory. This created a need for the sovereign to intervene on behalf of the minority, in

11. Id. at 771.
12. See id. at 772.
13. See id.
15. Rosenfeld, supra note 10, at 773.
consideration of freedom of contract becoming illusory.19
But, while the pendulum was swinging towards the preference of
sovereign power, limitations were still in place to ensure the
preservation of the right to freely contract; “[c]ourts are increasingly
sensitive to the need to balance their views concerning what public
policy demands with the need to fix their own limitations, and generally,
whenever it is possible, the courts will interpret a contract so as to
uphold it.”20 Courts have created a balancing test to determine whether a
contract be void by accounting for the “seriousness of any misconduct
involved and the extent to which it was deliberate, and . . . the directness
of the connection between that misconduct and the term.”21 However, it
still remains “[a]s a general rule [that] the courts do not review the
adequacy of the consideration.”22 In the instance that a “contractual
term is not specifically prohibited by legislation, courts will uphold the
term unless an otherwise identifiable public policy clearly outweighs the
interest in the term’s enforcement.”23
With this in mind, it is vital that the public policy behind the FLSA
be examined in light of the contractual settlement agreements that are
often reached as the result of litigation of FLSA claims. The Act was
passed by Congress in 1938 in response to the economic downturn that
was the Great Depression.24 It was “designed to protect the laboring
public.”25 The Act protected against “the evil of overwork” without
statutorily required compensation.26 The FLSA established the
minimum wage and time-and-a-half overtime payments in the public and
private sectors.27 The Act would govern the wages of all employees,
except those specifically granted exemption status.28

19. See Teeven, supra note 17, at 129.
21. Sylver v. Regents Bank, Nat’l Ass’n, 300 P.3d 718, 723 (Nev. 2013); RESTATEMENT
(SECOND) OF CONTRACTS § 178(1), (3)(c, d) (FOUND. PRESS 2003).
23. CSA 13-101 Loop, LLC v. Loop 101, LLC, 341 P.3d 452, 453 (Ariz. 2014); WILLISTON
ON CONTRACTS, supra note 20 (emphasis added).
26. Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (quoting Chao
v. Gotham Registry, Inc., 514 F.3d 280, 285 (2d Cir. 2008))
27. See Fair Labor Standards Act of 1938 §§ 6-7, 29 U.S.C. §§ 206-207; see also U.S. Dep’t
of Labor, Wages and Hours Worked: Minimum Wage and Overtime Pay, EMP. LAW GUIDE,
28. 29 U.S.C. §213(a) (exempting those employees in administrative capacities, fishermen,
farmers, newspaper publication employees, telephone switchboard operators, casual domestic
service workers, etc.)
FLSA rights are generally not waivable due to their statutory nature. However, there are two statutory methods for disposing of an FLSA claim: payment of unpaid wages under the supervision of the Secretary of Labor, and a stipulated judgment agreed upon by both parties. It is the latter of these methods that has proven to be the most problematic for the American judicial system.  

II. A BRIEF OVERVIEW

A. Sleeping Dogs Awaken

Questions of legislative intent followed the passage of the FLSA and served to confuse the functionality of the act. These questions of legislative intent were not merely confined to the years immediately following its passage, but instead have permeated a great deal of FLSA settlements since the inception of the statute. This uncertainty of intent has led to the 2015 case of Cheeks.  

Before Cheeks, wage-and-hour settlements in the Second Circuit were largely conducted out of court. The only court involvement came in the form of finalizing the written settlement agreement. This involved:

[S]imply submit[ing] a stipulation of dismissal for the court’s endorsement, or agree[ing] to place the material terms of their settlement on the record, which would often include, inter alia, a requirement that the parties keep their settlement confidential, and that the employee provide the employer with a broad, general release.
The protocol for individualized FLSA claim settlements seldom required judicial approval. 38 That is not to say that judicial approval was a rarity, but rather that no case law or statute required it. 39

In Cheeks, the Second Circuit Court of Appeal shut the door on private settlements under FLSA and ruled that such settlements had to be approved by the Court or the Department of Labor (hereinafter “DOL”) to be effective. 40 Furthermore, this prevented any FLSA settlement from being carried out in camera. 41 “[T]he Cheeks decision not only means settlement agreements must be submitted for approval, but also that approval will not be a mere rubber stamp . . . .” 42 By preventing in camera settlements, the Second Circuit eliminated an integral part of settlement agreements. 43

B. Practical Effects

This dual strike against private settlement is making it harder to settle FLSA claims for both, employers facing FLSA claims, and employees embroiled in litigation. 44 It has been argued that the employee’s freedom to contract is abridged by the court’s paternalistic requirement of FLSA approval. 45 Likewise, “from the management

release”).

38. See Trafimow, supra note 6 (“Only in limited circumstances would parties typically choose to submit a settlement agreement for judicial approval in an individual wage-and-hour case, whereas collective or class action settlement of FLSA claims have always required court approval.” (quoting Souza v. 65 St. Marks Bistro, No. 15-CV-327, 2015 U.S. Dist. LEXIS 151144, at *4-5 (S.D.N.Y. Nov. 16, 2015))).
39. See Cheeks, 796 F.3d at 202 (“We start with a relatively blank slate, as neither the Supreme Court nor our sister Circuits have addressed the precise issue before us. District courts in our Circuit, however, have grappled with the issue to differing results.”).
40. See id. at 200, 206.
41. See id.
43. See ROBIN C. LARNER & THOMAS SMITH, 3 OHIO JURIS., ALTERNATIVE DISPUTE RESOLUTION § 71 (3d ed. 2017) (“Confidentiality agreements are frequently made part of settlement agreements; confidentiality clauses in settlement agreements are often required to ‘get the deal done.’”).
45. See Russel Penzer, FLSA Litigation: A New Era of Judicial Protectionism?, INSIDE
perspective, these rulings are making it difficult for defendants to settle because they preclude confidentiality of the agreement, thereby creating a fear of setting a public precedent for future claims.\textsuperscript{46} It is noted by some scholars that "[t]he extra work the \textit{Cheeks} decision places on the already overburdened federal judiciary, and the delays and costs imposed upon plaintiffs and defendants, raise serious concerns."\textsuperscript{47} Considering that FLSA claims usually settle for meager returns for both the plaintiff and the plaintiff's attorney, there is a huge disincentive placed on plaintiff's attorneys to take FLSA claims if judicial scrutiny creates one more layer of delay.\textsuperscript{48} The exponential growth of FLSA cases over the past two decades has created a "caseload crisis" in the DOL, to which the judiciary must aid.\textsuperscript{49}

A majority of federal jurisdictions mandate court or DOL approval for the release of FLSA rights, "which often means that parties have to file otherwise confidential settlement agreements in publicly-available electronic court filing systems."\textsuperscript{50} In the Second Circuit, the reasoning behind the requirement of approval derived from the judiciary's concern regarding employee disparagement through the prevention of the free-flowing information.\textsuperscript{51} This prevention of freely flowing information directly contravenes public policy.\textsuperscript{52} Similarly, general releases for unrelated claims and non-disparagement clauses have been dubbed off limits since the \textit{Cheeks} decision.\textsuperscript{53} If a release uses language indicating the waiver of "known or unknown" claims then it is considered by the


\textsuperscript{47} Daniel Wiessner, \textit{Courts, Labor Department Must Review Agreements to Drop FLSA Claims, 2nd Circuit Says}, 30 No. 3 WESTLAW J. EMP. 10, Sept. 1, 2015, at 1*.

\textsuperscript{48} See \textit{Cheeks v. Freeport Pancake House, Inc.}, 796 F.3d 199, 207 (2d Cir. 2015) (noting that "FLSA cases tend to settle for less than $20,000 in combined recovery and attorneys' fees, and usually for far less than that; often the employee will settle for between $500 and $2000 dollars in unpaid wages.")


\textsuperscript{50} See Whitman, \textit{supra} note 44.


\textsuperscript{52} See Trafimow, \textit{supra} note 6.

\textsuperscript{53} See \textit{id.}
Second Circuit to offend the FLSA.\footnote{54. Gonzales v. Lovin Oven Catering of Suffolk, Inc., No. 14-CV-2824 (SIL), 2015 WL 6550560, at *3 (E.D.N.Y. Oct. 28, 2015).}

Some strategies have emerged as a means to circumvent Cheeks in the Second Circuit.\footnote{55. See Trafimow, supra note 6.} For instance, some Southern District of New York decisions have allowed for mutual release of claims between two parties when an FLSA claim is being asserted by a party.\footnote{56. See Souza v. 65 St. Marks Bistro, No. 15-CV-327 (JLC), 2015 WL 7271747, *5 (S.D.N.Y. Nov. 6, 2015) ("A mutual release will ensure that both the employees and the employer are walking away from their relationship up to that point in time without the potential for any further disputes").} Additionally, a bifurcated settlement structure has been taken when non-FLSA claims are joined by FLSA claims; no requirement of court approval would attach to non-FLSA claims, while FLSA claims would still be subjected to the Cheeks approval.\footnote{57. See Trafimow, supra note 6.}

Some circuits still enforce the reclusiveness of privately settled FLSA claims, when filed without court.\footnote{58. See Whitman, supra note 44.} In light of this case law split, the legislative history, precedential case law, and governing procedural law are of the utmost importance in examining the validity of the Second Circuit’s refusal to enforce FLSA settlements without first receiving the Cheeks approval.

III. THE ECHOES OF HISTORY

A. The Birth of the Fair Labor Standards Act

The National Industrial Recovery Act of 1933\footnote{59. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 105 (1933).} was passed by the U.S. Congress in an effort to stimulate the national economy in the wake of the economic downturn of the Great Depression.\footnote{60. John S. Forsythe, The Legislative History of the Fair Labor Standards Act, 6 L. & CONTEMP. PROBS. 464, 464 (Summer 1939).} In 1935, the Supreme Court decision of \textit{A.L.A. Schecter Poultry Corp. v. United States} deemed the statute unconstitutional due to the far reaching breadth of presidential discretion as a result of unlawful legislative delegation of power.\footnote{61. See A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 538-40 (1935) ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever law he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.").} President Franklin D. Roosevelt was agitated by the Supreme
Court’s decision and “repeatedly deplored their abandonment.”\textsuperscript{62} The following year, the Supreme Court continued to strike down legislative attempts to prescribe minimum wage rates.\textsuperscript{63} Even at the state level, the Court maintained that “the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult . . . workers as to the amount of wages to be paid.”\textsuperscript{64} At the time it was uncertain whether wage and hour legislation “was beyond the sphere of the state, as well as federal, activity.”\textsuperscript{65}

The Seventy-Fifth Congress regrouped in May of 1937 with plans for statutory amendments, constitutional amendments and even the reorganization of the federal judiciary.\textsuperscript{66} Cooler heads prevailed as a revised bill was quickly drafted by the Secretary of Labor, Frances Perkins, and Sidney Hillman, the founding president of the Amalgamated Clothing Workers of America.\textsuperscript{67} Senator Hugo Black eventually proposed the bill to Congress under the name of the Black-Connery bill,\textsuperscript{68} and the bill would later become the FLSA.\textsuperscript{69}

The proposed Fair Labor Standards Act of 1937 was subject to numerous alterations after its introduction to the floors of the Senate and House of Representatives.\textsuperscript{70} The original act was proposed with a high degree of flexibility in an effort to reach a bipartisan consensus, but not too much flexibility as to implement drastic changes (e.g. “wages could not be raised more than five cents in any 12-month period”).\textsuperscript{71} The areas subjected to the greatest congressional debate were the administrative provisions, the wage and hour standards, and child labor.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{62} See Forsythe, \textit{supra} note 60, at 464.
\item \textsuperscript{63} See Moorehead \textit{v.} New York (\textit{ex rel} Tipaldo), 298 U.S. 587, 612 (1936) (“The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered.”).
\item \textsuperscript{64} Id. at 611.
\item \textsuperscript{65} Forsythe, \textit{supra} note 60, at 464.
\item \textsuperscript{66} See \textit{id.} at 464-65 (“Reports of the President’s first press conference of the year indicate that plans were being formulated to ‘do something’ about minimum wages as well as judicial opposition to his program . . . [It serves to illustrate the significant fact, namely, the close ties between federal labor standards legislation and the President’s plans for ‘reorganization’ of the Supreme Court.”).
\item \textsuperscript{68} See \textit{id.} at 34.
\item \textsuperscript{69} See Forsythe, \textit{supra} note 60, at 466.
\item \textsuperscript{70} See Forsythe, \textit{supra} note 60, at 466. “These amendments were mainly to strengthen the administrative portions of the act and further protect collective bargaining agreements.” \textit{Id.} at 468.
\item \textsuperscript{71} \textit{Id.} at 481-82.
\item \textsuperscript{72} See \textit{id.} at 475-90.
\end{itemize}
When comparing the original bill to the various bills that followed, what stands out the most is the difference between the original’s handling of exemptions and the progression away from discretion at the hands of administrations, such as the Fair Labor Standards Board. What this bill epitomized was the ideological discourse between James Madison and James Landis.

Madison believed, as illustrated in The Federalist Papers, that no power vested in the federal government should be shared amongst any of the three branches. The “vast influence” of Montesquieu were evident in Madison’s notion of a republic’s separation of powers, and subsequently reflected in the constitution. Aside from Montesquieu, Madison also borrowed from John Locke’s wariness towards “the concentration of power in the hands of one person.” Instead, each branch of government would exert force upon the others in an effort to check the consolidation of power in any single branch.

Madison “embraced the concept of a divided government,” while Landis envisioned a “presidentially-coordinated technocratic government.” Stemming from the failures of The Great Depression, Landis’ proposition of an administrative government did not self-aggrandize rights, but rather reallocated “an assemblage of rights normally exercisable by government as a whole.” The administrative process sprang “from the inadequacy of a simple tripartite form of government to deal with modern problems.” This divergence from the formalism of Madison towards the functionalism of Landis is still hotly contested by legal scholars today.

73. See id. at 483-87.
74. See infra text accompanying notes 79-83.
75. See THE FEDERALIST NO. 48 (James Madison).
78. See id. at 319.
79. Id. at 325.
82. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1-2 (Yale Univ. Press, 1938).
between both approaches seems to swing with the changing of every governing administration.

In the case of the Fair Labor Standards Act of 1937, broad discretionary power had been placed in the hands of the Fair Labor Standards Board in accordance with Landis’ theory. As the bill progressed, the discretion became more and more narrow and the specific exemptions became larger and larger. This embodied the conflict between Madison and Landis. Akin to the Madisonian school of thought, the discretion placed in the administrative agency was speculatively scaled down due to the fear of Landis’ “presidentially-coordinated technocratic government.” The drafters of the legislation sought to divest the Fair Labor Standards Board of discretion by more specifically enumerating the boundaries of the FLSA. “[G]reat flexibility and wide administrative discretion [were] eliminated in favor of rigid standards.” In contemplation of the discretionary power restricted in the final act, historians of the time noted that:

It should be remembered that, while the original characteristics would have permitted the accomplishment of much good beyond the scope of the present act, they also contain in themselves the seed of many undesirable results and in the absence of an almost super-human job of administration might have done considerable harm to the cause they were designed to serve.

These discretionary restrictions were looked upon in a positive light by scholars, but were by no means unanimously supported.

On June 15, 1938, both houses approved the final amendments to the bill. After a long and arduous journey, President Roosevelt signed


84. See Forsythe, supra note 60, at 483.
85. Id. at 483.
86. See Cuállar, supra note 80, at 1351.
87. See id. at 484. “Although it was not specifically mentioned, the original bill was not intended to apply to retailers or service trades.” Id.
88. Id. at 490.
89. Id.
90. See supra text accompanying notes 75-90.
91. See Samuel, supra note 67, at 36.
the Fair Labor Standards Act of 1938 into law on June 28.92 With this momentous achievement came the beginning of a near century long conflict.

B. In the Wake of 1938

In the 1940 case Fleming v. Warshawsky, the Northern District of Illinois held that employees of a company who brought a claim under the FLSA were capable of waiving their claims so long as it was done voluntarily and without coercion.93 Fleming marked one of the first cases to specifically address the ability to settle and dismiss a claim under the FLSA. In the initial Fleming decision, the presence of classical contract theory is evident, in light of the decision’s direct reflection of the Second Restatement of Contracts.94 However, the subsequent appeal of Fleming saw the judgment reversed by the Seventh Circuit in an effort to follow a Second Circuit trend.95 The reversal was due in part to a reliance on the congressional declaration of policy that aimed at “the elimination of labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency and general well-being of employees, and the eradication of the burdens on commerce caused by such sub-standard labor conditions.”96

On appeal, the Seventh Circuit judgment restraining employers from failing to pay out the complete minimum wage owed to an employee was based on the notion that an employee cannot waive his right to the statutorily prescribed minimum wage.97 Intent was deemed to be irrelevant by the Seventh Circuit because any deviation from the statutorily prescribed minimum wage would be injurious to the congressional policy laid out in the FLSA.98

92. See id.
94. See id. at 140 (“The waivers of receipt of their respective claims were voluntarily made without coercion.”); see also Restatement (Second) of Contracts § 175 (noting that duress and undue influence make a contract voidable).
95. See Fleming v. Warshawsky, 123 F.2d 622, 626 (7th Cir. 1941); see also U.S. ex rel Johnson v. Morley Constr. Co., 98 F.2d 781, 789 (2d Cir. 1938) (“In any event we are not dealing with the law of New York, but with the construction of a federal statute; and while we have found no decision in point, we are satisfied that the statute cannot be circumvented by so easy a device.”).
96. Fleming, 123 F.2d at 626 (quoting Robertson v. Argus Hosiery Mills, 121 F.2d 285, 286 (6th Cir. 1941)).
97. See id.
98. See id.
After Fleming, two major cases came before the Supreme Court: *Brooklyn Savings Bank v. O'Neil* and *D. A. Schulte v. Gangi*. In *O'Neil*, a settlement of a FLSA claim for overtime compensation was made in the absence of a bona fide dispute between parties. The employee subsequently sought liquidated damages in addition to the settlement. The question presented before the Court was whether the employee could waive his statutory right to liquidated damages from overtime compensation under the FLSA. The Court noted that the statutory language, legislative reports, and congressional debates all failed to specifically consider the issue before the Court. In examining the legislative intent, the Court recognized that "certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." The Court reasoned that the same policy which forbids the waiver of the statutory minimum wage rate, forbids the waiver of liquidated damages under the FLSA. Allowing waiver of claims for liquidated damages would permit an employer to circumvent the provisions of the Act, and gain an unfair competitive advantage. As a result, the employee was allowed to proceed on his claim for liquidated damages despite having signed a statutory rights waiver to said liquidated damages.

The following year, *Gangi* presented two questions about the FLSA: whether or not an employer is covered by the Act, and whether employers lack the power to amicably settle FLSA claims. In addressing the first question, the Supreme Court looked again towards the purpose of the FLSA. Its purpose "was to secure for the lowest

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100. See O'Neil, 324 U.S. 697, 703 (1945).
101. See id.
102. See id. at 705.
103. See id. at 705-706.
104. Id. at 706-07.
105. See id. at 708. The Court purported to bar the waiver of liquidated damages under the FLSA, but these holdings were invalidated by statutory language of 29 U.S.C.A. § 253(c), two years later. See id.
106. Id. at 710.
107. See id. at 704.
109. See id. at 113.
110. See id. at 116.
paid segment of the Nation's workers a subsistence wage. The employee was deemed to take precedence over the employer. As to the second question, the Court determined "that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." Statutorily prescribed minimum wages were not able to be reduced by private contract, but the Court left open the idea that bona fide disputes over hours could still be settled privately. Of course, these questions were secondary to the major challenge addressed by the Court involving the Fair Labor Standard Act's relation to the commerce clause.

The Supreme Court would eventually elaborate further upon these challenges to FLSA settlements. The intent of the Act's minimum wage provisions was to foster the "minimum standard of living necessary for health, efficiency, and general well-being of workers." Any settlement that did not reach the statutory minimum threshold would frustrate this congressional intent.

C. Time to Take a Second Look

The cases that proceeded in the 1940's caused Congress to revisit the FLSA. The Portal-to-Portal Pay Act of 1947 was the congressional attempt at revisiting and clarifying the extent of the FLSA. The Portal-to-Portal Pay Act further elaborated that transportation to and from work was not compensable, a statute of limitations of two years would limit any FLSA claims, and good faith applied to FLSA claims for employers. Unfortunately, the Portal-to-Portal Pay Act only applied after O'Neil and Gangi as a means of retroactive legislation thus only providing a policy argument for the

111. Id.
112. See id.
113. Id.
114. See id. at 114-15.
115. See id. at 121; see also United States v. Darby, 312 U.S. 100, 124-26 (1941) (upholding the constitutionality of the FLSA through the Commerce Clause).
118. See Barrentine, 450 U.S. at 740.
121. Id. § 254.
122. Id. § 255.
123. Id. §§ 259-60.
For the purposes of FLSA settlement, the most notable amendment to the FLSA is 29 U.S.C. § 253. In section 253, it was established that a FLSA claim may be compromised between the parties so long as "there exists a bona fide dispute as to the amount payable by the employer to his employee." This compromise must be based on the premise that the agreed upon wage rate does not fall below that of the prescribed wages as dictated by the Fair Labor Standards Act. Additionally, the amendment allows for the waiver of liquidated damages in accordance with FLSA claims. In the absence of fraud or duress, any such compromise of FLSA claims are valid.

The Portal-to-Portal Pay Act was Congress's first attempt at addressing the settlement of FLSA claims, a facet of the FLSA which was surprisingly omitted. Despite settlement being the key concern of the Cheeks decision, the Portal-to-Portal Pay Act receives no consideration in the final holding of Cheeks.

D. The Birth of the Cheeks Approval

Over a half century after the Portal-to-Portal Pay Act, the certainty of FLSA settlement was still largely in dispute. Simultaneously, the popularity of FLSA claims had begun to skyrocket; "[a]ccording to figures from PACER, litigants filed a total of 8,954 FLSA cases between January 1, 2015, and December 31, 2015." This swelling of FLSA

126. Id. § 253(a) ("Any cause of action under the Fair Labor Standards Act of 1938 ... to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.").
127. Id.
128. Id. § 253(b) ("Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938 ... to liquidated damages, in whole or in part, with respect to activities engaged in prior to May 14, 1947.").
129. Id. § 253(c) ("Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.").
130. Id. §§ 251-62.
131. See Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 199 (2d Cir. 2015).
claims and growing settlement uncertainty would eventually culminate into Cheeks.

In Cheeks, Dorian Cheeks, worked at “both Freeport Pancake House, Inc. and W.P.S. Industries, Inc. (together, ‘Freeport Pancake House’) as a restaurant server and manager over the course of several years.” During his time at the report Pancake House, Cheeks was owed overtime ages, and complained to his superiors about it. He “was demoted, and ultimately fired, for complaining about Freeport Pancake House’s failure to pay him and other employees the required overtime wage.”

In August 2012, Cheeks sued “under both the F[air] L[abor] S[ tandards] A[ ct] and New York Labor Law” and “sought back pay, front pay in lieu of reinstatement, and damages for the unlawful retaliation.” These claims were initially refuted by Freeport Pancake House, but after a period of discovery a settlement was reached; “[t]he parties then filed a joint stipulation and order of dismissal with prejudice pursuant to Rule 41(a)(1)(A)(ii).” The Honorable Judge Joanna Seybert of the United States District Court for the Eastern District of New York rejected the stipulation and insisted that parties could not privately settle FLSA claims. Instead, the stipulation had to be presented to the district court or DOL for approval with an affidavit exhibiting why the proposed settlement was fair and reasonable.

E. The Second Circuit’s Decision

Subsequently, the issue that faced the Second Circuit on appeal was “whether parties may settle FLSA claims with prejudice, without court approval or DOL supervision, under Federal Rule of Civil Procedure (hereinafter ‘FRCP’) 41(a)(1)(A)(ii).” Court approval is predicated on whether or not the FLSA is classified under the “applicable federal

133. Cheeks, 796 F.3d at 200.
134. See id.
135. Id.
136. Id.
137. Id.
138. See id.
139. See id. at 200-01.
140. Id. at 201.
statute” exemption of the FRCP Rule 41(a)(1)(A).141 The Court based its analysis on O’Neil and Gangi.142 In conjunction with these cases, it was noted that a circuit split existed within the Eleventh and Fifth Circuits.143

The Second Circuit also acknowledged Picerni v. Bilingual Seiz & Preschool, Inc., in which the Eastern District of New York found the absence of explicit exemption under Rule 41, to be dispositive of its non-exempt status.144 To further clarify, under Rule 41, if the Picerni court had found the FLSA to achieve the “applicable federal statutes” exempt status, then court approval would be necessary for settlement.145 Simply put, exemption means approval is necessary.

The Cheeks court determined that the governing FRCP rule for FLSA claims is Rule 41(a)(1)(A)(ii) and that the FLSA does receive exemption status from the rule as it is not one of the “applicable federal statutes.”146 At the conclusion of the appeal, FLSA settlements were deemed to require court or DOL approval in order to have prejudicial effect.147

On January 11, 2016, Dorian Cheek’s petition for writ of certiorari was denied by the Supreme Court of the United States.148 The attorney of Dorian Cheeks indicated that the “Supreme Court... rather than the Second Circuit, should be the one to settle ‘an important matter of federal law’ such as the one presented in the case, according to his petition.”149 An attorney representing Cheeks stated:

\[T\]hat while there were ‘excellent reasons’ for the Supreme Court to weigh in on the matter, the Second Circuit’s decision in the instant case may end up helping plaintiffs, such as by limiting or eliminating general releases and by reminding lower courts and litigants that the FLSA’s purpose is to protect employees, rather than

142. See Cheeks, 796 F.3d at 202.
143. See id. at 203-04.
144. See id. at 204-05 (citing Picerni v. Bilingual Seiz & Preschool Inc., 925 F. Supp. 2d 368, 373 (E.D.N.Y. 2013)).
146. See Cheeks, 796 F.3d at 206.
147. See id. at 201-02.
employers.\textsuperscript{150}

The Supreme Court's denial of certiorari could "cast doubt on tens of thousands of FLSA cases discontinued with prejudice, and without court approval nationwide, and would create chaos in the judicial system."\textsuperscript{151} Likewise, dangerous legal implications could loom on the horizon; FLSA claims of individual contractors, like those employed by Uber, and unpaid interns could be extremely problematic in the wake of the \emph{Cheeks} decision. It is for this reason that the exploration of \emph{Cheeks} and the alternatives to the \emph{Cheeks} approval are necessary to examine.

IV. ANALYZING \textsc{Cheeks}

A. Improper Reliance

In reaching its conclusion, the \emph{Cheeks} court based most of its argument on the decisions of \emph{O'Neil} and \emph{Gangi}.\textsuperscript{152} This legal analysis is sound, except for the omission that \emph{O'Neil} and \emph{Gangi} were decided in 1945 and 1946, respectively.\textsuperscript{153} Both cases based their arguments off of the congressional intent that the courts read into the passage of FLSA.\textsuperscript{154} The problem with basing the \emph{Cheeks} decision off of \emph{O'Neil} and \emph{Gangi} is that both cases fail to take into consideration the Portal-to-Portal Pay Act of 1947 which amended the Fair Labor Standards Act of 1938.\textsuperscript{155} The Portal-to-Portal Pay Act illustrated a congressional intent that contradicted the perceived intent that was relied upon in the decisions of \emph{O'Neil} and \emph{Gangi}.\textsuperscript{156}

In section 253 of the Portal-to-Portal Pay Act, compromise is

\addtocounter{footnote}{150}
\footnote{150. Id.}
\addtocounter{footnote}{1}
\footnote{151. Id.}
\addtocounter{footnote}{2}
\footnote{152. See \emph{Cheeks}, 796 F.3d at 202.}
\addtocounter{footnote}{3}
\footnote{153. See \emph{Brooklyn Sav. Bank v. O'Neil}, 324 U.S. 697 (1945); see also \emph{D.A. Schulte, Inc. v. Gangi}, 328 U.S. 108 (1946).}
\addtocounter{footnote}{4}
\footnote{154. See \emph{O'Neil}, 324 U.S. at 706-08; see also \emph{Gangi}, 328 U.S. at 113.}
\addtocounter{footnote}{5}
\footnote{155. See \emph{O'Neil}, 324 U.S. at 698-99; see also \emph{Gangi}, 328 U.S. at 122.}
\addtocounter{footnote}{6}
\footnote{156. \textit{Compare} Portal-to-Portal Pay Act, 29 U.S.C. § 253 (1947) ("Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.")}, \textit{with} Brooklyn Sav. Bank v. \emph{O'Neil}, 324 U.S. 697, 713 (1945) ("We are of the opinion that the legislative history and provisions of the Act support a view prohibiting such waiver.")}, and \emph{D.A. Schulte, Inc. v. Gangi}, 328 U.S. 108, 115 (1946) ("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 liquidated damages in the \emph{O'Neil} case.").}
specifically enunciated as being permissible so long as the terms of the settlement fall within the parameters of prescribed minimum wage of the FLSA.\(^{157}\) The only limitations placed upon the settlement are those that would render a contract unenforceable (e.g. fraud or duress).\(^ {158}\) This evinces the idea that the congressional intention for the FLSA was no farther reaching than that of contract law. Fast forward to 2015 courts had concocted a multi-factor test for the determination of FLSA settlement approval, as well as a four-factor test that weighed against settlement approval.\(^ {159}\) Case law had substantively strayed far from the limitations set in place by § 253(c). As a result, it is important to take a closer examination of the procedural grounds upon which Cheeks was decided.

\[ B. \text{Procedural Settlement Requirements for Rule 41(a)(1)} \]

The FRCP “became effective September 16, 1938, just less than 150 years after the federal judicial system was established in the Judiciary Act of 1789.”\(^ {160}\) The FRCP was preceded by the FLSA, which was initially enacted on June 25, 1938.\(^ {161}\) To further clarify, the FRCP was made effective four months after the passage of the FLSA. For this reason, the governing procedure of FLSA claims under the FRCP is not easily ascertainable; legislative intent towards the FRCP is not present within the confines of the FLSA. In fact, the only mention of procedure in the FLSA is in the March 23, 2010 amendment, 29 U.S.C.A. § 218c.\(^ {162}\)

Rule 41(a)(1) has never been the most popular rule among academics. Frequent calls for the repeal or amendment have permeated the history of the FRCP:

Relatively early in the history of the Federal Rules, several commentators argued that Federal Rule 41(a)(1) should be repealed. This would have made all voluntary

\[ \text{\textbullet \ See 29 U.S.C. § 253(a).} \]
\[ \text{\textbullet \ See id. § 253(c).} \]
\[ \text{\textbullet \ See Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 176 (S.D.N.Y. 2015); but see Li Rong Gao v. Perfect Team Corp., No, 10-CV-1637 (ENV) (CLP), 2017 WL 1434491 (E.D.N.Y. Apr. 21, 2017) (declining to require Cheeks approval when dealing with a bankruptcy settlement for a litigation posture analogous to the present action).} \]
\[ \text{\textbullet \ See 29 U.S.C. § 201.} \]
\[ \text{\textbullet \ See id. § 218(b).} \]
dismissals discretionary with the district judge, thereby allowing the court to weigh the particular equities of the situation and impose needed conditions on a case by case basis.\textsuperscript{163}

This initial call for Rule 41(a)(1) was not pursued by the advisory committee,\textsuperscript{164} but this did nothing to stem the demand for change. Even leading up to 2014, scholars were heavily critical of the rule.\textsuperscript{165}

In deciding \textit{Cheeks}, the Second Circuit noted that the FLSA is silent as to Rule 41 and its provisions regarding the dismissal of actions.\textsuperscript{166} The notable FLSA procedural vacancy gave rise to the case law classification of FLSA claim settlements as exceptions under Rule 41(a)(1).\textsuperscript{167} As dictated by FRCP 41(a)(1)(A)(ii), a voluntary dismissal by the plaintiff without a court order is permissible so long as it is “[s]ubject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute.”\textsuperscript{168} If the claim is subject to Rules 23(e), 23.1(c), 23.2, 66 and any applicable federal statute, then “the plaintiff may dismiss an action without a court order by filing... a stipulation of dismissal signed by all parties who have appeared.”\textsuperscript{169} The \textit{Cheeks} court took a firm stance and held “that absent [court or DOL] approval, parties cannot settle their FLSA claims through a private stipulated dismissal with prejudice pursuant to [Rule] 41(a)(1)(A)(ii),” thus rendering it an exception to the “any applicable federal statute” language under Rule 41.\textsuperscript{170}

After \textit{Cheeks}, a question of whether court approval or DOL supervision was necessary for a settlement to have prejudicial effect under Rule 41(a)(1)(A)(i) continued to linger.\textsuperscript{171} No case spoke directly

\begin{itemize}
\item \textsuperscript{163} Charles Alan Wright et al., \textit{Voluntary Dismissal as a Matter of Right}, 9 FED. PRAC. \& PROC. CIV. § 2363 (3d ed., 2016).
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Shannon, supra note 4 at 265 (“It is time for more substantial change. Regardless of whether Rule 41 ever served its purpose—or even represented a correct statement of the relevant law—it has become increasingly apparent that the rule is not adequately aligned with the realities of modern federal practice.”).
\item \textsuperscript{166} Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 201 (2d Cir. 2015).
\item \textsuperscript{167} See id. at 201, 206.
\item \textsuperscript{168} FED. R. CIV. P. 41 (emphasis added). In Cheeks, “[t]he DOL submitted a letter brief on March 27, 2015, taking the position that the FLSA falls within the ‘applicable federal statute’ exception to Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA claims with prejudice without the involvement of a court or the DOL.” \textit{Cheeks}, 796 F.3d at 201.
\item \textsuperscript{169} FED. R. CIV. P. 41(a)(1)(A)(ii).
\item \textsuperscript{170} \textit{Cheeks}, 796 F.3d at 200.
\item \textsuperscript{171} LOR/WH REPORT LETTER, NO. 1142, LAB. \& EMP. L. 9010403 (C.C.H., 2015), 2015 WL 9010403.
\end{itemize}
to the issue of whether the FLSA is an "applicable federal statute" under Rule 41(a)(1)(A), until Martinez v. Ivy League School, Inc. In Martinez, the plaintiff commenced an action for unpaid minimum wages and overtime wages owed in the Eastern District of New York. The "plaintiff filed a notice of voluntary dismissal 'with prejudice' pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure." The Eastern District of New York noted that the two parties had come to terms, but refused to enforce the settlement until court approval was granted or a memorandum was filed as to why court approval was not necessary. When faced with the Order to Show Cause, the plaintiff contended that the Cheeks approval was limited to prejudicial dismissals in accordance with Rule 41(a)(1)(A)(ii), not Rule 41(a)(1)(A)(i).

Rule 41(a)(1)(A)(i) allowed for the possibility of settlement with "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." To determine whether or not the Cheeks approval would extend to Rule 41(a)(1)(A)(i), the Eastern District of New York followed Cheeks analysis. The Martinez court based its decision off of Santos v. Gomez, LLC. In Santos, the court noted that "[t]he Federal Rules of Civil Procedure do not overrule the FLSA's substantive requirement of a court-approved settlement." The Martinez court found this to be compelling and ordered the plaintiff "provide this court with the specifics of the settlement to enable the Court to determine whether it is fair and reasonable." In doing so, the Cheeks approval was expanded to Rule 41(a)(1)(A)(i).

The problem with the Martinez court's reliance on the Santos decision is that the FLSA has no stated "substantive requirement of a court-approved settlement." This "substantive requirement" was judicially manifested in Lynn's Food Stores, Inc. In Lynn's Food Stores, the Eleventh Circuit based its "substantive requirement of court-
approval” off of *Brooklyn Savings Bank*.\footnote{184} As mentioned previously, *Brooklyn Savings Bank* failed to account for the FLSA amendment that is the Portal-to-Portal Pay Act of 1947, which specifically provided for FLSA settlement, yet made no mention of court-approval.\footnote{185} It is under this line of legal analysis that the *Cheeks* approval was expanded to FRCP 41(a)(1)(A)(i).

The Eastern District of New York, on one occasion, has disregarded the precedent set by the *Cheeks* decision as it relates to Rule 41.\footnote{186} The court regarded claims that are “infinitesimally small” to not be subjected to the strict statutory standards of the FLSA and thus dismissible under Rule 41(a)(2).\footnote{187} Here, the distinction between Rule 41(a)(1) and Rule 41(a)(2) comes into effect. Because the court’s consideration is statutorily tied into Rule 41(a)(2), a claim below the statutory standard may be overlooked, so long as it is an insignificant amount and not economically feasible to continue to pursue or dispute.\footnote{188} This commonsense approach could potentially spell out a new method of judicial scrutiny.

### C. Without Prejudice Exception

Immediately after the decision in *Cheeks*, the Southern District of New York was confronted with the issue of whether a voluntary dismissal without prejudice of an FLSA claim may be permitted in *Reynoso v. Norman’s Cay Group LLC*.\footnote{189} In *Reynoso*, it was acknowledged that *Cheeks* prevented the settlement of claims with prejudice, but settlements without prejudice were still permissible.\footnote{190} This decision was later echoed by the Eastern District of New York in the case *Dawidowicz v. Black Square Builders Corp.*\footnote{191} Despite this, settlements without prejudice are a rather hollow victory for employers; therefore alternate methods of dispute resolution have been experimented with since the *Cheeks* decision in 2015.

\footnote{184. Id. at 1353 n.8.} \footnote{185. See infra, Part III Section A.} \footnote{186. See Gao v. Perfect Team Corp., 10-CV-1637 (ENV)(CLP), 2016 WL 413095, at *2 (E.D.N.Y. 2016).} \footnote{187. Id. at *1-2.} \footnote{188. Id.} \footnote{189. See Reynoso v. Norman’s Cay Grp., 15 Civ. 1352 (PAE), 2015 WL 10098595, at *1 (S.D.N.Y. Nov. 23, 2015).} \footnote{190. See id.} \footnote{191. See Dawidowicz v. Black Square Builders Corp., 15 CV 7380 (FB) (CLP), 2016 WL 7665417, at *4-5 (E.D.N.Y. Nov. 8, 2016).}
D. Rule 68 Exception

A month after the Cheeks decision, the Eastern District of New York held that “Cheeks should be confined to the [FRCP] Rule 41 context, and does not reach an Offer of Judgment under [FRCP] Rule 68.” An offer of judgment under Rule 68(a) is made when:

At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

This mandate for a clerk to enter judgment is in stark contrast with Cheeks. There is no room for judicial intervention. Similarly, FRCP 68(c) states that:

When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time – but at least 14 days – before the date set for a hearing to determine the extent of liability.

For offers of judgment no catch-all is provided for “any applicable federal statute.” As stated in Barnhill v. Fred Stark Estate, “In that way, [Rule 68] is narrower than Rule 41, because while the latter, subject to its stated qualifications, permits dismissal for any or no

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193. FED. R. CIV. P. 68(a).
194. FED. R. CIV. P. 68(c).
reason—for example, a change of heart by the plaintiff, or a settlement—Rule 68, by its terms, requires entry of judgment."\(^{196}\) By contrasting the "Cheeks approval" of Rule 41 to Rule 68 the paradox is evident; a plaintiff is unable to voluntarily dismiss a FLSA claim without court approval, but a defendant may instigate settlement through an offer of judgment which, upon acceptance by the plaintiff, the clerk must then enter judgment.\(^{197}\) To put it in the elegant words of the *Baba v. Beverly Hills Cemetery Corp. Inc.* court, "the Rule 68 Offer of Judgment procedures gives clever defendant-employers an aperture the size of the Grand Canyon through which they can drive coercive settlements in Fair Labor Standards Acts cases without obtaining court approval."\(^{198}\)

The court in *Barnhill* recognized the FLSA's classification by prior courts as a "uniquely protective statute," but rejected the notion that the Act is truly as unique as the courts purport it to be.\(^{199}\) As a result of this, the court declined to extend the "Cheeks approval" to Rule 68.\(^{200}\) The *Barnhill* court states, "Unlike Rule 41, as construed in *Cheeks*, Rule 68 has no 'hook,' no limiter, that restricts its use and that would permit excluding the F[air] L[abor] S[tandards] A[ct] from its reach."\(^{201}\) Attorneys have begun formulating settlement agreements during negotiations and submitting them as Rule 68 offers as a way to circumvent *Cheeks*.\(^{202}\)

An exception to this circumvention exists in the realm of opt-in collective actions under the FLSA.\(^{203}\) The mootness of a Rule 68 offer must be assessed by a court.\(^{204}\) If all the available relief sought by a plaintiff is contained in the offer, then the case is moot.\(^{205}\) In the

\(^{196}\) *Id.* ("Rule 68 provides when an offer of judgment is accepted, the Clerk *must* then enter judgment") (Emphasis added) (internal quotations marks omitted).

\(^{197}\) *Compare* Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (requiring court approval for settlements in FLSA claims), *with Barnhill*, 2015 WL 5680145, at *1 (allowing parties in FLSA claims to settle without court approval as long as the plaintiff accepted the offer of judgment).


\(^{199}\) *Barnhill*, 2015 WL 5680145, at *2.

\(^{200}\) See *id.* at *2-3.

\(^{201}\) *Id.* at *1.

\(^{202}\) See Butler, *supra* note 47.

\(^{203}\) 29 U.S.C. § 216(b) (2017) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").


\(^{205}\) See *Weis v. Fein, Such, Kahn & Shepard*, P.C., No. 01 Civ. 1086 (AGS), 2002 WL 449653, at *3 (S.D.N.Y. March 22, 2002).
instance that the relief is insufficient, the case is not moot.\textsuperscript{206} The question of mootness is further complicated by opt-in plaintiffs. "If no additional plaintiffs opt in to the lawsuit, the FLSA section 16(b) plaintiff advances only her own individual claims."\textsuperscript{207} If other plaintiffs opt in then the adequacy of the Rule 68 offer must be considered in light of the additional plaintiffs.\textsuperscript{208} In short, collective action Rule 68 offers may prove to be more problematic to employers than initially anticipated.

\textbf{E. The Fair Labor Standards Act is Holier Than Thou}

The \textit{Cheeks} court, in reaching its decision, qualified the FLSA as a "uniquely protective statute."\textsuperscript{209} This "uniquely protective" status has been further catalogued by case law.\textsuperscript{210} The implicit assumption, that the FLSA is "uniquely protective" is nothing more than a thin veneer to mask the bolstering of sovereign powers. As the Eastern District of New York noted in \textit{Barnhill}:

\[\text{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).}\textsuperscript{211}

The court’s true fear resided in the abuse of employee, not by his own employer, but by his attorney.\textsuperscript{212} This fear belies the malpractice


\textsuperscript{208} See Gonyer v. Vane Line Bunkering, Inc. 32 F. Supp. 3d 514, 517-18 (S.D.N.Y. 2014).

\textsuperscript{209} Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 207 (2d Cir. 2015).


element that "the attorney owed the plaintiff the duty of professional care and breached that duty."\textsuperscript{213} By the basic rules of economics, self-interest drives attorneys to abide by this duty of care in order to maintain clientele and keep their license to practice.

It could be argued that once a plaintiff invokes the jurisdiction of the court by bringing an FLSA collective action, the court assumes the responsibility to see to it that its processes have not been used to the detriment of employees who have not yet received notice that the action is pending.\textsuperscript{214}

In \textit{Cheeks}, this idea stems from the perceived abuse of employees at the hands of the legal system:

In \textit{Nights of Cabiria}, the proposed settlement agreement included (1) a battery of highly restrictive confidentiality provisions \ldots{} in strong tension with the remedial purposes of the FLSA; (2) an overbroad release that would waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues; and (3) a provision that would set the fee for plaintiff's attorney at between 40 and 43.6 percent of the total settlement payment without adequate documentation to support such a fee award.\textsuperscript{215}

"Of course, with 8,126 FLSA cases filed in 2014, it is precarious to rely on anecdotal instances."\textsuperscript{216} FLSA filings have increased some 400\% nationwide since 2001 and now comprise nearly nine percent of all new civil cases in the Southern District of New York.\textsuperscript{217}

In relying on the "unique policy considerations" underlying the

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\textsuperscript{216} Barnhill, 2015 WL 5680145, at *2.

FLSA, the *Cheeks* court offered several cases of gross abuse of the statute in settlement agreements that rightfully were rejected by the courts, like secret settlements meant to shield the result from other employees, 218 unreasonable allocation of recoveries as attorneys' fees at the expense of the plaintiff, 219 or restrictions on the ability of the plaintiff's attorney to represent other employees. 220 Even prohibitions on future employment have been deemed to be "abuses by unscrupulous employers" as a result of the disparate bargaining power between employer and employee. 221

In *Barnhill*, the court noted that:

[M]ost of the litigation to protect the vulnerable under remedial legislation is attorney-driven as a result of fee-shifting provisions, but it does not follow that there is a pervasive problem of attorneys favoring themselves at their clients' expense that is peculiar to the FLSA and that requires the courts to police every Rule 68 offer in FLSA cases for abuse. 222

It remains to be seen how such a small sample size can be extrapolated to be representative of the rapidly growing FLSA claims. It has been interpreted by courts in the wake of *Cheeks* that judicial review of the fee arrangement between an FLSA plaintiff and his counsel is required by of the court. 223 This extension of the court's duty is merely illustrative of the absurd paternalism that has extended to FLSA plaintiffs. 224

218. See Lopez, 96 F. Supp. 3d at 177-78.
219. See id. at 181-82. Courts have grown wary of these types of settlements in an effort to combat these practices. Siddiky v. Union Square Hosp. Grp., LLC, 5 Civ. 9705 (JCF), 2017 WL 2198158, at *8 (S.D.N.Y. May 17, 2017) ("It is therefore within the discretion of the court to reallocate funds between the class and Class Counsel if that is necessary to assure a fair outcome.").
224. See Penzer, supra note 45.
Many attorneys have found that a court’s examination of attorney’s fees to be a strong disincentive to Rule 41(a)(1)(A)(ii) settlements. By examining the record, courts attempt to find “sufficient justification” for the attorney’s fees by calculating the percentage of the total settlement that the fee encompasses. Additionally, courts seek justification for the initial fee arrangement, billable hours and a breakdown between of costs.

This examination into attorney’s fees is perceived as more of a hindrance to employee attorneys because employer billing records are not necessary in assessing the reasonableness of employee billing records. Many attorneys seek to avoid fairness hearings, so courts do not assess their billing hours. There are undocumented ways that plaintiffs’ attorneys go about circumventing the court’s wary eye. One rumored method involves employee attorneys hiding their billing hours within the actual wage settlement amount, thus tricking judges in fairness hearings into perceiving the wage an hour claim settlement to be inflated, while not alerting the judges to attorney’s fees that exceed the norm. This is only a rumored perception of ways to circumvent judicial scrutiny, but courts have begun to carefully analyze the monetary allocations of settlements as a result.

Another method of circumventing judicial scrutiny lies in Rule 68. Lincoln was once quoted along the lines of:

[H]e used to liken the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, “Five,” to which the prompt response was made that calling the tail a leg would not

227. See id.
232. See FED. R. CIV. P. 68; see also supra Part II.D.
Some jurists quip along these lines that relabeling method of mode of settlement does not change its unlawful nature. Many jurists are still highly skeptical of the problems that Rule 68 offers present.

With the fear of attorney abuse in mind, the public policy of FLSA has been the basis of all of the procedural decisions leading toward, as well as stemming from, the Cheeks decision. The application of public policy in FLSA settlements has been largely unilateral due to an apparent unwillingness to apply policies against the FLSA narrative. "[P]ublic policy also requires that parties of full age and competent understanding must have the greatest freedom of contracting, and contracts, when entered into freely and voluntarily, must be upheld and enforced by the courts." This contrary narrative comes dangerously close to the dreaded "L" word: Lochner.

G. The Specter of Lochner

In 1905, the Supreme Court of the United States decided a seminal case about the imposition of a limitation of employment in bakeries to sixty hours which was imposed by article 8, chapter 415, section 110 of the Laws of 1897. The Court noted that "[t]he statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer." The issue was that of Fourteenth Amendment applicability; "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." In short,
the Court held that the Fourteenth Amendment would prevent state limitations on an individual's right to contract.241

In the wake of Lochner, there was a hotly contested friction between the governmental power to regulate, and the Fourteenth Amendment and Fifth Amendment's Due Process clause.242 This friction is still evident in the Cheeks approval because the balance between private contractual settlements and the government's power to regulate is once again being examined. During the Lochner era,

Under strict Benthamite theory, all such laws [abridging an individual's right to contract] were idle and vicious: idle, because the whole wage contract was controlled by factors over which the collective will of the community had no control; vicious, because it put restraint upon the 'natural' and inevitable adjustment of industry.243

The Benthamite theory was embodied in the Lochner decision,244 but experienced contention in many decisions leading up to Lochner.245 Disagreement within the Supreme Court itself was notable, but none more notable than that of Justice Oliver Wendell Holmes Jr.246

Constitution violated by state statute).

241. See Lochner, 198 U.S. at 57 ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.").

242. See Learned Hand, Due Process of Law and the Eight-Hour Day, 21 HARV. L. REV. 495, 495-96 (1908) ("But the meaning of the words 'due process of law' or 'the law of the land' has not become settled.").

243. Id. at 501.

244. See id.

245. See, e.g., Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901) ("[T]his court held that it was competent for the legislature of Missouri to pass such a law even though it places a limitation upon the right of contract."); St. Louis Iron Mountain Ry. Co. v. Paul, 173 U.S. 404, 410 (1899) ("[T]he act was passed 'for the protection of servants and employee[s] of railroads,' and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations, and a duty was specially imposed, for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid."); Holden v. Hardy, 169 U.S. 366, 397 (1898) ("Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government."); Missouri Pac. Ry. Co. v. Mackey, 127 U.S. 205, 209 (1888) ("Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character. ").

246. See Allen Mendenhall, Justice Holmes and Conservatism, 17 TEX. REV. L. & POL. 305,
Holmes preached judicial restraint above all else—and preferred deference to state legislation.\(^{247}\) His devotion to judicial restraint and his fear of judicial tyranny were such that he once wrote, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."\(^ {248}\) Holmes based the belief that "a judge should not impose his personal ideology onto a populace" on his Civil War service; the war had ingrained in him a disdain for "avoidable conflicts between different cultures trying to impose their norms on each other and intensely disliked those who claimed to know what was true or right with absolute certainty."\(^ {249}\) This paints an enigmatic and slightly contradictory picture because it permits states to make decisions for citizens without implicating the Fourteenth Amendment. Simultaneously, lawmakers may be of a different culture or socioeconomic background than the constituents against whom the law is imposed upon.

After much debate, the end of the *Lochner* era was instigated by *Nebbia v. New York.*\(^ {250}\) *Lochner* quickly became unpopular, but a recent trend has seen it revisited as a pivotal transitional period in United States jurisprudence.\(^ {251}\) "A flood of new *Lochner* scholarship refutes the idea that the Court substituted its wisdom for the legislature’s to support of *laissez-faire* economics, favoring a number of other theories. The work of these *Lochner* revisionists has done much to ameliorate the sting of the charge of ‘Lochnerism.’"\(^ {252}\) Once again, the *Lochner* question has reared its ugly head in regard to private FLSA settlements: are federal limitations a violation of an individual’s right to contract? Jurisdictional conflict has given no clear answer to this question.\(^ {253}\)

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310 (Spring 2013).

247. See id. at 311.

248. Id.

249. Id.

250. See Nebbia v. New York, 291 U.S. 502, 525 (1934) ("The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.").


252. Id.

253. See Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352 (11th Cir. 1982) ("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.") (citations omitted); but see Martinez v. Bohls Bearing Equip. Co., 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005)
H. The Circuits in Disagreement

The Eleventh and Fifth Circuits have presented diametrically opposing views on the issue of private settlement. The Eleventh Circuit was first to denounce private settlement of wage claims under the FLSA in *Lynn's Food Stores, Inc.* In *Lynn's Food Stores*, the DOL determined that Lynn's Food Stores (hereinafter "Lynn's") owed back wages to its employees in violation of the FLSA.\(^\text{254}\) Lynn's attempted to negotiate with the DOL, but after not finding success, directly approached its employees.\(^\text{255}\) "Lynn's offered its employees $1000.00, to be divided among them on a pro rata basis, in exchange for each employee’s agreement to waive ‘on behalf of himself (herself) and on behalf of the U. S. Department of Labor’ any claim for compensation arising under the FLSA."\(^\text{256}\) Several employees accepted this agreement, but DOL calculations remarked that this settlement would insufficiently meet the wages owed under the FLSA.\(^\text{257}\) Lynn's attempted to gain court approval and the challenge was elevated to the Eleventh Circuit.\(^\text{258}\) After review of a record of transaction of the settlement, it was perceived by the Eleventh Circuit that "the transcript provides a virtual catalog of the sort of practices which the FLSA was intended to prohibit."\(^\text{259}\) It was based on these practices that the policy considerations of the FLSA were implicated as the fundamental reason for denying unapproved settlement in the Eleventh Circuit.\(^\text{260}\)

The major split from *Lynn's Food Stores* came from *Bohls Bearing Equipment* in the Western District Court of Texas. *Bohls Bearing Equipment* took a thorough approach to analyzing the case law and statutory precedent of private settlement approval; *O'Neil* and *Ganji* were both taken into consideration, as well as a slew of cases prior to 1945 which hindered the concept of private settlement under the FLSA.\(^\text{261}\) However, unlike most of the cases that had ruled on private

\(^{254}\) See *Lynn's Food Stores, Inc.*, 679 F.2d at 1352-53.

\(^{255}\) See id. at 1352.

\(^{256}\) Id.

\(^{257}\) See id.

\(^{258}\) See id.

\(^{259}\) Id. at 1354.

\(^{260}\) See id. at 1354-55.

settlements, *Bohls Bearing Equipment* actually incorporated the FLSA amendments that proceeded after *O’Neil* and *Gangi*. In *Bohls Bearing Equipment*, it was remarked that “[t]he Portal-to-Portal Act is also generally viewed as a direct response to the decisions in *O’Neil* and *Gangi*.”

“This suggests that a Congress relatively contemporary with the passage of the FLSA in 1938 viewed these decisions as contrary to the intent of the FLSA.” Similarly, the Fair Labor Standards Amendments of 1949 consisted of a Congress contemporary to that of the original FLSA and was illustrative of the availability of compromise between employer and employee. It was under the influence of these statutory revisions that the possibility of compromise was allowed for under the FLSA.

The Fifth Circuit would eventually echo this sentiment in *Martin*. The Fifth Circuit carved out an exception from the rule prohibiting employee waiver of FLSA claims and allowing for the private compromise of claims under the FLSA where there exists a bona fide dispute as to liability. Despite the Fifth Circuit, “[t]he trend among district courts is to continue subjecting FLSA settlements to judicial scrutiny.” But this trend is by no means a well-established one.

It has been theorized that this circuit split can possibly be recognized by the vastly different facts leading to different procedural implications. *Martin*, was decided on the factual predicate of pre-litigation settlements, in which a bona fide dispute still existed between the parties. Because a bona fide dispute existed, the employees were able to agree upon a settlement after being fully advised by legal counsel. This has the effect of preventing “abuses by unscrupulous employers.”

262. *See id.* at 633.

263. *Id.* at 623; *see also* United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 862 (5th Cir. 1975).


265. *See id.* at 626.

266. *See id.* at 631.


268. *Id.*


271. *See Martin*, 688 F.3d at 255, 257.

272. *See id.* at 257.

To the contrary, *Lynn's Food Stores* specifically involves an exploitative arrangement in which an uninformed party waives its statutory right under the FLSA.\(^{274}\) It has been theorized that:

The primary difference between the *Lynn's Food* and *Martin* standards is the timing of the judicial scrutiny. The Fifth Circuit scrutinized the agreement in *Martin* at some point after the parties entered it once a question arose over the settlement’s enforceability. Thus, *Martin* stands for retrospective scrutiny to determine the agreement’s enforceability ex post. . . . In contrast, the *Lynn's Food* standard is applied prospectively to approve the agreement ex ante.\(^{275}\)

This ideology has begun to take root in 2nd Circuit jurisprudence.\(^{276}\) With any luck, future case law will distinguish between ex post pre-litigation settlements and ex ante litigation settlements.

### I. Arbitration as an Alternative

After *Cheeks*, the question presented to the Southern District of New York was whether arbitration still stood as a viable method for FLSA dispute resolution.\(^{277}\) In *Moton v. Maplebear Inc.*, the plaintiff agreed to an Independent Contractor Agreement, which resulted in all claims being subjected to arbitration as a method of dispute resolution.\(^{278}\) Moton alleged that he was misclassified as an independent contractor, and thus eligible for employee protections under the FLSA.\(^{279}\) The

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\(^{274}\) *See* Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1352 (11th Cir. 1982).


\(^{278}\) *Id.* at *1-2 (stating within section 7.1 of the agreement that “the Parties agree that to the fullest extent permitted by law, any controversy, dispute or claim arising out of or relating to the Services performed by the Contractor, this Agreement, the breach, termination, interpretation, enforcement, validity, scope and applicability of any such agreement, or any allegations of discrimination or harassment on any basis under federal, state, or local law, which could otherwise be heard before any court of competent jurisdiction . . . , shall be submitted to and determined exclusively by binding arbitration.”) Moton also agreed to the Federal Arbitration Act (9 U.S.C. § 2) being the governing law, as well as an express waiver of the right to a jury trial. *See id.* at *2.

\(^{279}\) *See id.* at *1.
defense motioned to compel arbitration and the four factor test was initiated.\textsuperscript{280}

Initially, it was necessary to determine if FLSA claims were even arbitrable. Plaintiff argued that \textit{Barrentine} and \textit{Cheeks} rendered FLSA claims nonarbitrable, but the Southern District of New York refuted this.\textsuperscript{281} The court distinguished \textit{Barrentine} on factual considerations that did not align with the plaintiff's contention.\textsuperscript{282} \textit{Cheeks} was also quickly dispelled with, but the court felt compelled by the \textit{Cheeks} decision to subject any settlement to arise from arbitration to court approval.\textsuperscript{283} It was also noted that the confidentiality requirements of arbitration would not be a detrimental factor because court approval would be determined after the arbitration process reached its conclusion.\textsuperscript{284} All in all, arbitration was able to accompany FLSA claims despite a hollow victory due to the inevitability of court approval.

The Eastern District of New York came to a similar conclusion in the sister case of \textit{Bynum v. Maplebear Inc.}\textsuperscript{285} Later that year, the Eastern District of New York would even approve of an arbitration deadline for FLSA grievances, so long as they did not eliminate an individual's ability to vindicate their statutory rights.\textsuperscript{286} Arbitration still stands as a viable solution for FLSA claims, but the glaring problems of the \textit{Cheeks} decision still persist in the lack of confidentiality and the need for court approval that follow an arbitration decision.

\section*{V. THEORETICAL SOLUTIONS}

It must be noted that the issues presented in this article are in no way a comprehensive collection of the multitude of problems that have emerged following the \textit{Cheeks} decision. This article is more useful as a tool to provide insight and historical context to the legal trajectory of our
current treatment of the FLSA. With that being said, it is now important to theorize on how practically approaching the Cheeks decision could be improved upon, so as to alleviate the current burden placed on the already overburdened judicial system. It is clear that Cheeks has done much to disrupt the average docket, as well as cause employee’s and employer’s attorneys to fear. This brings to question whether the approval of settlements is the best usage of judicial resources. Whether it is best for our plaintiffs. Whether it is best for society.

A. Confidentiality, Deference or Sunshine

There are certain parts of Cheeks that seem indisputable. It seems that confidentiality and the FLSA are at odds with each other. There is no foreseeable way to meet the legislative goals of the FLSA while maintaining confidentiality in FLSA settlements. For this reason, confidentiality must remain. However, it would also seem that the court’s approval process is too arbitrary to be applied consistently. A jurist who has served as a public servant all her life may chop attorney’s fees in half without a second consideration, while jurists converted from the private sector may prove to be much more generous in their perception of attorney’s fees. A totality of the circumstances approach is taken in assessing the FLSA settlement, but this assessment should give the highest degree of deference to the parties submitting the agreement. Judges do not know what went into all the negotiations that led up to the settlement. With their limited knowledge, they cannot impute their sense of what is proper upon a plaintiff. This is largely illogical, and relatively paternalistic.

Congress may be inspired by Sunshine in Litigation Acts, which prohibit confidentiality in settlements that contravene public safety. Florida has led this push on the state level, which has been reflected in

287. See Ronald L. Burdge, Bad for Clients, Bad for Lawyers, Bad for Justice, 29 No. 6 GSOLO 25, 25-26 (2012) (“Society itself might be better off if all settlements were public knowledge. Wrongful conduct would be exposed not just for the economic justice of the victim, but for the broader societal purpose of curbing such wrongful conduct. Lawmakers and the public can see where problems exist, both in products and service suppliers, and act appropriately. . . . Secrecy in settlements also hurts lawyers. A lawyer cannot place a fair and reasonable value on a case when the lawyer cannot compare it to other known cases. It is particularly harmful to inexperienced lawyers who may be most prone to undervaluing a case. The secrecy allows the perpetrator to assess a fair value while preventing the innocent victim from doing likewise.”).


290. See id.
the Eleventh Circuit decision of *Lynn's Food Stores*. A similar version of the Florida statute emerged in U.S. Congress in 2015 under the name of “Sunshine in Litigation Act of 2015.” The bill was sponsored by Jerrold Nadler, the current representative for New York’s 10th congressional district, on May 14, 2015. The bill would prohibit courts from: (1) enforcing any provision of an agreement that restricts a party from disclosing information to any federal or state agency with authority to enforce laws regulating an activity; or (2) enforcing any provision of a settlement agreement that prohibits a party from disclosing the presence of a settlement or the terms thereof that involve matters relevant to the protection of public health and safety.

The bill died in Congress, but has been reintroduced by Jerrold Nadler in 2017. With any luck, the agreed upon provisions may accurately enunciate what settlements contravene public policy, as well as what jurists should look for when assessing settlements.

**B. Ex Post Pre-Litigation Settlements and Ex Ante Litigation Settlements**

*Lynn’s Food Stores* and *Martin* are not diametrically opposed. For ex ante settlements, as was the case in *Martin*, “the interests of the parties are aligned” in disposing of the litigation due to a bona fide dispute of fact. In ex post, “[t]he dividing point... is significant because it changes the interest structure of the parties,” as was the case in *Lynn’s Food Stores*. With the procession of litigation brings numerous implications, discovery being chief among them. Once a forecast becomes results, the balance tips. “A court focusing on the direct costs of broader discovery from an ex post perspective, would miss the pre-dispute agreement’s potential for discouraging litigation and encouraging settlement, both effects reducing public litigation costs and delay.” This solution would be received well by practitioners, seeing as it would significantly ease their burden in the settlement process.

291. *See* Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1354-55 (11th Cir. 1982).
293. *See* id.
294. *See* id. § 1660(a)(1)-(c)(1).
297. *Id.* at 1483.
298. *Id.* at 1487.
VI. CONCLUSION

The history of labor in America has been marred by numerous challenges in the legal system. The *Cheeks* decision is just another challenge in this collection. Post-*Cheeks* settlements have changed the landscapes of FLSA litigation, but there is still more that needs to be developed and reconciled. With this much confusion in the settlement process, change will come. For now, it is imperative that practitioners and jurists, alike, adjust to the *Cheeks* approval.

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