Labor & Employment Law /Immigration

Cheeks Ruling Carves Out FLSA Exception To FRCP 41

The Second Circuit, in *Cheeks v. Freeport Pancake House, Inc.*, made clear that parties to a lawsuit cannot privately settle Fair Labor Standards Act ("FLSA") claims without the approval of the United States District Court or the United States Department of Labor ("DOL").

In 2012, after being demoted and fired, Cheeks sued Freeport Pancake House seeking to recover overtime wages, liquidated damages and attorneys' fees under both the FLSA and New York Labor Law."[1] After some discovery was completed, both parties attempted to settle the claim via Federal Civil Rule 41(a)(1)(A)(ii) by a stipulation of dismissal by the parties. U.S. District Judge Joanna Seybert, of the Eastern District of New York held that the parties could not stipulate to settle this litigation in the usual manner as provided for in Rule 41.

Court approval of FLSA settlements became an accepted practice within the Second Circuit. This is so even though there is a paucity of authority that the "FLSA is one of those Rule 41-exempted statutes."[2] In *Cheeks*, Judge Seybert refused to endorse the *Cheeks* stipulation without its review by the Court.

Indeed, Judge Seybert noted that "[t]here is no definitive decision as to whether the Court is required to approve the settlement of FLSA overtime claims as 'fair and reasonable.'" Nonetheless, the "district court directed the parties to 'file a copy of the settlement agreement on the public docket,'" and to "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching."'[3]

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The parties chose to appeal the ruling and asked the district court to certify the question to the Second Circuit. The Second Circuit granted the parties' motion and heard the interlocutory appeal.

On the day before the Second Circuit decided Cheeks, EDNY Senior District Court Judge Arthur D. Spatt also tackled the issue of "whether, in an FLSA case, the Court has the duty to approve a settlement and make a determination as to whether the settlement is 'fair and reasonable.'"[4] He wrote that "[t]he Second Circuit has apparently not addressed the issue, and district courts in this Circuit are divided on whether such an analysis is required under the FLSA."[5] In addressing the issue himself, Judge Spatt found the reasoning in *Picerni v. Bilingual Seit & Preschool Inc.*, a recent 2013 case from the EDNY, persuasive. He based his decision on "the fact that the plain language of the FLSA does not require judicial approval for the settlement of the FLSA claims."[6] The Second Circuit, in its decision, however, disagreed.

At the outset, the Second Circuit noted in *Cheeks* that "neither the Supreme Court nor our sister Circuits have addressed the precise issue,"[7] before the court agreed with the reasoning set forth by a substantial number of Southern District of New York cases and the EDNY case, *Socias v. Vornado Realty L.P.*[8] The court in *Socias* believed that there were many indications that the FLSA should be read into a Rule 41 exemption.

The Second Circuit reasoned that "[t]he burdens described in *Picerni* 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."'[9] This balancing of interests justified the Second Circuit's threading of the FLSA into a FRCP 41 exemption.

In contrast, Judge Spatt had reasoned that,

> Of particular importance to the Court is the fact that the plain language of the FLSA does not require judicial approval for the settlement of the FLSA claims. While there may be risks that low wage employees will be coerced into settlement by employers or their own counsel seeking attorneys' fees, as the court in *Socias* stated, the same risks are present in other areas of the law for which court approval is not required for settlement.[10]

As opposed to class actions,[11] several categories of civil cases are by settlement without Court approval[12] or supervision. "[T]he concern over absent class members is not present in this case where an individual plaintiff is seeking to voluntarily dismiss his overtime claim solely on behalf of himself."[13] Indeed, Judge Spatt concluded that,[t]he Court sees no reason why it should depart from that practice with respect to FLSA settlements without express statutory language requiring it to do so."[14]

One day after Judge Spatt issued his decision in *Marrano*, on August 7, 2015, the Second Circuit issued the *Cheeks* decision. The Second Circuit wrote that the FLSA in the "applicable federal statute" exception of FRCP 41, holding that United States District Courts should evaluate private FLSA agreements for fairness.[15] Although in *Cheeks*, the

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Second Circuit acknowledged that, "the FLSA itself is silent on the issue," [and] there are not "any cases that speak directly to the issue" and the Advisory Committee's notes fail to address the issue,[16] it reasoned that the "FLSA is a uniquely protective statute"[17] and these settlements cannot remain private."

In sum, "to prevent abuses by unscrupulous employers…and remedy the disparate bargaining power between employers and employees[,]" the Second Circuit placed FLSA settlements into an exception to Rule 41, foreclosing the option of private resolution once a case is filed. This sends a clear message to counsel for plaintiff and defendant once the lawsuit is filed, be prepared to litigate or have the proposed FLSA settlement subject to review and on the public record.

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1. *Cheeks v Freeport Pancake House, Inc.*, 796 F3d 199, 200 (2d Cir. 2015).
2. *Socias v Vornado Realty L.P.*, 297 FRD 38, 40 (E.D.N.Y. 2014) (quoting *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 373 (E.D.N.Y. 2013).
3. *Cheeks*, 796 F.3d at 200 (citing App'x at 35).
4. *Marrano v. Oyster Bay Animal Hosp., P.C.*, 2015 U.S. Dist. LEXIS 103950, *1-2 (E.D.N.Y. Aug. 6, 2015).
5. *Id* at *2.
6. *Id*.
7. *Cheeks*, 796 F3d at 202.
8. 297 FRD 38, 40 (E.D.N.Y. 2014) ("Low wage employees, even when represented in the context of a pending lawsuit, often face extenuating economic and social circumstances and lack equal bargaining power; therefore, they are more susceptible to coercion or more likely to accept unreasonable, discounted settlement offers quickly. In recognition of this problem, the FLSA is distinct from all other employment statutes.")
9. *Cheeks*, 796 F3d at 207.
10. *Marrano*, 2015 U.S. Dist. LEXIS 103950, *5 (external quotation marks omitted).
11. See *Mills v. Capital One*, 2015 U.S. Dist. LEXIS 133530, *18 (S.D.N.Y. Sept. 30, 2015) (citing *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012) ([I]t should be noted that "an FLSA settlement is examined with less scrutiny than a class action settlement; [whereby] the court simply asks whether the settlement reflects a fair and reasonable compromise of disputed issues that was reached as a result of contested litigation.")
12. See *Picerni*, 925 F. Supp. 2d at 373 ("Nothing in *Brooklyn Savings, Gangi*, or any of their reasoned progeny expressly holds that the FLSA is one of those Rule 41-exempted statutes. For it is one thing to say that a release given to an employer in a private settlement will not, under certain circumstances, be enforced in subsequent litigation — that is the holding of *Brooklyn Savings and Gangi* - it is quite another to say that even if the parties want to take their chances that their settlement will not be effective, the Court will not permit them to do so.")
13. *Id*.
14. *Id*. at *6.
15. See, e.g., *Lynn's Food Stores, Inc. v. United States By and Through U.S. Dep't of Labor, Employment Standards Admin., Wage and Hour Div.*, 679 F.2d 1350, 1352-53 (11th Cir. 1982); *Urbino v. Puerto Rico Ry. Light & Power Co.*, 164 F.2d 12, 14 (1st Cir. 1947); *Santana v. Café Au Bon Gout, Inc.*, 2012 U.S. Dist. LEXIS 110360, *4, 2012 WL 3201403 (S.D.N.Y. Aug. 6, 2012); *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F.2d 960 (5th Cir. 1947).
16. *Cheeks*, 796 F.3d at 204.
17. *Id*. at 207.

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approach."[8] Then, and only then, are the courts allowed to consider a limited number of documents in the record to determine whether the conviction rises to the level of a CIMT. These documents include the indictment, the plea, the verdict, and the sentence, which the court uses to determine the offense for which the alien was convicted.[9]

Even with the ability to look at documents in the record, there is still no provision to consider the specific facts of a particular case. The record of conviction specifically refers to the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of plea proceedings, and the judgment.[10] By examining the record of conviction, the hope is to determine which subsection of the statute the foreign national was convicted of so the court can compare the crime to its federal generic definition.

There are many controversies associated with the modified categorical approach. For example, there are some difficulties distinguishing whether a statute is "divisible," listing various elements of the crime, or "overly broad," stating various forms of committing a crime. Nonetheless, without an examination of documents outside the "record of conviction," many questions may remain unanswered.

In 2008, the BIA attempted to provide immigration courts with greater discretion in determining what qualifies as a CIMT and allowed the consideration of "any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."[11] However, that decision was vacated since the Attorney General believed that it would not establish "a uniform framework"[12] in applying crimes of moral turpitude, leaving attorneys in the same position as before.

The Consequences of Ambiguity in Finding CIMT

Pursuant to INA § 236(c), a foreign national, even one who has been a long-time LPR, will face removal proceedings and be subject to mandatory detention by Immigration and Customs Enforcement if the foreign national has committed "two or more [CIMTs], not arising out of a single scheme of criminal conduct"[13] or "is inadmissible by reason of having committed any offense covered in section 212(a)(2)"[14] of the INA. Those crimes enumerated under INA § 236(c) render the foreign national subject to mandatory detention without the possibility of an immigration judge setting bail.

For these reasons, the U.S. Supreme Court mandated that criminal defense counsel and/or the court must advise the defendant of immigration consequences to a plea of guilty.[15] Towards this end, it is strongly recommended that prior to admitting criminal conduct that results in a conviction, the defendant or counsel seek the input from immigration counsel.

Crimes involving moral turpitude can have drastic effects on the foreign national's ability to remain in the United States notwithstanding strong equities such as family ties, good character behavior, or financial considerations. The fact that the court cannot look at the criminal action, as opposed to the criminal statue, renders the criminal plea of utmost importance. Hopefully, further clarification will be given in the future and the courts will consider the great punishment involved pursuant to such a stringent standard.

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1. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909, 921 (9th Cir. 2009).
2. *See* Transactional Records Access Clearinghouse, Syracuse Univ., *Individuals Charged with Moral Turpitude in Immigration Court* (2008), *available at* http://trac.syr.edu/immigration/reports/moral_turp.html.
3. *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994).
4. *Rodríguez-Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2005).
5. *Franklin v. I.N.S.*, 72 F.3d 571 (8th Cir. 1995).
6. *Matter of Short*, 20 I. & N. Dec. 136, 137 (B.I.A. 1989).
7. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003).
8. *Descamps v. United States*, 133 S. Ct. 2276 (2013).
9. *Matter of Short*, 20 I. & N. Dec. 136 (B.I.A. 1989).
10. *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir. 2003).
11. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 704 (A.G. 2008).
12. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 552 (A.G. 2015).
13. INA § 237(a)(2)(A)(ii).
14. INA § 236(c)(1)(A).
15. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

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municipal consultant, working with New York State on its expenditure of federal funds for post-Superstorm Sandy infrastructure rebuild on Long Island. Previously, she served as Chief Deputy County Attorney for Special Projects at the Office of the Nassau County Attorney (2006-2014), where she was responsible for fair housing issues, attorney and law student recruitment and professional development, and training and compliance issues for Nassau County agencies. She also served as Counsel to the Nassau County Planning Commission, the Nassau County Human Rights Commission and the Nassau County Office of Consumer Affairs. Prior to joining the Office of the Nassau County, Krisel served as Village Attorney for the Incorporated Village of Rockville Centre (1996-2006) and currently chairs the Village's Board of Ethics.

Mortgage Foreclosure Pro Bono Project

An active member of the Nassau County Bar Association for 25 years, Krisel has held a number of leadership positions including her service on the Board of Directors since 2008. Passionate about ensuring access to justice, Krisel has chaired the Pro Bono Mortgage Foreclosure Task Force since 2007, which launched NCBA's award-winning Pro Bono Mortgage Foreclosure Project and Sandy Recovery clinics. Established in May of 2009, NCBA has held more than 125 free clinics and provided representation at mandated settlement conferences in court. To date, NCBA has helped more than 10,000 Nassau County families and children facing foreclosure and - as of October 2012 - facing Superstorm Sandy problems including FEMA, SBA and private insurance and landlord-tenant matters. In coordination with NCBA, she obtained NYS Home Ownership Protection Program (HOPP) grants to fund staff needed to coordinate clinics twice a month as well as daily mandated settlement conferences. In 2009, Past President Peter Levy awarded Krisel the NCBA President's Award for her efforts. She was also recognized in 2011 by New York Law Journal's *Lawyers Who Lead by Example*.

In addition to her appointment to the Rockville Centre Board of Ethics, Krisel has served on the Nassau County Board of Ethics and the New York State Bar Association Committee on Attorneys in Public Service. She regularly lectures and writes on land use, fair housing and labor and employment issues. She received her J.D. degree from SUNY Buffalo in 1981.