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Expert Analysis

FLSA Litigation: Are We Entering A New Era of Judicial Protectionism?

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Recently, several federal district courts and circuit courts of appeals have rendered decisions uncharacteristically protective, or some have argued paternalistic, toward plaintiffs in Fair Labor Standards Act (FLSA) cases. In *Cheeks v. Freeport Pancake House*, the U.S. Court of Appeals for the Second Circuit held that plaintiffs cannot settle FLSA claims through private stipulated dismissals with prejudice in the absence of court approval or the U.S. Department of Labor (DOL) supervision.[1] Then, in *Lewis v. Epic Systems Corp.*, the U.S. Court of Appeals for the Seventh Circuit determined that employment arbitration agreements that require employees to waive the right to engage in FLSA class or collective action violate the National Labor Relations Act (NLRA).[2]

In *Cheeks*, the Second Circuit emphasized the public policy rationales underlying the FLSA and left undefined the parameters by which courts are to review private settlement agreements. As a result, some district courts have ushered in a new wave of judicial protectionism under the umbrella of *Cheeks*, going beyond the court's holding. To the surprise of many, the Supreme Court denied certiorari review of *Cheeks*, thus, declining to provide guidance for the time being.

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Although the impact of *Epic Systems* remains to be seen, the decision resoundingly promotes the judiciary's assumption of a paternalistic role. Attorneys representing employers and employees alike should take notice of the apparent trend developing in the lower federal courts with respect to FLSA plaintiffs, and what these rulings mean for their clients.

The Cheeks Decision

In *Cheeks*, an employee-plaintiff brought claims for overtime wages against his employer under the FLSA and New York Labor Law. The parties reached a private settlement and filed a joint stipulation of dismissal with prejudice under Fed. R. Civ. P. 41(a)(1)(A)(ii). The district court rejected the stipulation on the grounds that a FLSA plaintiff cannot enter into a private settlement stipulating dismissal with prejudice without either court approval or DOL supervision. Ultimately, the district court certified the case for interlocutory appeal to the Second Circuit.

Rule 41(a)(1)(A) sets forth the general rule that parties may stipulate to dismissal of an action without court involvement. However, Rule 41(a)(1)(A) is expressly made subject to "any applicable federal statute." Although the FLSA is silent as to Rule 41, in affirming the trial court's holding, the Second Circuit ruled that, "in light of the unique policy considerations underlying the FLSA," the FLSA constitutes an "applicable federal statute."

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As such, the court held that stipulations dismissing FLSA claims with prejudice require court approval or DOL supervision.

After reaching its determination, the court delineated the policy rationales underlying the FLSA, noting that the statute's remedial and humanitarian goals require liberal interpretation and exceptionally broad protections. The court then warned against the "potential for abuse" in private settlement, as exemplified by the proposed settlement agreement in *Lopez v. Nights of Cabiria*, which contained (i) "highly restrictive confidentiality provisions"; (ii) "an overbroad release that would waive practically any possible claim"; and (iii) an excessively high attorney fees award.[3]

Prior to *Cheeks*, the U.S. Court of Appeals for the Fifth Circuit had reached the opposite determination, holding that parties may settle FLSA claims privately, such that a release of FLSA rights is enforceable without court or DOL approval.[4] Despite these conflicting holdings, the Supreme Court denied certiorari in *Cheeks*.

The Impact of 'Cheeks'

In providing few guidelines for the judicial review mandated by *Cheeks*, the Second Circuit left it to the district courts to make their own determinations as to the scope of their role with respect to review of FLSA settlement agreements.

Some district courts have expanded the requirement of court or DOL approval to all private FLSA settlement agreements, including those contemplating dismissal without prejudice. In doing so, courts have found that "side-stepping" the judicial review process for settlements without prejudice would be contrary to the FLSA's remedial purpose.[5]

The protectionist approach adopted in *Cheeks* has also found application beyond the private settlement context. For example, in *Flood v. Carlson Rests.*, the Southern District of New York held that the opt-in period for FLSA class members should be extended, reasoning that, under *Cheeks*, "the FLSA should be interpreted 'liberally' and its protections afforded 'exceptionally broad coverage.'"[6]

Additionally, some courts have looked to *Cheeks* as sanctioning the liberal construction of all "uniquely protective statutes." In *Walters v. Performant Recovery*, a Connecticut district court suggested that plaintiffs may not be able to waive Fair Debt Collection Practices Act and Connecticut Unfair Trade Practices Act claims without court or agency approval due to the statutes' remedial purposes.[7]

Even when applied within context, the judicial review mandated in *Cheeks* has been subject to inconsistent application throughout the Second Circuit. District courts have disagreed as to whether court approval of a settlement requires judicial review of attorney fees awards for reasonableness,[8] whether settlement agreements should be afforded deference,[9] and whether the presence of the "offensive provisions" identified by the Second Circuit automatically precludes court approval of a settlement agreement.[10] However, one thing that is clear is that *Cheeks* requires greater judicial intervention for purposes of protecting FLSA plaintiffs.

The Epic Systems Decision

The Epic Systems case also arose out of an employee's FLSA claims against his employer, yet invoked the considerations of another statute, the NLRA. Prior to the action, the plaintiff and his co-workers were required to sign an arbitration agreement waiving collective arbitration and collective action, as a condition to continued employment with Epic Systems Corporation. When Epic moved to compel arbitration, the district court denied the motion on the ground that the arbitration agreement violated the employees' right to engage in concerted action under the NLRA. Upon review, the Seventh Circuit affirmed.

In its opinion, the court determined that the NLRA's history and purpose required a broad reading of the term "concerted activities" to include representative, joint, collective, or class legal remedies. Next, the court evaluated whether the Federal Arbitration Act (FAA) required enforcement of the parties' arbitration agreement. The court determined that such enforcement was not required in that the FAA's savings clause permitted the invalidation of arbitration agreements by general contract defenses. As such, the court found no conflict between the NLRA and FAA, as under the savings clause, any agreement violative of the NLRA (i.e., an illegal contract) would be invalid under the FAA.

One of the most notable aspects of the Seventh Circuit's analysis was its glossing over of the Supreme Court's decision in *AT&T Mobility v.*

Concepcion.[11] In *Concepcion*, the court held that a California statute requiring class arbitration was preempted by the FAA and, therefore, invalid. In writing for the majority, Justice Antonin Scalia expressed the majority's view that class arbitration is inconsistent with the FAA. In so holding, the court noted that the procedural formality required for class arbitration conflicts with the FAA's overarching purpose of facilitating streamlined proceedings and expeditious results through the enforcement of arbitration agreements. However, the four dissenting justices opined that class arbitration is entirely consistent with the FAA's purpose.

In *Epic Systems*, the Seventh Circuit declined application of *Concepcion*, ignoring the majority's clear criticism of the class arbitration mechanism. The court rationalized its holding by stating that *Concepcion* did not go "so far as to say that anything that conceivably makes arbitration less attractive automatically conflicts with the FAA." Although acknowledging that the NLRA and FAA are on equal footing, the court ultimately determined that, due to the NLRA's impact on countless aspects of the employer/employee relationship, the NLRA's protections were more significant, and thus, that waiver of class or collective actions under the FLSA was prohibited.

Will Protectionism Continue?

Prior to the Epic Systems decision, all prior circuit courts weighing in on the issue determined that class arbitration waivers do not violate the NLRA. In fact, within one week of the Epic Systems decision, the U.S. Court of Appeals for the Eighth Circuit rejected the argument that employment agreements containing class action waivers violate the NLRA.[12] At this juncture, it remains undetermined whether Epic will seek Supreme Court review, and whether the high court will grant such review. As in *Cheeks*, it is possible that the Supreme Court will decline to weigh in at this time and deny certiorari, despite the circuit split. This outcome seems particularly likely given the current vacancy on the Supreme Court resulting from Scalia's passing. *Concepcion* was a 5-4 decision, with Scalia writing for the majority. Principles of stare decisis aside, the current court's ideological make-up would probably yield a 4-4 split in a review of *Epic Systems*, thus leading to an affirmance of the Seventh Circuit's paternalistic approach, yet one without precedential weight.

Until the Supreme Court addresses the apparent recent trend of judicial protectionism of FLSA plaintiffs, lower federal courts are left without guidance as to when heightened protection is necessary or appropriate.

The dangers of judicial paternalism have perhaps best been addressed by Judge Brian M. Cogan of the Eastern District of New York in *Barnhill v. Stark Estate*. In this post-Cheeks decision, Cogan cautioned that the "evil of overwork" underlying the FLSA is no greater than the evils underlying other federal statutes (i.e., police brutality, predatory debt collection, workplace sexual harassment, etc.)—all such statutes designed to protect "unique interests based on unique policy considerations."[13] Cogan went on to admonish that the courts' ranking of the wrongs addressed by Congress, without congressional instruction, amounts to the judiciary's assumption of a legislative role.

Until the Supreme Court addresses the apparent recent trend of judicial protectionism of FLSA plaintiffs, lower federal courts are left without guidance as to when heightened protection is necessary or appropriate. Counsel practicing in this area should follow these developments closely, as these recent decisions will almost certainly shape the FLSA litigation landscape for the foreseeable future.

1. 796 F.3d 199 (2d Cir. Aug. 7, 2015) (hereinafter, *Cheeks*), cert denied, *Cheeks v. Freeport Pancake House*, 136 S.Ct. 824 (2016).
2. 2016 U.S. App. LEXIS 9638 (7th Cir. May 26, 2016) (hereinafter, *Epic Systems*).
3. 96 F.Supp.3d 170 (SDNY March 30, 2015).
4. *Martin v. Spring Break '83 Prods.*, 688 F.3d 247 (5th Cir. July 24, 2012).
5. See, e.g., *Calderon v. Congee Place,* 2016 U.S. Dist. LEXIS 65287 (EDNY May 13, 2016); see also *Lopez v. Ploy Dee,* 2016 U.S. Dist. LEXIS 53339 (SDNY April 20, 2016).
6. 2015 U.S. Dist. LEXIS 149272 (SDNY Nov. 3, 2015).
7. 124 F.Supp.3d 75 (D. Conn. 2015).
8. *Barbecho v. M.A. Angeliades*, 2016 U.S. Dist. LEXIS 45461 (SDNY April 1, 2016).
9. *Boyle v. Robert M. Spano Plumbing & Heating,* 2016 U.S. Dist. LEXIS 56126 (SDNY April 27, 2016) ("[T]here is generally 'a strong presumption in favor of finding a settlement fair, as the Court is generally not in as good a position as the parties to determine the reasonableness of an FLSA settlement.'").
10. *Souza v. 65 St. Marks Bistro,* 2015 U.S. Dist. LEXIS 151144 (SDNY Nov. 6, 2015) (evaluating inclusion of confidentiality provision in settlement agreement).
11. 563 U.S. 333 (2011) (hereinafter, *Concepcion*).
12. *Cellular Sales of Missouri v. NLRB,* 2016 U.S. App. LEXIS 10002 (8th Cir. June 2, 2016).
13. *Barnhill v. Stark Estate*, 2015 U.S. Dist. LEXIS 125115 (EDNY Sept. 17, 2015).