JUDICIAL APPROVAL OF FLSA BACK WAGES SETTLEMENT AGREEMENTS

Keith William Diener
Assistant Professor, Stockton University

JUDICIAL APPROVAL OF FLSA BACK WAGES SETTLEMENT AGREEMENTS

Introduction

The Fair Labor Standards Act of 1938 ("FLSA")[1] was passed to remedy the poor working conditions that mired the Great Depression, including the deleterious effects of the industrial age, consequent low wages, and proliferating child labor.[2] The FLSA's justificatory policies include reducing the poor working conditions that burden commerce, create unfair competition, result in labor disputes, and interfere with the orderly marketing of goods in commerce.[3] These overarching policies infused in the FLSA were intended to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers…"[4] These provisions intended to provide for a living wage, to motivate employers to hire more employees, and to disperse the work among more people.[5] Among the mechanisms for effectuating its purposes, the FLSA provides minimum wage[6] and overtime requirements.[7] When back wages are sought for violations of the minimum wage or overtime requirements, injured employees may file a complaint in a state or federal court, or with the Secretary of Labor.[8] Once that complaint is filed, however, injured employees are unknowingly entering a paternalistic system wherein freedom of contract and individual autonomy are trumped by the overarching policy considerations of the FLSA as perceived by the presiding judge.

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

I. A Unique Combination of Historical Factors

[1] 29 U.S.C. §201 et seq.
[2] Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013).
[3] 29 U.S.C. §202.
[4] *Id.*
[5] Debra D. Burke & N. Leroy Kauffman, *The Bona Fide Professional Exemption of the Fair Labor Standards Act as Applied to Accountancy*, 14 J. EMP. AND LAB. L. 1 (2013) ("The provisions intended to guarantee a living wage, as well as to encourage employers to hire more workers and spread the available work, in an effort to avert the additional salary burden imposed if their workers qualified for overtime").
[6] 29 U.S.C. §206.
[7] 29 U.S.C. §207 (maximum hour requirements).
[8] 29 U.S.C. §216 (currently, this complaint is filed through the U.S. Department of Labor's Wage and Hour Division (WHD), see https://www.dol.gov/whd/).

The idea that judges must supervise all FLSA back wage settlement agreements arose as a function of the judiciary's good-hearted attempts to effectuate the legislative intent of the FLSA. The idea, over time, became a requirement within some circuits, and district courts in many other circuits (having no guidance from their own circuits) cautiously followed the rulings of those circuits that mandated supervision. This contemporary setting initiated in the 1940s with a series of U.S. Supreme Court cases.[9] Most pertinent of these is *Brooklyn Savings Bank*, within which the U.S. Supreme Court decided that the lack of an express prohibition against waivers of FLSA liquidated damages did not prevent a litigant who waived liquidated damages in a private settlement from recovering liquidated damages.[10] The Court examined the lack of an express provision, as well as the lack of specific legislative intent, before concluding that the overarching policies of the FLSA and Congressional history "clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages."[11] It was within the analysis of these policies that circuit courts later found justification for mandating judicial supervision of all FLSA back wages settlement agreements.

The policies the Supreme Court examined in *Brooklyn Savings Bank* were broadly construed to ensure the purpose of the FLSA. First, prohibiting waivers of liquidated damages is necessary to protect the vulnerable employee population that is subjugated by the more powerful employer class.[12] Second, liquidated damages constitute "a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[13] Third, FLSA rights are of a private-public nature, and "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."[14] Fourth, prohibiting waivers of liquidated damages promotes the policy of "uniformity in the application of the provisions of the Act."[15] These policies allowed the Supreme

---

[9] This series of cases began with Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577, 62 S. Ct. 1216, 1220, 86 L. Ed. 1682 (1942) ("If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions from the reach of dominant constitutional power") (internal citations and quotations omitted); and continued with Walling v. Helmerich & Payne, 323 U.S. 37, 42, 65 S. Ct. 11, 14, 89 L. Ed. 29 (1944) ("The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act"), and then came Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945). A line of case law from the Supreme Court also holds that FLSA rights supersede conflicting provisions of collective bargaining agreements. See Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 177-178, 66 S.Ct. 379, 381-382, 90 L.Ed. 603 (1946); Walling v. Harnischfeger Corp., 325 U.S. 427, 430-432, 65 S.Ct. 1246, 1248-1249, 89 L.Ed. 1711 (1945); Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161, 166-167, 170, 65 S.Ct. 1063, 1066-1068, 89 L.Ed. 1534 (1945); and Tennessee Coal, Iron & R. Co. v. Muscoda Local No. *123*, 321 U.S. 590, 602-603, 64 S.Ct. 698, 705-706, 88 L.Ed. 949 (1944).

[10] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

[11] *Id.* at 706.

[12] *Id.* at 706-707.

[13] *Id.* at 707 (internal quotations omitted).

[14] *Id.* at 704. See also *Id.* at 710. ("To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy").

[15] *Id.* at 710.

Court to determine that Congress did not intend to allow waivers of liquidated damages in FLSA claims.

One year after *Brooklyn Savings Bank*, the U.S. Supreme Court decided in *Gangi* that private settlements that resolve the issue of whether employees are covered by the FLSA also violates these policies.[16] The Court noted that the "reasons which lead us to conclude that compromises of real disputes over coverage which do not require the payment in full of unpaid wages and liquidated damages do not differ greatly from those which led us to condemn the waivers of liquidated damages…"[17] Justice Frankfurter did dissent to this opinion contending that "the 'policy' of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air."[18] Justice Frankfurter's dissent reveals the concern that the Supreme Court was reaching beyond legislative intent in deciding these cases, stretching the language of the FLSA to support its proffered view. Despite Frankfurter's admonitions, thirty-five years after *Gangi*, the Supreme Court again asserted that "FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate."[19] By this time, the prohibition against contravening FLSA policies via contract was well-engrained in decades of jurisprudence.

Thus, in 1982, when the Eleventh Circuit Court of Appeals was tasked with deciphering if an FLSA settlement agreement involving a bona fide dispute regarding whether back wages were owed was subject to judicial scrutiny, a body of judicially constructed policies and precedent laid at its fingertips.[20] In *Lynn's Food*, a Department of Labor ("DOL") investigation revealed that Lynn's Food Stores, Inc. ("Lynn's") violated FLSA requirements including its overtime, minimum wage, and record-keeping provisions.[21] Consequently, the DOL found Lynn's liable for both back wages and liquidated damages.[22] After failed negotiation attempts with the DOL, Lynn's attempted to negotiate directly with its employees.[23] Fourteen employees agreed to settle directly with Lynn's for a *pro rata* share of $1000.00 (which was offered as compensation for an estimated $10,000.00 of unpaid back wages).[24] The DOL proceeded to bring suit against Lynn's, claiming the settlement agreement was void, and Lynn's filed an action for declaratory relief seeking to have the settlement agreement declared enforceable.[25] The district court found that the settlement agreement violated the policies and provisions of the FLSA, and the Eleventh Circuit affirmed.[26]

In analyzing the enforceability of Lynn's settlement, the Eleventh Circuit relied on the same policies that Judge Frankfurter decades before described as being pulled "out of the air," in his dissent in *Gangi*,[27] and were originally construed through judicial overreaching by the majority

---

[16] D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–15, 66 S. Ct. 925, 928–29, 90 L. Ed. 1114 (1946).
[17] *Id.* at 115.
[18] *Id.* at 121-122 ("Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress") (joined in this dissent by Justice Burton).
[19] Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740, 101 S. Ct. 1437, 1445, 67 L. Ed. 2d 641 (1981).
[20] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).
[21] *Id.* at 1352.
[22] *Id.*
[23] Id.
[24] *Id.*
[25] *Id.* at 1351-1352.
[26] *Id.*
[27] D.A. Schulte, Inc., v. Gangi, 328 U.S. 108, 121-122.

in *Brooklyn Savings Bank*.[28] In particular, the Eleventh Circuit reiterated that because "there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees."[29] Further, by an overly stringent reading of 29 U.S.C. §216, the Eleventh Circuit narrowly carved out only two methods by which settlement for back wages can be achieved under the FLSA.[30] The Eleventh Circuit concluded that parties may only settle FLSA back wages claims (i) under the supervision of the Secretary of Labor, or (ii) under the scrutiny and supervision of the courts.[31] Yet nowhere in the text of 29 U.S.C. §216, which the Eleventh Circuit cites in support of these exclusive methods of settling FLSA disputes, does the language expressly suggest that private parties cannot settle FLSA disputes without the paternalistic overstepping of the government into private contractual affairs, nor does the statute expressly require a court to scrutinize stipulated settlements brought before it.[32] Nevertheless, the Eleventh Circuit held that "to approve an 'agreement' between an employer and employees outside of the adversarial context of a lawsuit brought by the employees would be in clear derogation of the letter and spirit of the FLSA."[33] Accordingly, because Lynn's agreement was neither supervised by the Secretary of Labor nor was it devised in the context of judicial oversight, the Eleventh Circuit refused to approve it.[34] The decision in *Lynn's Food* reached beyond former Supreme Court jurisprudence to prohibit an employer and FLSA covered employee from negotiating a settlement regarding a bona fide dispute over back wages without court or DOL supervision.

Although the invalidation of the settlement agreement between Lynn's and its employees, under these unique factual circumstances, was the correct outcome, the reasoning for that outcome is based in policies, albeit noble and worthwhile policies, that were judicially imposed, and not spurring from express legislative intent or express prohibitions by the Supreme Court. The Eleventh Circuit instead reviewed a transcript submitted by the employer of the settlement negotiations, and found the transcript to reflect a "virtual catalogue" of the kinds of insidious employer tactics that the FLSA was created to prevent.[35] The transcript was submitted to show the employees were not pressured into the agreement, but (ironically) the Court found, to the contrary, that the transcript revealed that Lynn's representative implied that back wages were not really due to the employees; said that if wages were due, they would be much less than the DOL suggested; said that most people who received back wages from the DOL returned the wages to the employer (suggesting that only "malcontents" would keep their employer's money); and transcripts also

[28] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704-710.
[29] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352 (11th Cir. 1982) (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697)
[30] *Id*. at 1352-1353.
[31] *Id*.
[32] For these propositions, the court cites to 29 U.S.C. §216(b) and 29 U.S.C. §216(c), which create rights to file in state or federal court, or with the Secretary of Labor for violations of the FLSA. These provisions do contain mandatory language for clear and unambiguous violations of the FLSA, but contain no language regarding judicial supervision of unclear or potential violations of the FLSA.
[33] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1354.
[34] *Id.* at 1355. (The Eleventh Circuit concludes that: "Other than a section 216(c) payment supervised by the Department of Labor, there is only one context in which compromises of FLSA back wage or liquidated damage claims may be allowed: a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable resolution [sic] of a bona fide dispute over FLSA provisions").
[35] *Id*. at 1354.

revealed that employees who expressed discontent with the amount offered were not given the opportunity to say so.[36] The content of the transcript convinced the Eleventh Circuit "of the necessity of a rule to prohibit such invidious practices."[37] Consequently, the Eleventh Circuit declared that settlement agreements between an employer and a FLSA covered employee involving back wages must be supervised by the DOL or a court. The invidious practices reflected in the transcript, however, could have given rise to a variety of defenses to the enforcement of a contract, including the potential for duress, fraudulent misrepresentation, or unconscionability. Any of these traditional common law doctrines could have been utilized to void the settlement agreement between the employer and employees without mandating the judicial supervision of all bona fide disputes over FLSA back wages settlement agreements.

II. The Aftermath of *Lynn's Food*

Following the 1982 decision of *Lynn's Food*, courts in the Eleventh Circuit and across the country struggled to decipher the amorphous contours of a fair and reasonable, judicially approvable settlement. The language in *Lynn's Food* that indicates when a settlement should be approved by a district court is ominously vague, including concepts such as a "reasonable compromise" of a "bona fide dispute" which may be approved "to promote the policy of encouraging settlement of litigation."[38] This vague language led to many lower courts devising a variety of tests to determine if settlement agreements resolving bona fide disputes over back wages should be approved.

Through the 1980s, most references to the *Lynn's Food* decision involved questions of its applicability to unique circumstances.[39] By 1991, however, the Alaska Supreme Court utilized the

---

[36] *Id.* at 1354-1355.

[37] *Id.* at 1355.

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

[39] Black v. Standard Oil Co., No. C83-220, 1983 WL 131195, at *3 (N.D. Ohio Oct. 8, 1983) (finding the situation in this case not analogous to Lynn's because the DOL did sufficiently supervise the settlement); Barker v. Billo, No. 82-C-1548, 1984 WL 3171, at *6–7 (E.D. Wis. May 1, 1984) (accepting a check from employer in partial payment of unpaid wages does not constitute a waiver of FLSA rights); Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) ("Ordinarily there would be no need for a statute allowing settlement of a dispute between employer and employees—people may resolve their own affairs, and an accord and satisfaction bars a later suit. Yet the Fair Labor Standards Act is designed to prevent consenting adults from transacting about minimum wages and overtime pay. Once the Act makes it impossible to agree on the amount of pay, it is necessary to ban private settlements of disputes about pay. Otherwise the parties' ability to settle disputes would allow them to establish sub-minimum wages. Courts therefore have refused to enforce wholly private settlements…Yet a prohibition of settlement ensures costly litigation, even though the parties might be able to compromise their dispute without subverting the principles of the statute. Section 16(c) creates the possibility of a settlement, supervised by the Secretary to prevent subversion, yet effective to keep out of court disputes that can be compromised honestly"); Cedotal v. Forti, 516 So. 2d 405, 410 (La. Ct. App. 1987) (relying on Lynn's when deciding that a waiver not signed in the context of a lawsuit does not waive an action by the employee against the employer, and that the use of DOL forms in effectuating the waiver did

reasoning of *Lynn's Food* to require the supervision of liquidated damages claims arising under its state laws.[40] As in *Lynn's Food*, the Alaska Supreme Court examined the policies behind the Alaska Wage and Hour Act (AWHA), in deciding that private settlements of AWHA liquidated damages claims are void as against public policy.[41] Unlike *Lynn's Food*, however, the Alaska Supreme Court acknowledged that the liquidated damages provisions were intended to promote the policy of punishing employers for violating the law.[42] This policy is in distinct opposition to the policy for liquidated damages articulated in *Brooklyn Savings Bank*, which is to compensate injured employees for those losses that are not easily quantifiable.[43] Despite the conflicting policies, the end result was the same: the mandated judicial supervision of wage and hour settlement agreements.

The Court of Appeals of Utah soon after followed the reasoning of *Lynn's Food* to conclude that a private waiver of FLSA rights was void.[44] Specifically, the Court held that "waivers of FLSA rights which are neither administratively supervised nor judicially approved are not enforceable to bar a cause of action for unpaid overtime compensation. Such waivers are against public policy and are unenforceable as a matter of law."[45] Thus, the progeny of *Lynn's Food* continued to bar private settlements of FLSA claims,[46] but little guidance was then available to instruct lower courts as to when a judicially supervised settlement of a bona fide dispute over back wages should be approved.

Through the 1990s and the 2000s, courts across the country continued to struggle to decipher the contours of a fair and reasonable settlement as per *Lynn's Food*'s vague instructions. Through this time-period, courts saw a substantial uptick in the number of FLSA claims filed in court, a trend that continued into the subsequent decades.[47] As the case load increased, more and

---

not constitute supervision by the Secretary of Labor). See also Gormin v. Brown-Forman Corp., 744 F. Supp. 1100, 1107 (M.D. Fla. 1990), rev'd, 963 F.2d 323 (11th Cir. 1992) (the district court relied on Lynn in holding unsupervised ADEA waivers invalid, but the Eleventh Circuit reversed holding them not per se invalid).

[40] McKeown v. Kinney Shoe Corp., 820 P.2d 1068, 1071 (Alaska 1991) ("permitting private settlement of liquidated damages claims under the AWHA is contrary to the strong policy behind the AWHA and its liquidated damages provisions").

[41] *Id.*

[42] *Id.* at 1070-1071.

[43] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707, 65 S. Ct. 895, 902, 89 L. Ed. 1296 (1945) ("the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages") (citing Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942)).

[44] Druffner v. Mrs. Fields, Inc., 828 P.2d 1075 (Utah Ct. App. 1992).

[45] *Id.* at 1080.

[46] Hampton v. Am. Plumbing & Sewer, Inc., No. 95 C 1836, 1996 WL 3966, at *1 (N.D. Ill. Jan. 3, 1996), aff'd, 95 F.3d 1154 (7th Cir. 1996) (In this case, an employer alleged that he called the employee after the FLSA lawsuit was filed and they agreed the suit would be dropped in exchange for the employer forgiving money the employee allegedly owed him. As a result, the employer did not respond to the complaint, and the employee attained a default judgment. The employer could not vacate the default judgment on the basis of his purported defense of waiver because it was not a meritorious defense because private settlements of FLSA claims are not enforceable).

[47] Seyfarth Shaw LLP, *FLSA Cases 1990, 1993-1999, 2000-2014, Graph Based on Federal Judicial Caseload Statistics*, available at: http://www.wagehourlitigation.com/wp-content/uploads/sites/215/2014/05/FLSA-Cases-20141.pdf (last visited March 14, 2017) (showing fairly consistent, year-over-year increases in the numbers of FLSA court cases from the early 1990s to 2014 with a significant jump in filings circa 2003 and beyond). See also Andrew R. McClure, *Number of New FLSA Lawsuits Filed Each Year Continues to Rise*, ABA LITIGATION NEWS, available at: https://apps.americanbar.org/litigation/litigationnews/top_stories/101410-rise-in-flsa-employment-and-labor.html (last visited March 14, 2017) (utilizing the PACER statistics to show increasing numbers of FLSA lawsuits); and Seyfarth Shaw LLP, *Another Year, Another All Time High for Wage and Hour Litigation*, available at:

more courts grappled with the ambiguous language left by the *Lynn's Food* decision, which led to courts devising *ad hoc* and inconsistent rules for analyzing FLSA settlement agreements. As the case law developed, albeit inconsistently across the nation, four aspects of a settlement agreement became the key areas of scrutiny in the approval of FLSA back wages settlements for FLSA covered employees: (i) the existence of a bona fide dispute, (ii) the reasonableness and fairness of the settlement to the employee, (iii) the potential the settlement will frustrate the implementation of the FLSA in the workplace, and (iv) the reasonableness of attorney's fees and costs.

A. The Existence of a Bona Fide Dispute

A court approval of a settlement agreement for FLSA back wages that does not include a provision mandating a payment of the full amount of wages and liquidated damages, must be the result of a bona fide dispute over whether those back wages are owed. This requirement arises directly from the mandatory language of 29 U.S.C. §216, which requires employers to pay the full amount of back wages owed and liquidated damages to injured employees.[48] Consequently, a bona fide dispute may involve either (i) a dispute over whether any back wages are owed to FLSA covered employees, or (ii) a dispute over the amount of back wages that are owed to FLSA covered employees.[49] Although *Brooklyn Savings Bank* left this question open, in *Gangi* the Supreme Court answered it, in part, by holding that private settlements that resolve the issue of whether employees are covered by the FLSA are impermissible, but the court did not resolve the related question of whether private settlements of bona fide disputes between an employer and a FLSA covered employee are permissible without court or DOL supervision.[50] The Eleventh Circuit answered this question in *Lynn's Food* by holding that such settlements of such bona fide disputes must be supervised by a court.[51] However, *Lynn's Food* did not define a "bona fide" dispute. Thus, district courts across the country were left to determine on their own when a dispute was bona fide.

An employer that challenges liability or the amount of liability under the FLSA simply to attempt to avoid payment to an employee does create a dispute, but not a bona fide dispute. A "bona fide" dispute is a disagreement that is genuine, legitimate, and made in good faith; it is not merely the by-product of an employer trying to skirt well-established laws or insincerely reduce the money it owes its employees.[52] According to the Eastern District of Pennsylvania, "In essence, for a bona fide dispute to exist, the dispute must fall within the contours of the FLSA and there

---

http://www.wagehourlitigation.com/overtime/another-year-another-high/ (last visited March 14, 2017) (showing the increase in claims from 2000 to 2015).

[48] 29 U.S.C. §216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title *shall* be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages") (emphasis added).

[49] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704, n. 12 (1945) (in referencing that there was no bona fide dispute, the court noted that "there was no discussion or dispute…either as to the existence of liability under the Act or as to the amount of such liability"). See also Kraus v. PA Fit II, 155 F.Supp.3d 516, 530, 2016 WL 125270, at *10 (E.D.Pa. Jan. 11, 2016) ("In essence, for a bona fide dispute to exist, the dispute must fall within the contours of the FLSA and there must be evidence of the defendant's intent to reject or actual rejection of that claim when it is presented").

[50] D.A. Schulte, Inc., v. Gangi, 328 U.S. 108, 114–15, 66 S. Ct. 925, 928–29, 90 L. Ed. 1114 (1946)

[51] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352 (11th Cir. 1982).

[52] See e.g. *Merriam-Webster*, available at: https://www.merriam-webster.com/dictionary/bona%20fide (The plain English definition of "bona fide" includes: 1. *"*made in good faith without fraud or deceit*" 2*. "made with earnest intent: sincere*"; 3*. "neither specious nor counterfeit: genuine*").*

must be evidence of the defendant's intent to reject or actual rejection of that claim when it is presented."[53] Thus, there must be some legitimate controversy over whether money is owed or the amount of money owed (that does not relate to whether the employee is covered by the FLSA) in order for a dispute to be bona fide.

In *Martinez*, the Western District of Texas began to move away from the holding in *Lynn's Food*. After an exhaustive analysis of the statutory and case history of the issue, the *Martinez* court diverged from the majority in deciding that "parties may reach private compromises as to FLSA claims where there is a bona fide dispute as to the amount of hours worked or compensation due. A release of a party's rights under the FLSA is enforceable under such circumstances."[54] In *Martinez*, the defendants provided a means of calculating the amount of money owed the plaintiff, and deemed that amount at a little over $500, yet plaintiff claimed that he was owed over $3000 in unpaid overtime compensation.[55] The parties settled the disagreement, without court or DOL supervision, for $1000.[56] The disagreement as to the amount owed was enough for the *Martinez* court to deem the dispute as bona fide, and thus enforce the settlement agreement.[57] The private settlement that was agreed to without DOL supervision and outside the boundaries of litigation was deemed enforceable in *Martinez* because it was the product of a bona fide dispute, and did not otherwise contravene the FLSA.

Following *Martinez*, some attorneys attempted to argue that their private FLSA settlements no longer required court approval. In *Dees*, the Middle District of Florida had to grapple with the progeny of *Martinez* in light of *Lynn's Food*. It commented that "Although leaving the definition of "bona fide dispute" unstated, *Martinez* decides that only a "bona fide dispute" under the FLSA is subject to private compromise and that, apparently, a category of non-"bona fide" FLSA disputes requires approval by the Department of Labor or the district court."[58] The *Dees* court went on to say that "On the other hand, *Lynn's Food* requires approval of each FLSA compromise, regardless of the issue that underlies the compromise. In practice, leaving an FLSA settlement to wholly private resolution conduces inevitably to mischief."[59] The *Dees* court rejected the reasoning of *Martinez* calling it "dicey"[60] and adopted the requirement per *Lynn's Food* that FLSA settlement agreements require either DOL or court supervision. In so doing, the District Court acknowledged a truism which remains today, namely, that "an employer undertakes the private resolution of an FLSA dispute at his peril."[61]

In 2012, thirty years after the monumental *Lynn's Food* decision, the Fifth Circuit Court of Appeals approved the reasoning of *Martinez*, thus creating a split in the circuits as to the requirement of judicial approval of bona fide disputes involving FLSA back wages.[62] In *Martin v. Spring Break '83 Prods., L.L.C.*, a union negotiated compensation for alleged monies not paid

---

[53] Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 530 (E.D. Pa. 2016) (although the Third Circuit has not explicitly addressed whether *Lynn's Food* applies in its circuit, many district courts in this circuit nevertheless apply the *Lynn's Food* framework). See also Mabry v. Hildebrandt, No. CV 14-5525, 2015 WL 5025810, at *1 (E.D. Pa. Aug. 24, 2015) (while stating that "it is unsettled in the Third Circuit whether a district court needs to approve a private FLSA settlement," this court joins the majority of district courts in the Third Circuit by utilizing Lynn's framework).

[54] Martinez v. Bohls Bearing Equip. Co., 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005).

[55] *Id.* at 631-632.

[56] *Id.* at 612.

[57] *Id.* at 632.

[58] Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1236 (M.D. Fla. 2010).

[59] *Id.* at 1236-1237.

[60] *Id.* at 1237.

[61] *Id.*

[62] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 249 (5th Cir. 2012).

to film set workers. In deciding that settlement agreement enforceable, the Fifth Circuit concluded that bona fide disputes over wages can be privately settled without court supervision. It determined this dispute bona fide because there was disagreement about the number of hours owed, the rate of pay, and proof-issues relating to whether the workers had worked on the days they alleged.[63] The Fifth Circuit not only applied the rationale of *Martinez* but also relied on its 1976 decision holding private settlement agreements that give the employee everything they are entitled to under the FLSA, as enforceable.[64] The union and defendants had agreed in their settlement agreement that the amount paid was the amount owed.[65] Thus, *Martin*, in its adoption of the *Martinez* reasoning, provided an alternative to the traditional *Lynn's Food* approach.[66]

The district courts, whether adopting the *Lynn's Food* standard or the more lenient standard of *Martin* must regardless require evidence that a dispute is bona fide, and that a plaintiff is not just waiving FLSA rights through settlement.[67] In *Archer*, for example, the Eastern District of New York refused to approve a FLSA settlement agreement because the parties had not submitted evidence of a bona fide dispute.[68] Even though the settlement agreement was reached during litigation and the employees had counsel, there was no evidence of a bona fide dispute, and so the judge refused to approve the settlement.[69] The court clearly articulated that even under the *Martin* standard, there must still be evidence of a bona fide dispute.[70] However, leave was granted to file the settlement agreement and a memorandum of law in support of the approval of the settlement.[71] In *Carillo*, on the other hand, the DC District Court determined a dispute was bona fide because there was dispute over: "(1) the accuracy of the plaintiffs' time slips maintained by the defendants; (2) whether travel between work sites during the work day was reasonably compensable; and (3) the amount of money, if any, "advanced" to the plaintiffs that is not reflected on their time slips."[72] These factors were sufficient for the court to deem the dispute bona fide and not a mere waiver of

---

[63] *Id.* at 255.

[64] *Id.* at 255-256. See Thomas v. State of La., 534 F.2d 613, 615 (5th Cir. 1976) ("Settlement agreements have always been a favored means of resolving disputes. When fairly arrived at and properly entered into, they are generally viewed as binding, final, and as conclusive of rights as a judgment. We see no reason here to depart from the general rule. There is no problem of disproportionate bargaining power when a settlement gives employees everything to which they are entitled under the FLSA at the time the agreement is reached. Thus, the agreement is enforceable [sic], and the lower court erred in setting it aside") (footnotes omitted).

[65] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 256 (5th Cir. 2012)

[66] See Fernandez v. A–1 Duran Roofing, Inc., 2013 WL 684736, at *1 (S.D.Fla. Feb. 25, 2013) (approval is not necessary where "both Parties were represented by counsel and therefore negotiated a settlement ... in an adversarial proceeding"); Picerni v. Bilingual Seit & Preschool Inc., 925 F.Supp.2d 368, 371–73, 2013 WL 646649, at *4–5 (E.D.N.Y. Feb. 22, 2013); Smith v. Tri–City Transmission Serv., 2012 U.S. Dist. LEXIS 119428, at *3 (D.Ariz. Aug. 23, 2012) ("It is no longer clear that a settlement of FLSA claims must be approved by the court to be binding...."); and Lliguichuzhca v. Cinema 60, LLC, 948 F. Supp. 2d 362, 364 (S.D.N.Y. 2013) ("it is not clear that judicial approval of an FLSA settlement is legally required"). Note, however, that these New York cases were decided before Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016) (discussed *infra*).

[67] See also Sarceno v. Choi, 66 F. Supp. 3d 157, 170 (D.D.C. 2014) ("The Court concurs with the reasoning of the Fifth Circuit in *Martin* that a private settlement of FLSA claims may be enforceable, even if the settlement was reached without United States Department of Labor or judicial supervision or approval, but only when the agreement resolves a bona fide dispute between the parties and the terms of the settlement are fair and reasonable").

[68] Archer v. TNT USA, Inc., 12 F. Supp. 3d 373, 386–87 (E.D.N.Y. 2014).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 387.

[72] Carrillo v. Dandan Inc., 51 F. Supp. 3d 124, 133 (D.D.C. 2014).

statutory rights.[73] Similarly, in *Kraus*, the plaintiff, a personal trainer, alleged that she was not paid overtime for working over forty hours a week and she was also not paid for her time assessing potential clients who ultimately chose not to hire her.[74] The case settled without the defendants explicitly denying her allegations, and so the court examined evidence proffered by the plaintiff to determine if there was a bona fide dispute.[75] The court described the issue of a bona fide dispute as one that was "not obvious," but found evidence of denial in (i) the defendant's answer filed in a related wage discrimination administrative hearing, and (ii) the terms of the settlement agreement itself.[76] Accordingly, the court deemed the dispute a bona fide one.[77] The preliminary determination of a bona fide dispute is necessary to ensure that the statutory rights of the FLSA are not abrogated through an insincere dispute and consequent settlement of back wages claims.[78] The district court must make the initial determination about whether a dispute is bona fide before approving a settlement agreement, and only if bona fide, if applying the majority rule of *Lynn's Food*, should a court go on to analyze the reasonableness and fairness of the agreement.[79]

B. The Reasonableness and Fairness of the Settlement to the Employee

The amorphous concept of "reasonableness" has stumped the finest of judicial minds for centuries. After all, as the Arkansas Supreme Court recognized, "It is common knowledge that sometimes human actions and reactions defy logical explanations."[80] In line with the complexities of human rationality, a complex and diverse body of case law exists across the district courts that addresses the reasonableness (and/or fairness) of FLSA settlement agreements. The aim of this body of law is to ensure that the more vulnerable employee-party to the agreement is not taken

---

[73] *Id.*

[74] Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 530

[75] *Id.* at 530-531.

[76] *Id.* (the court found that the combination of (i) the defendants' contentions that the plaintiff-Kraus was paid more than other personal trainers in the administrative hearing, and (ii) the statement in the settlement agreement that "Defendants believe they acted lawfully and properly at all times and in all respects and specifically deny any and all liability for the claims alleged by Kraus, but desire to avoid further legal fees and expenses that necessarily will result from prolonged litigation," to be sufficient evidence for a finding that the dispute was bona fide).

[77] *Id.*

[78] See also Nall v. Mal-Motels, Inc., 723 F.3d 1304, 1307 (11th Cir. 2013) (The Eleventh Circuit confirmed that "the rule of *Lynn's Food* applies to settlements between former employees and employers"); Silva v. Miller, 307 F. App'x 349, 351 (11th Cir. 2009) (the Eleventh Circuit declined to consider what level of judicial oversight applies when there is full satisfaction of a FLSA claim made, because, in this case, the settlement involved attorney's fees to be deducted from the settlement, and so the claim was compromised, and not full satisfaction under the FLSA); Niland v. Delta Recycling Corp., 377 F.3d 1244, 1248 (11th Cir. 2004) (confirming that when the DOL adequately supervises a settlement, judicial supervision is not needed); Rodrigues v. CNP of Sanctuary, LLC., 523 F. App'x 628 (11th Cir. 2013) (the Eleventh Circuit denied interlocutory review requesting clarification of standards of fairness relating to scrutiny of FLSA settlement agreements, and particularly non-monetary provisions).

[79] See also Melgar Morataya v. Nancy's Kitchen of Silver Spring, Inc., No. GJH-13-01888, 2016 WL 2990720, at *5 (D. Md. May 20, 2016) (although not in the context of settlement approval, the court decided that a lack of good faith on the part of the employer in failing to adequately attempt to calculate payment amounts in accordance with the requirements of the FLSA, resulted in a finding that the dispute was not bona fide.); Rogers v. Sav. First Mortg., LLC, 362 F. Supp. 2d 624, 638 (D. Md. 2005) ("where a question is complex or uncertain, an employer at the least must show that it made a diligent investigation into the issues and concluded not to pay overtime based upon the results of its investigation"); and Wright v. Carrigg, 275 F.2d 448, 449 (4th Cir. 1960) ("plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict").

[80] United Steelworkers of Am. v. Walden, 228 Ark. 1024, 1029, 311 S.W.2d 787, 790 (1958).

advantage of by the more powerful employer-party when compromising a settlement. This is assured by judicial scrutiny of the terms of the settlement agreement – at a minimum, settlement agreements involving a compromise over a bona fide dispute involving back wages claims must be reasonable to the employee. The frameworks for deciphering reasonableness and associated applications of those frameworks are varied, yet three generalized approaches present across the circuits: (1) multi-factored tests, (2) totality of the circumstances tests, and (3) relevant circumstances tests.

1. Multi-factored Tests

Many of the FLSA multi-factored tests are rooted in tests adopted by courts to examine the fairness or reasonableness of class or collective action settlements.[81] In single or multi-plaintiff cases, the multi-factored tests employed in class or collective actions are often modified by district courts for the purposes of analyzing single or multi-plaintiff settlement agreements. District courts in the Second and Third Circuits regularly utilize modified renditions of the class action factors which eliminate the factors not relevant to non-class or collective cases. In the Third Circuit, the factors arise under *Girsh*,[82] and are:

> 1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (6) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in the light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[83]

These nine factors are often utilized by courts in the Third Circuit to analyze the reasonableness of FLSA settlement agreements.[84] However, some district courts in the Third Circuit have expressed a distaste for mechanically applying these nine factors in the single plaintiff context because some of the factors are irrelevant.[85] As a result, some district courts within the Third Circuit apply a version of the relevant circumstances test to decipher whether FLSA settlement agreements are reasonable.[86]

Many courts utilize a six-factored test, which are often applied to decipher the reasonableness of class action settlements under FRCP 23(e)(2):

---

[81] The distinction between class and collective actions under the FLSA arises pursuant to 29 U.S.C. §216(b) (collective actions) and FRCP 23 (class actions). In either case, employees must receive certification. For more on this topic, see Sam J. Smith & Christine M. Jalbert, *Certification – 216(b) Collective Actions v. Rule 23 Class Actions & Enterprise Coverage under the FLSA*, ABA SECTION OF EMPLOYMENT & LABOR LAW: WAGE & HOUR BOOTCAMP, available at: http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/084.authcheckdam.pdf

[82] Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir.1975).

[83] *Id.* at 156-57.

[84] Brumley v. Camin Cargo Control, Inc., Nos. 08–1798, 10–2461, 09–6128, 2012 WL 1019337, at *4–5 (D.N.J. Mar. 26, 2012).

[85] Howard v. Phila. Hous. Auth., No. 15-4462, 2016 WL 3878175, at *2 n.1 (E.D. Pa. July 18, 2016) ("[t]hus, [e]ven though Girsh may suggest the type of factors to be considered in assessing a private FLSA settlement, courts need not fall into the alluring trap of mechanically applying Girsh simply because it is the court's duty to assess whether the proposed agreement is fair and reasonable") (internal quotation marks and citation omitted).

[86] *Id.* (the relevant circumstances tests are discussed *infra*, section II(B)(3)).

> (1) the existence of collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of counsel.[87]

Courts are already devising a variety of multi-factored tests to utilize to decipher the reasonableness of FLSA settlement agreements.

2. Totality of the Circumstances Tests

Some district courts within the Second Circuit similarly enunciate a list of factors that are relevant to the reasonableness or fairness of the settlement agreement. In the aftermath of *Cheeks*, a 2015 Second Circuit decision which effectively required parties to seek judicial or DOL approval of bona fide disputes over back wages, significant uncertainty arose regarding the enforceability of settlement agreements.[88] Consequently, many district courts in the Second Circuit have since used the *Wolinsky* factors to decipher the fairness of FLSA settlements.[89] *Wolinsky*, although technically a "totality of the circumstances test" analyzes a list of factors, known as the *Grinnel* factors which are almost identical to those found in *Girsh*.[90] *Wolinsky* also incorporates other factors, and in particular *Wolinsky* instructed that:

> In determining whether the proposed settlement is fair and reasonable, a court should consider the totality of circumstances, including but not limited to the following factors: (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.[91]

Wolinksy clearly provides that these factors are not exclusive, but instead that all relevant circumstances should be considered.[92] *Wolinsky* thus provides something of a hybrid of a multi-factored test and a totality of the circumstances test because it lists key factors yet indicates that the totality of circumstances should be considered.

---

[87] See, e.g., Velez v. Audio Excellence, Inc., No. 10–CV–1448–ORL–22, 2011 WL 4460110, at *1 (M.D.Fla. Sept. 21, 2011); Camp v. City of Pelham, No. 10–cv–1270, 2014 WL 1764919, at *3 (N.D.Ala. May 1, 2014); Dees v. Hydradry, Inc., 706 F.Supp.2d 1227, 1241 (M.D.Fla.2010); Lomascolo v. Parsons Brinckerhoff, Inc., No. 08–1310, 2009 WL 3094955, at *10 (E.D.Va. Sept. 28, 2009). See also Carrillo v. Dandan Inc., 51 F. Supp. 3d 124, 132 (D.D.C. 2014).

[88] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016) (discussed *infra* Section III).

[89] Wolinsky v. Scholastic, 900 F.Supp.2d 332, 334 (S.D.N.Y. 2012).

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

[91] Wolinsky v. Scholastic Inc., 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012) (internal citations and quotations omitted).

[92] *Id.*

Although *Wolinksy* provides some guidance as to what circumstances should be considered in a totality of the circumstances analysis, and the *Girsh* factors too provide guidance, some courts take a more liberal approach to the totality of the circumstances, generally identifying in a non-mechanical way the relevant considerations, if any, regarding the reasonableness of the FLSA settlement agreement. The DC District Court, for example, examined both the multi-factored approach to deciphering fairness and reasonableness, and the totality of the circumstances approach, and opted to utilize the totality of the circumstances approach because the "flexibility in this approach gives courts the ability to examine a settlement globally, rather than adhering to a list of enumerated factors compiled to effectuate another regime and designed to protect absent members of a class."[93] In deciphering reasonableness, however, and in consideration of the totality of the circumstances, the DC District Court analyzed, among other things, if the settlement was the result of the employer's overreaching, if it was a product of arm's length negotiations between counsel, and whether there were any "serious impediments" to the plaintiff's ability to collect the judgment.[94] These factors, however, are just a starting point, and not an end point, to the analysis of whether a FLSA settlement is fair and reasonable.

3. Relevant Circumstances Tests

The relevant circumstances test is a variation upon the totality of the circumstances test insofar as it suggests that any circumstances that are relevant to the fairness and reasonableness of the agreement should be considered. However, unlike the totality of the circumstances test, this test does not include an enunciation of factors for consideration. At least one district court sitting in the Third Circuit has adopted this test through an order signed on January 11, 2016, the exact same day that the Supreme Court denied certiorari in *Cheeks*.[95] On this day, the Eastern District of Pennsylvania signed an order requiring the judicial approval of FLSA settlement agreements through a test that is still developing in its jurisprudence.[96] The Eastern District of Pennsylvania explicitly rejects the mechanical application of the multi-factored tests, such as those found in *Girsh*,[97] and instead focuses its inquiry on whatever may be relevant to the instant case.[98] Some such relevant considerations include whether the compensation terms are "significant," whether representing counsel understands the merits and risks of the case, and the "balancing the likelihood of success against the benefit of a certain settlement."[99] In essence, the relevant circumstances test identifies those factors that are relevant to the particular settlement, and analyzes them without mechanically considering all factors of a multi-factored test.

---

[93] Carrillo v. Dandan Inc., 51 F. Supp. 3d 124, 133 (D.D.C. 2014).
[94] *Id.* at 132-135.
[95] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016).
[96] Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516 (E.D. Pa. 2016).
[97] Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir.1975). See Howard v. Philadelphia Hous. Auth., 197 F. Supp. 3d 773, 777 (E.D. Pa. 2016) ("Thus, '[e]ven though Girsh may suggest the type of factors to be considered in assessing a private FLSA settlement, courts need not fall into the alluring trap of mechanically applying Girsh simply because it is the court's duty to assess whether the proposed agreement is fair and reasonable'") (quoting Kraus v. PA Fit II, LLC, 155 F.Supp.3d 516, 523 n. 3, 2016 WL 125270, at *4 n. 3 (E.D.Pa. Jan. 11, 2016)).
[98] Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516 (E.D. Pa. 2016).
[99] Howard v. Philadelphia Hous. Auth., 197 F. Supp. 3d 773, 778 (E.D. Pa. 2016) ("Here, the Court finds that the compensation terms are fair and reasonable because the settlement amount is significant in light of Plaintiff's claim.")

Some district courts sitting in the Sixth Circuit similarly apply a relevant circumstances test to decipher the fairness and reasonableness of FLSA settlement agreements.[100] Of these circumstances, some courts have given significant credence to the representations of counsel involved in the litigation, because they have a unique understanding of the complexities and merits of the case.[101] As in the Eastern District of Pennsylvania, these district courts typically identify the relevant factors from a pre-existing multi-factored tests, and only apply those factors pertinent to the case at hand.

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

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

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

Courts regularly hold confidentiality provisions in FLSA settlement agreements to frustrate the purposes of the FLSA. The general rule is that FLSA settlement agreements cannot contain confidentiality provisions because a "confidentiality agreement, if enforced, (1) empowers an employer to retaliate against an employee for exercising FLSA rights, (2) effects a judicial confiscation of the employee's right to be free from retaliation for asserting FLSA rights, and (3) transfers to the wronged employee a duty to pay his fellow employees for the FLSA wages unlawfully withheld by the employer. This unseemly prospect vividly displays the inherent impropriety of a confidentiality agreement in settlement of an FLSA dispute."[102] Although the general rule holds, some courts have allowed confidentiality provisions when such provisions are uniquely crafted. Thus, there are a few exceptions to the general rule that have developed in common law. For example, confidentiality agreements tailored to ensure that the employer has no means of retaliating against the employee for breaching the confidentiality provision have been held permissible.[103] Moreover, reasonably tailored non-disparagement clauses have been held not to frustrate the purposes of the FLSA.[104] In one case, a confidentiality provision was upheld when

---

[100] Gentrup v. Renovo Servs., LLC, No. 1:07CV430, 2011 WL 2532922, at *3 (S.D. Ohio June 24, 2011) ("The court may choose to consider only factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case"); Redington v. Goodyear Tire & Rubber Co., No. 5:07CV1999, 2008 WL 3981461, at *11 (N.D. Ohio Aug. 22, 2008) ("The Court may choose to consider only those factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case"). See also Granada Investments, Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992) ("Relevant factors framing our inquiry include the likelihood of success on the merits, the risk associated with the expense and complexity of litigation, and the objections raised by class member").

[101] Edwards v. City of Mansfield, No. 1:15-CV-959, 2016 WL 2853619, at *4 (N.D. Ohio May 16, 2016).

[102] Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1242 (M.D. Fla. 2010).

[103] Schwartz v. Pennsylvania State Univ., No. 4:15-CV-02176, 2017 WL 1386251, at *4–5 (M.D. Pa. Apr. 18, 2017);

[104] Mabry v. Hildebrandt, No. CV 14-5525, 2015 WL 5025810, at *3 (E.D. Pa. Aug. 24, 2015) ("the Court notes that the non-disparagement clause of the Settlement Agreement does not frustrate the purposes of the FLSA").

it only prohibited the plaintiff from discussing the case with the press and the media, while simultaneously leaving the agreement in public record and permitted the employee to discuss the agreement with other employees.[105] In other cases, settlement agreements are approved regardless of confidentiality provisions, and the court *sua sponte* severs the provision when approving the agreement.[106]

Releases of claims in FLSA settlement agreements are also often scrutinized by courts. Courts recurrently hold general releases of all claims to be impermissibly broad. FLSA settlement agreements should typically only provide for a release of the wage and hour claims at issue (e.g., FLSA claims and, when appropriate, any equivalent state law wage claims).[107] The narrow waiver of FLSA claims, however, cannot be prospective, but can only waive past claims.[108] In essence, the release of claims must only relate to past claims arising under the FLSA, within the scope of the instant lawsuit.

Aside from releases and confidentiality provisions, courts may examine other provisions or circumstances that may indicate that the purposes of the FLSA may be undermined. These circumstances may include whether this employer or this particular industry has a "history of noncompliance," or also if there are other "similarly situated" employees.[109] Additionally, some courts have further considered "whether there is a likelihood that the circumstances giving rise to this action will recur."[110] There is relatively broad discretion attributed to the district courts to scrutinize settlement agreements and the surrounding circumstances to ensure that the purposes of the FLSA are not contravened. Accordingly, there is no provision in a FLSA settlement agreement for back wages that is immune to the potential that it will delay or even undermine a proffered settlement.[111]

---

[105] In re Chickie's & Pete's Wage & Hour Litig., No. CIV.A. 12-6820, 2014 WL 911718, at *3 (E.D. Pa. Mar. 7, 2014). Cf. Mabry v. Hildebrandt, No. CV 14-5525, 2015 WL 5025810, at *2–3 (E.D. Pa. Aug. 24, 2015) (confidentiality provisions that allowed plaintiff to talk only with spouse about it held too extreme, even though not fully restrictive); Diclemente v. Adams Outdoor Advert., Inc., No. CV 3:15-0596, 2016 WL 3654462, at *4 (M.D. Pa. July 8, 2016) (finding the confidentiality provision permissible when it allowed communications with "spouse, significant other, immediate family, attorney, accountant and/or tax consultant, or as otherwise required by law" but the plaintiffs could also "disclose that this case has been resolved without referencing the terms of the agreement.")

[106] See e.g., Altenbach v. Lube Ctr., Inc., No. 1:08-CV-02178, 2013 WL 74251, at *3 (M.D. Pa. Jan. 4, 2013) (granting joint motion for approval of settlement agreement excepting the confidentiality provision because it frustrates the implementation of the FLSA in the workplace).

[107] See e.g. Howard v. Philadelphia Hous. Auth., 197 F. Supp. 3d 773, 779-780 (E.D. Pa. 2016); Kraus v. PA Fit II, LLC, 155 F.Supp.3d 516, 532-533, 2016 WL 125270 (E.D.Pa. Jan. 11, 2016).

[108] Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1243 (M.D. Fla. 2010).

[109] Sapp v. Linked Commc'ns, No. 3:12CV245/MCR/EMT, 2014 WL 1584491, at *1 (N.D. Fla. Mar. 13, 2014), report and recommendation adopted, No. 3:12CV245/MCR/EMT, 2014 WL 1584497 (N.D. Fla. Apr. 21, 2014).

[110] Herring v. Thunder Ridge Trucking & Filtration, Inc., No. 15-CV-00062-RM-KLM, 2016 WL 7868819, at *2 (D. Colo. May 24, 2016)

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

D. The Reasonableness of Attorneys' Fees and Costs

District courts regularly scrutinize settlement agreement provisions regarding attorneys' fees and costs. The FLSA contains a fee-shifting statute to ensure that a prevailing plaintiff is able to recover reasonable fees and certain costs.[112] What constitutes a reasonable attorney fee is regularly an issue of contention,[113] and this perennial concern is magnified in the context of FLSA settlements. District courts across the circuits utilize a variety of nuanced tests to decipher if attorney's fees are reasonable in the context of a specific case. Costs, however, are generally deemed to be those costs enumerated in 28 U.S.C. §1920.[114] Thus, while the determination of reasonable costs is typically governed by clear-cut rules, the determination of reasonable fees is governed by more flexible standards.

There are five major ways attorneys can charge clients fees: the percentage of recovery (contingency) fee, the lodestar fee, the hourly fee, the flat rate fee, or the hybrid fee (some combination of the preceding, such as part percentage and part hourly). Regardless of the agreement terms between the client and attorney, the fee must in all circumstances satisfy the reasonableness standards prevailing in the relevant jurisdiction. These reasonableness requirements must presumably be equivalent to or stricter than the reasonableness requirements of Model Rule of Professional Conduct 1.5 (or the state promulgated equivalent of this standard).[115]

The contingency fee is often utilized in FLSA and non-FLSA contexts. In non-FLSA employment law contexts, contingency fees that exceed a reasonable hourly rate are often permissible. For example, for claims brought pursuant to 42 U.S.C. §1988, the U.S. Supreme Court held that there is no per se ceiling on attorney compensation arising from that statute, and so that an attorney and client can contract for contingency fees that may exceed a reasonable hourly rate.[116] The Supreme Court explicitly held that "§1988 controls what the losing defendant must

---

[112] 29 U.S.C. §216 ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action").

[113] See generally Keith William Diener, *A Battle for Reason: The Unconscionable Attorney-Client Fee Agreement,* 2016 J. OF THE PROF. LAWYER 129 (2016).

[114] 28 U.S.C. §1920 provides that "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." See also *Mock v. Bell Helicopter Textron, Inc.,* 456 Fed. Appx. 799, 802 (11th Cir.2012) (finding that costs pursuant to 29 U.S.C. § 219(b) are those set forth in 28 U.S.C. § 1920) (citing *Glenn v. General Motors Corp.,* 841 F.2d 1567, 1575 (11th Cir.1988)); *Patel v. Shree Jalarm, Inc.,* No. CIV.A. 12-0224-KD-M, 2013 WL 5175949, at *7 (S.D. Ala. Sept. 13, 2013) (However, when the defendant agrees to pay costs in excess of those set forth in 28 U.S.C. §1920, then a court may find the costs reasonable "in consideration of the overall agreement by the parties and the amount sought").

[115] Model Rule of Professional Conduct 1.5 provides eight non-exclsive factors for considering the reasonableness of a fee:" (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." See also Keith William Diener, *A Battle for Reason: The Unconscionable Attorney-Client Fee Agreement,* 2016 J. OF THE PROF. LAWYER 129 (2016).

[116] Venegas v. Mitchell, 495 U.S. 82, 86-90 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990) (this includes claims arising under 42 U.S.C. §§1981, 1982, 1983, 1985, & 1986).

pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract."[117] Although §1988 itself does not limit a contingent fee, the state rules of professional conduct do place the outermost limits upon permissible fees arising under this statute.[118] Although outside of FLSA contexts, such contingency fee arrangements are often permissible, the FLSA places limits upon such contracting.

The freedom of an attorney and client to contract for contingency fees that exceed the reasonable fee award under the FLSA is limited. Courts that have considered the question have repeatedly held that prevailing plaintiffs should receive full compensation, including back wages and liquidated damages, without having to pay fees out of their recovery. To force the employee to pay attorneys' fees would undermine the purpose of the FLSA and Congressional intent.[119] The Eleventh Circuit has even taken this analysis a step further, concluding that contingency arrangements that are deducted from FLSA settlements create a claim that is compromised, and thus subject to judicial supervision.[120] In other words, for an injured employee to receive full compensation in accordance with the FLSA, the employee must not be forced to pay fees out of his statutorily mandated recovery, but instead the employer should pay the fees (over and above the payment of back wages and liquidated damages paid to the employee).

To decipher the reasonableness of a percentage of recovery method, some courts employ a multi-factored test. Some courts in the Third Circuit,[121] for example, apply the *Gunter* factors for common fund cases:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.[122]

---

[117] *Id.* at 90.

[118] See e.g., ABA Model Rule of Professional Conduct 1.5.

[119] Zegers v. Countrywide Mortg. Ventures, LLC, 569 F. Supp. 2d 1259, 1267 (M.D. Fla. 2008 ("Because the FLSA was intended to provide workers with the full compensation they are due under the law, requiring a plaintiff to pay his or her attorney a fee in addition to what the Court determines is a reasonable fee for the attorneys' services is contrary to Congressional intent"); Maddrix v. Dize, 153 F.2d 274, 275-76 (4th Cir.1946) ("[o]bviously Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs"); United Slate, Tile and Composition Roofers, Damp and Waterproof Workers, 732 F.2d 495, 502 (6th Cir.1984) (citing Maddrix approvingly); Skidmore v. John J. Casale, Inc., 160 F.2d 527, 531 (2d Cir.1947) ("We have considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that an employee's recovery should be net, and that therefore the lawyer's compensation should come solely from the employer"); Burke v. Mesta Mach. Co., 79 F.Supp. 588, 615 (W.D.Pa.1948) ("Any agreement between the plaintiffs and their counsel for an additional fee on a contingent basis, or any other understanding, would be contrary to the purpose of Congress to have the employee collect and return unpaid wages and liquidated damages").

[120] Silva v. Miller, 307 F. App'x 349, 351 (11th Cir. 2009) (the Eleventh Circuit declined to consider what level of judicial oversight applies when there is full satisfaction of a FLSA claim made, because, in this case, the settlement involved attorney's fees to be deducted from the settlement, and so the claim was compromised, and not full satisfaction under the FLSA).

[121] Crevatas v. Smith Mgmt. & Consulting, LLC, No. CV 3:15-2307, 2017 WL 1078174, at *5 (M.D. Pa. Mar. 22, 2017)

[122] Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir. 2000).

Although, the *Gunter* factors need not be "applied in a formulaic way" and, "[e]ach case is different, and in certain cases, one factor may outweigh the rest."[123] These are nonetheless some of the relevant factors that may be used to decipher the reasonableness of an attorney fee. In lieu of a percentage of recovery fee, some courts employ the lodestar method of calculating fees, or utilize the lodestar method as a cross-check upon a contingency-based fee award, although this cross-check is sometimes argued as outdated and inaccurate.[124] Regardless of the terms of the attorney-client fee agreement, a district court supervising a FLSA settlement must ensure that the fee is reasonable.

In summary, in the aftermath of *Lynn's Food*, the district courts across the circuits have devised a variety of approaches to deciphering the existence of a bona fide dispute, the reasonableness and fairness of settlements, whether a settlement agreement frustrates the implementation of the FLSA in the workplace, and whether attorneys' fees and costs are reasonable. The variety of methodologies utilized particularly to decipher the fairness and reasonableness of agreements has led to inconsistencies in the application of FLSA provisions, diminishing predictability as to the potential for enforcement of FLSA settlement agreements, and, disharmony in the application of the FLSA across the United States. Thus, in an attempt to ensure that one of the policies identified in *Brooklyn Savings Bank* is ensured, that is, the protection of the vulnerable employee population, courts have contravened another policy identified, namely, the "uniformity in the application of the provisions of the Act."[125] The next section discusses how these, and related policies have similarly played a role in creating a circuit court split.

III. The Circuit Court Split: Policies in Conflict

In framing the controversy over the requirement of judicial supervision of FLSA settlement agreements for back wages, one must be cautious not to over-extend the contours of the circuit court split or exaggerate its scope. The question left open by the U.S. Supreme Court is a narrow one. Although a narrow question, it is one with vast implications for FLSA practice, *viz*., whether private settlements of bona fide disputes for back wages between an employer and a FLSA covered employee are enforceable when reached without court or DOL supervision?[126] The Eleventh Circuit in *Lynn's Food* answered this question in the negative, holding that all FLSA settlements

---

[123] *Id*.

[124] Altnor v. Preferred Freezer Servs., Inc., 197 F. Supp. 3d 746, 766-767 (E.D. Pa. 2016). ("The lodestar crosscheck is performed by calculating the "lodestar multiplier," which is determined by dividing the requested fee award by the lodestar. To determine the lodestar method's suggested total, the court multiplies "the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services"") (internal citations omitted). See also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 563-568, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986), supplemented, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987).

[125] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 710, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

[126] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945("Our decision ... has not necessitated a determination of what limitation, if any, Section 16(b) of the [FLSA] places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement."); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–15, 66 S. Ct. 925, 928–29, 90 L. Ed. 1114 (1946) ("Nor do we need to consider here the possibility of compromises in other situation which may arise, such as a dispute over the number of hours worked or the regular rate of employment."); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740, 101 S. Ct. 1437, 1445, 67 L. Ed. 2d 641 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate").

for back wages must be supervised by either the court of the DOL.[127] The Fifth Circuit accepted this general rule, but carved out an exception to the general rule expressed by *Lynn's Food*.[128] It is this exception that has created a split in how the circuits treat certain FLSA settlement agreements. The exception holds essentially that when a dispute is bona fide, if both parties are represented by counsel, then private settlement agreements for FLSA back wages are enforceable even without court or DOL supervision.[129]

The current landscape is one leaning heavily in favor of the blanket rule imposed by *Lynn's Food*. The Eleventh[130] and Second[131] Circuits require judicial supervision of FLSA settlement agreements for back wages; the Fifth Circuit[132] carves out a narrow exception to the supervisory requirement; the Fourth,[133] Seventh,[134] Eighth,[135] and Ninth[136] Circuits have not expressly decided the issue, but have (in dicta) acknowledged the requirement of supervision; and the First,[137]

[127] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).
[128] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 249 (5th Cir. 2012).
[129] *Id.*
[130] Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).
[131] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016).
[132] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 249 (5th Cir. 2012).
[133] Although the Fourth Circuit has not expressly decided the issue, it has acknowledged the prohibition in Taylor v. Progress Energy, Inc., 493 F.3d 454, 460 (4th Cir.2007) ("under the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims"), although this case was overruled by regulation as stated in Whiting v. Johns Hopkins Hosp., 416 Fed.Appx. 312 (4th Cir.2011).
[134] The Seventh Circuit declined to address, for lack of need in DeBraska v. City of Milwaukee, 189 F.3d 650, 653 (7th Cir. 1999) (noting "but [the Supreme Court] has not decided "what limitation, if any, § [2]16(b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties") (quoting Brooklyn Bank v. O'Neil, 324 U.S. 697, 714, 65 S.Ct. 895, 89 L.Ed. 1296 (1945)). See also Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986).
[135] The Eighth Circuit cited *Lynn's Food* approvingly in Copeland v. ABB, Inc., 521 F.3d 1010, 1014 (8th Cir. 2008) ("There are only two statutory exceptions to this general rule. First, an employee may accept payment of unpaid wages under the supervision of the Secretary of Labor and if the back wages are paid in full. Second, if an employee brings suit directly against a private employer pursuant to § 216(b) of the statute, and the district court enters a stipulated judgment, it will have res judicata effect on any subsequent claim for damages") (internal citations omitted).
[136] The Ninth Circuit cited *Lynn's Food* approvingly in Seminiano v. Xyris Enter., Inc., 602 F. App'x 682, 683 (9th Cir. 2015) ("The record also supports the district court's denial of Seminiano's request to settle and dismiss his FLSA claims. FLSA claims may not be settled without approval of either the Secretary of Labor or a district court). See also Juvera v. Salcido, No. CV-11-2119-PHX-LOA, 2013 WL 6628039, at *7 (D. Ariz. Dec. 17, 2013) ("While the Ninth Circuit Court of Appeals has not specifically addressed the procedure to settle FLSA claims, numerous district courts throughout the Ninth Circuit have followed the lead in the seminal case of *Lynn's Food Stores").*
[137] City P'ship Co. v. Atl. Acquisition Ltd. P'ship, 100 F.3d 1041, 1043 (1st Cir. 1996) (While not explicitly addressing FLSA settlement, the general rule in the First Circuit is that a "district court can approve a class action settlement only if it is fair, adequate and reasonable. When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement) (internal citations omitted). Nevertheless, some district courts in the First Circuit do supervise FLSA settlements. See e.g. Prescott v. Prudential Ins. Co. of Am., No. 2:09-CV-00322-DBH, 2011 WL 6662288, at *1 (D. Me. Dec. 20, 2011) (But in the FLSA context, for an employee's waiver of his rights to unpaid wages and liquidated damages to be binding, either the U.S. Secretary of Labor must supervise the settlement or a court must approve it); Singleton v. AT&T Mobility Servs., LLC, 146 F. Supp. 3d 258 (D. Mass. 2015).

Third,[138] Sixth,[139] Tenth,[140] and District of Columbia[141] Circuits having not yet expressly addressed the issue. Although, cutting against this trend, the Federal Circuit[142] announced a rule that relaxes the supervisory requirements for public (federal) employees. Thus, across the circuits there is considerable room for the existing circuit court split to widen as more circuits explicitly address the issue. The current landscape is summarized in Table X, and the conflicting policies that led to this split are examined in the paragraphs that follow.

TABLE X:

Supervision of FLSA settlement agreements required in all circumstances	**Supervision of FLSA settlement agreements not always required**	**Acknowledged the requirement of supervision but have not expressly decided the issue**	**Have not expressly decided the issue**
Eleventh Circuit Second Circuit	Fifth Circuit Federal Circuit	Fourth Circuit Seventh Circuit Eighth Circuit Ninth Circuit	First Circuit Third Circuit Sixth Circuit Tenth Circuit DC Circuit

A. The *Martin* Exception to the Supervisory Requirement

In *Martin*, the Fifth Circuit intricately analyzed the U.S. Supreme Court's jurisprudence pertaining to FLSA settlement agreements and determined that the Supreme Court does not mandate the supervision of all FLSA settlement agreements for back wages.[143] To the contrary, the Supreme Court expressly left open the question of whether bona fide disputes between covered employees and employers over back wages, such as disputes over the number of hours worked or the regular rate for employees, require supervision.[144] The *Lynn's Food* court looked to the policies identified by the Supreme Court to impose such a requirement, but the *Martin* court did not perceive those policies to be implicated when FLSA rights are not abrogated through contract. The *Martin* court reiterated "that FLSA substantive rights may not be waived in the collective

[138] Stickel v. SMP Servs., LLC., No. 1:15-CV-00252, 2016 WL 827126, at *2 (M.D. Pa. Mar. 1, 2016) ("The United States Court of Appeals for the Third Circuit has not addressed the factors district courts should weigh when evaluating FLSA settlements. However, courts within this circuit have relied on the considerations set forth in Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982).")

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

[140] District Courts in the Tenth Circuit routinely apply the *Lynn's Food* standards even though the Tenth Circuit has not explicitly addressed the issue. See e.g., Baker v. Vail Resorts Mgmt. Co., No. 13-CV-01649-PAB-CBS, 2014 WL 700096 (D. Colo. Feb. 24, 2014).

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

[142] O'Connor v. United States, 308 F.3d 1233 (Fed. Cir. 2002); McCall v. U.S. Postal Serv., 839 F.2d 664 (Fed. Cir. 1988).

[143] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247 (5th Cir. 2012).

[144] *Id*. at 255 (citing Schulte, Inc. v. Gangi, 328 U.S. 108, 114–15, 66 S.Ct. 925, 90 L.Ed. 1114 (1946)).

bargaining process, however, here, FLSA rights were not waived, but instead, validated through a settlement of a bona fide dispute."[145] In such cases, judicial scrutiny of settlement agreements is not required *prior* to those agreements becoming enforceable and binding upon the parties.

The *Martin* ruling implies that agreements involving bona fide disputes become binding *prior* to receiving court approval, so long as FLSA rights are not abrogated via agreement. Thus, under *Martin*, when competent parties represented by counsel agree to a settlement of a bona fide FLSA dispute over back wages, the parties need not go through the additional (sometimes tumultuous) process of seeking court or DOL approval *prior* to effectuating the settlement. However, if one party later realizes the terms of the agreement were unfair, that party may purportedly still bring claims to court to decipher whether such an agreement was fair and reasonable (likely, either by filing a FLSA action or by requesting declaratory relief). Thus, the *Martin* ruling's consequence is largely the modification of the procedures for the approval of FLSA settlements of bona fide disputes within the Fifth Circuit. Instead of parties being forced to seek approval prior to effectuating the settlement of bona fide disputes, parties may instead effectuate settlement, and subsequently, if necessary, bring an action to court to decipher whether that agreement was fair, reasonable, and thus enforceable. The risk for private FLSA settlements, even in the Fifth Circuit, however, is that the agreement could eventually be scrutinized and if FLSA rights were waived, even inadvertently through the private settlement, then the agreement could be held void as against public policy. In this way, the Fifth Circuit has partially restored the traditional common law methods for challenging a contract (via public policy), and disposed of procedural hurdles for agreements that validate FLSA rights. This, in turn, creates the potential for the reduction of filings of FLSA cases and agreements in district courts.

The *Martin* court approved of the reasoning set forth by the Western District of Texas in *Martinez*,[146] and, in doing so, embraced the freedom of contractual parties to craft their own agreements for bona fide disputes, so long as such agreements do not violate the public policies embedded in the FLSA (e.g., preventing the exploitation of vulnerable employees by avoiding overtime or minimum wage requirements). The Fifth Circuit gave primacy to party autonomy and freedom of contract in lieu of the paternalistic supervisory mechanisms set forth in *Lynn's Food*, while still preserving the common law mechanisms for voiding contracts that violate the public policies embedded in the FLSA. The procedure resulting from the *Martin* decision prevents courts from disrupting settlements of consenting parties who agree to a resolution of a bona fide dispute that they, the parties (as represented by counsel), think is fair and reasonable, as opposed to an agreement that a presiding judge (who is not intimately familiar with the circumstances, needs, and desires of the parties) believes to be fair and reasonable. Such compromises could conceivably fall within a broad range of potential settlements, so long as FLSA rights are not waived in the process of settlement, and the policies embedded therein are not abrogated.

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

---

[145] *Id*. at 257.

[146] Martinez v. Bohls Bearing Equip. Co., 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005).

A few years after *Martin*, the Fifth Circuit declined to extend the narrow exception to the general rule set forth in *Lynn's Food*. In *Bodle*,[147] the Fifth Circuit considered whether a general waiver of claims resulting from a non-FLSA action between employees and employer could bar subsequent FLSA claims.[148] The district court enforced the release relying on the reasoning of *Martin*, but the Fifth Circuit reversed, and, in doing so, declined to extend the rule of *Martin*.[149] The *Bodle* court reasoned that the release was obtained as part of a settlement of a previous state court claim, involving a covenant not to compete, and did not involve claims for unpaid wages, and because the court was not "assured under these facts that the release resulted from a bona fide dispute regarding overtime wages," it declined to enforce the release against claims arising under the FLSA.[150] In deciding this issue, the court gave clarity that the ruling in Martin carved out a narrow exception to the general rule that FLSA settlement agreements for back wages must be supervised by a court or the DOL. It considered that the key component of this exception coming into play is that there be sufficient evidence of a "bona fide" dispute, and so, when such a dispute exists, the employees are compensated for their FLSA claims through a reasonable compromise. The exception did not apply in *Bodle,* because there was no evidence presented that, prior to entering into the general release in the state court action, the parties discussed overtime compensation, nor was there a factual determination at that time about the number of hours of unpaid overtime due.[151] Thus, the court reasoned, there is no evidence that there was a bona fide dispute over those overtime wages, and the "general prohibition against FLSA waivers" did apply to bar the enforcement of the general release against the FLSA claims.[152] *Bodle* more precisely defined the narrow circumstances of the *Martin* exception, and the contours of a bona fide dispute.

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

In the years that followed the *Martin* case, many innovative attorneys in other circuits attempted to rely on its reasoning to persuade district courts that bona fide FLSA disputes for back wages do not require judicial supervision. Some district courts have rejected the *Martin* rule.[153]

---

[147] Bodle v. TXL Mortg. Corp., 788 F.3d 159, 161 (5th Cir. 2015).
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] *Id*. at 165.
[152] *Id*.
[153] Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 528 (E.D. Pa. 2016) ("this Court rejects the *Martin* standard in favor of *Lynn's Food")*; Steele v. Staffmark Investments, LLC, 172 F. Supp. 3d 1024, 1026 (W.D. Tenn. 2016) ("based on the unique purpose of the FLSA and the unequal bargaining power between employees and employers, this Court finds that FLSA settlements require approval by either the Department of Labor or a court"); Peralta v. Soundview at Glen Cove, Inc., No. 11-CV-0867 JS AKT, 2013 WL 2147792, at *2 (E.D.N.Y. May 16, 2013) (finding the reasoning of Martin not applicable to this case); Files v. Federated Payment Sys. USA, Inc., No. 11-CV-3437 JS GRB, 2013 WL 1874602, at *3 (E.D.N.Y. Apr. 2, 2013) (refusing to find that judicial approval of FLSA settlement agreement is not required); Archer v. TNT USA, Inc., 12 F. Supp. 3d 373, 387 (E.D.N.Y. 2014) (discussing *Martin* and finding that even under its standards, the settlement agreement in this case was not approvable, and thus not deciding per se whether it applies); Grahovic v. Ben's Richardson Pizza Inc., No. 4:15CV01659 NCC, 2016 WL 1170977, at *1 (E.D. Mo. Mar. 25, 2016) (as appears the common practice in the Eastern District of Missouri, the court stated: "because declining to review the proposed settlement agreement would leave the Parties in an uncertain position, the Court…[did] review the settlement's FLSA-related terms for fairness"); Bettger v. Crossmark, Inc., No. 1:13-CV-2030, 2015 WL 279754, at *3 (M.D. Pa. Jan. 22, 2015) ("Although the Third Circuit has not addressed whether such § 216(b) actions claiming unpaid wages may be settled

Yet other district courts have concurred with the *Martin* rule.[154] The Second Circuit Court of Appeals was the first circuit court[155] to expressly consider the question of whether the *Martin* rule applies, and it declined to follow the rule, siding instead with the traditional supervisory requirements of *Lynn's Food*.[156] In reaching its resolution, the Second Circuit widened the existing circuit split, siding with the Eleventh Circuit instead of the Fifth. Despite this split, the U.S. Supreme Court has twice denied certiorari on this issue.[157]

The precise issue before the *Cheeks* court was whether parties are permitted to consent to a stipulated dismissal of a FLSA back wages claim under FRCP 41(a)(1)(A)(ii), that is, whether the FLSA is an "applicable federal statute" within the meaning of the rule.[158] The interrelated issue raised by *Cheeks* was "whether parties may settle FLSA claims with prejudice, without court approval or DOL supervision."[159] In *Cheeks*, the district court held, and the Second Circuit affirmed, that parties must have approval of either a court or the Department of Labor (DOL) to settle FLSA claims for back wages, and thus are not permitted to enter into a stipulated dismissal under FRCP 41(a)(1)(A)(ii) (because the FLSA is not an "applicable federal statute" within the meaning of the rule).[160] The *Cheeks* court exhaustively analyzed the case law on the issue of court supervision of FLSA settlement agreements for back wages and although recognizing the differing policy interests, including the consideration that "the vast majority of FLSA cases ... are simply too small, and the employer's finances too marginal, to have the parties take further action if the Court is not satisfied with the settlement."[161] Although sympathizing with this salient concern, the Second Circuit determined that these concerns "must be balanced against the FLSA's primary remedial purpose: to prevent abuses by unscrupulous employers, and remedy the disparate

---

privately without first obtaining court approval, district courts within the Third Circuit have followed the majority position and assumed that judicial approval is necessary").

[154] Sarceno v. Choi, 66 F. Supp. 3d 157, 170 (D.D.C. 2014) ("The Court concurs with the reasoning of the Fifth Circuit in *Martin* that a private settlement of FLSA claims may be enforceable, even if the settlement was reached without United States Department of Labor or judicial supervision or approval, but only when the agreement resolves a bona fide dispute between the parties and the terms of the settlement are fair and reasonable"); Schneider v. Habitat for Humanity Int'l, Inc., No. 5:14-CV-5230, 2015 WL 500835, at *3 (W.D. Ark. Feb. 5, 2015) ("this Court believes that the risk is minimal that an unreasonable settlement will result from "unequal bargaining power as between employer and employee" in FLSA lawsuits" when certain criteria are satisfied); Fernandez v. A-1 Duran Roofing, Inc., No. 12-CV-20757, 2013 WL 684736, at *1 (S.D. Fla. Feb. 25, 2013) (finding approval of the settlement agreement unnecessary); Duprey v. Scotts Co. LLC, 30 F. Supp. 3d 404, 411 (D. Md. 2014) (citing Martin approvingly); Picerni v. Bilingual Seit & Preschool Inc., 925 F. Supp. 2d 368, 374 (E.D.N.Y. 2013) (overruled by *Cheeks*).

[155] As of this writing, it is also the only Circuit to consider the applicability of *Martin*.

[156] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016)

[157] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247 (5th Cir. 2012), cert. denied, 133 S. Ct. 795, 184 L. Ed. 2d 583 (2012); Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016).

[158] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016).

[159] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 201 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016); see also Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 204 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016) ("The question before us, however, asks whether the parties can enter into a private stipulated dismissal of FLSA claims with prejudice, without the involvement of the district court or DOL, that may later be enforceable").

[160] *Id*.

[161] *Id.* at 205 (quoting Picerni v. Bilingual Seit & Preschool Inc., 925 F. Supp. 2d 368, 377 (E.D.N.Y. 2013)).

bargaining power between employers and employees."[162] Accordingly, the Second Circuit decided that judicial or DOL supervision of FLSA cases for back wages is required.

The *Cheeks* decision, like *Lynn's Food* before it, gave significant credence to the policies underlying the FLSA in coming to its decision that effectively bans private settlements of bona fide disputes for back wages without the supervision of the courts or DOL. The *Cheeks* court emphasized the importance of protecting vulnerable employees from substandard wages, and found that this policy supersedes other relevant considerations. While not addressing specifically the interests of party autonomy and freedom of contract, the primacy nevertheless lies with the remedial purposes of the FLSA. The *Cheeks* court's decision, however, flies in the face of a corresponding policy identified by the Supreme Court seventy years prior, namely, the "uniformity in the application of the provisions of the Act."[163] The Second Circuit solidified a split in the Circuits through its explicit rejection of the *Martin* rule, which the Fifth Circuit previously described merely as an exception to the supervisory requirements. Thus, while attempting to promote the policy of employee protection, the Second Circuit simultaneously undermined the policy of uniform application.

C. The Progeny of *Cheeks*

The repercussions of *Cheeks* had an immediate effect both within and outside of the Second Circuit.[164] For example, on January 11, 2016, the same day that the Supreme Court denied certiorari in *Cheeks*, the Eastern District of Pennsylvania, a court sitting in the Third Circuit, signed an order requiring the judicial approval of FLSA settlement agreements.[165] Beyond solidifying a circuit court split and the resulting reaction by district courts, *Cheeks* also led to new issues relating to: (1) the impact of *Cheeks* on offers of judgment arising under FRCP 68; and the revitalization of older issues post-*Cheeks* relating to: (2) the factors to be employed when deciphering a fair and reasonable FLSA settlement.

1. The Impact of *Cheeks* on Offers of Judgment

The month after the Second Circuit decided *Cheeks*, Judge Cogan,[166] whose opinion in *Picerni* was expressly overruled in *Cheeks*, responded to the ruling. Judge Cogan distinguished Rule 41 stipulated dismissals from Rule 68 offers of judgment and concluded that *Cheeks* does not apply to Rule 68 offers of judgment.[167] In *Barnhill*, the plaintiffs filed a "notice of acceptance" of a Rule 68 offer of judgment which indicated they accepted the defendant's offer to provide them full compensation for their FLSA claims.[168] Without scrutinizing the settlement, Judge Cogan

---

[162] *Id*. at 206-207.

[163] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 710, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

[164] Westlaw's "Citing Resources" feature shows that *Cheeks* has been cited 153 times by District Courts sitting in Connecticut, Florida, Hawaii, Illinois, Massachusetts, Michigan, Mississippi, New York, Ohio, Pennsylvania, and Tennessee. Of these 153 citations, 137 of them are from New York ("Citation Resources" search conducted on May 11, 2017).

[165] Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516 (E.D. Pa. 2016).

[166] Sitting on the U.S. District Court for the Eastern District of New York.

[167] Barnhill v. Fred Stark Estate, No. 15-CV-3360 (BMC), 2015 WL 5680145, at *1 (E.D.N.Y. Sept. 24, 2015).

[168] This notice stated that defendants shall "pay to Plaintiffs the sum of sixty thousand dollars ($60,000.00), representing full payment for all the Plaintiff's claims, including but not limited to their claims for lost income, unpaid wages, liquidated damages, penalties, and interest, and inclusive of all reasonable costs and fees (such as

ordered the clerk to enter the judgment.[169] Cogan reasoned that Rule 68 offers of judgment should be treated differently than Rule 41 stipulated dismissals because: (1) Rule 68 does not defer to "any applicable federal statute" but "subject to its stated qualifications, permits dismissal for any or no reason";[170] (2) Rule 68 requires an entry of a judgment by the clerk of the court; (3) the policy considerations underpinning the FLSA cannot be taken too far as all federal statutes have legitimate policies underlying them and a judicial ranking of the importance of these policies would be an overreaching of judicial powers; (4) there are a large number of FLSA cases filed each year; and (5) Rule 68 judgments are matters of public record, so secret settlements will be impossible in this context.[171] Through this rationale, Judge Cogan has allowed the utilization of a different procedural mechanism for the dismissal of FLSA cases without judicial scrutiny, thereby side-stepping the decision in *Cheeks*.

Barnhill led to a split of opinions within the Second Circuit, with some judges sitting on district courts in the Second Circuit agreeing that Rule 68 judgments do not need judicial scrutiny[172] and yet others contending that they do need scrutiny.[173] Those who contend Rule 68 judgments need supervision for fairness and reasonableness surmise that concluding otherwise would undermine the overarching policy of protecting vulnerable workers by creating a canyon sized exception to the requirement of judicial supervision that unscrupulous employers could leverage to their advantage.[174] These judges reason that there are narrow exceptions to the mandatory nature of entering Rule 68 offers of judgment, including supervisory requirements over class actions, bankruptcy claims, *qui tam* actions under the False Claims Act, and others.[175] This question was recently certified to the Second Circuit for interlocutory appeal.[176] Regardless of how the Second Circuit decides this appeal, similar questions will arise regarding the scope and extent of judicial supervisory requirements of FLSA settlement agreements.[177]

---

attorneys' fees) incurred up to the date of this offer of judgment. The Plaintiffs may divide this sum as they see fit. If they cannot agree, the sum is to be divided equally among the Plaintiffs." *Id.*

[169] *Id*. at *3.

[170] *Id*. at *1.

[171] *Id*. at *1-*3.

[172] See e.g., Arzeno v. Big B World, Inc., 317 F.R.D. 440 (S.D.N.Y. 2016); Khereed v. W. 12th St. Rest., 317 F.R.D. 441 (S.D.N.Y. 2016); Pest v. Express Contracting Corp. of Great Neck, No. 16 CV 3785 (DRH), 2016 WL 6518577 (E.D.N.Y. Nov. 3, 2016); Cf. Sagardia v. AD Delivery & Warehousing, Inc., No. 15CV677CBARLM, 2016 WL 4005777, at *1 (E.D.N.Y. July 25, 2016) (assuming Cheeks applies to Rule 68 offers of judgment); Anwar v. Stephens, No. 15-CV-4493(JS)(GRB), 2017 WL 455416 (E.D.N.Y. Feb. 2, 2017).

[173] See Yu v. Hasaki Rest., Inc., No. 16-cv-6094 (JMF), 2017 U.S. Dist. LEXIS 54597, at *6 (S.D.N.Y. Apr. 10, 2017); Lopez v. Overtime 1st Ave. Corp., No. 15-CV-820 (RJS), 2017 WL 1737657, at *2 (S.D.N.Y. May 2, 2017); Mei Xing Yu v. Hasaki Rest., Inc., No. 16-CV-6094 (JMF), 2017 WL 1424323, at *3 (S.D.N.Y. Apr. 10, 2017); Sanchez v. Burgers & Cupcakes LLC, 16–CV–3862 (VEC), 2017 U.S. Dist. LEXIS 38292, at *4–6 (S.D.N.Y. Mar. 16, 2017); Toar v. Sushi Nomado of Manhattan, Inc., 13–CV–1901 (VSB), Docket No. 137, (S.D.N.Y. Mar. 16, 2017); Cantoran v. DDJ Corp., No. 15–CV–10041 (PAE), Docket No. 35 (S.D.N.Y. June 2, 2016); Walker v. Vital Recovery Servs., Inc., 300 F.R.D. 599, 602 (N.D. Ga. 2014)).; Norman v. Alorica, Inc., No. 11–CV–433 (KKD), 2012 WL 5452196, at *2 (S.D. Ala. Nov. 7, 2012); Dees v. Hydradry, Inc., 706 F.Supp.2d 1227, 1246–47 (M.D. Fla. 2010); Luna v. Del Monte Fresh Produce (S.E.), Inc., No. 06-CV-2000 (JEC), 2008 WL 754452, at *12–13 (N.D. Ga. Mar. 19, 2008).

[175] See e.g., Mei Xing Yu v. Hasaki Rest., Inc., No. 16-CV-6094 (JMF), 2017 WL 1424323, at *3 (S.D.N.Y. Apr. 10, 2017).

[176] *Id.* at 5 (notice of interlocutory appeal was filed on April 14, 2017 – the author will update this section if and when there is a ruling).

[177] For example, in *Cheeks*, the Second Circuit declined to decide "whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice." Cheeks v.

2. The Factors for a Fair and Reasonable Settlement

Cheeks, like *Lynn's Food* before it, mandated the judicial supervision of FLSA settlement agreements for back wages, but similarly did not endorse a framework for district courts to follow when making determinations about whether settlements agreements are fair and reasonable. This has led to considerable uncertainty within the Second Circuit given the lack of clear standards and guidance for what constitutes a fair and reasonable settlement. As a result, practitioners are left with a considerable degree of uncertainty as to boundaries of reasonableness even in a post-*Cheeks* environment. Although some district courts in the Second Circuit have embraced the *Wolinsky* factors as part of a "totality of the circumstances" test, the Second Circuit has yet to explicitly endorse these factors.[178] Given the array of tests utilized by district courts across the nation,[179] the decision in *Cheeks* compounds the level of uncertainty and diminishing predictability of the potential for judicial enforcement of FLSA settlement agreements for back wages.

The lack of clear guidance in this area has consequent practical implications for counsel who desire approval of FLSA settlement agreements. At times, counsel in FLSA cases are required to submit multiple motions or stipulations to a court in order to have a settlement approved, even if both parties, and all counsel, agree it is fair and reasonable, in order to convince a presiding judge to approve the agreement.[180] While the parties may want a lawsuit to end, the paternalistic environment of judicial supervision of FLSA settlements for back wages, may prevent parties from concluding a litigation, extend the time and expense of it, and, at times, even undermine the delicate negotiation process and the otherwise desirable settlements reached between representing counsel. Unexpected time and costs arise when judges require settlement agreement revisions or additional filings by attorneys subsequent to the initial request for the approval of a settlement. Often these costs are not anticipated by the initial fee amount agreed to via the settlement. The rules of court, and risks of additional costs, often deter practitioners from requesting interlocutory appeals of the non-final orders denying such motions or stipulations requesting approval of settlement agreements.[181] In light of these, and related, consequences of the judicial supervision of FLSA settlement agreements for back wages, a new framework is needed to resolve the increasingly complicated issues spurring from these supervisory requirements.

IV. A Rebuttable Presumption that the Contract Accords with Public Policy

Although district courts across the United States have employed a variety of approaches to analyzing the fairness and reasonableness of FLSA settlement agreements for back wages, little scholarly work has been produced on this topic to-date. In this section, this article outlines a model for analyzing FLSA settlement agreements for back wages. It suggests, first, that courts abandon the language of *Lynn's Food* pertaining to "reasonableness" and "fairness." It then provides five

---

Freeport Pancake House, Inc., 796 F.3d 199, 201 n. 2 (2d Cir. 2015), cert. denied, 136 S. Ct. 824, 193 L. Ed. 2d 718 (2016).

[178] Wolinsky v. Scholastic, 900 F.Supp.2d 332, 334 (S.D.N.Y. 2012).

[179] Discussed *supra*, Section II(B).

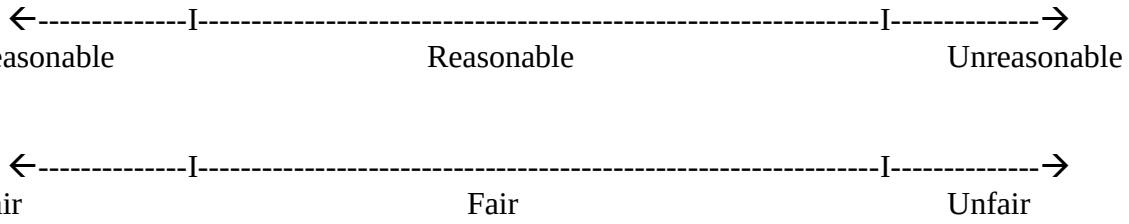
[180] See e.g., Hughes v. Twp. of Franklin, No. CV 13-3761 (AMD), 2015 WL 9462965 (D.N.J. Dec. 23, 2015) (subsequent to this decision on summary judgment, the judge delayed the approval of the settlement reached between the parties because the judge was not convinced that the agreement was fair and reasonable, despite all parties and counsel believing so, forcing plaintiff's counsel to submit multiple submissions to court even after settlement was reached – thus driving up the costs and time spent on this case).

[181] See 28 U.S.C. § 1292(b).

prerequisites of a FLSA settlement agreement for back wages, which, if met, should give rise to a rebuttable presumption that the agreement accords with the public policies underpinning the FLSA. Third, it discusses the circumstances by which the presumption may be rebutted. This section is followed by a brief conclusion.

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

Figure X:



The task, under *Lynn's Food*, is for a court to identify those contractual terms that would presumptively place a FLSA settlement agreement between the two lines of fairness and reasonableness, without extending too far outwards so as to become unfair or unreasonable terms. This framework of analyzing what is "fair and reasonable" has led to at least three major approaches to deciphering fair and reasonable settlement agreements within the district courts: the totality of the circumstances approach, the multi-factored approach, and the relevant circumstances approach to deciphering if a contract is fair and reasonable.[182] First, these different approaches have led to disharmony in the application of the FLSA. Second, "fair and reasonable" has become a fused term within most FLSA settlement agreement analyses, with courts giving little consideration to the differences between what is "fair" and what is "reasonable," but treating them as one and the same (presuming that what is fair is reasonable and vice-versa). Third, the amorphous nature of these terms do not give specific guidance to district court judges who are tasked with approving these settlement agreements. Such guidance is also lacking for practitioners who negotiate FLSA settlement agreements. Fourth, the "fair and reasonable" standards were judicially imposed by the Eleventh Circuit and have neither a basis in statute nor in traditional common law. To the contrary, traditional common law principles, as discussed in *Brooklyn Savings Bank*, instruct judges to analyze FLSA settlement agreements to decipher if they are void for violating public policy (and not to analyze them for fairness or reasonableness). In sum, the

[182] Discussed *infra*, Section II(B).

"fair and reasonable" language spurring from *Lynn's Food* undermines many of the policies it was promulgated to preserve. Accordingly, this language should be abandoned in favor of a framework that provides improved guidance to practitioners and judges, better balances the policies underpinning the FLSA, and accords with traditional Supreme Court jurisprudence.

A. The Five Prerequisites of the Presumption

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

1. Employees Must be Given Full Compensation

In order for a FLSA settlement agreement for back wages to be presumed to accord with public policy, the party seeking approval must first represent that the injured employee does receive full compensation pursuant to the settlement agreement. In order to decipher if full compensation is being paid, an initial determination regarding the status of the case must be made by the presiding judge. A FLSA case for back wages may be dissected into four types: an undisputed case, a bona fide dispute, a non-bona fide dispute, and a dispute over coverage. The measure for calculating "full compensation" is different for bona fide disputes, than it is for undisputed cases and non-bona fide disputes. In any case, however, the U.S. Supreme Court jurisprudence dating back to the 1940s articulates unquestionably that FLSA rights cannot be waived by contract, full compensation must be provided to injured employees, and that full compensation includes back pay and liquidated damages.[183]

An undisputed case is one within which the employer and employee agree that back wages are owed, and they also agree as to the amount of back wages owed. Such a case is quite likely to settle outside of court, and if it does, full compensation must be paid to the injured employee. For undisputed cases, full compensation is calculated pursuant to 29 U.S.C. §216(b). That is, the employee is due the amount of back wages (unpaid overtime and/or unpaid minimum wage) and an equal amount in liquidated damages.[184] Thus, if an employee is owed $1000 for unpaid

[183] See *supra*, Section I.
[184] 29 U.S.C. §216(b).

overtime, that employee is entitled to another $1000 for liquidated damages, for a total of $2000. The reasonable attorneys' fees and costs must be paid by the employer on top of this amount, and not taken out of it.

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

Settlements of bona fide disputes comport with public policy when such settlements fall into a range of potential settlements, somewhere between the employee's best possible recovery and the employer's lowest possible payout, if all cards were to, so to speak, fall in favor of one or the other if the case were to be tried on its merits. Ironically, and a fact that opens a wide door for employer compulsion, given the inherent unpredictability of trials, in some cases, full compensation for bona fide disputes could range anywhere from zero to one hundred percent of the requested back wages and liquidated damages. This could be the case if an employer were to have a defense that would alleviate it completely from any FLSA liability, such as if firefighters or police were on a 28 day work period under 28 U.S.C. §207(k),[185] and thus any disputed hours were not due overtime payments.

Yet, in other cases, the range of full compensation for a bona fide dispute is much smaller. For example, a case wherein the employee claims she is owed overtime wages for 100 hours of work, and the employer claims the wages are only owed for 80 hours of work. If the rate of pay in this example were $20.00 per hour, then full compensation for the back wages would be somewhere between $1600 and $2000, plus liquidated damages in an equal amount (totaling $3200 to $4000). Thus, a settlement in the amount of $1000 for these injuries would not provide full compensation, because it is below the employer's lowest possible payout, but a settlement at $3200, or above, would provide full compensation because it is at or above the employer's lowest possible payout. In any case, an employee must be provided full compensation, and for bona fide disputes, such full compensation will fall within a case-specific range.

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

Finally, disputes over FLSA coverage cannot be settled by private agreement without violating the public policies embedded in the FLSA. *Gangi* held that private settlements that resolve the issue of whether employees are covered by the FLSA violate public policy.[186] However, if an

[185] See e.g., Singer v. City of Waco, 324 F.3d 813, 818 (5th Cir. 2003) (dispute over whether 28 U.S.C. §207(k) exception applied). See also Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 805 (11th Cir. 1992).
[186] D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–15, 66 S. Ct. 925, 928–29, 90 L. Ed. 1114 (1946).

employer desired to avoid continued litigation when coverage is an issue, an employer could purportedly concede FLSA coverage, and provide full compensation to the injured employee without violating any public policies. Such a case, then, would be better classified as an undisputed FLSA case than a dispute over coverage, and full compensation should be provided per 29 U.S.C. §216(b).

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

2. Employees Must Be Represented by Counsel When Claim is Disputed

In order for a FLSA settlement agreement for back wages to be presumed to be in accordance with public policy, for all types of claims other than undisputed claims, the injured employee must be represented by counsel during the settlement of the claims. For undisputed claims, a waiver of the right to counsel may be sufficient. Although the Fifth Circuit's ruling in *Martin* fell short of initiating a *per se* requirement of attorney representation prior to deeming a settlement of a bona fide dispute for back wages enforceable, the court did reiterate that the parties were represented by counsel during settlement on multiple occasions.[187] Subsequent cases have honed in on this language, signifying the importance of party representation in bona fide disputes over FLSA back wages.[188] In order to ensure that an injured employee does not unknowingly waive FLSA rights, and is fully informed of the merits of a case, and the range of possible recoveries, in order for a FLSA settlement for back wages to be presumed to accord with public policy, the party seeking approval must show the judge that the injured employee was represented by counsel during settlement. While it is tempting to permit a waiver of this right, for any type of claim other than an undisputed claim, a waiver would not sufficiently protect the rights of the parties. Thus, for any bona fide dispute, non-bona fide dispute, or dispute over coverage, in order for the presumption to come into effect, there must be a showing of employee representation by counsel. Thus, in the case of undisputed claims for wages, party representation is not a per se prerequisite to enforceability, so long as the employee receives full compensation (all back wages plus liquidated damages). Yet, in the case of a bona fide dispute, when there is a range of potential recovery, party representation by competent counsel is a prerequisite to the presumption that the agreement comports with public policy. Such an employee would undeniably be disadvantaged by proceeding through such negotiations without counsel to advise the employee as to the range of possible recoveries, and likelihood of success if such a case were tried on its merits.

3. Attorneys' Fees and Costs Must be Reasonable

Going hand-in-hand with the notions of full compensation and employee representation by counsel, in all cases, the party seeking approval of a FLSA settlement agreement must show that the attorneys' fees and costs paid through settlement are reasonable, and that such reasonable fees

[187] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 249 (5th Cir. 2012).

[188] The Second Circuit commented that the Fifth Circuit's ruling in *Martin* "cannot be read as a wholesale rejection of *Lynn's Food*: it relies heavily on evidence that a bona fide dispute between the parties existed, and that the employees who accepted the earlier settlement were represented by counsel." *Cheeks*, 796 F.3d at 204.

and costs are paid directly by the employer over and above the full compensation to the employee, and not paid out of it. 29 U.S.C. §216(b) provides that for proceedings brought in court to recover unpaid overtime or unpaid minimum wages, that the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."[189] The statute is unambiguous that such fees and costs shall be paid "in addition to any judgment" and not out of such a judgment.[190] For fee awards via settlement, so long as full compensation is paid, attorneys should be permitted to negotiate any reasonable fee that does not otherwise violate the pertinent rules of professional conduct in the relevant jurisdiction.[191] The reasonableness of fees in settlements should not be limited beyond those that are permissible under the rules of professional conduct in the relevant jurisdiction, so long as the employee is paid full compensation for any back wages under the FLSA (including liquidated damages), and fees are paid by the employer over and above such full compensation.[192]

4. There Must be No Confidentiality Provisions

The importance of making FLSA settlement agreements public, and thus preventing their confidentiality, is a well-recognized prerequisite to ensuring the public policies of the FLSA are not undercut. One commentator, Elizabeth Wilkins, argues that allowing parties to maintain the confidentiality of FLSA settlement agreements for back wages is repugnant to and undermines the FLSA.[193] Wilkins is predominately concerned with ensuring transparency in the FLSA settlement process, so that unscrupulous employers cannot remove their misdeeds from the public eye. Allowing confidential FLSA settlements, she argues, would fly in the face of the quasi-public rights of the FLSA, promote the potential for power imbalances produced by unequal worker-employer bargaining, and are not sensible in light of the "actual dynamics" of FLSA lawsuits "in today's economy" and particularly those barriers faced by low wage workers who attempt to vindicate their rights.[194] Wilkins provides greater depth to the justifications for prohibiting broad confidentiality provisions within FLSA contexts, a prohibition that is generally accepted across the district courts.[195]

Confidentiality provisions have been utilized in a variety of ways within FLSA settlement negotiations. Although some courts have allowed limited confidentiality provisions, such as promises not to discuss the case with the press or media, or provisions that provide no retaliatory mechanisms for the employer if violated, as a general rule, a party seeking a presumption that a settlement agreement accords with public policy must show that there is no confidentiality provision in the FLSA settlement agreements for back wages.[196] Even if limited, or crafted

---

[189] 29 U.S.C. §216(b).
[190] *Id.*
[191] See e.g., ABA Model Rule of Professional Conduct 1.5.
[192] Limitations on fees pursuant to the fee-shifting statute, if applied after the entry of a judgment in the employee's favor, are in the discretion of the trial court. Agreements as to fees pursuant to settlement, however, presuming full compensation, are only limited by the relevant rules of professional conduct in the jurisdiction at issue.
[193] Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 112 (2013).
[194] *Id.* at 135.
[195] See generally *Id.*
[196] Discussed *supra* Section II(C). Cf. Trinh v. JP Morgan Chase & Co., No. 07–CV–01666 W(WMC), 2009 WL 532556 (S.D.Cal. Mar.3, 2009), and Williams v. Aramark Sports, LLC, No. 10–1044, 2011 WL 4018242 (E.D.Pa. Sept.8, 2011).

carefully to have no means of sanctioning violations, the confidentiality of these agreements does undercut the FLSA, and so should not be permitted.[197]

5. There Must be No General Releases of Claims

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

In summary, if these five prerequisites are satisfied, then a court may *ipso facto* presume that a FLSA settlement agreement does not violate public policy. Thus, once a settlement is presented to a court that satisfies these five prerequisites, it should be presumed to accord with the policies underpinning the FLSA. Once this presumption attaches, the burden falls on a challenging party to prove that, despite these five criteria being satisfied, that the agreement, or a provision therein, is nevertheless void. After the presumption attaches, the burden of persuasion falls to a contractual party who wishes to challenge the agreement. This challenge may take place at any time, and by any party to the agreement. In the case of single-plaintiff cases, it is unlikely that a challenge will arise. However, in the case of collective or class actions, certain parties may wish to challenge the agreement. This burden-shifting framework will ensure that the supervision of FLSA settlement agreements for back wages is not subsumed, or ignored, in class action cases.[198] Regardless, once the five prerequisites are shown, the presumption that the agreement accords with public policy shall come into effect, and the burden of persuading the judge that the agreement nevertheless violates public policy (or is void for another reason) lies with the challenging party. If no one challenges the agreement, it shall be presumed to accord with public policy, and be approved by the presiding judge without further inquiry or analysis.

B. How the Presumption May Be Rebutted

Once a party shows that the five prerequisites are satisfied, the presumption that the settlement agreement accords with public policy does come into effect, and the burden shifts to the

[197] Although beyond the scope of this paper, a future area of research or initiative would be to consider the benefits and burdens of the Department of Labor requiring the mandatory filing of all FLSA settlement agreements for back wages with their office. Then, the DOL could maintain a repository of all agreements and make them available to the public. This, or a similar mechanism, without fully exploring the notion, would seem to ensure public access.

[198] See Roberts v. TJX Companies, Inc., No. 13-CV-13142-ADB, 2016 WL 8677312, at *5 (D. Mass. Sept. 30, 2016) ("A court's review of a FLSA settlement, however, is slightly less demanding than its review of a Rule 23 class action settlement because, unlike a Rule 23 class action, a FLSA collective action settlement does not bind absent class members. See Lizondro-Garcia v. Kefi LLC, 300 F.R.D. 169, 179 (S.D.N.Y. 2014). In this case, the Court ultimately concludes that the parties' proposed Settlement satisfies the more stringent Rule 23 standard. Thus, the Court will not conduct a separate fairness analysis under the FLSA standard").

challenging party (if any) to attempt to rebut the presumption that the contract accords with public policy, and thus is presumably enforceable. A challenging party may rebut this presumption by showing that some other aspect of public policy is violated pursuant to the relevant agreement. The challenging party could argue that a certain provision of the agreement violates public policy or that the agreement as a whole does, by pointing to, among other things, the FLSA, its history, related rules or regulations, or other judicial decisions.[199] In the event that a party successfully shows that a provision of the FLSA agreement violates public policy, the judge may sever that provision and approve the rest of the agreement. Alternatively, if the provision or agreement as a whole violates public policy, the judge may choose not to approve it, and force the parties to renegotiate the agreement. This latter scenario will rarely come into play if the five prerequisites are satisfied, as they are the material terms of the agreement, and most other terms could likely be severed without impacting these material terms. Thus, in most cases, when a challenging party is able to show a provision of a FLSA settlement agreement violates public policy, after the five prerequisites are satisfied, the appropriate course of action is typically for a judge to sever the provision and enforce the rest of the agreement.

C. Benefits and Downsides to the Rebuttable Presumption Framework

In their attempts to promote the FLSA's policy of protecting vulnerable employees, courts have simultaneously undercut the competing FLSA policy of promoting uniformity in the application the FLSA, and the general public policies of promoting party autonomy and freedom of contract. The framework set forth in this article rebalances these policies by providing an approach that can be applied uniformly across the circuits, without resorting to increasingly vague and complex analyses of fairness and reasonableness. Moreover, this framework returns the analysis of FLSA settlement agreements for back wages back to their common law roots, of considering whether or not the agreements violate public policy. It modifies the central inquiry from one of fairness and reasonableness, and instead refocuses the inquiry on its original center, that is, upon whether or not the contract is in accordance with public policy.[200] In doing so, this framework increases the potential for parties to contract freely and autonomously subject to certain prerequisites. By clearly articulating these prerequisites, moreover, both judges and practitioners are offered improved guidance in their drafting of and consideration of FLSA settlement agreements for back wages.

The rebuttable presumption framework also reduces the burden on the courts, and prevents judges from paternalistically undermining settlements that all parties agree to. So long as practitioners are fully informed of the five prerequisites, and the approach is applied consistently across the circuits, there is no reason that every FLSA settlement agreement should not be approved upon its first submission. This will reduce the need for courts to scrutinize every detail of a FLSA settlement agreement, it will reduce the post-settlement workload of attorneys who are currently as baffled by the amorphous requirements of fairness and reasonableness as some judges

[199] See e.g., Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980) ("The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient. Absent legislation, the judiciary must define the cause of action in case-by-case determinations").

[200] *Brooklyn Sav. Bank*, 324 U.S. at 710.

are, and it will expedite settlement terms and payments to the injured employees who often require swift resolution to recover much needed money. This framework simultaneously provides a mechanism for parties to challenge agreements that may otherwise be against public policy despite satisfying the initial perquisites. By doing so, it balances the needs to protect the vulnerable employee population with the interests of decreasing the burden on these parties, the attorneys that represent them, and the courts.

The rebuttable presumption framework, however, does have its limits. It is only focused on ensuring that the settlement agreement does not violate public policy. This framework does not address the other mechanisms by which a contract could otherwise be held void or voidable. Presumably, however, a party seeking to make a FLSA settlement agreement void on some other grounds, such as duress, undue influence, fraud, or unconscionability, could do so through the normal procedures of the court regardless of this framework. Alternatively, evidence supporting any of these common law doctrines could be presented after the burden shifts to a challenging party, to show why the agreement should not be enforced.

Conclusion

The *Lynn's Food* framework has led to the inconsistent application of the FLSA, and a circuit court split regarding supervisory requirements of settlements of bona fide disputes. This article suggests that a new framework is needed to rebalance the public policies pronounced by the U.S. Supreme Court in *Brooklyn Savings Bank*, with the contemporary needs of actual FLSA practice. This article began by tracing the unique set of historical factors that led to FLSA settlement agreements being treated with higher scrutiny than most other types of employment settlement agreements. It showed how the U.S. Supreme Court judicially created public policies by their unique reading of the FLSA in its historical context, and how these judicially created policies were then standardized through a series of precedents in the mid and late twentieth century. This article also revealed the inconsistencies spurring from the open question left by the Supreme Court regarding whether settlement agreements regarding bona fide disputes for back wages under the FLSA require judicial supervision. The ways the district courts across the U.S. analyze FLSA settlement agreements vary, and this has, in turn, led to inconsistency in the application of the act. Despite the circuit court split, the Supreme Court has twice denied certiorari, leaving the field in an uncertain and disjointed state. To remedy the lack of unification, practitioners should ensure that the five prerequisites to the presumption outlined in this article's burden shifting framework are fully satisfied in all FLSA settlement agreements, and courts should consider a new middle way approach to judicial supervision of fees. Albeit the approach set forth in this article is imperfect, it is a starting point which will hopefully provide movement towards a more uniform, national approach to the supervision of FLSA settlement agreements for back wages.