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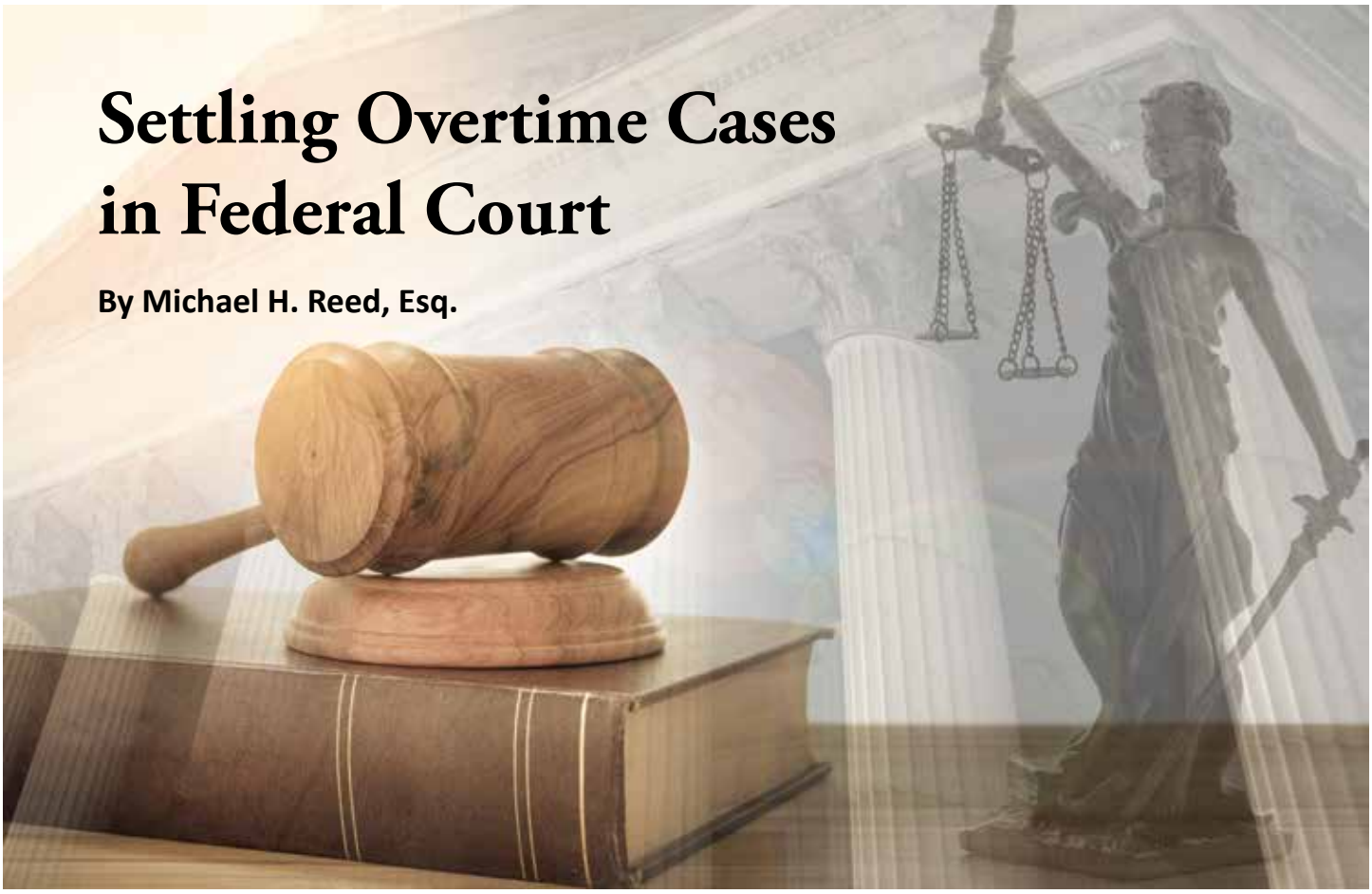

Settling Overtime Cases in Federal Court

By Michael H. Reed, Esq.

As a general rule, settlements happen in private and without judicial review. For years, overtime cases in federal court have been an exception to that rule. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) held that overtime cases filed under the Fair Labor Standards Act ("FLSA") cannot be settled without judicial approval. Approvals are public, and they require the underlying settlement documents to be publicly filed on the docket. The process is far from a rubber stamp. It involves a review of the amount of the settlement, the fee to the plaintiffs' attorney, and the terms of the settlement. Because approvals require scrutiny, and because the federal docket is so large, approvals can take time.

On December 6, 2019, the Second Circuit largely gave parties a way around the approval process required by *Cheeks*. *Mei Xing Yu v. Hasaki Rest., Inc.*, No. 17-3388-CV, 2019 WL 6646618 (2d Cir. Dec. 6, 2019) holds that parties in FLSA cases can bypass *Cheeks* by entering into a settlement that takes the form of an accepted "offers of judgment" under Federal Rule of Civil Procedure 68. *Hasaki* is a must-know decision for any lawyer involved in an overtime case.

The FLSA

The FLSA was passed in 1938. It gave America a minimum wage, overtime, and child labor protections. The law's goal was to end "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 201.

Supreme Court cases from the 1940s do not treat the FLSA as just another statute. Instead, they treat it as the embodiment of a national public policy.

In *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), an employer offered a former employee his unpaid overtime, and the former employee signed a settlement agreement waiving his right to liquidated damages (additional damages available under the FLSA). The employee then sued to recover the liquidated damages he had purportedly waived. The Supreme Court held that because the waiver was a "mere waiver," rather than a waiver entered into as part of the settlement of a bona fide dispute, the waiver was invalid. Ruling the other way would, the Court said, "nullify the purposes of the [FLSA]."

The next year, in another overtime

case, the Supreme Court refused to decide whether parties who disagreed about the number of overtime hours owed could enter into settlements without judicial approval. More than 70 years later, the Supreme Court has yet to decide the question.

Cheeks

Fast forward to 2015 and *Cheeks*. *Cheeks* presents the question of whether parties can voluntarily dismiss FLSA claims with prejudice. Formally, *Cheeks* is about dismissals, not settlement. But as a practical matter, *Cheeks* is about settlement because parties typically don't dismiss claims with prejudice unless they settle.

To answer the voluntary dismissal question, the Second Circuit looked to Federal Rule of Civil Procedure 41. Rule 41 says that, "subject to . . . any applicable federal statute," plaintiffs may dismiss their claims by stipulation. *Cheeks* holds that the FLSA is an "applicable federal statute" for purposes of Rule 41. After *Cheeks*, if an FLSA claim was going to be dismissed with prejudice, the district court would have to weigh in.

Cheeks approvals have become a common feature of federal practice. Before a judge would dismiss an FLSA claim with prejudice, he or she would review the underlying settlement, including the attorneys' fee award, to make sure everything was fair and reasonable. Certain settlement terms, and certain attorneys' fee awards (calculated as a percentage of the settlement) were generally non-starters. Judge Pauley composed a "greatest hits" list of terms that fail *Cheeks* review. The list includes: general releases, broad confidentiality provisions, and gag clauses preventing the plaintiff from discussing the settlement.

Cheeks operationalizes the concerns underlying *Brooklyn Savings*. It made sure that federal judges, focused on the public good, will scrutinize overtime settlements. On the other hand, it introduced delays into the process and removed a degree of autonomy from the parties.

Hasaki

Hasaki pits *Cheeks* against Rule 68. Rule 68 says that a defendant can make "an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P. 68(a). If the plaintiff accepts within 14 days, the clerk "must" enter judgment. *Id.* If the plaintiff rejects the offer and the case goes to a judgment that is "more favorable than the unaccepted offer," the plaintiff has to pay costs incurred by the defendant after the offer was made. The purpose of Rule 68 is to encourage settlement. As articulated by the Supreme Court, that is not the purpose of the FLSA.

In *Hasaki*, the plaintiff accepted a Rule 68 offer of judgment, but the court refused to dismiss the case, citing *Cheeks*. The parties appealed. They argued that Rule 68 governs and that their case should have been dismissed under Rule 68 without *Cheeks* review. In a 2-1 decision, the Second Circuit accepted their argument.

For the majority, it was critical that the FLSA lacks "a command that FLSA actions cannot be settled or otherwise dismissed without approval from a court." Given the absence of any such command and given the "mandatory character" of Rule 68, it held that Rule 68 governs.

Judge Calabresi "respectfully, but emphatically" dissented. In his view, the "FLSA, as a whole, prohibits the kind of unsupervised private settlement agreements that the application of Rule 68(a) to FLSA claims would bring about." Judge Calabresi wrote that while the FLSA does not use "robotic words," it nevertheless contains the "command" required by the majority.

Hasaki in Perspective

Hasaki may be a sign of the times. In *Brooklyn Savings*, the Supreme Court asked the question: what does the FLSA seek to accomplish. In *Hasaki*, decided 70 years later, the Second Circuit didn't much care about what the FLSA seeks to accomplish. It cared about the FLSA's explicit text.

In that regard, *Hasaki* follows recent Supreme Court case law. For decades, FLSA exemptions—provisions that allow employers to not pay overtime to certain employees—were read narrowly. In 2018, the Court rejected that approach. It reasoned that the narrow reading principle was a judicial gloss on the FLSA lacking support in the text of the statute. *Hasaki* is like *Encino Motors* because it, too, focuses not on intent but on explicit text.

Conclusion

Hasaki promises to largely take the judiciary out of many FLSA settlements, and it will certainly make the settlement process faster. On the other hand, *Hasaki* will not turn FLSA settlements into private settlements because offers of judgment are entered on the docket.

Whether *Hasaki* will remain good law is unclear. The case takes as its departure a 70-year old Supreme Court opinion and it features a dissent from a prominent Senior Judge. For the moment, though, *Hasaki* is the law of this Circuit.

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CANNABIS LAW RESOURCES

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The action center provides congressional scorecards and offers a click-and-write interface to support various state and federal legislation to reform cannabis laws. This section also maintains a free, easy to read list of proposed legislation affecting decriminalization, expungements, medical marijuana, legalization, and hemp production. Additionally, NORML provides a blog and cannabis news that can be filtered by state.

8. The Maze Calendar

https://themazecalendar.com/

The Maze Calendar is a weekly newsletter of cannabis advocacy, industry, and community events. It is to the point and includes conferences, festivals, expos, and community talks—big and small, free and paid events. You can also submit an event to be added. The Maze Calendar is growing and currently serves New York City which includes occasional events in the lower Hudson Valley, Atlanta, the Bay Area, Boston, Chicago, Denver, D.C., Los Angeles, Philadelphia, and New Jersey.

9. Women Grow

https://womengrow.com

Women Grow encourages women to enter the cannabis industry and provides networking opportunities with the goal of helping women to succeed. Women Grow events hosts informative panel discussions, networking opportunities, and community events. Everyone is welcome. Women Grow creates a welcoming environment for attendees to meet each other. Events are well attended by a diverse audience and knowledgeable speakers. Women Grow was founded in Denver in 2014, and now has regional chapters across the county. The closest chapter is in New York City which has recently started hosting occasional events in Westchester County.

Digesting the happenings of the evolving cannabis industry is a battle between time and finding the most time-efficient and credible sources that work for you. Armed with your new-found favorite resources, we invite you to come out and meet other people interested in the cannabis industry.

The Cannabis Law Committee meets monthly and is intended to be a welcoming place for WCBA members who have an interest in the subject matter. We are committed to learning together and supporting each other in this emerging area of the law.

Endnote

1. *Legal Marijuana Industry Toasts Banner Year*, Gillian Flacus, The Associated Press, Dec. 27, 2018 https://www.apnews.com/0bd3cdbae26c4f99be359d6fe32f0d49

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