Fw: Two suggestions for the Civil Rules Advisory Committee
John D. Bates to: Frances Skillman 01/12/2017 04:32 PM
Cc: Rebecca Womeldorf, coopere

History: This message has been replied to.

Fran:

Please log this suggestion from Judge Furman as a new Civil Rules matter under consideration.

Thanks.

John Bates
----- Forwarded by John D. Bates/[redacted] on 01/12/2017 04:28 PM -----

From: Jesse M Furman/[redacted]
To: John D. Bates[redacted]
Date: 01/10/2017 02:38 PM
Subject: Two suggestions for the Civil Rules Advisory Committee

John:

There are two issues that I wanted to bring to your attention for possible consideration by the Civil Rules Advisory Committee, one relating to Rule 68 offers of judgment and another relating to the growing practice of pre-motion conferences.

Rule 68

There are any number of issues that could be discussed with respect to Rule 68, and I'd be inclined to think it might make sense, at some point in the near future, to revisit the Rule generally. *See, e.g.*, Jay Horowitz, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 Denv. U. L. Rev. 485 (2010) (discussing the history of the Rule and proposing potential amendments). But, as I mentioned to you at the Rules Committee meeting last week, there is one particular issue that has arisen recently, at least in my District, that I think might warrant the Committees' attention. As you may know, in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 119, 206 (2d Cir. 2015), the Second Circuit held (as other courts have) that judicial approval is required for dismissals with prejudice under Rule 41(a)(1)(A)(ii) of claims under the Fair Labor Standards Act. The Court reached that conclusion based on the language and purpose of the FLSA and the opening phrase of Rule 41(a)(1)(A) (namely, "Subject to ... any applicable federal statute...").

Since *Cheeks*, judges in my District (and elsewhere in the Circuit, I believe) have begun seeing, with increasing frequency, settlements of FLSA claims under Rule 68 rather than Rule 41 and arguments from the parties that Rule 68 settlements do not require judicial approval. I gather - from a recent submission to me (my first personal encounter with the issue) - that at least two judges in my District have held that judicial approval is still applicable to Rule 68 settlements of FLSA claims. *See, e.g.*, *Cantoran v. DDJ Corp.*, No. 15 Civ. 10041 (PAE), 2016 U.S. Dist. LEXIS 79353, at *2-3 (S.D.N.Y. June 16, 2016); *Segarra v. United Hood Cleaning Corp.*, No. 15 Civ. 656 (VSB), Docket Entry 20 (S.D.N.Y. Jan. 6, 2016). The majority of judges to confront the issue, however, appear to have held that approval is *not* required - based on the absence of any "[s]ubject to . . . any applicable federal statute" language in Rule 68 and the mandatory nature of the Rule ("The clerk *must* ... enter judgment."). *See, e.g.*, *Khereed v. W. 12th St. Rest.*, No. 15-CV-1363 (JLC), 2016 WL 6885186, at *1 (S.D.N.Y. Nov. 22, 2016) (citing cases). Notably, several have reached that conclusion despite express misgivings and have noted explicitly a belief that counsel are using Rule 68 to make an end run around *Cheeks* and the judicial approval requirement. As Chief Judge McMahon bluntly put it:

> I am affirmed in my belief that the Rule 68 Offer of Judgment procedures gives clever

> defendant-employers an aperture the size of the Grand Canyon through which they can drive coercive settlements in Fair Labor Standards Acts cases without obtaining court approval – as well as a vehicle for seriously compromising the plaintiff's lawyer-client relationship, for the reasons set forth in this court's March 31, 2016 Order (Docket # 62). However, I can see no basis for reading any exception into the absolutely mandatory language of Rule 68, which compels the Clerk of Court to enter judgment on an accepted Offer of Judgment. The *Second Circuit's decision in Cheeks v. Freeport Pancake House, Inc.*, 796 F. 3D 199 (2d Cir. 2015), which gave rise to this court's concern, rests entirely on "exceptional" language in Rule 41(a); there simply is no commensurate language in Rule 68. If Congress's concern for the rights of FLSA plaintiffs is great enough, it may want to bring Rule 68 into line with Rule 41(a); it will have to amend the Rule by eliminating FLSA cases, and perhaps other certain types of cases, from the procedure whereby Offers of Judgment will cut off the right to a recovery of "costs" (including attorneys' fees, which are denominated as costs under *Marek v. Chesney*, 473 U.S. 1, 8-9 (1985)). Until Congress does so, I anticipate that Rule 41 will cease to be a vehicle for settling FLSA cases, and that we will instead see a flood of accepted Offers of Judgment, which the Clerk of Court will have no choice but to enter.

Baba v. Beverly Hills Cemetery Corp. Inc., No. 15 CIV. 5151 (CM), 2016 WL 2903597, at *1 (S.D.N.Y. May 9, 2016).

In my opinion, this is a worthwhile issue for the Committee to review. There may be countervailing issues that warrant caution, but it strikes me as odd and concerning to allow a situation where the requirement of judicial approval (a requirement that derives from Congress's view that certain categories of cases warrant close scrutiny) would depend on how the parties structure a settlement and, in particular, on the Rule upon which they rely. (One final note: In case you were wondering, I haven't yet opined on the issue myself. In recent weeks, I have received two Rule 68 settlements. But a colleague of mine invited the Secretary of Labor to submit an amicus brief on the question (a brief that is due by next Friday), and I have deferred decision in my cases until I have had an opportunity to review that brief.)

<u>Pre-Motion Conferences</u>

If I remember correctly, I had a brief chat with you about the practice of holding pre-motion conferences - or, more broadly, about requiring parties to seek approval before filing certain kinds of motions (motions to dismiss and motions for summary judgment being the big ones). I don't know how widespread that practice is, but many judges in my District have adopted it and firmly believe that it is helpful in heading off some frivolous motions or motions that can be addressed without full briefing. I myself do not have a pre-motion requirement. There are a few reasons I made that decision, but one - a view that I know is shared by some of my colleagues who have not adopted the practice either - is doubt about whether it is proper under the Rules, as nothing in the Rules would seem to allow a judge to prevent a party from filing a motion that would otherwise be proper and timely (even temporarily, pending a conference). I think it might be worth thinking about whether the Rules should be modified to make clear that judges can adopt a pre-motion conference requirement - both to put the practice on firmer footing and, perhaps, to encourage other judges/districts to think about adopting it. Rule 16(b)(3)(B)(v) gives a judge that sort of discretion with respect to discovery motions (prompted, I think, by my District's practices on that front), but query whether the Rules should be (or need to be) modified to allow for that sort of approach with respect to motions generally. (Indeed, one could argue that, given Rule 16(b)(3)(B)(v)'s explicit blessing of a pre-motion requirement for discovery motions, that the absence of a similar Rule for other motions means it is prohibited. To be clear, though, I have not seen anyone make that argument.)

Please let me know if you have any questions or want any additional information or thoughts on these subjects.

I look forward to seeing you soon.

All the best,
Jesse

Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007
Email: [redacted]
Office: 212-805-0282
Fax: 212-805-7996