

# ENFORCING SETTLEMENTS IN FEDERAL CIVIL ACTIONS

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## INTRODUCTION

Settlements in civil actions in federal district courts may be subject to later judicial enforcement. However, as noted in the 1994 U.S. Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co. of America*, any enforcement “requires its own basis for jurisdiction.”<sup>1</sup> Such jurisdiction seemingly can arise under one of two different heads of ancillary jurisdiction in the absence of an “independent basis for federal jurisdiction.”<sup>2</sup> One head allows enforcement where the settlement is “in varying respects and degrees, factually interdependent”<sup>3</sup> with a claim that had been presented for adjudication. The other permits enforcement when necessary for the district court “to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.”<sup>4</sup>

In *Kokkonen*, there was not a basis for independent jurisdiction and neither head of ancillary jurisdiction supported the enforcement of a settlement that earlier prompted a voluntary dismissal.<sup>5</sup> Any claim for settlement breach had “nothing to do” with any claim earlier presented for resolution, making it neither “necessary nor even particularly efficient that they be adjudicated together.”<sup>6</sup> Further, the settlement was not “made part of the order of dismissal”;<sup>7</sup> thus, any breach would not be “a violation”<sup>8</sup> of a court order implicating the “court’s power to protect its proceedings and vindicate its authority.”<sup>9</sup>

Since *Kokkonen*, the lower federal courts have struggled with requests for the exercise of ancillary settlement enforcement jurisdiction. Troubling issues include when and how ancillary enforcement jurisdiction should be retained, when such jurisdiction should later be exercised, and what substantive laws and procedures should be employed in settlement enforcement proceedings. Neither

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1. 511 U.S. 375, 378 (1994).

2. *Id.* at 382.

3. *Id.* at 379.

4. *Id.* at 380. Herein, we employ the term “ancillary jurisdiction” as it was used in *Kokkonen*, recognizing that, at times, other terms are used, including pendent, supplemental, residual, derivative, essential, and inherent jurisdiction, as well as jurisdiction of necessity.

5. While the dismissal occurred under FED. R. CIV. P. 41(a)(1)(ii), *id.* at 378, the analysis would have been the same with a dismissal under FED. R. CIV. P. 41(a)(2), *id.* at 381; in both settings, a court order recognizing the settlement was required for any ancillary jurisdiction.

6. *Kokkonen*, 511 U.S. at 380.

7. *Id.* at 381.

8. *Id.*

9. *Id.* at 380.

the Supreme Court in its common law decisions or court rules, nor Congress in statutes, has provided significant guidance. Troubles will likely continue as civil case settlements are being promoted more than ever. The federal district courts recently were expressly directed to facilitate civil settlements and, in order to do so, were authorized to require both party and attorney participation in settlement conferences.<sup>10</sup> After reviewing *Kokkonen* and some contemporary difficulties, we will suggest both lawmaking mechanisms and legal standards for improving settlement enforcement.

### I. SETTLEMENT ENFORCEMENT UNDER *KOKKONEN*

Federal district courts are courts of limited subject matter jurisdiction, generally possessing only powers allowed by the federal constitution and authorized by federal statutes.<sup>11</sup> To date, there have been no statutes or court rules governing the retention and exercise of jurisdiction over settlements reached in pending federal civil actions.<sup>12</sup> Given the lack of written laws, some federal courts before 1994 had liberally employed an “inherent powers” doctrine, or similar devices, to enforce settlement agreements reached in civil litigation.<sup>13</sup> Other federal courts were more reticent, leaving most enforcement to the state courts. Some guidance was provided by the U.S. Supreme Court in 1994 in *Kokkonen*. Unfortunately, the ruling in *Kokkonen* addressed only some issues, leaving many questions on settlement enforcement unanswered, and prompting continuing uncertainties and confusion.

The *Kokkonen* case initially involved a dispute over the termination of Matt T. Kokkonen’s general agency with Guardian Life Insurance Company.<sup>14</sup> His state court lawsuit was subject to a removal to a federal district court based upon

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10. FED. R. CIV. P. 16(c). For our thoughts on needed amendments to the rule on settlement conferences in federal civil actions, see Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 KAN. L. REV. 347 (2002).

11. *Kokkonen*, 511 U.S. at 377, 380 (indicating that authorization need not be express, with nonexpress authority sometimes characterized as inherent, ancillary, or essential). There may be small realms of authority beyond congressional control. See, e.g., *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562-63 (3d Cir. 1985) (describing “irreducible inherent authority”). But see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48 n.12 (1991) (noting the absence of Supreme Court precedents recognizing such judicial authority).

12. Congress has delegated to the Article III federal courts certain rulemaking responsibilities regarding their own powers. See, e.g., 28 U.S.C. § 2071(a) (2000) (permitting courts to prescribe “rules for the conduct of their business”).

13. See, e.g., *Lee v. Hunt*, 631 F.2d 1171, 1173 (5th Cir. 1980) (“inherent power to enforce”); *Kukla v. Nat’l Distillers Prods. Co.*, 483 F.2d 619, 621 (6th Cir. 1973) (“inherent power”).

14. *Kokkonen*, 511 U.S. at 376. Consider: “The complaint, as amended, stated causes of action for wrongful termination, breach of fiduciary duty, interference with prospective business advantage, fraud, breach of lease, wrongful denial of lease, and prayed for damages, including exemplary damages.” Petitioner’s Brief at \*4 n.2, *Kokkonen* (No. 93-263).

diversity jurisdiction where a jury trial was commenced.<sup>15</sup> During trial, the parties reached an oral agreement settling all claims and counterclaims. The key terms of the agreement were recited on the record before the district judge in chambers.<sup>16</sup> “[T]he parties executed a Stipulation and Order of Dismissal with Prejudice”<sup>17</sup> which the district judge signed “under the notation ‘It is so ordered.’”<sup>18</sup> The stipulation and order mentioned neither the settlement nor any retention of jurisdiction. When a dispute involving Kokkonen’s “obligation to return certain files”<sup>19</sup> under the settlement later arose, Guardian Life moved in the same civil action for enforcement. Kokkonen opposed the motion on the ground that the court lacked subject matter jurisdiction. The district court found it could enforce because it had “an ‘inherent power’ to do so.”<sup>20</sup> The court of appeals affirmed, relying on an “inherent supervisory power.”<sup>21</sup>

After noting that the federal courts were “courts of limited jurisdiction,”<sup>22</sup> Justice Scalia, writing for the majority, emphasized that Guardian Life had sought the enforcement of the settlement agreement, not the reopening of the case. He observed that some, but not all, courts of appeals had held that

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15. *Kokkonen*, 511 U.S. at 376.

16. *Id.* (indicating that “the substance” of the agreement was recited). Guardian Life argued that because of this in camera recitation, the judge “plainly anticipated that any proceeding to enforce the settlement agreement would require an appearance before him and not in state court.” Respondent’s Brief at \*4, *Kokkonen* (No. 93-263). The court of appeals wrote that the “oral agreement . . . was stated in its entirety on the record before the district court in chambers.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, No. 93-263, 1993 WL 164884, at \*1 (9th Cir. May 18, 1993).

17. *Kokkonen*, 511 U.S. at 376-77.

18. *Id.* at 377.

19. *Id.* Guardian also claimed Kokkonen breached the settlement by communicating to Guardian on behalf of a client who was a Guardian policyholder. Petitioner’s Brief at \*6 n.8, *Kokkonen* (No. 93-263).

20. *Kokkonen*, 511 U.S. at 377.

21. *Id.*

22. *Id.* Kokkonen framed the issue before the Supreme Court by asking, does a federal district court have subject matter jurisdiction to enforce a settlement agreement entered into between the parties when: 1) the case is no longer pending before the court at the time the court issued the order, having been dismissed with prejudice prior to the application for enforcement of the settlement agreement, 2) the settlement agreement has never been incorporated into an order or judgment of the court disposing of the action, 3) the court has not expressly retained jurisdiction over the action, and 4) no other independent grounds for federal court jurisdiction to enforce the agreement exist?

Petitioner’s Brief at \*i, *Kokkonen* (No. 93-263). Guardian Life framed the issue by asking: “Does a district court have jurisdiction to exercise its discretion to enforce a settlement agreement after dismissal of the case where the settlement was entered into on the record, at trial, with the Court’s active participation, and where the Court anticipated its involvement in any enforcement of the agreement?” Respondent’s Brief at \*i, *Kokkonen* (No. 93-263).

reopening the case in such circumstances was available.<sup>23</sup> In contrast to reopening, Justice Scalia explained that enforcement, “whether through award of damages or decree of specific performance, is more than just a continuation or renewal of a dismissed suit, and hence requires its own basis for jurisdiction.”<sup>24</sup> In denying that there was any enforcement power, Justice Scalia cited the absence of an independent basis for subject matter jurisdiction or any ancillary jurisdiction.<sup>25</sup> Yet, Justice Scalia recognized that there were two types of ancillary jurisdiction that might have been available. Ancillary jurisdiction can be exercised “(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.”<sup>26</sup> Justice Scalia found that any earlier-presented claims and the settlement claim presented by Guardian were not factually interdependent as they had “nothing to do with each other.”<sup>27</sup> In the case, he also found that any power to enforce the settlement unaccompanied by a retention of jurisdiction was “quite remote from what courts require in order to perform their functions.”<sup>28</sup> He observed that “the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement.”<sup>29</sup> He noted that

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23. *Kokkonen*, 511 U.S. at 378 (citing FED. R. CIV. P. 60(b)(6)). The idea of reopening a case was discussed at some length during the oral arguments in *Kokkonen*. Transcript of Oral Arguments, *Kokkonen* (No. 93-263).

24. *Kokkonen*, 511 U.S. at 378. Of course, where a federal civil action, once dismissed, is continued or renewed, there must also be subject matter jurisdiction. Yet, such jurisdiction differs significantly from enforcement jurisdiction in that only with the former is there a return to the claims that prompted the civil action, and thus in effect, a resumption of jurisdiction. Of course, where a state law claim in a federal civil action remains under supplemental jurisdiction after the federal law claims, providing the independent jurisdictional basis is dismissed, there are continuing inquiries into jurisdictional basis. 28 U.S.C. § 1367(c) (2000) (granting courts discretion to decline to continue exercising supplemental jurisdiction).

25. *Kokkonen*, 511 U.S. at 380.

26. *Id.* at 379-80.

27. *Id.* at 380 (concluding “it would neither be necessary nor even particularly efficient that [the claims] be adjudicated together”). Evidently, the claims and counterclaims on which the jury trial was commenced had little or nothing to do with the postjudgment dispute over the return of certain files by *Kokkonen*. As well, seemingly efficiency would not be promoted by district court settlement enforcement as there was no indication that the district judge was in a unique position to interpret the settlement terms involving the return of the files. *But cf.* *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 955 (7th Cir. 1997) (indicating that the judge who presided over the lawsuit was in the “best position to evaluate the settlement agreement”); *Scelsa v. City Univ. of New York*, 76 F.3d 37, 42 (2d Cir. 1996) (“there are few persons in a better position to understand the meaning of an order of dismissal than the district judge who ordered it”).

28. *Kokkonen*, 511 U.S. at 380.

29. *Id.*

[t]he situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.<sup>30</sup>

“In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.”<sup>31</sup> Although the district court “is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree,”<sup>32</sup> Justice Scalia further wrote that a failure to do so means “enforcement of the settlement agreement is for state courts.”<sup>33</sup> The “judge’s mere awareness and approval of the terms of the settlement agreement”<sup>34</sup> were insufficient to make those terms a part of the court order, and thus to prompt ancillary jurisdiction.<sup>35</sup>

So, the Supreme Court recognized two ways in which a federal district court could enforce a civil case settlement for a case that had been dismissed.<sup>36</sup> One way involved settlement claims that were factually interdependent with the

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30. *Id.* at 381. The import of this difference was not said to be reflected in any written federal law. *Cf.* 750 ILL. COMP. STAT. 5/502(d) (2001) (stating that either the terms of a marriage dissolution agreement may be “set forth” in a judgment or that the marriage dissolution case judgment “shall identify the agreement and state that the court has approved its terms,” in a setting where such an agreement often is subject to later judicial modification, as where the agreement covers support, custody or visitation of children). This difference has also been deemed important outside the settlement enforcement arena. *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002) (noting importance to prevailing party status when attorney fee recovery may be available under 42 U.S.C. § 1988 (1994 & Supp. V 1999)). *Compare* *Roberson v. Giuliani*, 2002 WL 253950 (S.D.N.Y. Feb. 21, 2002) (noting that not all retentions of settlement enforcement jurisdiction prompt prevailing party status under 42 U.S.C. § 1988 (1994 & Supp. V 1999)).

31. *Kokkonen*, 511 U.S. at 381.

32. *Id.* at 381-82.

33. *Id.* at 382.

34. *Id.* at 381.

35. In contrast to federal district courts, when civil actions are settled in the courts of appeal, there is no discretion available to retain jurisdiction over possible settlement breaches. *See, e.g.,* *Herrnreiter v. C.H.A.*, 281 F.3d 634, 637 (7th Cir. 2002) (“a court of appeals lacks factfinding apparatus”).

36. Of course, in the absence of a dismissal and a judgment thereon, enforcement could also occur where a pleading was amended to reflect the settlement. *See, e.g.,* *Bd. of Managers of the Alexandria Condo. v. Broadway/72nd Assocs.*, 729 N.Y.S.2d 16 (App. Div. 2001). Yet here too a federal court would need subject matter jurisdiction, often arising under the supplemental jurisdiction statute, 28 U.S.C. § 1367 (2000), because of factual relatedness. *But see* *Sadighi v. Daghhighfekr*, 66 F. Supp. 2d 752, 758 (D.S.C. 1999) (quoting *Wilson v. Wilson*, 46 F.3d 660, 664 (7th Cir. 1994) (“a district court possesses the inherent or equitable power summarily to enforce an agreement to settle *a case pending before it*”) (alteration in original)).

claims presented for court resolution, making adjudication before one trial court "efficient."<sup>37</sup> The other way involved settlement enforcement that promoted successful court functioning. While some found that the analysis in *Kokkonen* led to simple rules,<sup>38</sup> applications of its principles have proven to be difficult. Troubles have already arisen regarding such matters as how to incorporate settlement terms into court orders; how otherwise to retain jurisdiction; whether settlement disputes may prompt the reopening of judgments; and what substantive contract laws and what procedures should apply when federal case settlements are enforced. We find further difficulties in the application of *Kokkonen* which, to date, have gone largely unrecognized. These difficulties include whether there is judicial discretion to refuse party requests that future enforcement jurisdiction be retained, and whether and when any settlement disputes can prompt discretionary refusals to exercise available enforcement jurisdiction.

## II. DIFFICULTIES IN SETTLEMENT ENFORCEMENT AFTER KOKKONEN

### A. Incorporating Settlement Terms into Court Orders

Under *Kokkonen*, a federal district court may enforce a civil case settlement order after "incorporating the terms of the settlement agreement in the order."<sup>39</sup> Questions have arisen on how settlement terms are properly incorporated. Must all key "terms" be included? If not, which, if any, absent terms are subject to ancillary enforcement jurisdiction? And, what conduct constitutes "incorporation"? The lower courts seem unsure.

The Eighth Circuit has found that a "dismissal order's mere reference to the fact of settlement does not incorporate the settlement agreement."<sup>40</sup> The dismissal order did acknowledge that all matters were settled, but did not otherwise mention the agreement or any of its terms.<sup>41</sup> The appeals court noted that "although *Kokkonen* does not state how a district court may incorporate a settlement agreement in a dismissal order, the case does not suggest the

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37. *Kokkonen*, 511 U.S. at 380.

38. One commentator suggested that *Kokkonen* "supplies clear guidelines for seeking" supervision of settlement agreements. Charles K. Bloeser, Notes and Comments, *Kokkonen v. Guardian Life: Limiting the Power of Federal District Courts to Enforce Settlement Agreements in Dismissed Cases*, 30 TULSA L.J. 671, 691 (1995). Another said: "For those seeking to ensure federal jurisdiction over agreements settling cases pending in federal court, *Kokkonen* provides a simple answer." Bradley S. Clanton, Note, *Inherent Powers and Settlement Agreements: Limiting Federal Enforcement Jurisdiction*, 15 MISS. C. L. REV. 453, 475 (1995). The petitioner in *Kokkonen* had called "for a 'bright line' rule that will guide district courts in the future." Petitioner's Brief at \*17, *Kokkonen* (No. 93-263).

39. *Kokkonen*, 511 U.S. 381.

40. *Miener v. Mo. Dep't of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995).

41. *Id.* at 1127-28.

agreement must be ‘embodied’ in the dismissal order.”<sup>42</sup> Therefore, the court found that reference to, or even approval of, the settlement agreement was, by itself, insufficient to prompt later enforcement jurisdiction.<sup>43</sup> It did not explain relevant differences between varying nonembodied agreements.

The Ninth Circuit ruled that an order based on a settlement, without more, did not place the agreement within the order.<sup>44</sup> The court stated that the “settlement terms must be part of the dismissal in order for violation of the settlement agreement to amount to a violation of the court’s order.”<sup>45</sup> Thus, the court concluded that “[w]ithout a violation of the court’s order, there is no jurisdiction.”<sup>46</sup>

The Sixth Circuit ruled that the “phrase ‘pursuant to the terms of the Settlement’ fails to incorporate the terms of the Settlement agreement into the order.”<sup>47</sup> The lower court had specifically stated: “In the presence of and with the assistance of counsel, the parties placed a settlement agreement on the record before the Hon. Bernard Friedman on October 1, 1991. Pursuant to the terms of the parties’ October 1, 1991 settlement agreement, the Court hereby DISMISSES this case.”<sup>48</sup>

Some appellate courts have determined that when some, but not all the provisions, of a civil case settlement are placed in a dismissal order, only the incorporated terms are subject to later enforcement proceedings. The Seventh Circuit explained that “[h]aving put some but not all of the terms in the judgment, the district court has identified which it will enforce and which it will not.” It further stated that any violation of settlement terms not in a judgment do not “flout the court’s order or imperil the court’s authority” and thus “do not activate the ancillary jurisdiction of the court.”<sup>49</sup> The Tenth Circuit held similarly, stating “[a]lthough the district court specified in its order that it retained jurisdiction, and although it set forth some provisions of the parties’ settlement agreement, it did not expressly set forth the provision prohibiting communications to the media.”<sup>50</sup> Yet, not all judges may now deny enforcement

42. *Id.* at 1128.

43. *Id.*

44. *O’Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995).

45. *Id.*

46. *Id.*

47. *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 917 (6th Cir. 2000). The court cited *In Re Phar-Mor, Inc. Securities Litigation*, 172 F.3d 270, 274 (3d Cir. 1999) (citing *Miener v. Mo. Dep’t of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995) (“The phrase ‘pursuant to the terms of the Settlement’ fails to incorporate the terms of the Settlement agreement into the order.”)). See also *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000).

48. *Caudill*, 200 F.3d at 915.

49. *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994).

50. *Consumers Gas & Oil, Inc. v. Farmland Ind.*, 84 F.3d 367, 371 (10th Cir. 1996).

Interestingly, the lower court’s order of dismissal stated:

Without affecting the finality of this Judgment in any way, the Court reserves continuing jurisdiction over the implementation and enforcement of the terms of the Stipulation of

of unincorporated settlement terms,<sup>51</sup> especially where breaches of incorporated and unincorporated terms are alleged simultaneously and where all issues are factually interdependent so that their joint resolution promotes efficiency.<sup>52</sup> We favor a bright line test whereby only settlement terms incorporated into court orders (or otherwise referenced particularly) are subject to possible enforcement jurisdiction. Where necessary, efficiency in hearing incorporated and unincorporated pacts together usually can be achieved by a federal court refusal to exercise jurisdiction over the referenced terms, leaving all related matters for a new state court lawsuit.<sup>53</sup>

Under *Kokkonen*, incorporation of settlement terms into a court order is one way to anticipate enforcement jurisdiction. Another way is through a provision retaining jurisdiction over the settlement agreement.<sup>54</sup>

### *B. Retaining Settlement Enforcement Jurisdiction*

Under *Kokkonen*, a federal district court can also enforce if it retains jurisdiction over the settlement agreement.<sup>55</sup> Questions have arisen. Can jurisdiction be retained even though the phrase, 'retaining jurisdiction,' or something like it, is not used? If so, what other terms or actions suffice? At times, are the intentions of the parties and the judge sufficient regardless of the words used? And, can enforcement ever occur after a dismissal where there is no incorporation, no expressly retained jurisdiction, and no subjective intent, but where the exercise of jurisdiction makes sense at the time when enforcement is

Settlement and any issues relating to Subclass membership, notice to Class Members, distributions to Class Members, allocation of expenses among the class, disposition of unclaimed payment amounts, and all other aspects of this action, until all acts agreed to be performed under the Stipulation of Settlement shall have been performed and the final order of dismissal referenced above has become effective or until October 1, 1996, whichever occurs latest.

*Id.* at 369. It is not clear to us the district judge did not intend to enforce the agreement on media communications, or that its absence is significant given the order's coverage of "all other aspects of this action."

51. *See, e.g.*, *Brewer v. Nat'l R.R. Passenger Corp.*, 649 N.E.2d 1331 (Ill. 1995) (stating the court could enforce a term in the settlement agreement (employee would quit his job) not incorporated into the dismissal order though other terms were included in the order (pursuant to Illinois Code of Civ. Pro. 2-1203, a trial court retains jurisdiction thirty days after entry of judgment)).

52. Of course, in this situation already bootstrapped claims would themselves prompt even more bootstrapping with the unincorporated terms possibly very far removed from the original civil action and perhaps even unknown to the district court until enforcement was sought.

53. Refusals are permitted even when some ancillary enforcement jurisdiction was earlier retained since all ancillary jurisdiction is discretionary. *See* Part III.G, *infra*.

54. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994).

55. *Id.* *See, e.g.*, *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 299 (4th Cir. 2000) (stating "court retains jurisdiction to enforce the settlement of the parties").



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The Second Circuit has held that “[o]nce the District Court ‘so ordered’ the settlement agreement, which included a provision for sealing the case file, it was required to enforce the terms of the agreement,”<sup>56</sup> unless “limited circumstances” permit modification of the “so ordered” stipulation. It reasoned that when a court orders a stipulated and sealed settlement, it accepts certain responsibilities, including a duty to enforce even where there is no court order retaining jurisdiction or incorporating any settlement terms.<sup>57</sup>

In another case, a district judge issued an order stating that any “subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.”<sup>58</sup> The appellate court stated that “[o]f course, the court may only enter subsequent orders involving the settlement agreement if it has retained jurisdiction.”<sup>59</sup> It found that *Kokkonen* “only requires a reasonable indication that the court has retained jurisdiction,” as the *Kokkonen* court used the term “such as” when speaking of a separate provision retaining jurisdiction.<sup>60</sup> The court held that the language employed by the district court contemplated a continuing judicial role sufficient to constitute a “separate provision” retaining jurisdiction.<sup>61</sup>

The Eighth Circuit found enforcement jurisdiction was not retained where a dismissal order only stated that the court was “‘reserving jurisdiction’ to permit any party to reopen the [civil] action.”<sup>62</sup> It said that reopening due to a settlement breach was different from enforcing a settlement.<sup>63</sup>

Yet another appeals court ruled that the trial court “need only manifest its intent to retain jurisdiction.”<sup>64</sup> The court found this intent in a district court order that declared dismissal was “pursuant to a confidential settlement agreement” and expressly authorized each party to enforce the agreement in the event of breach.<sup>65</sup> The court reasoned “that a district court need not use explicit language or ‘any magic form of words.’”<sup>66</sup>

In contrast, a different appeals court held that the mere intent to retain jurisdiction is insufficient.<sup>67</sup> It stated:

At the time the civil case was settled, it is clear that the district court

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56. *Geller v. Branich Int’l Realty Corp.*, 212 F.3d 734, 737 (2d Cir. 2000).

57. *Id.*

58. *Re/Max Int’l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 645 (6th Cir. 2001).

59. *Id.*

60. *Id.* at 643.

61. *Id.* at 645.

62. *Sheng v. Starkey Lab., Inc.*, 53 F.3d 192, 195 (8th Cir. 1995).

63. *Id.*

64. *Schaefer Fan Co. v. J&D Mfg.*, 265 F. 3d 1282, 1287 (Fed Cir. 2001) (quoting *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985)).

65. *Id.*

66. *Id.*

67. *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995) (footnote omitted).

*intended* to retain jurisdiction. It stated at the settlement conference:

I will act as a czar with regard to the drafting of the settlement papers and the construction of this settlement and the execution of this settlement. And that means that if there is any dispute that is brought to me by counsel, I will decide the matter according to proceedings which I designate in the manner that I designate, and that decision will be final without any opportunity to appeal.

That it believed it had continuing jurisdiction to enforce the agreement is also clear from its order of January 28, 1993:

As part of the settlement agreement, plaintiff agreed not to provide evidence to prosecute the Oregon State Bar complaint filed against defendant and to take any and all reasonable actions to prevent that matter from proceeding. The parties also agreed that the terms and conditions of the settlement agreement were to remain confidential and not disclosed to anyone. The parties further agreed that all questions relating to their rights and duties under the agreement would be determined exclusively by the undersigned.

It is equally clear, however, that the district court did not retain jurisdiction over the settlement. As noted, the Dismissal neither expressly reserves jurisdiction nor incorporates the terms of the settlement agreement.<sup>68</sup>

This holding was later reaffirmed when the same court held that “even a district court’s expressed intention to retain jurisdiction is insufficient to confer jurisdiction if that intention is not expressed in the order of dismissal.”<sup>69</sup>

In the absence of incorporation, jurisdiction retention, or intent, judicial enforcement of settlements still seems appropriate in certain settings. Parties to a federal civil action ending in a judgment upon a settlement are unable to return to the district court with an agreement indicating a new-found intent that jurisdiction over an earlier settlement be retained.<sup>70</sup> Yet, so long as a federal civil

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68. *Id.* at 1433.

69. *O’Connor v. Calvin*, 70 F.3d 530, 532 (9th Cir. 1995).

70. *See, e.g., Lane v. Birnbaum*, 910 F. Supp. 123 (S.D.N.Y. 1995). The court stated: In this case, the Order of Dismissal preceded the Stipulation by almost two months. It is therefore apparent that compliance with the agreement was not an operative part of the dismissal. That the parties subsequently felt the need to have the terms of their agreement embodied in a stipulation on file with the Court, cannot serve to vest the Court with jurisdiction over the agreement. . . . Clearly, the Court’s dismissal of the action was in no way conditioned upon the parties’ compliance with the terms of the agreement. Nor did the Court retain jurisdiction over the parties’ agreement. Therefore, enforcement of the settlement agreement is a matter of contract between the parties, for

action remains open because there is no final judgment, a district court seemingly may enforce a settlement therein even though the judge never earlier considered enforcement.<sup>71</sup> Thus, in dismissing a civil action upon a settlement, a trial judge may reserve rendering a judgment as by granting a conditional dismissal, thereby allowing a party to return to court for any reason, including settlement enforcement, before a final judgment is entered.<sup>72</sup>

### *C. Discretionary Refusals of Later Settlement Enforcement Jurisdiction*

Where any later settlement enforcement would not have “its own basis for jurisdiction,”<sup>73</sup> thus requiring some form of ancillary power, can a federal district judge refuse to incorporate the settlement terms into a court order or otherwise to retain enforcement jurisdiction though requested by all parties? The Supreme Court in *Kokkonen* said that with any dismissal of a pending civil action based on a settlement,<sup>74</sup> potential enforcement is “in the court’s discretion.”<sup>75</sup> This comports with the longstanding principle that ancillary jurisdiction is discretionary. What factors should guide such exercises of discretion?

One appeals court has urged caution when a federal district judge decides

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the state courts to address.

*Id.* at 128 (footnote omitted).

71. *See, e.g.,* *Sadighi v. Daghighfeker*, 66 F. Supp. 2d 752 (D.S.C. 1999). The court stated: [A]fter the court was informed that settlement had been reached, there was a delay when no formal settlement documents were executed and no order of dismissal was issued. Consequently, when Defendants decided that the settlement agreement reached earlier was no longer to their satisfaction, the case was still on [the] court’s active docket . . . . In short, nothing had been done to divest [the] court of jurisdiction.

*Id.* at 758.

72. *See, e.g.,* *Bell v. Schexnayder*, 36 F. 3d 447, 450 n.2 (5th Cir. 1994) (stating that *Kokkonen* is “distinguishable from our case, since here the district court’s order of dismissal expressly provided that the parties could, within 60 days, move to reopen the case to enforce the settlement. Defendants so moved within the 60 days of the dismissal order.”). Similar trial court initiatives can be addressed in court rules. *See, e.g.,* Form 7-345 of Florida Small Claims Rules (“Stipulation for Installment Settlement, Order Approving Stipulation, and Dismissal,” under which proceedings are stayed by agreement while settlement monies are paid over time, with an expressly recognized enforcement power). Yet, conditional dismissal orders, without judgments, may permit later settlement enforcement proceedings. *See, e.g.,* *Pratt v. Philbrook*, 38 F. Supp. 2d 63, 66 (D. Mass. 1999) (stating conditional dismissal grounded on settlement where parties have sixty days to return “to reopen the action *if settlement is not consummated by the parties*”); *see also* *Pratt v. Philbrook*, 109 F.3d 18, 21 n.5 (1st Cir. 1997) (stating that the sixty-day procedure developed as a mechanism to close cases “while retaining jurisdiction to enforce a settlement for a period of time after closure is announced”).

73. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

74. *See, e.g.,* FED. R. CIV. P. 41(a)(1)(ii) (“stipulation of dismissal signed by all parties”) and FED. R. CIV. P. 41(a)(2) (dismissal “upon order of the court”).

75. *Kokkonen*, 511 U.S. at 381.

whether to enter a consent decree. The Fifth Circuit stated that “[t]he court, however, must not merely sign on the line provided by the parties.”<sup>76</sup> The court opined that though a proposed decree has the consent of the parties, the judge should not give perfunctory approval because the court’s duty is akin, but not identical to its responsibility in approving settlements of class actions, stockholders’ derivative suits, and proposed compromises of claims in bankruptcy.<sup>77</sup> The appeals court declared that the trial court must ascertain whether the settlement is fair, adequate, and reasonable.<sup>78</sup> Where a proposed consent decree, “by virtue of its injunctive provisions, reaches into the future and has continuing effect,” the terms require careful scrutiny,<sup>79</sup> presumably because a trial court is “a judicial body, not a recorder of contracts.”<sup>80</sup>

Another appeals court ruled a trial court must “ensure that its orders are fair and lawful,” meaning that an agreement that is made part of an order necessarily has judicial imprimatur and contemplates judicial “oversight.”<sup>81</sup>

For settlements that are not incorporated into court orders, but over which enforcement jurisdiction may be retained, does discretion operate differently? If so, should trial judges scrutinize such terms more or less carefully? While these settlements are not consent decrees, they are also not wholly private agreements.<sup>82</sup> For us, it seems that in all settings district judges should exercise at least some discretion before agreeing to enforce a civil case settlement agreement if a dispute arises later.<sup>83</sup> Thus, where enforcement jurisdiction is retained but the settlement is not formally filed (as a record available to the public),<sup>84</sup> a copy of the settlement should not only be provided to the court, but the court should also determine it is an appropriate subject for possible court enforcement and oversight, though its terms normally do not need to receive full judicial approval.<sup>85</sup>

76. *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981) (footnotes omitted).

77. *Id.* at 440-41.

78. *Id.* at 441 n.13 (requiring further that the agreement must also have the valid consent of the concerned parties and be “appropriate under the particular facts,” meaning “a reasonable factual and legal determination based on the facts of record”).

79. *Id.* at 441 (stating further that the agreement cannot violate the “Constitution, statute, or jurisprudence”).

80. *Ho v. Martin Marietta Corp.*, 845 F.2d 545, 548 n.4 (5th Cir. 1988).

81. *Smyth v. Rivero*, 282 F.3d 268, 282 (4th Cir. 2002).

82. *See, e.g., id.* at 280 (“a private settlement, although it may resolve a dispute before a court, ordinarily does not receive the approval of the court”).

83. For example, enforcement jurisdiction should not be retained where later disputes inevitably would involve novel or complex issues of state law, or where there are “compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c)(1) & (4) (2000).

84. *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (intervenor granted access to civil rights settlement agreement that had been submitted for court “approval” and maintained under seal in court’s file even though jurisdiction to enforce it was not retained).

85. *See, e.g., Roberson v. Giuliani*, 2002 WL 253950, at \*2 (S.D.N.Y. Feb. 21, 2002) (contract “provided” to court, but not filed or subject to “so ordered” judgment). Certainly, judges

#### *D. Reopening Federal Civil Actions*

Under *Kokkonen*, a district court is enabled, in ruling on a Rule 60(b) motion to set aside a judgment, to influence, if not exercise jurisdiction over, a breached settlement that had previously ended a civil action.<sup>86</sup> If a breach of a settlement can prompt post judgment relief overturning the settlement by reinstating the claims, even though the settlement was never incorporated into the judgment and enforcement jurisdiction was not otherwise retained, in most instances a new settlement will simply follow.<sup>87</sup>

Prior to *Kokkonen*, the appellate courts were split on whether such a settlement breach provided sufficient reason to grant a motion for judgment modification.<sup>88</sup> In *Kokkonen*, the court did not address the issue, finding “that

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should never agree to enforce illegal or procedurally unconscionable settlement agreements. And at times, in order to ensure fairness to certain parties, as with class actions and claims by minors, judicial approval of the substance of settlements is required.

86. Federal Rule of Civil Procedure 60 is entitled “Relief from Judgment or Order” and reads in part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

87. We think such reopened cases have final settlement rates at least comparable to those for other civil cases. In any event, it seems clear that most reopened cases will eventually settle, if they do not otherwise end without trial.

88. *Compare* *Fairfax Countywide Citizens v. County of Fairfax*, 571 F.2d 1299, 1302-03 (4th Cir. 1978) (footnote omitted) (holding that “upon repudiation of a settlement agreement which had terminated litigation pending before it, a district court has the authority under Rule 60(b)(6) to vacate its prior dismissal order and restore the case to its docket”), *with* *Sawka v. Healtheast Inc.*, 989 F.2d 138, 140 (3d Cir. 1993) (“Assuming arguendo that Healtheast breached the terms of the settlement agreement, that is no reason to set the judgment of dismissal aside, although it may give rise to a cause of action to enforce the agreement. Relief under Rule 60(b)(6) may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur.”) *See also* *Keeling v. Sheet Metal Workers Int’l Ass’n*, 937 F.2d 408, 410 (9th Cir. 1991) (“Repudiation of a settlement agreement that terminated litigation pending before a court constitutes an extraordinary circumstance, and it justifies vacating the court’s prior dismissal order.”); *Harman v. Pauley*, 678 F.2d 479, 481-82 (4th Cir. 1982) (in this case “interests of justice do not require vacation of dismissal order”); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371

what respondent seeks in this case is enforcement of the settlement agreement, and not merely reopening of the dismissed suit by reason of breach of the agreement that was the basis for dismissal.”<sup>89</sup> The court noted that settlement enforcement, “whether through award of damages or decree of specific performance,” was different<sup>90</sup> because it was “more than just a continuation or renewal of the dismissed suit”<sup>91</sup> and thus required its own basis for jurisdiction.<sup>92</sup>

After *Kokkonen*, the Sixth Circuit foreclosed a Rule 60(b) motion founded on an alleged settlement breach. The court said that the rule could not support enforcement of a settlement agreement not expressly incorporated in a court order because relief from a final judgment was an extraordinary remedy available only in exceptional circumstances.<sup>93</sup> The request for a contempt finding was deemed “clearly ‘more than just a continuation or renewal of the dismissed suit’” and any use of the judgment modification rule would “create an exception to the holding in *Kokkonen* that would swallow the rule.”<sup>94</sup>

The Seventh Circuit has held that “[n]othing in *Kokkonen* purports to change the stringent standards that govern the availability of relief under Rule 60(b)(6),”<sup>95</sup> so that a movant could not, in the guise of attempting to set aside an order, seek judicial interpretation of a settlement that was not incorporated in a court order and over which there was no retained jurisdiction.<sup>96</sup>

However, like the pre-*Kokkonen* split, there may now be a post-*Kokkonen* split. One federal district court, after referencing *Kokkonen*, found “that federal courts are empowered to reopen suits dismissed by reason of breach of a settlement agreement by virtue of Rule 60(b)(6).”<sup>97</sup> Another court allowed a

(6th Cir. 1976) (court had full power to vacate its order of dismissal when one party “attempted repudiation of the agreement on which the dismissal rested”).

89. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

90. *Id.* Of course, there must also be some jurisdictional basis for a Rule 60(b) motion, though such a basis was not discussed in *Kokkonen*. Authority over judgment modification motions is rarely questioned on jurisdictional grounds.

91. *Id.*

92. *Id.* Judgment modification was discussed during the oral arguments in *Kokkonen*. See Transcript of Oral Arguments, *Kokkonen* (No. 93-263).

How about any other 60(b)(6), the catch all, and the judge saying well, it sounds like a pretty good 60(b) motion to me; I was listening to these two people debate what their settlement was going to be, and they made certain representations, and one of them is trying to get out of it. So I think that fits the 60(b)(6) catchall. It justifies relief to tell me one thing and the [sic] go do another thing.

*Id.*

93. *McAlpin v. Lexington 76 Auto Truck Stop*, 229 F.3d 491, 502-03 (6th Cir. 2000).

94. *Id.* at 503.

95. *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 955 (7th Cir. 1997).

96. *Id.*

97. *Trade Arbed Inc. v. African Express* 941 F. Supp. 68, 70 (E.D. La. 1996) (emphasis omitted). See also *Rovira v. Fairmont Hotel*, 1997 WL 707115, at \*2 (E.D. La. Nov. 12, 1997) (“In *Kokkonen*, the Supreme Court ruled that federal courts do not have the power to enforce settlement

Rule 60 motion in a more unusual setting; the case involved a settlement that had been reached between the parties before the court entered a judgment based upon a pending motion. The judge explained that as the “parties’ settlement agreement preceded the entry of judgment [upon the grant of the motion], by the clerk of this court the plaintiff is entitled to postjudgment relief pursuant to Fed. R. Civ. P. 60(b)(1) . . . on the grounds of mistake.”<sup>98</sup> The court further explained “[i]t would be this court’s mistake of fact, i.e., that the parties had not settled the claims at bar before entry of judgment . . . that justifies relief.”<sup>99</sup> Instead of reopening the case, the district judge withdrew its ruling and gave the defendant “thirty-five (35) days . . . to comply with the terms of the settlement agreement.”<sup>100</sup> The court stated that if the defendant failed to comply, “the plaintiff may return . . . for whatever relief is appropriate.”<sup>101</sup>

### *E. Choosing the Applicable Contract Laws*

When *Kokkonen* permits settlement enforcement, questions have arisen about which contract laws apply. The Seventh Circuit recently ruled that “[t]he uncertainty . . . over whether state or federal law would govern a suit to enforce a settlement of a federal suit, has been dispelled; it is state law.”<sup>102</sup> This ruling applies to settlements involving both federal and state law claims.<sup>103</sup> Yet, most rules have exceptions and therein lies the rub. Helpful guidelines on any exceptions to state law applicability are hard to find. A second appeals court has simply declared that state contract law operates “unless it presents a significant conflict with federal policy,”<sup>104</sup> with such conflicts “few and restricted.”<sup>105</sup> Another appeals court was more specific, holding that local law applies unless the settlement is sought to be “enforced against the United States” or there was

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agreements that produce stipulations of dismissal. . . . This ruling, however, does not prevent federal courts from reopening dismissed suits when the interests of justice justify such relief.”); *Hernandez v. Compania Transatlantica*, 1998 WL 241530, at \*2 (E.D. La. May 7, 1998) (“Federal Rule of Civil Procedure 60(b)(6) empowers a federal district court to reopen a dismissed suit due to a party’s breach of a settlement agreement.”).

98. *Davis v. Magnolia Lady Inc.*, 178 F.R.D. 473, 474 (N.D. Miss. 1998).

99. *Id.* at 474-75 (also relying on Rule 60(b)(6)) (emphasis omitted).

100. *Id.* at 476.

101. *Id.*

102. *Lynch v. Samatamason*, 279 F.3d 487, 490 (7th Cir. 2002).

103. *See, e.g., United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000) (federal question claim involving issue of whether a settlement offer extended by the Assistant U.S. Attorney was accepted by appellee); *Carr v. Runyan*, 89 F.3d 327, 331 (7th Cir. 1996) (diversity claim where issue on appeal was whether daughter had the authority to bind mother to settlement agreement reached in mediation).

104. *Ciramella v. Reader’s Digest Ass’n, Inc.*, 131 F.3d 320, 323 (2d Cir. 1997) (citing *Atherton v. FDIC*, 117 S. Ct. 666, 670 (1977)).

105. *Id.* (quoting *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994)).

“a statute conferring lawmaking power on federal courts.”<sup>106</sup>

The exceptional conditions under which federal laws apply to settlements of federal civil actions are difficult to discern from Supreme Court precedents. In one case, federal decisional contract law on the validity of a written prelawsuit release of a federal statutory claim, allegedly procured by fraud, was applied to the settlement of a case filed in a state court because otherwise “federal rights . . . could be defeated,” because settlements of claims under that federal law “play an important part” in the “administration” of the relevant federal act, and because if “federal law controls,” there would be “uniform application throughout the country essential to effectuate” the purposes underlying the federal statutory right to sue.<sup>107</sup> And, in another case involving a different federal statutory claim presented in a state tribunal, the high court simply said that “waiver” of the “right to sue” was governed by federal law because “the policies underlying [the federal statute may] in some circumstances render that waiver unenforceable.”<sup>108</sup>

Based on such precedents, there are times when federal district courts should employ federal contract law principles in reading federal case settlement agreements. One district court nicely summarized the relevant factors.<sup>109</sup> They include: 1) whether Congress has expressed a policy of encouraging voluntary settlement of the relevant federal statutory claims; 2) whether “the Supreme Court has already articulated certain prerequisites to the validity of settlement agreement” of any relevant federal claims; 3) whether any settled federal claims are within exclusive federal court subject matter jurisdiction; 4) whether state laws in the relevant area of law are preempted “through a comprehensive statutory scheme”; 5) whether there is an expressed federal governmental interest “in remedying unequal bargaining power” between the settling parties; 6) whether the United States is a party to the settlements; and 7) whether Congress empowered the federal courts “to create governing rules of law.”<sup>110</sup>

When state contract laws are employed to sustain and interpret settlement agreements reached in federal civil actions, difficulties can arise because the sources of state law extend far beyond the “substantive” matters demanded by the Erie doctrine. Specifically, some state written civil procedure laws, seemingly operative only in the state trial courts, are used in the federal district courts. For example, federal courts have utilized a Texas Rule of Civil Procedure which

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106. *Makins v. District of Columbia*, 277 F.3d 544, 547-48 (D.C. Cir. 2002).

107. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361-62 (1952) (claim under the Federal Employers’ Liability Act). The decision seemingly was not followed in *Good v. Pennsylvania Railroad Co.*, 384 F.2d 989 (3d Cir. 1967) (state law governs lawyer’s authority to settle client’s FELA case) and *Pulcinello v. Consolidated Rail Corp.*, 784 A.2d 122 (Pa. Super. Ct. 2001) (FELA case settlement governed by state law on validity of oral agreements).

108. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1982) (civil rights claim under 42 U.S.C. § 1983). The decision was criticized in Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295 (1988).

109. *Sears, Roebuck & Co. v. Sears Realty Co., Inc.*, 932 F. Supp. 392 (N.D.N.Y. 1996).

110. *Id.* at 398-401.



states “no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.”<sup>111</sup> And at times, but not always, federal courts employ state professional conduct and civil procedure law standards to determine the authority of a person other than the party to settle pending civil actions on behalf of that party.<sup>112</sup>

### *F. Choosing the Applicable Procedures*

When a district court exercises jurisdiction over an alleged breach of a civil case settlement there are a variety of procedures that may be used. Possible procedures appear in the Federal Rules of Civil Procedure as well as in common law decisions and statutes.<sup>113</sup> Some, but not all, procedures are geared toward enforcement and remedies on behalf of the party harmed by the settlement breach.

For some settlement breaches, the court may proceed in contempt.<sup>114</sup> There are two forms of contempt, civil and criminal,<sup>115</sup> and either form may be direct or indirect. The major goals of criminal contempt are less connected to enforcement, as they chiefly involve punishment and vindication.<sup>116</sup> On the civil

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111. *In re Omni*, 60 F.3d 230, 232 (5th Cir. 1995) (quoting TEX. R. CIV. P. 11). The Texas rules are said to “govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated.” TEX. R. CIV. P. 2. A similar New York provision, CPLR § 2014, has prompted “disagreement” over its applicability to federal civil actions in the Court of Appeals for the Second Circuit. *Turk v. Chase Manhattan Bank USA, NA*, No. 00CIV1573CMGAY, 2001 WL 736814, at \*2 n.1 (S.D.N.Y. June 11, 2001).

112. *Compare* *United States v. Int’l Bhd. of Teamsters*, 986 F.2d 15, 20 (2d Cir. 1993) (federal precedent regarding attorney settlement authority used); *Reo v. U.S. Postal Serv.*, 98 F.3d 73, 77 (3d Cir. 1996) (under Federal Tort Claims Act, state law used to determine settlement authority of representative of a child); *Neilson v. Colgate-Palmolive Co.*, 993 F. Supp. 225, 226-27 (S.D.N.Y. 1998) (pursuant to local federal rule, court dispenses with certain state law requirements governing Guardian Ad Litem’s power to settle a civil case on behalf of adult incompetent to pursue her own claims as technical compliance with state law would prompt “extended and prejudicial delay”).

113. *See* 18 U.S.C. § 401 (2000) (criminal contempt); FED. R. CIV. P. 65 (injunctions); FED. R. CIV. P. 69 (writs of executions); FED. R. CIV. P. 70 (judgments for specific acts); *Feiock v. Feiock*, 485 U.S. 624 (1988) (reviewing civil and criminal contempt precedents).

114. Available procedures for certain civil case settlement breaches include criminal contempt, 18 U.S.C. § 401(3) (2000) (disobedience to lawful court order), and compensatory or coercive civil contempt. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993) (contempt may be used only where breaches involve alleged violations of express and unequivocal commands of court orders). For a review of the forms contempt and suggestions on their use, see Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345 (2000).

115. *See, e.g., Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911).

116. *Id.* *See also* 18 U.S.C. § 401(3) (criminal contempt includes disobedience to a lawful court order).

side, there may be either coercive civil contempt or compensatory civil contempt.<sup>117</sup> Before there is a contempt proceeding in the settlement breach setting, there usually must be a failure of compliance with an express and unequivocal command within a lawful court order.<sup>118</sup> Thus, contempt may only be available for a settlement breach where the agreement was incorporated into a court order. If the settlement terms were sealed or otherwise outside a court order, but jurisdiction over the settlement was retained, contempt may not be immediately available, though other procedures may be used.<sup>119</sup> Where contempt is available, both civil and criminal proceedings may arise from a single act, though because different procedures apply, they frequently will be presented separately.<sup>120</sup>

A trial court may also proceed on settlement breaches by way of contract dispute resolution. Here, settlement enforcement often follows the routine contract dispute resolution procedures employed to resolve any factual and legal disputes. Yet, the applicable procedures may not always be the same as they would for ordinary contract disputes involving such matters as defective widgets; for example, more “summary” procedures may be appropriate for settlement enforcement.<sup>121</sup>

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117. *Int'l Union v. Bagwell*, 512 U.S. 821, 827-29 (1994).

118. *D. Patrick, Inc.*, 8 F.3d at 460. In rare settings, perhaps, breach of an unincorporated settlement agreement may also be misbehavior in the vicinity of the court that obstructs the administration of justice and triggers possible contempt. 18 U.S.C. § 401(1).

119. *See, e.g., D. Patrick, Inc.*, 8 F.3d at 457-58, 462 (suggesting that while contempt procedures were unavailable to enforce an earlier settlement that was not incorporated into a court order, breach of contract procedures could be used because the trial court expressly retained jurisdiction “for the purposes of the enforcement”); *Central States S.E. & S.W. Pension Fund v. Richardson Trucking, Inc.*, 451 F. Supp. 349, 350 (E.D. Wis. 1978) (“Here the orders in both cases are in substance injunctive. However, the orders did not themselves set forth what payments the defendants were required to make, but instead did nothing more than incorporate the terms of the parties’ agreements with respect to payment schedules. The orders thus fail to meet the directive of Rule 65(d), and even if they are disobeyed, they may not be made the subject of civil contempt proceedings.”).

120. *See, e.g., F.J. Hanshaw Enter., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128 (9th Cir. 2001) (civil contempt finding affirmed, but criminal contempt finding reversed because procedural protections were not present).

121. Often, in settlement enforcement settings, “summary” procedures involve resolution without evidentiary hearings. Where necessary procedures entail evidentiary hearings following formal discovery because of disputes over material issues of fact, jury trials may be needed. *Compare* *Millner v. Norfolk & W. Ry. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1981) (when a material dispute arises regarding a settlement agreement, the “trial court must . . . conduct a plenary evidentiary hearing”); *Quint v. A.E. Staley Mfg. Co.*, No. Civ.96-71-B, 1999 WL 33117190, at \*1 (D. Me. Dec. 23, 1999) (usually no jury trial right in settlement enforcement proceedings, with FELA claims possibly excepted); *Ford v. Cotozems & S. Bank*, 928 F.2d 1118, 1121-22 (11th Cir. 1991) (no jury trial right). Summary settlement enforcement and ordinary contract enforcement procedures both differ from contempt procedures that may be employed when settlement orders are

Certain breaches of settlement pacts incorporated into judgments and involving only “the payment of money” seemingly may also be processed through writs of execution under Federal Rule of Civil Procedure 69(a), “unless the court directs otherwise.”<sup>122</sup> Here, the procedures follow the practices of “the state in which the district court is held.” These writs can involve such remedies as attachment, garnishment, and sequestration.<sup>123</sup> Unlike written federal laws, some written state laws expressly recognize the opportunity for a judgment creditor to choose between different enforcement procedures. For example, the Illinois Marriage and Dissolution of Marriage Act says that terms of a dissolution agreement “set forth in [a] judgment are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.”<sup>124</sup>

Choices of applicable procedures are constrained in some settings. Consider, for example, cases where settling parties wish to keep their agreement secret, but nevertheless have the district court retain at least some enforcement jurisdiction. In one recent case, a newspaper sought to intervene in a civil action in order to obtain a copy of such a settlement agreement.<sup>125</sup> The magistrate judge had approved the agreement, but “did not embody his approval in a judicial order that would have made the agreement enforceable by contempt proceedings.”<sup>126</sup> The appeals court ruled that such an approval had “no legal significance” to enforcement unless it was “embodied in a judicial order retaining jurisdiction of the case in order to be able to enforce the settlement without a new lawsuit.”<sup>127</sup> As to the wish to keep the settlement secret, the appeals court said, “the general rule is that the record of a judicial proceeding is public” and that concealing records disserves the values protected by the First Amendment and bars the public from monitoring judicial performance adequately.<sup>128</sup> The appeals court found there was “a strong presumption,” rather than an absolute rule, of

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disobeyed. *See, e.g., D. Patrick, Inc.*, 8 F.3d at 459 (“because the contempt proceeding is concerned solely with whether or not the respondent’s conduct violates a prior court order, the parties cannot reasonably expect to litigate to the same extent that they might in a new and independent civil action”); *F.J. Hanshaw*, 244 F.3d at 1143 n.11 (need finding of bad faith in civil contempt proceeding, perhaps based on clear and convincing evidence).

122. FED. R. CIV. P. 60(a). In “extraordinary circumstances” Fed. R. Civ. P. 70 may be used. *See, e.g., Spain v. Mountanos*, 690 F.2d 742, 744-45 (9th Cir. 1982) (“under the extraordinary circumstances here where the [money] judgment is against a state which refuses to appropriate funds through the normal process . . . any remedy provided in Rule 69 or Rule 70 to enforce the award” is appropriate).

123. *In re Merrill Lynch Relocation Mgmt., Inc. v. Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d 1116, 1120 (9th Cir. 1987) (Rule 69(a) has been applied “to garnishment, mandamus, arrest, contempt of a party, and appointment of receivers”).

124. 750 ILL. COMP. STAT. ANN. 5/502(e) (2002).

125. *Jessup v. Luther*, 277 F.3d 926, 927 (7th Cir. 2002).

126. *Id.*

127. *Id.* at 929.

128. *Id.* at 927-28.

openness.<sup>129</sup> So upon “a compelling interest in secrecy,” the record of an enforceable settlement could be sealed.<sup>130</sup> The court noted most “settlement agreements, like most arbitration awards and discovery materials, are private documents. . . not judicial records,” and thus the issue of balancing the interest in promoting settlements by preserving secrecy versus the interest in making public materials upon which judicial decisions are based does not arise.<sup>131</sup> The issue does not arise because there is “no judicial decision” where there is “a stipulation of dismissal . . . without further ado or court action,” leaving the settlement with “the identical status as any other private contract.”<sup>132</sup> Since the trial judge in the case had participated in “the making of the settlement,” the appeals court found the “fact and consequence of his participation are public acts.”<sup>133</sup> So, future ancillary enforcement jurisdiction may be unavailable to many parties who wish secrecy for their settlements.

Choices of applicable procedures are also constrained in certain settings where settling parties or their attorneys may later wish to pursue an award of attorney’s fees. For example, fees may be awarded to “the prevailing party” in certain civil rights actions.<sup>134</sup> The U.S. Supreme Court has ruled that a determination of “legal merit” is a condition for such an award and that a consent decree may meet this condition if it involves judicial approval and oversight of “court-ordered change in the legal relationship” between the settling parties.<sup>135</sup> One federal court has ruled that such a consent decree arises when a trial court incorporates a settlement into an order, making the contractual obligations enforceable as an order of court, but may not arise when a trial court retains enforcement jurisdiction over a settlement which has not been incorporated.<sup>136</sup>

### *G. Discretionary Refusals of Settlement Enforcement Requests*

Where a federal district court has incorporated terms of a settlement agreement into an order or has retained jurisdiction to enforce a settlement agreement, can it later decline to enforce the settlement even though requested, leaving the matter to other courts? If so, under what circumstances? Or, is such

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129. *Id.* at 928.

130. *Id.*

131. *Id.* (citation omitted).

132. *Id.*

133. *Id.* at 929.

134. *See, e.g.*, 28 U.S.C. § 1988(b) (1994 & Supp. 1999).

135. *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)). The same “prevailing party” standard seemingly operates in other civil rights settings where fee awards are allowed. *See Race v. Toledo-Davita*, 291 F.3d 857 (1st Cir. 2002) (America with Disabilities Act claims); *Oil, Chem. & Atomic Workers Int’l Union v. Dep’t of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (using standard in fee requests under Freedom of Information Act).

136. *See Roberson v. Giuliani*, 2002 WL 253950, at \*6 (S.D.N.Y. Feb. 21, 2002); *Smyth v. Rivero*, 282 F.3d 268, 285 (4th Cir. 2002).

enforcement exclusively within the subject matter jurisdiction of that district court, so that no other court (federal or state) may enforce? To date there has been little attention to these questions.

We reject the notion of exclusive subject matter jurisdiction in the trial court where the settlement was reached, even where there is an incorporation of the agreement or a retention of jurisdiction. Where enforcement jurisdiction is ancillary, judicial discretion about its exercise should remain available as it does in similar settings, such as when federal district courts are asked to exercise “supplemental” jurisdiction.<sup>137</sup> When a settlement dispute involves “a novel or complex issue of [s]tate law,”<sup>138</sup> federal enforcement jurisdiction often should be declined. Yet, employment of the same standards in enforcement settings that are used in other ancillary jurisdiction settings would be inappropriate. Thus, enforcement should not be declined simply because all claims over which there was original jurisdiction have been dismissed.<sup>139</sup> If the discretion to decline to exercise ancillary enforcement power is used too liberally where the settlement was incorporated into a court order or where jurisdiction was expressly retained, the future settlements will be deterred and certain judicial efficiencies will be undermined. Therefore, there should be very little discretion to refuse enforcement requests where earlier court orders expressly provided for “exclusive” jurisdiction over later disputes.<sup>140</sup>

In addition to at least some of the standards used with statutory supplemental jurisdiction, we posit additional general guidelines on discretionary refusals of settlement enforcement requests. First, refusals should be more difficult where federal law claims were settled because there is a greater likelihood that federal laws will govern legal issues arising during enforcement proceedings. Second,

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137. 28 U.S.C. § 1367(c) (2000). The extent to which enforcement jurisdiction may be exercised under the supplemental jurisdiction statute remains somewhat unclear. To us, at least some exercise is appropriate under 28 U.S.C. § 1367(a) (allowing supplemental jurisdiction over “claims that are so related to claims in the action within . . . original jurisdiction that they form part of the same case or controversy”). See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (recognizing that in some instances settlement enforcement claims and claims earlier presented for judicial resolution may have something to do with each other in that they are all “in varying respects and degrees factually interdependent”).

138. 28 U.S.C. § 1367(c)(1) (granting court discretion to decline supplemental jurisdiction when “claim raises a novel or complex issue of State law”).

139. *But see* 28 U.S.C. § 1367(c)(3) (granting court discretion to decline supplemental jurisdiction when “court has dismissed all claims over which it has original jurisdiction”).

140. While parties cannot establish federal district court subject matter jurisdiction by contract, the incorporation of an exclusive venue provision in a court order in a pending civil action signifies a judicial recognition that there will be ancillary jurisdiction in certain events, in addition to providing a judicial promise that, in the absence of exceptional circumstances, it will be exercised. See, e.g., *Manges v. McCamish, Martin, Brown & Loeffler*, 37 F.3d 221, 224 (5th Cir. 1994). *But see* *Housing Group v. United Nat’l Ins. Co.*, 109 Cal. Rptr. 2d 497 (Ct. App. 2001) (persons involved in settlement talks outside of any civil lawsuit cannot agree to place settlement before a trial court in order to secure possible court enforcement because there is no justiciable controversy).

refusals should be more difficult where the same district judge will preside over the settlement enforcement proceedings as presided over the settlement talks because desired efficiencies are more likely to occur.<sup>141</sup> Third, refusals should be easier when federal governmental interests are diminished due to settlement agreements which expressly require that state laws govern any future disputes. Fourth, refusals should be more difficult where enforcement proceedings will involve settlement breaches that violate court orders because they more readily implicate the power of the courts to “protect” their proceedings and to “vindicate” their authority.<sup>142</sup> Fifth, refusals should be easier where enforcement proceedings will not involve extensive inquiries into court records, such as hearing transcripts and filed papers. Sixth, refusals should be more difficult where earlier and related settlement enforcement proceedings have already occurred in the federal district court.

### III. IMPROVING SETTLEMENT ENFORCEMENT IN THE FEDERAL DISTRICT COURTS

Many of the difficulties with federal settlement enforcement proceedings can be reduced by new written federal laws. We posit that such new laws are needed both from the U.S. Supreme Court, as the federal civil procedure rulemaker, and from the Congress. As rulemaker, the Court should consider both amendments to existing civil procedure rules and entirely new rules. We urge Congress at this time to focus only on changes to the supplemental jurisdiction statute.

Difficulties regarding the incorporation of settlement terms into court orders and the retention of jurisdiction for later enforcement could be reduced through amendments to Federal Rule of Civil Procedure 58. The rule already speaks to judgments upon jury verdicts or other decisions by juries, as well as to judgments upon decisions by courts without juries.<sup>143</sup> An amended rule could be accompanied by new forms, which would reduce confusion, as they would be “sufficient” if used.<sup>144</sup> An amended rule could be modeled on some existing state civil procedure laws. For example, a Texas statute says:

- (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
- (b) The court in its discretion may incorporate the terms of the agreement in the court’s final decree disposing of the case.
- (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.<sup>145</sup>

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141. *Kokkonen*, 511 U.S. at 380 (“efficient” to adjudicate settlement breach with claim prompting the settlement where facts underlying both have much “to do with each other”).

142. *Id.* at 380-81.

143. FED. R. CIV. P. 58.

144. FED. R. CIV. P. 84 (forms in Appendix of Forms are sufficient).

145. TEX. CIV. PRAC. & REM. §154.071.

And, a California Code of Civil Procedure says:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.<sup>146</sup>

Difficulties regarding discretionary refusals of future or present settlement enforcement requests could be reduced through amendments to the supplemental jurisdiction statute.<sup>147</sup> That statute is applied today, for the most part, to the initial adjudicatory authority over civil claims pleaded or otherwise presented before or during so-called trials on the merits, typically encompassing “factually interdependent” claims under *Kokkonen*.<sup>148</sup>

Further difficulties with settlement enforcement procedures can be diminished with amendments to Federal Civil Procedure Rules 65 and 69. Amendments to Federal Rule of Civil Procedure 65(d) could address enforcement issues arising from settlements involving equitable remedies. Amendments to Federal Rules of Civil Procedure 69(a) could address enforcement issues arising from settlements involving monetary payments. Should codification of civil contempt procedures be found necessary, a new federal civil procedure rule seems the best vehicle to do so<sup>149</sup> using several local court rules and written state laws as models.<sup>150</sup>

#### CONCLUSION

Settlements of federal civil actions may, but need not, be subject to later judicial enforcement. As recognized by the U.S. Supreme Court in *Kokkonen v. Guardian Life Insurance Co.*, one significant limitation on enforcement proceedings is subject matter jurisdiction because federal district courts are “courts of limited jurisdiction.” Under *Kokkonen*, enforcement jurisdiction may be “independent,” but usually is “ancillary” because state law claims typically are

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146. CAL. CIV. PRO. CODE §664.6 (1987 & Supp. 2002). Prior to its enactment, “California appellate decisions were in conflict as to the appropriate procedure for enforcement of an agreement to settle pending litigation.” *Assemi v. Assemi*, 872 P.2d 1190, 1194-95 (Cal. 1994). *But see* LA. CIV. CODE ANN. art. 3071 (1994) (settlement recited in open court “confers” upon each party “the right of judicially enforcing its performance”).

147. 28 U.S.C. § 1367 (2000).

148. A review and critique of the supplemental jurisdiction statute appears in Jeffrey A. Parness & Daniel J. Sennott, *Expanded Recognition in Written Laws of Ancillary Federal Court Powers: Supplementing the Supplemental Jurisdiction Statute*, \_\_\_ U. PITT. L. REV. \_\_\_ (2002).

149. Acts constituting criminal contempt are already expressly addressed in 18 U.S.C. § 401 (2000). These statutory standards have traditionally been used to help define acts constituting civil contempt.

150. *See, e.g.*, ILL. CIR. CT. R. FOR FIFTEENTH CIR. 11.1 (2000); CONN. SUP. R. § 1-14 (1999).

involved where there is no diversity of citizenship. Ancillary enforcement powers may be exercised by district courts either where claims were initially presented for adjudication and disputes arising from later settlements are “factually interdependent,” or where recognition of enforcement authority enables courts “to function successfully,” such as where courts need to insure that their orders are not “flouted or imperiled.” Typically, enforcement authority is exercised so that the courts function successfully.

Difficulties have surfaced regarding this ancillary settlement enforcement jurisdiction. They concern how to incorporate settlement terms into court orders and how otherwise to retain jurisdiction, whether settlement disputes may prompt the reopening of judgments, and what contract laws and what procedures should apply when federal case settlements are enforced. There are additional troubles which have yet to surface significantly, including whether there is judicial discretion to refuse requests that future enforcement jurisdiction be retained and whether certain settlement disputes can prompt discretionary refusals of available enforcement jurisdiction.

We believe new written federal laws are needed now to address many of these difficulties. Relevant lawmakers include both the U.S. Supreme Court, as promulgator of the federal rules of civil procedure, and the Congress. We suggest amendments to the Federal Rules of Civil Procedure on judgment entry, on judgments involving money and on permanent injunctions, as well as changes to the supplemental jurisdiction statute.