

Tulsa Law Review

Volume 30
Number 4 *Mineral Law Symposium*

Volume 30 | Number 4

Summer 1995

Kokkonen v. Guardian Life: Limiting the Power of Federal District Courts to Enforce Settlement Agreements in Dismissed Cases

Charles K. Bloeser

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Charles K. Bloeser, *Kokkonen v. Guardian Life: Limiting the Power of Federal District Courts to Enforce Settlement Agreements in Dismissed Cases*, 30 Tulsa L. J. 671 (1995).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol30/iss4/3>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

NOTES AND COMMENTS

KOKKONEN v. GUARDIAN LIFE: LIMITING THE POWER OF FEDERAL DISTRICT COURTS TO ENFORCE SETTLEMENT AGREEMENTS IN DISMISSED CASES

I. INTRODUCTION

The enforcement of settlement agreements is not a sexy subject, but it is intensely relevant to the life of the practicing lawyer and that lawyer's clients.¹ In a rare unanimous opinion,² the United States Supreme Court recently answered the divisive question³ of whether a federal district court possesses "inherent" subject matter jurisdiction⁴ to enforce a settlement agreement between parties whose case was dismissed from federal court with prejudice, pursuant to the agreement, and over which the court has no remaining independent grounds for jurisdiction.

In *Kokkonen v. Guardian Life Insurance Co.*,⁵ the United States Supreme Court flatly rejected the Ninth Circuit's assertion of such

1. See, e.g., Robert L. Haig and Steven P. Caley, *Deep Pocket Perils: Defendants Rich in Resources Must Overcome Bias*, 80 A.B.A. J. 59 (Dec. 1994); Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1.

2. Judge Shadur of the United States District Court for the Northern District of Illinois has noted that the *Kokkonen* decision "represents an instance of a somewhat rare phenomenon: a unanimous decision of the Supreme Court." *Smith v. Martin*, 1994 WL 529325 (N.D. Ill. 1994).

3. The question had divided the federal circuit. See *infra* notes 13-31 and accompanying text.

4. Subject matter jurisdiction refers to a court's authority to hear and adjudicate cases of the general class or category to which proceedings in question belong. *Standard Oil Co. v. Montecatini Edison*, 342 F. Supp. 125, 129 (D.D.C. 1989). A federal court will have subject matter jurisdiction to hear a dispute if it presents a federal question or if the parties are "diverse." Federal questions are those that arise "under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. CONST. art. III, § 2. 28 U.S.C. § 1331 (1988) provides that "[t]he district court shall have original jurisdiction of all civil actions" arising under the same authorities. Federal statutes and common law, administrative regulations and matters involving interstate commerce can all create a "federal question." See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 2.3, at 13-19 (2d ed. 1993).

Diversity jurisdiction involves parties from different states who have met a jurisdictional minimum amount in controversy, currently \$50,000. 28 U.S.C. § 1332 (1988). This form of subject matter jurisdiction arises under the Constitutional extension of judicial power "to Controversies . . . between Citizens of different States, . . . and between a State, or the Citizens thereof and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2.

5. 114 S. Ct. 1673 (1994).

"inherent" jurisdiction.⁶ The Court held that the doctrine of ancillary jurisdiction does not extend to this type of case.⁷ Furthermore, because a settlement agreement is a contract, unless a district court makes compliance with a settlement agreement part of its dismissal⁸ or unless the parties seek the retention of court jurisdiction,⁹ a litigant must ask a state court to enforce a settlement agreement, absent an independent basis for federal jurisdiction.¹⁰ The Court's decision to articulate a "bright line" rule put to rest a dispute among the federal circuits¹¹ and eased the concerns of Oklahoma and eight other states who had urged that a recognition of such "inherent" jurisdiction would be an inexcusable affront to state sovereignty.¹² Because the decision reduces judicial uncertainty, preserves state sovereignty over settlement disputes, preserves due process, helps federal courts discharge overbearing dockets, and articulates clear guidelines for parties and attorneys who seek federal supervision of their settlement agreements, the decision is a welcome judicial development.

II. LAW PRIOR TO THE CASE

Prior to May 16, 1994, a litigant in federal court had little certainty that a settlement agreement it reached would be enforced by the federal court in which it had filed the action.¹³ The Circuits had split over the issue, and no "bright line" rule existed.

6. *Id.* at 1675.

7. *Id.* at 1676.

8. FED. R. CIV. P. 41(a)(2) states that "[e]xcept as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon *order of the court and upon such terms and conditions as the court deems proper . . .*" (emphasis added).

9. FED. R. CIV. P. 41(a)(1)(ii) provides:

[s]ubject to the provisions of Rule 23(e) [prohibiting party dismissal of class actions], of Rule 66 [prohibiting party dismissal where a receiver has been appointed], and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court . . . by filing a stipulation of dismissal signed by all parties who have appeared in the action. *Unless otherwise stated* in the notice of dismissal or stipulation, the dismissal is without prejudice . . . (emphasis added).

10. *Kokkonen*, 114 S. Ct. at 1677.

11. See *infra* notes 13-31 and accompanying text.

12. Oklahoma joined Ohio, Alaska, Illinois, Kansas, Massachusetts, Montana, Pennsylvania, Virginia, and the District of Columbia as *Amici Curiae* in support of *Kokkonen*. Brief for the States of Ohio, Alaska, Illinois, Kansas, Massachusetts, Montana, Oklahoma, Pennsylvania, Virginia, and the District of Columbia as *Amici Curiae* in Support of Petitioner, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1363 (1994) (No. 93-263) [hereinafter Brief for the States].

13. This is the date on which *Kokkonen* was decided.

The issue raised in *Kokkonen* divided the United States Circuit Courts of Appeal.¹⁴ The Third,¹⁵ Fourth,¹⁶ Fifth,¹⁷ Seventh,¹⁸ and Eighth¹⁹ Circuits rejected inherent jurisdiction under circumstances similar to those in the Ninth Circuit case. Appellate courts for the First,²⁰ Sixth,²¹ Eleventh²² and Ninth²³ Circuits decided cases that seemed to leave the door open to jurisdiction.

Those courts that recognized post-settlement jurisdiction did so for several reasons. These included the views that a settlement agreement was not an independent contract,²⁴ that the continuing exercise

14. For recent law review commentaries that discuss this split, see Alyson Weiss, Note, *Federal Jurisdiction to Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6)*, 10 CARDOZO L. REV. 2137 (1989); Note, *Postdismissal Enforcement of Settlement Agreements in Federal Court and the Problem of Subject Matter Jurisdiction*, 9 REV. LITIG. 249 (1990).

15. In *Sawka v. Healtheat, Inc.*, the Court of Appeals for the Third Circuit held that a district court lacks the power to enforce a settlement agreement "which is the basis of, but not incorporated into, an order or judgment of the court." 989 F.2d 138, 141 (3d Cir. 1993).

16. *Fairfax Countywide Citizens Ass'n v. County of Fairfax*, 571 F.2d 1299 (4th Cir. 1978). The Fourth Circuit dismissed this civil rights appeal because the settlement agreement had not been approved or incorporated into a court order, nor was there any independent ground for federal jurisdiction. *Id.*

17. In *Langley v. Jackson State Univ.*, the Fifth Circuit Court of Appeals stated that a district court may only in limited circumstances hear a post-dismissal motion to enforce a settlement agreement: "Once a court dismisses an action with prejudice because of a settlement agreement, and the agreement is neither approved of nor incorporated by the court in its decree or order and the court does not indicate any intention to retain jurisdiction, an action to enforce the settlement agreement requires federal jurisdiction independent of the action that was settled." 14 F.3d 1070, 1074 (5th Cir. 1994).

18. Judge Richard Posner, one of the early Law and Economics proponents who argued for an ever wiser expenditure of scarce judicial resources, was unwilling to affirm district court jurisdiction under facts similar to those in *Kokkonen*. Absent an independent basis for exercising federal jurisdiction over settlement agreements, "there must be a deliberate retention of jurisdiction, as by issuing an injunction or stating that jurisdiction is retained for a particular purpose." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985). See also Note, *Postdismissal Enforcement of Settlement Agreements*, 9 REV. LITIG. 249, 256 (1990); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994) (stating "*McCall-Bey* disposes of the contention that just because the initial suit sought to vindicate a federal right, the court possesses federal-question jurisdiction under 28 U.S.C. § 1331 to construe and enforce a contract ending the litigation.").

19. *Aduono v. World Hockey Ass'n*, 824 F.2d 617 (8th Cir. 1987); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984).

20. *Dankese v. Defense Logistics Agency*, 693 F.2d 13, 15 (1st Cir. 1982); *United States v. Baus*, 834 F.2d 1114 (1st Cir. 1987).

21. *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1374 (6th Cir. 1976) (granting vacation of dismissal without prejudice of patent infringement action under FED. R. Crv. P. 60 (b)(6), and granting order of specific performance of settlement agreement which caused suit's dismissal).

22. *Kent v. Baker*, 815 F.2d 1395 (11th Cir. 1987).

23. *Kokkonen v. Guardian Life Ins. Co.*, No. 92-16628, 1993 U.S. App. LEXIS 12448 (unpublished) (9th Cir. 1993); *Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555 (9th Cir. 1991). For a recent application of the *Kokkonen* rule to a civil rights action see *Sims v. Southern Pac. Transp. Co.*, 1994 WL 564701 (N.D. Cal. 1994).

24. *Aro Corp.*, 531 F.2d at 1374. The Ninth Circuit's unpublished opinion in *Kokkonen* is also among those cases that seems to rely on the fact that the settlement agreement would not have existed but for the litigation: "[T]he district court may, following its dismissal of an action

of jurisdiction was a cost efficient use of judicial resources,²⁵ and that Court authority would founder without the power to enforce settlement agreements.²⁶

Those circuits that rejected the "inherent power" to enforce settlement agreements between diversity litigants²⁷ who had left the courthouse without clear court retention of jurisdiction did so for several reasons. First, even though a settlement agreement did not arise separately from current or threatened litigation, the resulting contract does not sufficiently depend on that litigation to warrant its enforcement by a federal court.²⁸ It may, however, be dependent enough for a court to vacate its dismissal order under Rule 60(b).²⁹ Second, some courts held that the "inherent power" doctrine was part and parcel of the general jurisdiction of state courts, and that the doctrine, therefore, could not be supported by the specific and limited jurisdiction of federal courts.³⁰ Third, "inherent jurisdiction" was rejected because it was analytically too abstract; its boundaries were unclear, and therefore, it was "too soft" to sustain a jurisdictional foundation.³¹

III. OKLAHOMA'S PLEA

Oklahoma joined Ohio, Alaska, Illinois, Kansas, Massachusetts, Montana, Pennsylvania, Virginia, and the District of Columbia in supporting Kokkonen's sole claim that a federal district court should not have the power to enforce settlement agreements between litigants who have not retained federal district court jurisdiction as a part of

pursuant to a settlement agreement, enter a subsequent order enforcing the terms of the agreement." Kokkonen v. Guardian Life Ins. Co., No. 92-16628, 1993 U.S. App. LEXIS 12448, at *1 (unpublished) (9th Cir. 1993).

25. Kokkonen v. Guardian Life Ins. Co., No. 92-16628, 1993 U.S. App. LEXIS 12448, at *1 (unpublished) (9th Cir. 1993); *Aro Corp.*, 513 F.2d at 1371.

26. Cf. *United States v. Baus*, 834 F.2d 1114, 1124 (1st Cir. 1987).

27. Litigants who appear in federal court on the basis of diversity of citizenship, as opposed to those who are there due to a federal question raised by their claim. See *supra* note 4.

28. *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299, 1305 (4th Cir. 1978); cf. *Gardiner v. A. H. Robins Co.*, 747 F.2d 1180, 1188-89 (8th Cir. 1984).

29. FED. R. CIV. P. 60(b) provides, in part, that

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 . . . , misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

For an explication of the Rule and its applications, see *Fairfax*, 571 F.2d at 1299.

30. *Fairfax*, 571 F.2d at 1304.

31. *Mc-Call Bey v. Franzen*, 777 F.2d 1178, 1187 (7th Cir. 1985) (Posner, J.).

the settlement.³² Oklahoma joined the *amicus* brief because it was "concerned about the untenably broad conception of federal jurisdiction" asserted in the Ninth Circuit's opinion.³³ The States argued that the generalized "supervisory jurisdiction"³⁴ of federal courts should be strictly circumscribed because any broader application "is incompatible with a proper understanding of judicial self-restraint, threatens accepted principles of federalism, and violates the separation of powers"³⁵

Oklahoma did not argue that the doctrine of "supervisory jurisdiction" had no place in federal courts. Rather, it asserted with the *amici* that the Ninth Circuit had used the doctrine in an "improper and uncontrolled manner."³⁶ The Ninth Circuit had ignored the distinction between a settlement agreement between parties and the retention of court jurisdiction entered as an order of the court.³⁷ Furthermore, the *amici* argued that the Ninth Circuit applied the wrong test to determine whether a district court could retain jurisdiction; the appropriate test, they argued, was "whether the court entered a formal order containing binding terms subject to further enforcement."³⁸ According to the *amici*, it should not matter what time a settlement is reached,³⁹ whether the judge actively participates in the settlement negotiations⁴⁰ or manifests subjective intentions related to continuing jurisdiction,⁴¹ or whether a settlement agreement is memorialized in the record transcript.⁴²

32. Brief for the States, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1363 (1994) (No. 93-263).

33. *Id.* at 1.

34. The term "supervisory jurisdiction" refers generally to the doctrine that permits courts to supervise the activities of litigants outside the courthouse. It may also be read as analogous to the ancillary, pendant, or now, supplemental jurisdiction of federal courts.

35. Brief for the States at 2, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1363 (1994) (No. 93-263).

36. *Id.* The *amici* argued that the High Court had only permitted the exercise of "supervisory jurisdiction" in three limited circumstances: (1) where supervisory jurisdiction is "truly grounded in statutory authority," *see id.*, at 4 (citing *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)); (2) where the Supreme Court has invoked its own power to supervise the administration of criminal justice in the lower federal courts, *see* Brief for the States at 4 (citing *Elkins v. United States*, 364 U.S. 206, 216 (1960)); (3) where needed to secure compliance with the terms and conditions of its own decrees, *see* Brief for the States at 5 (citing *Hutto v. Finney*, 437 U.S. 678, 683-84 (1978); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)).

37. Brief for the States at 10, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1363 (1994) (No. 93-263); *see also infra* notes 143-152 and accompanying text.

38. Brief for the States at 15, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1363 (1994) (No. 93-263).

39. *Id.* at 16.

40. *Id.* at 17.

41. *Id.* at 18.

42. *Id.* at 19.

IV. *KOKKONEN V. GUARDIAN LIFE INSURANCE CO.*A. *Facts*

Guardian Life Insurance Company fired Matt Kokkonen after he served the company as an agent for fourteen years.⁴³ In response, Kokkonen filed a suit in 1990 against Guardian in California Superior Court in Tulare County, California.⁴⁴ Kokkonen alleged a variety of state law claims, including fraud, wrongful termination, and wrongful denial of lease.⁴⁵ He sought compensatory and punitive damages.⁴⁶ Guardian counterclaimed, alleging conversion and unfair competition.⁴⁷ On diversity grounds Guardian removed the case from the state court to the United States District Court for the Eastern District of California.⁴⁸

After a three-day jury trial in March 1992, but before the judge issued jury instructions, the parties agreed to settle the case.⁴⁹ On the record, they discussed the terms of settlement with federal Judge Robert Coyle,⁵⁰ who stated to the parties that he did not want to see them back in his court due to a breach of the settlement agreement.⁵¹ Although the parties discussed the settlement terms with the judge at the in-chambers conference, they never reduced the oral settlement to a written instrument.⁵² The parties prepared a Stipulation and Order of Dismissal With Prejudice,⁵³ in anticipation of dismissal of the

43. See Linda Mullenix, *The Inherent Jurisdiction of Federal Courts to Enforce Settlement Agreements in Dismissed Cases*, 1994 SUP. CT. PREVIEW 174 (Feb. 18, 1994).

44. *Kokkonen v. Guardian Life Ins. Co.*, No. CV-90-00325-REC (E.D. Cal. 1990).

45. Linda S. Mullenix, *supra* note 43, at 174.

46. Linda S. Mullenix, *supra* note 43, at 174.

47. Linda S. Mullenix, *supra* note 43, at 174.

48. *Kokkonen*, 114 S. Ct. 1673, 1674 (1994).

49. *Id.* at 1674-75.

50. *Id.*

51. Brief for Respondent at 11, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1674 (1994) (No. 93-263) [hereinafter Brief for Respondent].

52. See *Kokkonen*, 114 S. Ct. at 1675.

53. *Id.* The parties took these actions pursuant to FED. R. CIV. P. 41(a)(1)(ii). The order provided as follows:

It is hereby stipulated and agreed, by and between the parties hereto, through their undersigned attorneys, that plaintiff's entire Complaint against defendant The Guardian Life Insurance Company of America herein be, and the same hereby is, dismissed with prejudice, without costs or attorneys' fees in favor of any party against the other.

It is hereby further stipulated and agreed, that defendant The Guardian Life Insurance Company of America's entire cross-complaint against plaintiff herein be, and the same hereby is, dismissed with prejudice without costs or attorneys' fees in favor of any party as against the other.

Stipulation and Order of Dismissal With Prejudice, *Kokkonen v. Guardian Life Ins. Co.*, No. CV-90-00325-REC (E.D. Cal. 1990).

complaint and cross-complaint. Judge Coyle signed these under the notation, "It is so ordered."⁵⁴

A month later, Guardian filed a motion seeking enforcement of the settlement agreement, alleging that Kokkonen had breached.⁵⁵ Kokkonen responded that the district court lacked subject matter jurisdiction to enforce the agreement⁵⁶ because the case was no longer pending before the court and because the court lacked independent federal grounds to hear the enforcement motion.⁵⁷ Judge Coyle rejected Kokkonen's arguments, claimed jurisdiction and issued an enforcement order against Kokkonen.⁵⁸

B. *Treatment in the Ninth Circuit*

Relying solely on his jurisdictional objection, Kokkonen appealed to the U.S. Court of Appeals for the Ninth Circuit.⁵⁹ That court, in an unpublished opinion, affirmed Judge Coyle's decision.⁶⁰ In doing so, it relied upon *Wilkinson v. Federal Bureau of Investigation*,⁶¹ in which it asserted that federal district courts have "inherent" jurisdiction to enforce settlement agreements on the grounds of preservation of court authority and the furtherance of judicial economy.⁶²

The Ninth Circuit asserted that district court jurisdiction required that it be able to enforce agreements with respect to an action pending before the court.⁶³ However, in the court's unpublished opinion it

54. *Kokkonen*, 114 S. Ct. at 1675.

55. *Id.*

56. *Id.*

57. *Kokkonen v. Guardian Life Ins. Co.*, No. 92-16628, 1993 U.S. App. LEXIS 12488, at *1 (9th Cir. May 16, 1994).

58. *Kokkonen*, 114 S. Ct. at 1675.

59. *Id.*

60. *Id.*

61. 922 F.2d 555 (9th Cir. 1991). In *Wilkinson*, the appellants reached a settlement agreement with the F.B.I. that provided for the production of certain documents related to the appellants' activities. *Id.* at 556-57. The district court entered final judgment and dismissed the appellants' claims. *Id.* at 557. Subsequently, the F.B.I. allegedly improperly redacted 43,600 pages of the documents. *Id.* The appellants sought to compel the federal agency to produce them. *Id.* In response, the F.B.I. asserted that the court lacked jurisdiction over the settlement agreement. *Id.* Characterizing the appellant's motion as one for the enforcement of a settlement agreement, the Ninth Circuit asserted jurisdiction, claiming that "[d]istrict courts have the inherent power to enforce settlement agreements." *Id.*

62. *Kokkonen*, 114 S. Ct. at 1675.

63. *Kokkonen*, 1993 U.S. App. LEXIS 12448, at *1. The Ninth Circuit stated that a district court has the "inherent power summarily to enforce a settlement agreement with respect to an action pending before it The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation."

Id. (quoting *Dacaney v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978)).

neither addressed nor applied a rule for determining whether a particular settlement dispute threatens court authority.⁶⁴

As a second basis for continuing jurisdiction, the Ninth Circuit asserted the need to preserve scarce judicial resources.⁶⁵ The court chose not to require Guardian to seek relief under Federal Rule of Civil Procedure 60(b)⁶⁶ or to pursue formal dismissal of the prior order and the institution of a new action in state court, both of which would have required the additional expenditure of scarce judicial time, resources, and personnel.⁶⁷ The Ninth Circuit's position was bolstered by the fact that the trial was complete, except for the issuance of jury instructions, when the parties settled.⁶⁸

In the Ninth Circuit, Guardian argued that an additional basis for asserting continuing jurisdiction existed; Judge Coyle expected he would have such jurisdiction.⁶⁹ Judge Coyle had commented at length to the parties during the *in camera* hearing that he did not want to see them back in his courtroom due to a breach of the settlement agreement.⁷⁰ However, Judge Coyle did not put his intent in writing as required by the Federal rules.⁷¹ Rather, he merely dismissed the suit with prejudice and did not retain jurisdiction over the settlement agreement.⁷²

64. See *Kokkonen*, 1993 U.S. App. LEXIS 12448, at *1.

65. *Kokkonen*, 1993 U.S. App. LEXIS 12448, at *2 (citing *Dacaney v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978)).

66. Federal Rule of Civil Procedure 60(b) provides, in part: "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." FED. R. CIV. P. 60(b).

67. These goals are consistent with the Law and Economics Movement, which has generally sought a wiser expenditure of scarce judicial resources. See generally Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L. J. 599 (1988); James B. Zimarowski et al., *An Institutional Perspective on Law and Economics (Chicago Style) in the Context of United States Labor Law*, 35 ARIZ. L. REV. 397 (1993).

68. *Kokkonen*, 114 S. Ct. at 1674-75.

69. Brief for Respondent at 5, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1637 (1994) (No. 93-263).

70. *Id.* at 23. For instance, in discussing with the parties their settlement agreement, Judge Coyle stated that "I'm just trying to get this straight, and it makes sense and that you can all live with [it]. I don't [want to] see you all back here in the future." At another point, Judge Coyle stated: "I don't want to see you people come back here to have the agreement enforced. I don't want to see anybody fooling around, that's all I can say . . . You all have better things to do than worry about coming back here." Brief for Respondent, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1637 (1994) (No. 93-263), 1994 WL 137026 at 20.

71. See FED. R. CIV. P. 41.

72. Brief for Respondent at 4, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1637 (1994) (No. 93-263).

C. *The Issue Before the Supreme Court*

On writ of certiorari, the Supreme Court addressed one central issue. That is, does a federal district court have subject matter jurisdiction to enforce a settlement agreement entered into between parties when: (1) the case is no longer before the court at the time of the order, having been dismissed with prejudice prior to an application for enforcement of the settlement agreement; (2) the settlement agreement was never incorporated into an order of judgment by the court disposing of the action; (3) the federal district court did not expressly retain jurisdiction; and (4) there exist no other independent grounds for federal court jurisdiction to enforce the settlement agreement?⁷³ The Court answered this jurisdictional question in the negative.

V. THE SUPREME COURT'S DECISION IN *Kokkonen*

In a unanimous decision written by Justice Antonin Scalia, the Supreme Court held that the doctrine of ancillary jurisdiction does not grant a federal district court inherent jurisdiction to hear a post-dismissal motion to enforce a settlement agreement between parties who are no longer otherwise subject to the court's jurisdiction.⁷⁴ Beyond that, because a settlement agreement is nothing more than a contract, where a district court does not expressly retain jurisdiction over the parties or does not embody the settlement agreement in its dismissal order, and there is no independent basis for federal jurisdiction, the enforcement of that agreement is a matter solely for state courts.⁷⁵

VI. ANALYSIS OF THE DECISION

The Court's decision in *Kokkonen* is significant because it clearly sets the boundaries of the ancillary jurisdiction doctrine, preserves state sovereignty to hear contract disputes that are only incidentally touched by federal courts, and reinforces federalism in an age when the separation between federal and state governments is increasingly blurred. By laying down a bright-line rule, the decision also assures that federal court litigants who settle their claims will not be cheated of judicial due process if one party later alleges a breach.

73. *Kokkonen v. Guardian Life Ins. Co.*, 62 U.S.L.W. 3598, 3598 (U.S. March 15, 1994).

74. *Kokkonen*, 114 S. Ct. at 1676-77.

75. *Id.* at 1677.

A. *Ancillary Jurisdiction Does Not Extend Far Enough to Enforce the Settlement Agreement*

The Supreme Court rejected the Ninth Circuit's reasoning that the doctrine of ancillary jurisdiction authorized continuing district court jurisdiction.⁷⁶ It refuted that court's reliance on previous Supreme Court dicta suggesting jurisdiction was proper and necessary in order to deliver the fruits of settlement agreements.⁷⁷ The Court took the opportunity to clarify the proper rationale for the "supplemental jurisdiction" doctrine⁷⁸ and the two situations where it can be applied.⁷⁹ Neither of those situations contemplates the enforcement of a settlement agreement.⁸⁰

Guardian had persuaded the Ninth Circuit that the district court had "inherent" authority to enforce a settlement agreement in order to make sure that each party got what it had bargained for in the settlement.⁸¹ The Supreme Court found this argument off the mark and chastised Guardian and the Ninth Circuit for relying on dicta rather than the holdings of cases.⁸² It pointed out that the case holding principally relied upon was "not remotely as permissive as its language."⁸³

Further, the Court noted an important factual distinction between the case upon which Guardian had relied and *Kokkonen*. The court in the earlier case had "expressly reserved" continuing jurisdiction over the parties.⁸⁴ Judge Coyle, while aware of the terms of the

76. *Id.* at 1676-77. Federal ancillary jurisdiction is now treated under 28 U.S.C. § 1367 (1988) as supplemental jurisdiction. See generally CHARLES A. WRIGHT, ARTHUR MILLER, AND EDWARD H. COOPER, 13 FED. PRAC. & PROC. § 3523 (1984 & Supp.); Rochelle Cooper Dreyfus, *The Debate Over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute - A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992); Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 33 (1992).

77. *Kokkonen*, 114 S. Ct. at 1676 (citing *Julian v. Central Trust Co.*, 193 U.S. 93, 113-14 (1904) (quoting 1 C BATES, FEDERAL EQUITY PROCEDURE § 97 (1901))).

78. The Court utilized the long-familiar nomenclature of "ancillary jurisdiction."

79. *Kokkonen*, 114 S. Ct. at 1676.

80. *Id.*

81. *Id.*

82. *Id.* The Court noted that the "expansive language of *Julian* can be countered by (equally inaccurate) dicta in later cases that provide an excessively limited description of the doctrine." *Id.* As an example, Justice Scalia referenced *Fulton National Bank of Atlanta v. Hozier*, where the Court said that "no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Id.* (quoting *Fulton Nat'l Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925)).

83. *Kokkonen*, 114 S. Ct. at 1676.

84. *Id.*

settlement agreement between Kokkonen and Guardian Life,⁸⁵ did not reserve district court jurisdiction.⁸⁶ Indeed, the Stipulation and Order which he signed "did not so much as refer to the settlement agreement."⁸⁷

The Court also rejected Guardian's claim that Judge Coyle's clear contemplation of jurisdiction warranted its exercise.⁸⁸ In doing so, it contributed much to the cause of judicial certainty. The Court spared appellate courts the burden of determining whether a particular district judge contemplated jurisdiction enough to allow the further exercise of judicial supervision of litigants who had left the courthouse.

There seems to be little doubt that if the Supreme Court had passively assented to the assertion that "contemplation" was enough, considerable uncertainty would result. For example, on what basis would courts decide "how much contemplation is enough?" Could a party successfully argue that a judge's statements and body movements combined to show a clear "contemplation" of continuing jurisdiction? Could parties argue that, based on a particular judge's previous decisions on like matters, "surely the judge contemplated" jurisdiction? Fortunately, the Court has shielded parties, attorneys, and courts from having to make such determinations.

The Court did not reject in *Kokkonen* what is now called the "supplemental jurisdiction" doctrine.⁸⁹ However, it found the doctrine was too narrow to permit its application to the enforcement of the settlement agreement between Kokkonen and Guardian.⁹⁰ Using the familiar language of "ancillary jurisdiction,"⁹¹ the Court said the doctrine can only be exercised for two reasons:⁹² (1) to dispose of

85. *Id.* at 1675.

86. *Id.*

87. *Id.*

88. *Id.* at 1677.

89. *Kokkonen*, 114 S. Ct. at 1676-77. The "Supplemental Jurisdiction" statute, 28 U.S.C. § 1367 (1990), has replaced the prior doctrines of "ancillary" and "pendent" jurisdiction in federal courts. See generally CHARLES A. WRIGHT ET AL., 13 FED. PRAC. & PROC. § 3523 (1984 & Supp.)

90. *Kokkonen*, 114 S. Ct. at 1676-77.

91. For a discussion of the nuances of the doctrines of ancillary and pendant jurisdiction, and supplemental jurisdiction, see *supra* sources at note 72.

92. *Kokkonen*, 114 S. Ct. at 1676-77. Writing for the Court, Justice Scalia left open the possibility for further application of the doctrine by noting that "generally speaking," the Court had recognized jurisdiction for the two reasons discussed in *Kokkonen*. *Id.* at 1676.

factually interdependent claims⁹³ or (2) to ensure that the court's authority is protected.⁹⁴ Guardian satisfied neither.⁹⁵

In discussing the use of ancillary jurisdiction to permit a court to dispose of claims that are in some ways factually interdependent,⁹⁶ the Court noted as an example its holding in *Baker v. Gold Seal Liquors*.⁹⁷ Justice Douglas, writing for that Court, stated that it was proper for a district court to exercise ancillary jurisdiction to evaluate a judicially imposed set-off of awards that imposed a net loss on trustees of a railroad in reorganization.⁹⁸ As the *Baker* Court said, "[o]rordinarily where a court has primary jurisdiction over the parties and over the subject matter, the power to resolve the amount of the claim and the counterclaim is clear."⁹⁹

Unlike *Baker*, the original claims and counterclaims presented in *Kokkonen* were not factually interdependent with the jurisdiction claim.¹⁰⁰ In fact, as far as the Court was concerned, they had "nothing to do with each other."¹⁰¹ Although the Court gave this argument summary treatment, it is not difficult to see that the evidence necessary to prove the underlying claims of wrongful termination, wrongful denial of lease, conversion and unfair competition differed from evidence necessary to show breach of the settlement agreement.

Although the facts of *Kokkonen* did not satisfy the "factual interdependence" test, the Court could have gone further. It could have identified the level of interdependence necessary to show that claims are factually interrelated. Doing so would have further clarified the "transaction and occurrence" test now set forth in the Federal Rules¹⁰² and encouraged a further slowing of the increase in federal court litigation.

The Court in *Kokkonen* delineated a second ground upon which one can successfully rest an ancillary jurisdiction claim. One can claim

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (citing *Baker v. Gold Seal Liquors, Inc.* 417 U.S. 467, 468-69 (1974)). The test for determining factual interdependency is the "transaction and occurrence test." The test is set out in Federal Rule of Civil Procedure 13(a): "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction and occurrence that is the subject matter of the opposing party's claim" FED. R. CIV. P. 13(a).

98. *Baker*, 417 U.S. at 468, 469.

99. *Id.* at 468-69.

100. *Kokkonen*, 114 S. Ct. at 1676.

101. *Id.*

102. FED. R. CIV. P. 13(a).

that jurisdiction is necessary to facilitate successful court function, "that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."¹⁰³ As an example, the Court cited *Chambers v. NASCO, Inc.*,¹⁰⁴ which involved an action for specific performance by a television station purchaser. The station owner decided not to sell, and, despite a contract and a court order directing him not to do so, he took actions in district court, the Federal Communications Commission, the Court of Appeals, and the United States Supreme Court that were intended to prevent the sale.¹⁰⁵ The district court described some of these actions as "emasculat[ing] and frustrat[ing] the purposes of . . . the power of [the district] court . . . to prevent NASCO's access to the remedy of specific performance."¹⁰⁶

The Court responded to the challenge to its authority. It recognized ancillary jurisdiction to compel the payment of opposing party's attorney's fees as a sanction for misconduct.¹⁰⁷ Quoting *Anderson v. Dunn*,¹⁰⁸ the *Chambers* Court said, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."¹⁰⁹ These vestments provide the ability to fashion "an appropriate sanction for conduct which abuses the judicial process."¹¹⁰

The Supreme Court noted that both the district court and the Ninth Circuit in *Kokkonen* had relied upon this second reason for asserting ancillary jurisdiction.¹¹¹ However, it suggested that under the *Kokkonen* facts, such reliance was misplaced.¹¹² The exercise of ancillary jurisdiction in *Kokkonen* was not, in the opinion of the Court, necessary to protect its proceedings or vindicate its authority.¹¹³ The Court noted that Guardian sought the imposition of power that was quite "remote" from that required by a court to perform its goal.¹¹⁴

103. *Kokkonen*, 114 S. Ct. at 1676. In *Young v. United States ex rel. Vuitton et Fils S.A.*, the Court stated that "[t]he exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the judiciary." 481 U.S. 787, 809 (1987).

104. 501 U.S. 32 (1991).

105. *Id.* at 35-37.

106. *Id.* at 36.

107. *Id.* at 55.

108. 19 U.S. (6 Wheat.) 204, 227 (1821).

109. *Chambers*, 501 U.S. at 43.

110. *Id.* at 44-45.

111. *Kokkonen*, 114 S. Ct. at 1676-77.

112. *Id.*

113. *Id.* at 1677.

114. *Id.*

The denial of continuing jurisdiction did not undermine the district court's authority because Judge Coyle had not rested his authority on its dismissal of the lawsuit.¹¹⁵ Judge Coyle did not incorporate the terms of the settlement agreement into his order,¹¹⁶ nor did the parties create a separate provision in the settlement agreement that would empower the district court to "retain jurisdiction."¹¹⁷ Had either occurred, jurisdiction to enforce the settlement agreement would have existed.¹¹⁸ Instead, Judge Coyle only ordered that the case be dismissed.¹¹⁹ As such, no matter how egregious Kokkonen's acts may have been, they could not frustrate the court's instruction to dismiss the case. In short, Kokkonen did not threaten the court's adjudicative role merely because Guardian had to go elsewhere to seek enforcement of its settlement agreement with Kokkonen.

When the Supreme Court rejected Guardian's claim that Kokkonen had threatened the district court's authority, it thereby rejected an expansive interpretation of that authority. Implicit in the decision is the view that district courts possess a unique role in our society as powerful adjudicators. By virtue of their presence in every state, district courts permit disputants of all income levels and all mobility to bring their federal question or diversity claims to an arena where they can be spared the parochial prejudices sometimes common to state courts.¹²⁰ If that unique role is to be preserved, disputants must respect the authority of the court and its jurisdiction to enforce its actual rulings.

However, this unique role does not require federal district courts to roam "to and fro [upon] the earth"¹²¹ in search of disputants who become disgruntled once they have left the courthouse. Nor does that role require that the federal courthouse doors remain open to such litigants. As the *amici* properly noted, there is nothing preventing angry parties alleging breach of contract from filing in state court.¹²²

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1675.

120. The possibility of such prejudice was recognized by the Supreme Court early in this country's history. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). For a recent article that recognizes this potential problem as it applies to defending "deep-pocket" clients, see Robert L. Haig and Steven P. Caley, *Deep Pocket Perils: Defendants Rich in Resources Must Act to Overcome Bias*, 80 A.B.A. J. 59 (Dec. 1994).

121. *Job* 1:7 (King James).

122. Brief in Support of Petitioner at 7, *Kokkonen v. Guardian Life*, 114 S. Ct. 1673 (1994) (No. 93-263): "No doctrine of necessity requires [the power to enforce settlement contracts] to

It is clear that the Supreme Court did all courts a favor when it rebuffed the Ninth Circuit's broad expression of "inherent" jurisdiction.¹²³ Had the Court failed to do so, federal courts would have been faced with the prospect of never ending jurisdiction and litigants who might not carefully consider their settlement agreements beforehand on the assumption that "if it didn't work out," they could always have the federal judge fix the problem. Docket management could conceivably become a nightmare.

B. State Courts Remain the Proper Forum for Most Contract Disputes

The *Kokkonen* decision preserves state power to hear contract disputes. As far as the Supreme Court was concerned, the dispute Judge Coyle was asked to rule on stood apart from the underlying suit involving claims of fraud and wrongful termination.¹²⁴ Rather, he was asked to rule solely on a contract, part of the consideration for which was the dismissal of an earlier federal suit. Unless the breach of contract action had an independent basis in federal court,¹²⁵ the proper forum for this action was state court.¹²⁶

This view validated the *amici's* assertion that "a settlement agreement reached between the parties is a private contract, enforceable by the standard means of bringing a civil action under the common law."¹²⁷ A settlement agreement is nothing more than a contract, bargained for by the parties. Each party agrees to abide by the terms of that contract, only one of which is that the parties will jointly stipulate to have their case dismissed.¹²⁸ That stipulation is self-executing; it "does not depend for its efficacy on the entry of any order by the court."¹²⁹ The terms of the settlement agreement need not be included.¹³⁰

be exercised by the federal courts, since the state courts stand available to adjudicate such claims and resolve disputes." *Id.*

123. *Kokkonen*, 114 S. Ct. at 1675, 1677.

124. *Kokkonen*, 114 S. Ct. at 1676-77.

125. For example, if the settlement agreement itself was valued at over \$50,000 and was between parties of different states, the federal court would have diversity jurisdiction.

126. *Kokkonen*, 114 S. Ct. at 1677.

127. Brief in Support of Petitioner at 2, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994) (No. 93-263).

128. The district court must accept "a stipulation of dismissal signed by all parties." FED. R. Civ. P. 41(a)(1)(ii).

129. Brief in Support of Petitioner at 11, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994) (No. 93-263).

130. *Id.*

It is this private nature of the settlement agreement that distinguishes it from the "judicial consent decree." Through the latter, the district court terminates by direct order and judgment the litigation before it.¹³¹ The court may specify terms by which the parties must abide.¹³² A failure to comply with a term would then represent a failure to comply with a court order.

The Court prevented considerable judicial uncertainty by requiring that parties go to state court for their enforcement actions when the federal district court has not retained jurisdiction and when the settlement agreement lacks its own federal jurisdictional basis. Because settlement contracts often involve matters of considerable complexity and even some uncertainty that have not even been reduced to writing,¹³³ a district court would be left with little guidance to determine whether and how an agreement should be enforced, absent an entirely new action on the merits.

C. *Federalism in Kokkonen*

Kokkonen presented to the Court a central question: "How much reach does a federal court have?" To answer the question, the Supreme Court returned to the well-known federalist bulwark that federal courts are courts of limited jurisdiction.¹³⁴ Federal courts possess only that power authorized by the Federal Constitution and by statutes.¹³⁵ In fact, as Chief Justice Ellsworth wrote for the Court in *Turner v. Bank of North America*,¹³⁶ with respect to circuit courts of appeal, "a circuit court . . . has cognizance, not of cases generally, but only of a few specially circumstanced . . ."¹³⁷ It is presumed that a

131. *Id.* (citing Note, *Separation of Powers and The Reagan Administration's Policy on Consent Decrees: Have the Courts Overstepped the Limits of Judicial Powers?*, 1989 U. ILL. L. REV. 541 (1990)).

132. Brief in Support of Petitioner at 11, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994) (No. 93-263).

133. See generally, Hoffman, *supra* note 1.

134. *Kokkonen*, 114 S. Ct. at 1675. Article III, § 2 of the United States Constitution states that the judicial power extends to cases and controversies "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" U.S. CONST. art. III, § 2.

135. *Id.* See *Willy v. Coastal*, 503 U.S. 131 (1992). See also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 531, 542 (1986).

136. 4 U.S. (4 Dall.) 8 (1799).

137. *Id.* at 11.

cause of action rests outside a federal court's jurisdiction.¹³⁸ The party asserting jurisdiction bears the burden of proving otherwise.¹³⁹

Article III, § 2 of the United States Constitution identifies those cases which are "specially circumstanced."¹⁴⁰ That section provides federal courts with subject matter jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made under this Authority . . . between Citizens of different States . . ."¹⁴¹ The United States Congress has implemented § 2¹⁴² by providing that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000 . . . and is between . . . citizens of different States."¹⁴³ The original dispute between Kokkonen and Guardian Life was "specially circumstanced." The two parties were deemed citizens of differing states and their amount in controversy exceeded \$50,000.¹⁴⁴

The limited constitutional and statutory grants of power to federal courts are consistent with the Constitution's establishment of a federal form of government in which the national government exercises jurisdiction only over certain matters that concern the several states or those matters which are necessarily within the scope of the federal government's role as representative of the states. Powers not specifically reserved to the national government are reserved to the states.¹⁴⁵

In *Kokkonen* the Court implicitly reemphasized the primacy of the Constitution that established our federal form of government.

138. *Kokkonen*, 114 S. Ct. at 1675 (citing *Turner*, 4 U.S. (4 Dall.) at 11).

139. *Kokkonen*, 114 S. Ct. at 1675 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)).

140. U.S. CONST. art. III, § 2.

141. Article III, § 2 of the U.S. Constitution continues, including in its reach those cases "affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; . . . - [to controversies] between citizens of different States; - between Citizens of the same State claiming Lands under the Grant of different states" U.S. CONST. art. III, § 2.

142. 28 U.S.C. § 1332(a)-(a)(1) (1988). A debate continues to rage over the questions of whether a federal district court would have authority to hear these disputes in the absence of the congressional grant of power in the Judiciary Act of 1789, and whether Congress has really granted to federal courts the full authority made possible under the Constitution. For a brief discussion of these matters see JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* §§ 2.5 - 2.6, at 23-37 (2d ed. 1993).

143. 28 U.S.C. §§ 1332(a) and (a)(1) (1988).

144. *Kokkonen*, 114 S. Ct. at 1674. See 28 U.S.C. § 1331 (1988).

145. U.S. CONST. art. X. The utility of a federal system is born out in research that reveals that a decentralized form of government furthers both the effectiveness and the legitimacy of the government, thereby limiting the potential for the destruction of the system. For a classic statement of such considerations, see SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (Johns Hopkins Press, 1981).

While it should have been long ago settled that it is the Court's responsibility to do so,¹⁴⁶ it is not a foregone conclusion that it would always, particularly in an age when some view the Constitution as something other than the "Supreme Law of the Land."¹⁴⁷

The *Kokkonen* decision reinforces the position that certain matters are beyond the reach of automatic federal jurisdiction; the Court reasserts the rule that the role of the federal courts is limited. Such a restatement should not be taken lightly. In an age of increasing federal regulation, a limitation on the ability of federal courts to decide these disputes leaves open to state review decisions on everything from the purchase of real and personal property to employment matters.

The Court gave deference to federal concerns in *Kokkonen* at the expense of concerns about judicial economy. Guardian had argued that judicial economy mandated the exercise of post-settlement jurisdiction.¹⁴⁸ With the minimum claim for diversity jurisdiction in federal court now over \$50,000,¹⁴⁹ and with large annual increases in civil caseloads in federal court,¹⁵⁰ it is easy to understand the appeal for an ever wiser expenditure of scarce judicial resources.¹⁵¹ This is particularly true in *Kokkonen*, where the trial, complete with closing arguments, had concluded.¹⁵²

146. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

147. U.S. Representative Jack Shields, who in the summer of 1994 represented Texas' eighth congressional district, is among those who have expressed concern about such sentiment. In a 1994 article in the *Houston Post*, Shields expressed concern over environmentalists who argue that the Endangered Species Act, federal wetlands regulations and other environmental protection measures should supersede the Constitution. Jack Shields, *Proposed Measures Won't Leave Wetlands Owners High and Dry*, *HOUSTON POST*, July 17, 1994, at C3.

148. Brief for Respondents at 25-26, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994) (No. 93-263).

The litigants quite conceivably would be forced to exhaust the judicial resources of both federal and state courts, potentially to retry a case under needlessly difficult circumstances. The costs to the parties of the various proceedings in the federal and state forums would, of course, be considerable. Permitting the only court familiar with the case . . . to exercise jurisdiction to enforce the settlement agreement or, alternatively, to restore the case to the docket and proceed quickly to a trial on the merits, provides a significantly more efficient and effective means of resolving the dispute.

Id. at 56-57.

149. 28 U.S.C. § 1332(a) (1988).

150. David S. Clark, *Civil Procedure*, in *INTRODUCTION TO THE LAW OF THE UNITED STATES* (David S. Clark & Tugrul Ansary eds., 1992).

151. This position is part and parcel of the Law and Economics jurisprudential movement. The movement's proponents have argued that an efficient allocation of judicial resources is a wise allocation of those resources. See, e.g., Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 *OHIO ST. L. J.* 599 (1989).

152. *Kokkonen*, 114 S. Ct. at 1674-75.

However, what may be expedient from a resource allocation perspective may not be rational when viewed through a constitutional lens. As one Constitutional scholar has commented, "the Constitution cannot be cabined in any calculus of costs and benefits."¹⁵³

While courts may want to allocate scarce judicial resources more efficiently, the Supreme Court has affirmed the principle that constitutional concerns must preempt economic ones.¹⁵⁴ In a case the Court used to strike down the legislative veto power over executive branch actions, Chief Justice Warren Burger wrote for the Court in language that should be applicable to any weighing of constitutional versus economic considerations:

[I]t is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the framers ranked other values higher than efficiency

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.¹⁵⁵

D. *Preserving Due Process*

By rejecting the Ninth Circuit's assertion of "inherent" jurisdiction to enforce settlement agreements, the Supreme Court assures that litigants who settle their disputes will not be denied due process for doing so if a party later alleges a breach. The Court's decision implicitly recognizes that a settlement is a private, not a public, judicial, determination and that the parties considering a settlement agreement will weigh similar factors far differently than they will if they are preparing for trial.

153. Laurence Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 592 (1984).

154. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 923 (1983).

155. *Id.* at 958-59.

A settlement agreement is not a judicial determination.¹⁵⁶ Rather, it is a private contract.¹⁵⁷ A party considering such a settlement contract will likely consider and weigh the numerous variables differently from the way that party would if it were preparing for trial.¹⁵⁸ For example, a "deep pocket" defendant may choose to settle a claim if negative publicity, a tarnished reputation, or its perceived wealth could lead to a risky jury trial.¹⁵⁹ That party may also decide that settlement will help it avoid the expensive emotional costs associated with going to trial and waiting for a verdict.¹⁶⁰ It may decide that settlement will help to maintain a desirable long-term relationship,¹⁶¹ prevent the unwanted publicity of a trial,¹⁶² or make fair recompense without having to pay heavily in the "all or nothing" environment of the trial.¹⁶³ Settlement may even help curry the good will of an opponent.¹⁶⁴ Whether a party was liable for whatever injury occurred to the other party may never be considered.

For a court to enforce a settlement agreement reached by parties, irrespective of a determination of liability, is to deny parties their day in court. To enforce the settlement agreement is to deny one party the right to defend, with all its constitutional, statutory, and common law judicial protections, against the claim that it breached the settlement contract. By denying to federal district courts the automatic power to enforce settlement agreements between litigants dismissed with prejudice, the *Kokkonen* Court has guarded parties' due process rights against assault on the basis of expediency.

E. *Practical Implications of the Kokkonen Decision*

The practical implications of the *Kokkonen* decision are several. The case requires settling parties to decide at the time of settlement whether they want supervision of their settlement agreements by the court in which the case pends. For those who want such supervision,

156. Brief in Support of Petitioner at 10, *Kokkonen*, 114 S. Ct. 1673 (1994) (No. 93-263).

157. *Id.*

158. See generally, Hoffman, *supra* note 1. Hoffman discusses at length the considerations parties make in determining whether to settle their disputes. These considerations require "taking into account all of the economic and noneconomic costs of both settlement and trial." *Id.* at 3-4.

159. See, e.g., Robert L. Haig & Steven P. Caley, *Deep-Pocket Perils: Defendants Rich in Resources Must Act to Overcome Bias*, A.B.A. J., Dec. 1994, at 59.

160. Hoffman, *supra* note 1, at 33.

161. Hoffman, *supra* note 1, at 34.

162. Hoffman, *supra* note 1, at 35.

163. Hoffman, *supra* note 1, at 34.

164. Hoffman, *supra* note 1, at 35.

the decision supplies clear guidelines for seeking that goal. For those who do not initially seek such jurisdiction or whose efforts are rebuffed, the court leaves as an open door the 60(b) motion. Actions by federal district courts since *Kokkonen* have revealed a middle way that attorneys may employ if a court is reluctant to retain jurisdiction.

Parties who decide to settle their disputes must decide up front whether they want the federal district court to stand prepared to enforce the terms of their agreement. If parties do not decide and do not act, they should stand prepared for a federal district court to refuse enforcement for lack of jurisdiction.

Attorneys for parties who decide that district court supervision is desirable must make sure that dismissal documents they provide to the court, or those provided by the court, are drafted with precision. They must have the court either "retain" jurisdiction under Rule 41(a)(1)(ii) or make it part of its dismissal under Rule 41(a)(2). However, in either case, the Court may decline to exercise jurisdiction.¹⁶⁵

The *Kokkonen* decision does not leave room for post-settlement jurisdiction merely because the judge makes statements, clear or not, that contemplate continuing jurisdiction.¹⁶⁶ Guardian provided in its brief to the Supreme Court substantial quotations from Judge Coyle which demonstrated his belief that he had the power to enforce the settlement agreement. In fact, Judge Coyle likely believed that *Wilkinson*¹⁶⁷ provided him that power. However, Judge Coyle's statements and well-meaning contemplation of jurisdiction were immaterial to the rule the Court laid down in *Kokkonen*.

If a federal district court does not "retain jurisdiction," or if the settlement agreement is not incorporated into the dismissal order, a party may move the court to vacate its dismissal order under Federal Rule of Civil Procedure 60(b). However, not every circuit will grant a 60(b) motion for the breach of a settlement agreement.¹⁶⁸ Where a particular circuit does so, *Kokkonen* seems to require that a party clearly request the dismissal. Guardian had argued strenuously that the court should treat its motion to enforce the settlement agreement as a Rule 60(b) motion even though it was in the "wrong form."¹⁶⁹

165. See FED. R. CIV. P. 41.

166. *Kokkonen*, 114 S. Ct. at 1677.

167. *Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555 (9th Cir. 1991).

168. See *infra* note 171 and accompanying text.

169. Brief for Respondent at 19, *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994) (No. 93-263).

The Court chose not to respond to this argument, even though it recognized that some circuits would likely grant a 60(b) motion under similar circumstances.

The Court's failure to confront this issue leaves an unanswered question. Although the Court implied that it is currently inclined to require more than the breach of a settlement agreement to vacate a dismissal under Rule 60(b), it did not settle the matter. Rather, it drew a distinction between a 60(b) vacation, which permits the continuation or removal of the dismissed suit, and a motion for the enforcement of a settlement agreement, which seeks a damage award or a decree of specific performance. The latter, said the Court, requires its own basis for jurisdiction.¹⁷⁰ Had the Court squarely addressed Guardian's argument, it might have settled the dispute within the circuits over whether the breach of a settlement agreement is sufficient grounds for a judge to vacate the court's dismissal order under Rule 60(b).¹⁷¹

Since the *Kokkonen* decision, several district courts have granted 60-day Orders of Dismissal that preserve the right to return to the courthouse for the breach of a settlement agreement but still allow the court quickly to discharge its docket.¹⁷² In a recent case from Louisiana,¹⁷³ a United States District Court issued a 60-day order that held out the possibility of judicial enforcement of the settlement agreement if the parties approached the court with "good cause." However, when the plaintiff asked the court more than a year later to enforce the settlement agreement, the court rejected the plaintiff's motion for lack of subject matter jurisdiction.¹⁷⁴

170. *Kokkonen*, 114 S. Ct. at 1675-76.

171. Not all courts agree that the breach of a settlement agreement is sufficient grounds for a judge to vacate a dismissal order under Rule 60(b). In *Sawka v. Healtheast, Inc.*, the Third Circuit held that the breach of a settlement agreement was an insufficient reason to set aside a dismissal order where the settlement agreement was not a part of the record, not incorporated into an order of the district court, and where the court did not manifest an intent to retain jurisdiction over the settlement agreement. 989 F.2d 138 (3d Cir. 1993). See also *Harman v. Pauley*, 678 F.2d 479 (4th Cir. 1982). But see *Keeling v. Sheet Metal Workers Int'l Ass'n*, 937 F.2d 408 (9th Cir. 1991) (holding that one party's repeated failure to comply with a settlement agreement had completely frustrated the purpose of the agreement justifying the vacation of a dismissal order under 60(b)(6)). See also *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir. 1976).

172. See, e.g., *Bell v. Schexnayder*, 36 F.3d 447 (5th Cir. 1994).

173. *Bolton v. Welch*, 1994 WL 532031 (E.D. La. 1994).

174. *Id.*

VII. CONCLUSION

Settlement agreements are invaluable for discharging overbearing dockets in federal court and for furthering the long-term interests of the parties to them. However, like other contracts, they are susceptible to breach. The *Kokkonen* decision recognizes this reality, and it leaves the federal courthouse door open to enforce settlement agreements. However, in the interests of state sovereignty, the preservation of due process for litigants, and docket management, the decision has only left the door open a bit, and it requires those who seek federal judicial enforcement of settlement agreements to state their intentions clearly.

Charles K. Bloeser

