

FEDERAL JURISDICTION IN THE ENFORCEMENT OF SETTLEMENT AGREEMENTS: *KOKKONEN* REVISITED

By Morton Denlow^{*/}

Abstract

In 1994 the Supreme Court clarified the power of district courts to exercise jurisdiction over settlement agreements in *Kokkonen v. Guardian Life Insurance Co. Of America*. The Court indicated in *dicta* that a federal district court retains jurisdiction to enforce a settlement agreement if it either incorporates the settlement agreement into the dismissal order or specifically includes a clause in the dismissal order retaining jurisdiction. District and Circuit Courts of Appeal have interpreted this language in various ways, and often require specific language to meet the test laid out in *Kokkonen*. This article discusses language in dismissal orders found acceptable and unacceptable for federal courts to retain jurisdiction. In addition, the article recommends various options for retaining jurisdiction to enforce a settlement agreement while bringing the underlying litigation to a conclusion.

Table of Contents

- I.** Introduction
- II.** *Kokkonen v. Guardian Life Insurance Co. of America*
 - A.** The Supreme Court Decision
 - B.** Application of *Kokkonen* by Circuit Courts of Appeal
 - 1.** Dismissals With Prejudice Where Jurisdiction Was Retained Under *Kokkonen*.
 - a.** Specific Retention of Jurisdiction
 - b.** Incorporation of Terms
 - 2.** Dismissals With Prejudice In Which Jurisdiction Was Not Retained Under *Kokkonen*
 - a.** Language Was Insufficient to Retain Jurisdiction
 - b.** Language Was Insufficient to Incorporate the Settlement Agreement
 - C.** *Kokkonen* In Other Contexts
- III.** Recommended Alternatives
 - A.** Dismissal Order
 - B.** Consent Decree
 - C.** Conditional Dismissals Without Prejudice
- IV.** Conclusion

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I. INTRODUCTION

[I.1] The issue of proper federal jurisdiction may arise when a party returns to court to seek enforcement of a settlement agreement arising out of a previously dismissed case. The following is a typical fact pattern. A lawsuit is filed in federal court. After initial motion practice and discovery, the parties reach a settlement. The settlement agreement calls for periodic payments over two years by the defendant to the plaintiff. The district court dismisses the case with prejudice. One year later, the defendant misses a payment and the plaintiff moves the court to enforce the settlement. If the district court lacks jurisdiction to enforce the settlement agreement, the plaintiff must file a new suit for breach of contract. However, commencing a separate action is unsatisfactory to the plaintiff because of the delay and expense involved.

[I.2] In *Kokkonen v. Guardian Life Insurance Co. of America*,^{1/} the Supreme Court clarified the ability of district courts to retain jurisdiction to enforce settlement agreements after a case has been dismissed. Continued jurisdiction exists where: 1) compliance with the settlement agreement is a term of the dismissal order; 2) the dismissal order includes an express retention of jurisdiction over the settlement agreement; or 3) the settlement agreement is embodied in the dismissal order.^{2/}

[I.3] This article will discuss the Supreme Court's analysis in *Kokkonen* and how the circuit courts of appeal have interpreted its language.^{3/} In addition, the article will discuss alternative methods a court can use to retain jurisdiction to enforce settlement agreements. Finally, the article concludes with recommendations for the drafting of dismissal orders allowing judges to retain jurisdiction to enforce a settlement agreement.

^{1/} 511 U.S. 375 (1994).

^{2/} *Id.* at 381-82.

^{3/} Several other articles also discuss the issues raised in the *Kokkonen* decision. See Jeffrey A. Parness & Daniel J. Sennott, *Recognizing Party and Nonparty Interests in Written Civil Procedure Laws*, 20 REV. LITIG. 481 (2001); Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9 (1996); Darryl R. Marsch, Note, *Postdismissal Enforcement of Settlement Agreements in Federal Court and the Problem of Subject Matter Jurisdiction*, 9 REV. LITIG. 249 (1990) (pre-*Kokkonen*).

II. *KOKKONEN V. GUARDIAN LIFE INSURANCE CO. OF AMERICA*

A. THE SUPREME COURT DECISION

[II.A.1] In *Kokkonen*, the parties reached an oral settlement agreement and executed a stipulation and order of dismissal with prejudice,^{4/} unconditionally dismissing all claims pursuant to Rule 41(a)(1)(ii).^{5/} The judge made the notation, “It is so ordered,” and signed the stipulation and order, dismissing the case with prejudice.^{6/} Neither the stipulation nor the dismissal referred to the settlement agreement or reserved jurisdiction to the court to enforce the settlement.^{7/}

[II.A.2] A dispute arose and defendant moved to enforce the settlement agreement. Although the plaintiff opposed the motion claiming the district court lacked jurisdiction, the district court asserted

^{4/} After the parties have settled a case, dismissal of the action with prejudice constitutes a final judgment on the merits and prevents the plaintiff from raising the claims in a subsequent action. *Int’l Union of Operating Engineers-Employers Constr. Indus. Pension, Welfare & Training Trust Funds v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993).

^{5/} [511 U.S. at 376](#). Rule 41(a)(1) allows for voluntary dismissal of actions by the plaintiff or by stipulation. Rule 41(a)(1) reads as follows:

By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) 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, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

FED. R. CIV. P. 41(a)(1).

^{6/} *Kokkonen*, 511 U.S. at 377. Although the court signed the stipulation and order, a voluntary dismissal by notice under Rule 41(a)(1) does not require any act of the court; it is self-executing. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2363 (West 1995).

^{7/} *Kokkonen*, 511 U.S. at 377.

an “inherent power” to enforce the settlement agreement and entered an enforcement order.^{8/} Plaintiff appealed, and the Ninth Circuit affirmed the lower court’s decision.^{9/}

[II.A.3] In a unanimous decision, the Supreme Court reversed and remanded holding that enforcement of a settlement agreement is not a mere continuation or renewal of the dismissed suit, but requires its own basis for jurisdiction.^{10/} The Court explained that the lower courts had incorrectly relied on the doctrine of ancillary jurisdiction. Ancillary jurisdiction^{11/} provides federal courts with jurisdiction over some matters that are incidental to other matters properly before them and exists for two purposes:^{12/} (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.”^{13/}

[II.A.4] The Court held that neither of these purposes supported jurisdiction over the settlement agreement. The first head did not apply because the facts underlying the dismissed claim and the facts underlying the claim for breach of the settlement agreement had “nothing to do with each other;” adjudicating both claims together was neither necessary nor particularly efficient.^{14/} The second head of ancillary jurisdiction did not apply because the district court’s dismissal order did nothing more

^{8/} *Id.*

^{9/} *Kokkonen*, No. 92-16628, 1993 WL 164884, at *2 (9th Cir. May 18, 1993).

^{10/} *Kokkonen*, 511 U.S. at 378.

^{11/} Ancillary jurisdiction was codified as supplemental jurisdiction, along with pendent and pendent party jurisdiction, by 28 U.S.C. § 1367 in 1990. Section 1367(a) provides:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a). The *Kokkonen* court did not refer to the supplemental jurisdiction statute in its analysis.

^{12/} The two purposes are also referred to as the two “heads” of ancillary jurisdiction. *Kokkonen*, 511 U.S. at 380.

^{13/} *Id.* at 379-80.

^{14/} *Id.* at 380.

than dismiss the case; thus, it was in no way “flouted or imperiled by the alleged breach of the settlement agreement.”^{15/}

[II.A.5] In *dicta*, the Court noted the result 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.”^{16/} A breach of the agreement would then violate the order and ancillary jurisdiction would exist for the purpose of enforcing the agreement, allowing the district court to vindicate its authority and effectuate its decrees^{17/} However, the “judge’s mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order.”^{18/}

^{15/} *Id.*

^{16/} *Id.* at 381.

^{17/} *Id.* Some circuits had addressed the issue earlier and come to a similar conclusion as *Kokkonen*. *Fairfax Countywide Citizens Ass’n v. County of Fairfax*, 571 F.2d 1299, 1302-03 (4th Cir. 1978). For instance, in *McCall-Bey v. Franzen*, involving a dismissal without prejudice after a settlement was reached, the Seventh Circuit held that a district court does not have inherent jurisdiction to enforce a settlement agreement. The court said:

[W]e have expressed no doubt of the power of a district judge to dismiss a lawsuit conditionally, retaining jurisdiction to effectuate terms of settlement agreed to by the parties. Nor do we think there is any magic form of words that the judge must intone in order to make the retention of jurisdiction effective. All that is necessary is that it be possible to infer that he did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction.

McCall-Bey v. Franzen, 777 F.2d 1178, 1188 (7th Cir. 1985). This language is quoted and affirmed by the Seventh Circuit post-*Kokkonen* in a case involving a dismissal with prejudice. *VMS Sec. Litig. v. Prudential Sec., Inc. (In re VMS Sec. Litig.)*, 103 F.3d 1317, 1321-22 (7th Cir. 1996). See also *In re VMS Ltd. P’ship Sec. Litig.*, No. 90 C 2412, 1991 WL 134262, at *1 (N.D. Ill. July 16, 1991) (indicating that part of the case was dismissed with prejudice).

^{18/} *Kokkonen*, 511 U.S. at 381.

[II.A.6] The Court went on to explain that for dismissals pursuant to Rule 41(a)(2),^{19/} “the parties’ compliance with the terms of the settlement contract (or the court’s ‘retention of jurisdiction’ over the settlement contract) may, in the court’s discretion, be one of the terms set forth in the order.”^{20/} In addition, although Rule 41(a)(1)(ii)^{21/} does not by its terms empower district courts to attach conditions to the parties’ stipulation of dismissal, “the 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.”^{22/} By employing these devices, “a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.”^{23/} Absent such action, enforcement of the settlement agreement is a matter for state courts, unless there is an independent basis for federal jurisdiction, such as diversity of citizenship.^{24/}

^{19/} Rule 41(a)(2) provides:

By Order of Court. Except 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. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(a)(2).

^{20/} *Kokkonen*, 511 U.S. at 381.

^{21/} Rule 41(a)(1)(ii) is quoted in note 5.

^{22/} *Kokkonen*, 511 U.S. at 381-82. As pointed out above, a dismissal under FED. R. CIV. P. 41(a)(1)(ii) is effective upon filing and requires no action by the court. WRIGHT & MILLER, *supra* note 6. Thus, in many cases dismissed by stipulation, there will be no order by the court as there was here. Therefore, absent an order, a stipulation under Rule 41(a)(1)(ii) does not meet the *Kokkonen* test.

^{23/} *Kokkonen*, 511 U.S. at 381.

^{24/} *Id.* at 382. In *D.S. Atkinson v. Lutin Cent. Services Co., Inc.*, No. 93 C 2294, 1994 WL 722864, at *2-3 (1st Cir. Dec. 29, 1994), the court found an independent basis for jurisdiction, diversity of citizenship, to enforce a settlement agreement, even though the *Kokkonen* test was not met.

B. APPLICATION OF *KOKKONEN* BY CIRCUIT COURTS OF APPEAL

[II.B.1] When applying *Kokkonen*, courts have generally looked to the dismissal order for either an express retention of jurisdiction or the incorporation of the terms of the settlement agreement. If either is included, the district court properly retains jurisdiction. Circuits may differ on the specificity of the language required to retain jurisdiction. The difference in requirements among circuits may create confusion for parties and judges who are attempting to carefully craft stipulations to dismissal and dismissal orders. In settling a case, a defendant generally will request a dismissal with prejudice in order to prevent the plaintiff from raising the claims in a subsequent action.^{25/} Therefore, the cases will be examined in the context of whether courts can retain jurisdiction while dismissing the underlying action with prejudice.

1. Dismissals With Prejudice Where Jurisdiction Was Retained Under *Kokkonen*.

[II.B.1.1] In general, circuit courts have analyzed the jurisdictional issue by looking to whether the district court retained jurisdiction to enforce the agreement based on the language in the dismissal order, or whether the court incorporated the terms of the settlement into the dismissal order. Whether the case was dismissed with prejudice is not generally considered. However, the language required to retain jurisdiction may vary from circuit to circuit.

a. *Specific Retention of Jurisdiction*

[II.B.1.a.1] *Gilbert v. Monsanto Co.* presents an example in which the district court entered an order dismissing the case with prejudice “subject to its retention of jurisdiction to enforce the agreement.”^{26/} The order was entered on the basis of a stipulation of dismissal which read: “The ‘confidential Settlement Agreement and Release’ executed between the parties is here incorporated by reference. Furthermore, it is stipulated that the parties agree that this Court shall retain jurisdiction to enforce the terms of the Settlement Agreement and Release.”^{27/} Even though no settlement agreement was actually “executed,” the Eighth Circuit upheld the district court’s retention of jurisdiction over enforcement of the oral settlement agreement.^{28/}

^{25/} BLACK’S LAW DICTIONARY 1063 (6th Ed. 1990) defines the term as follows: “Phrase ‘with prejudice’ as used in context in which an action is dismissed with prejudice, means an adjudication on merits and final disposition, barring right to bring or maintain an action on same claim or cause.”

^{26/} *Gilbert v. Monsanto Co.*, 216 F.3d 695, 699 (8th Cir. 2000).

^{27/} *Id.* at 699.

^{28/} *Id.* at 700. Defendant Monsanto argued that the district court only retained jurisdiction over the parties’ “executed” settlement agreement and lacked jurisdiction to enter a judgment based
(continued...)

[II.B.1.a.2] Although the language in the stipulation includes both an incorporation by reference and a retention of jurisdiction of the settlement agreement and release, “the court dismissed the case with prejudice subject to its retention of jurisdiction to enforce the agreement.”^{29/} The fact that the underlying case was dismissed with prejudice did not prevent the court from retaining jurisdiction over the enforcement of the settlement agreement. The court was concerned only with the *Kokkonen* test which requires the parties’ obligation to comply with the settlement agreement to be made part of the dismissal order either by a provision “retaining jurisdiction” or by incorporation of the terms of the settlement agreement in the order.^{30/}

[II.B.1.a.3] In another example, the Sixth Circuit held that a district court properly retained jurisdiction after a dismissal with prejudice in *Re/Max Int’l, Inc. v. Realty One*.^{31/} The parties reached a settlement agreement,^{32/} and the dismissal order read:

Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000–July 13, 2000. During said conferences, settlement talks took place. After a diligent effort on all sides, the parties have settled this[.] Therefore,

IT IS ORDERED that the docket be marked, “settled and dismissed with prejudice”.

FURTHER, Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.^{33/}

The parties were later unable to agree on the details of a written settlement agreement.^{34/} The plaintiff, Re/Max, then moved the district court to enforce the settlement agreement. The defendant opposed the motion on the basis that the district court lacked jurisdiction, asserting the language of

^{28/} (...continued)
on an oral agreement. *Id.* at 699.

^{29/} *Id.* at 698-99.

^{30/} *Id.* at 699. The court also cites *Miener v. Missouri Dep’t of Mental Health*, 62 F.3d 1126, 1127 (8th Cir. 1995), in which the court held no jurisdiction exists to enforce a settlement where the order of dismissal with prejudice did not retain jurisdiction to enforce the settlement. *Id.*

^{31/} *Re/Max Int’l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 650 (6th Cir. 2001).

^{32/} The parties dictated the general terms of the settlement agreement for the record and agreed to draft a written settlement agreement within forty-five days. *Id.* at 637.

^{33/} *Id.* at 641.

^{34/} *Id.* at 640.

the dismissal order was unconditional.^{35/} The district court enforced the agreement and the circuit court affirmed its jurisdiction.^{36/} The Sixth Circuit held: “*Kokkonen* only requires a reasonable indication that the court has retained jurisdiction, ‘such as a provision “retaining jurisdiction” over the settlement agreement.’”^{37/} The court found the language in the dismissal order 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” was sufficient for the district court to meet the second prong of *Kokkonen*: retention of jurisdiction in the dismissal order.^{38/} In reference to this language, the court went on to note: “Of course, the court may only enter subsequent orders involving the settlement agreement if it has retained jurisdiction. Thus, the ‘continued role for the court that was contemplated after dismissal’ is included in the language of the order itself.”^{39/}

b. *Incorporation of Terms*

[II.B.1.b.1] A court may also retain jurisdiction by incorporating the settlement terms into the dismissal order and indicating an intent to enforce the settlement even where the underlying action is dismissed with prejudice. The Seventh Circuit in *VMS Securities Litigation v. Prudential Securities, Inc. (In re VMS Securities Litigation)*,^{40/} held that the district court had jurisdiction to enforce final judgment orders by enjoining plaintiffs from breaching a settlement agreement by commencing a new action in state court. The settlement terms were embodied in the final judgment order.^{41/} The case was dismissed “with prejudice, on the merits.”^{42/} The district court sought to retain jurisdiction as follows: “Without affecting the finality of this Final Judgment and Order, this Court hereby retains jurisdiction over the Actions for purposes of implementing and enforcing the

^{35/} *Id.* at 641. Although it may seem that *Kokkonen* implicitly rejected the argument that an unconditional dismissal alone terminated federal jurisdiction, the Seventh Circuit recently held that an unconditional dismissal does terminate federal jurisdiction. *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002). The court cited a pre-*Kokkonen* case indicating that a court may conditionally dismiss a case and retain jurisdiction, but only if it does not dismiss the case outright. *McCall-Bey v. Franzen*, 777 F.3d 1178, 1188 (7th Cir. 1985), *see supra* note 17.

^{36/} *Re/Max*, 271 F.3d at 645.

^{37/} *Id.* at 643.

^{38/} *Id.* at 645.

^{39/} *Id.* (citing *In re Bond*, 254 F.3d 669, 676-77 (7th Cir. 2001)).

^{40/} 103 F.3d 1317 (7th Cir. 1996).

^{41/} *In re VMS Ltd. P’ship Sec. Litig.*, No. 90 C 2412, 1991 WL 134262, at *2-6 (N.D. Ill. July 16, 1991).

^{42/} *Id.* at *1.

Settlement Agreement and this Final Judgment and Order.”^{43/} On appeal, the Seventh Circuit held that the district court had continuing jurisdiction because the language clearly illustrated the district court’s intention to maintain jurisdiction over the enforcement of the settlement.^{44/} The court found the district court’s action to be consistent with the Supreme Court’s reasoning in *Kokkonen*.^{45/}

[II.B.1.b.2] In *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, the court incorporated part of the settlement agreement into the order.^{46/} The case is an example in which the court’s incorporation of one term of the settlement agreement was insufficient to retain jurisdiction to enforce the entire settlement agreement. The Agreed Order of Dismissal With Prejudice provided in pertinent part:

The parties being in agreement and the Court being otherwise sufficiently advised that the parties hereto have settled their disputes, . . . the Court hereby orders:

1. That the Complaint filed herein is DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS asserted therein and this action is Ordered stricken from the docket of this Court in its entirety.
2. That this Court’s order of August 29, 1997, is hereby amended to provide that Count II of the Complaint is Dismissed with prejudice.
3. That the Court appointed Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants any and all copies of the Receiver’s First Interim Report as well as any drafts thereof or any other documents which he may have obtained or generated as a result of the performance of his duties as Receiver herein.^{47/}

The dismissal incorporated only one term of the parties’ twenty-page settlement agreement.^{48/} The Sixth Circuit held *Kokkonen* precluded the district court from enforcing any provisions of the settlement agreement that were not expressly incorporated into an order entered while the case was still pending on the court’s docket.^{49/} Thus, the court determined that the failure to expressly retain

^{43/} *Id.* at *6.

^{44/} *In re VMS Sec. Litig.*, 103 F.3d at 1322.

^{45/} *Id.*

^{46/} 229 F.3d 491, 502 (6th Cir. 2000).

^{47/} *Id.* at 497.

^{48/} *Id.* at 502.

^{49/} *Id.* at 501.

“jurisdiction over the Settlement Agreement or to incorporate more than one of the settlement terms in its dismissal order precludes it from enforcing unincorporated terms against the parties.”^{50/}

2. Dismissals With Prejudice In Which Jurisdiction Was Not Retained Under *Kokkonen*

[II.B.2.1] While the retained jurisdiction of the district courts has been upheld, it has also been denied in many cases under the *Kokkonen* analysis. Courts have found a lack of jurisdiction both when the language of the order is insufficient to retain jurisdiction and when it is insufficient to be considered an incorporation of the terms of the dismissal order.

a. Language Was Insufficient to Retain Jurisdiction

[II.B.2.a.1] In *Hagestad v. Tragesser*, the parties settled a civil case, and the court dismissed the case with the following order: “This action is dismissed with prejudice, without costs and with leave for good cause shown within ninety (90) days, to have the dismissal set aside and the action reinstated if the settlement is not consummated.”^{51/} The Ninth Circuit held this language insufficient to retain jurisdiction to enforce the settlement despite evidence that it intended to do so.^{52/} The judge stated at the settlement conference, “I will act as czar with regard to the drafting of the settlement papers and the construction of this settlement and the execution of this settlement.”^{53/} In addition, in another order, the court dictated some of the relevant terms of the settlement agreement.^{54/} Despite both of these actions indicating the court’s intent to retain jurisdiction, the absence of a clause in the dismissal order was fatal, and the defendant could not enforce the agreement.^{55/}

[II.B.2.a.2] In another case, the Second Circuit held that the district court had not retained jurisdiction when the stipulated dismissal order drafted by the parties read: “IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties, that the above-captioned action is dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties dated January 7, 1994.”^{56/} Sixteen months after the

^{50/} *Id.* at 504.

^{51/} 49 F.3d 1430, 1432 (9th Cir. 1995).

^{52/} *Id.* at 1433.

^{53/} *Id.*

^{54/} *Id.*

^{55/} *Id.*

^{56/} *Scelsa v. City Univ. of New York*, 76 F.3d 37, 39-40 (2d Cir. 1996).

dismissal, the plaintiff moved for a preliminary injunction to enforce the terms of the settlement.^{57/} Both the district court and the Second Circuit found that it lacked subject matter jurisdiction because the order included no express retention of jurisdiction and the reference to the settlement agreement in the dismissal order was insufficient to incorporate the agreement.^{58/}

[II.B.2.a.3] Thus, even when the parties may intend and the court may intend that it retain jurisdiction, without a clause in the dismissal order, the parties are left without a remedy in the federal courts.

b. *Language Was Insufficient to Incorporate the Settlement Agreement*

[II.B.2.b.1] In *In re Phar-Mor, Inc. Securities Litigation*, the district court dismissed the case with prejudice after the parties reached a settlement, but the dismissal order did not include a provision retaining jurisdiction over the settlement agreement or any of its terms.^{59/} The dismissal order read in relevant part:

[I]t is hereby ORDERED that (1) the settlement documented in the August 4, 1995 Settlement and Release executed on behalf of the Settling Plaintiffs in favor of the Director Defendants and others (the “Settlement”) is hereby approved; (2) the Director Defendants . . . are hereby dismissed with prejudice from this lawsuit pursuant to the terms of the Settlement, each party to pay its own costs^{60/}

The language was insufficient because the parties’ obligation to comply with the settlement was not included in the dismissal order.^{61/} The court held that the language dismissing the case “pursuant to the terms of the Settlement” was insufficient to incorporate the terms of the settlement into the dismissal.^{62/} The court quoted the Eighth Circuit’s rationale stating that the clause was insufficient because “a dismissal order’s mere reference to the fact of settlement does not incorporate the settlement agreement in the dismissal order.”^{63/} The court went on to further note that its rationale was based on its strict adherence to *Kokkonen* when determining whether the language in an order

^{57/} *Id.* at 40.

^{58/} *Id.* at 42.

^{59/} 172 F.3d 270, 273 (3d Cir. 1999).

^{60/} *Id.*

^{61/} *Id.* at 274.

^{62/} *Id.*

^{63/} *Id.* (quoting *Miener v. Missouri Dep’t of Health*, 62 F.3d 1126, 1128 (8th Cir. 1995)).

is sufficient to incorporate the settlement agreement.^{64/} Finally, the court addressed and rejected the argument that it should defer to the expressed intention of the district court because that court is in the best position to determine whether it intended to retain jurisdiction.^{65/}

[II.B.2.b.2] The Second Circuit, cited as a strict adherent in *Phar-Mor*, also held that jurisdiction was not retained when the dismissal order does no more than refer to the settlement agreement. For instance, in *Hester Industries, Inc. v. Tyson Foods Inc.*, the settlement agreement included a condition that the case would be dismissed subject to the enforcement of the agreement by the district court.^{66/} In addition, the dismissal order, to which a copy of the settlement agreement was attached, read:

Pursuant to Rule 41 of the Federal Rules of Civil Procedure and in accordance with the terms of the attached Settlement Agreement between the parties, this action is hereby dismissed with prejudice, including all claims or causes of action asserted herein. Further, pursuant to the agreement of the parties in settlement, no judgment against either party will be entered and all parties will bear their own costs and attorneys' fees.^{67/}

The district court concluded that the dismissal order was sufficient to incorporate the settlement agreement and it therefore had jurisdiction to enforce and held the breaching party in contempt.^{68/} The district court stated that “the wording of the [dismissal] order logically leads one to find that the

^{64/} *Id.* The court noted several of its “sister circuits” which also shared the strict interpretation view (citing *Scelsa v. City Univ. of New York*, 76 F.3d 37, 41 (2d Cir. 1996); *Miener v. Missouri*, 62 F.3d 1126, 1128 (8th Cir. 1995); *Hagestad v. Tragesser*, 49 F.3d 1430, 1432-33 (9th Cir. 1995); and *Lucille v. City of Chicago*, 31 F.3d 546, 548-49 (7th Cir. 1994)). *Id.* However, this characterization of at least the Seventh Circuit may not be accurate. In *Lucille v. City of Chicago*, the plaintiff asked the court to enforce a settlement agreement in which some of the terms were incorporated into the dismissal order. The circuit court held that only those terms incorporated could be enforced, but did not address whether the language entering the order “in accordance with the Settlement Agreement which has been signed by all parties” was enough in itself to incorporate the agreement. Only the concurrence raised this issue. *Lucille*, 31 F.3d at 549. In addition, the concurrence notes that in *McCall-Bey v. Franzen* (a pre-*Kokkonen* case, but in line with *Kokkonen*), the circuit court held that “a judgment entered ‘pursuant to’ a settlement agreement incorporated that agreement.” *Id.* at 549 (citing *McCall-Bey*, 777 F.2d 1178, 1188-89 (7th Cir. 1985)).

^{65/} *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 275 (3d Cir. 1999).

^{66/} 160 F.3d 911, 913 (2d Cir. 1998).

^{67/} *Id.*

^{68/} *Id.* at 914.

terms of the settlement agreement were conditions approved by the court through the dismissal order and, thus, were incorporated into the order.”^{69/}

[II.B.2.b.3] On appeal, the Second Circuit determined that the dismissal was pursuant to Rule 41(a)(1)(ii), and, as a result, it could not be conditioned on compliance with the settlement—to do so would be equivalent to a mandatory injunction.^{70/} Furthermore, in a footnote, the court indicated that although *Kokkonen* allows the court to retain jurisdiction to enforce the agreement with the consent of the parties in a Rule 41(a)(1)(ii) dismissal, the order expressed no such intent of the parties and the court.^{71/} Where the dismissal order dismissed the case “in accordance with the terms of the attached Settlement Agreement,” the Second Circuit determined that it was an improper condition on a settlement under Rule 41(a)(1)(ii).^{72/} Thus, jurisdiction was not retained even where the parties indicated in the settlement agreement that they wished to have it retained.^{73/}

[II.B.2.b.4] In *Lynch, Inc. v. SamataMason, Inc.*, the Seventh Circuit was faced with the question of whether an enforceable settlement agreement was entered before a judge.^{74/} The trial judge found that a settlement agreement had been reached and ordered the litigation dismissed with prejudice, but stated in the order that the court retained jurisdiction to enforce the settlement agreement.^{75/} The Seventh Circuit affirmed the decision but began its analysis by examining the significance of the purported retention of jurisdiction, stating as follows:

It had no significance. Having dismissed the entire litigation, the court had no jurisdiction to do anything further, and so if SamataMason wanted to enforce the settlement agreement and Lynch balked, SamataMason would have to sue Lynch under the law of contracts. A settlement agreement, unless it is embodied in a consent decree or some other judicial order or unless jurisdiction to enforce the agreement is retained (meaning that the suit has *not* been dismissed with prejudice), is enforced just like any other contract. *Kokkonen v. Guardian Life Ins. Co.*, 511

^{69/} *Id.*

^{70/} *Id.* at 916.

^{71/} *Id.* at 917 n.2. “[W]e conclude that the text of the dismissal order at issue here . . . did not clearly communicate an intention of the parties and of the district court that the parties’ settlement agreement be incorporated into the order.” *Id.*

^{72/} *Id.* at 917.

^{73/} *Id.* at 913.

^{74/} 279 F.3d 487, 488-89 (7th Cir. 2002).

^{75/} *Id.* at 489.

U.S. 375, 380-81, 114 S. Ct. 1673, 128 L. Ed.2d 391 (1994); *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002), and cases cited there.^{76/}

This decision runs counter to the Supreme Court's holding in *Kokkonen*, and the Seventh Circuit's earlier decision in *VMS Securities Litigation*,^{77/} because the trial court specifically reserved jurisdiction to enforce the settlement agreement in the dismissal order. In *Kokkonen*, the Supreme Court explained how a court could retain ancillary jurisdiction over the settlement agreement, even though the underlying litigation was dismissed with prejudice.

C. *KOKKONEN* IN OTHER CONTEXTS

[II.C.1] *Kokkonen* may also be applied when the district court employs an administrative closing order to dismiss a case. In *Morris v. City of Hobart*, the parties in a Title VII case reached a settlement, and the court entered an administrative closing order allowing the parties to reopen the case within 60 days.^{78/} The order read:

It appearing that these proceedings are held in abeyance pursuant to the settlement and compromise affected [sic] by the parties,

IT IS ORDERED that the clerk Administratively terminate the action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. If within 60 days hereof, the parties have not reopened for the purpose of obtaining such a final determination, the action will be deemed dismissed with prejudice.^{79/}

^{76/} *Id.* at 489. The Seventh Circuit indicated that once a case is dismissed with prejudice (i.e., unconditionally), any retention of jurisdiction under *Kokkonen* is irrelevant.

^{77/} 103 F.3d 1317 (7th Cir. 1996). This distinction in the conditional or unconditional dismissal goes back to the Seventh Circuit's analysis in *McCall-Bey*, a pre-*Kokkonen* case. *See supra* notes 17, 35.

^{78/} 39 F.3d 1105, 1108 (10th Cir. 1994).

^{79/} *Id.* at 1108.

Over four years later the plaintiff filed a separate suit in federal court for breach of the settlement agreement.^{80/} The district court found jurisdiction and enforced the agreement.^{81/} The Tenth Circuit determined that because the administrative closing order notified the parties that without further action, the case would be dismissed with prejudice after sixty days, it “matured” into a dismissal with prejudice at the expiration of the sixty-day time period and was sufficient to terminate the case.^{82/} After determining that the administrative closing order matured into a dismissal with prejudice, the Tenth Circuit analyzed the case under *Kokkonen*, stating that “[a] district court can . . . retain jurisdiction over a settlement agreement if the order of dismissal shows an intent to retain jurisdiction or incorporates the settlement agreement.”^{83/} The court found neither an intent to retain jurisdiction nor an incorporation clause in the administrative closing order, and therefore found no ancillary jurisdiction to enforce the settlement agreement.^{84/} Lastly, the court found no other independent basis for federal subject matter jurisdiction.^{85/}

[II.C.2] While the language of *Kokkonen* appears to be clear, requiring either a clause retaining jurisdiction over the enforcement of a settlement agreement, or the incorporation of the settlement agreement, the outcome of a particular case may depend on the interpretation by individual circuits. The so-called strict interpretation circuits, two, three, seven, eight, and nine,^{86/} may require more specific language in the dismissal order especially when the agreement is being incorporated into the dismissal, but may only be concerned with evidence of intent when the court uses a clause to retain jurisdiction.

[II.C.3] These two standards may cause confusion among district courts and attorneys attempting to have a district court retain jurisdiction to enforce a settlement agreement. For instance, even though *Phar-Mor* referred to the Seventh Circuit as a strict interpreter for incorporation purposes, the Seventh Circuit has stated that when the district court retains jurisdiction over enforcement of a settlement agreement in its final order, “the district court need not use ‘any magic form of words’ to retain jurisdiction—[a]ll that is necessary is that it be possible to infer that [the court] did intend to

^{80/} *Id.*

^{81/} *Id.*

^{82/} *Id.* at 1109.

^{83/} *Id.* at 1110 (citing *Kokkonen*, 511 U.S. at 381). It is noteworthy that *Kokkonen* itself does not use the “intent” language as it is cited by the *Morris* court.

^{84/} *Id.* at 1110.

^{85/} *Id.* at 1111.

^{86/} As listed in *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274 (3rd Cir. 1999), *supra* note 64.

retain jurisdiction.”^{87/} Whatever confusion this may cause, the Seventh Circuit has added to it by determining that dismissals with prejudice preclude any further retention of jurisdiction, despite the clear direction to the contrary in *Kokkonen*.^{88/}

III. RECOMMENDED ALTERNATIVES

[III.1] Judicially enforceable settlement agreements are important tools to resolve pending litigation. As a result, it is imperative that lawyers and judges be aware of the alternatives available to them and the pitfalls if an appropriate dismissal order is not entered. If the dismissal order does not preserve jurisdiction to the court to enforce the settlement agreement, the parties may be consigned to the state court to file a second lawsuit if there is no independent basis of federal jurisdiction. Furthermore, parties may be reluctant to settle if the trial judge lacks jurisdiction to enforce the settlement.

A. Dismissal Order

[III.A.1] In *Kokkonen*, the Supreme Court set forth the principles for courts to follow in order to retain jurisdiction to enforce settlement agreements. *Kokkonen* permits a court to retain jurisdiction where: 1) the dismissal order requires the parties’ compliance with the settlement contract; 2) the court retains jurisdiction to enforce the settlement; or 3) the settlement agreement is embodied in the dismissal order by agreement of the parties. The following is a proposed order which seeks to meet *Kokkonen*’s requirements.

AGREED ORDER OF DISMISSAL

The parties hereby agree that this case has been settled and that all issues and controversies have been resolved to their mutual satisfaction. The parties request the Court to retain jurisdiction to enforce the terms of their settlement agreement under the authority of *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 381-82 (1994):

IT IS HEREBY ORDERED:

1. The parties shall comply with the terms of their settlement agreement entered into on [DATE], [a copy of which is attached and incorporated by reference as if fully set forth].
2. By consent of the parties, the Court shall retain jurisdiction for the purpose of enforcing the terms of the settlement agreement through [DATE].

^{87/} *In re VMS Sec. Litig. v. Prudential Sec., Inc.*, 103 F.3d 1317, 1322 (7th Cir. 1996) (quoting *McCall-Bey*, 777 F.2d at 1188).

^{88/} *Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 488 (7th Cir. 2002), see *supra* notes 74-77 and accompanying text.

3. Except as provided for in paragraphs 1 and 2 above, this case is dismissed, with prejudice, and each party shall bear its own attorney's fees and costs.

IT IS SO ORDERED this ____ day of _____, 20 ____.

JUDGE

[III.A.2] The introductory paragraph attempts to express the clear intent of the parties that the court retain jurisdiction in accordance with *Kokkonen*. Paragraph number 1^{89/} imposes a judicial requirement that parties comply with the terms of the settlement agreement. In addition, the parties have the option of attaching the agreement and incorporating its terms by reference. Paragraph number 2 is designed to reflect an express retention of jurisdiction by the court.^{90/} An end date is suggested so the parties and the court are clear that the court does not intend to be involved forever. For example, if a settlement calls for payments to be made over a one-year period, the Court may wish to retain jurisdiction for a period of fifteen months to give the court time to address a default should it occur. Paragraph number 3 is intended to carve out a clear exception for the court to retain jurisdiction while dismissing the underlying case with prejudice.^{91/} The document is prepared in the form of an agreed order rather than a stipulation because *Kokkonen* contemplates that the retention of jurisdiction must be accomplished through an order even if the parties stipulate to it under Rule 41(a)(1)(ii).^{92/}

B. Consent Decree

[III.B.1] A consent decree is an alternative to a settlement agreement. It is an agreement that parties desire and expect to be as enforceable as a judicial decree, subject to the rules generally

^{89/} Paragraph 1 is directed at the Supreme Court's statement in *Kokkonen* that the "situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the dismissal order – 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." 511 U.S. at 381.

^{90/} *Id.*

^{91/} See discussion *supra* notes 25-39 and accompanying text.

^{92/} "Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties stipulation of dismissal) we think the 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." *Kokkonen*, 511 U.S. at 381-82.

applicable to other judgments and decrees.^{93/} Furthermore, a consent decree is a final judgment and may be reopened only to the extent equity requires.^{94/}

[III.B.2] The entry of a consent decree makes retention of jurisdiction more certain. In *Smyth v. Rivero*, consent decrees were distinguished from settlements.^{95/} *Smyth* explained the dual character of consent decrees, which have elements of both judgment and contract.^{96/} As a judgment, a consent decree is enforceable by judicial sanctions.^{97/} In contrast, settlement agreements are essentially private contracts. For the court to retain jurisdiction to enforce the settlement after dismissal of the suit, the obligation to comply with the agreement's terms must be expressly made part of a court's order.^{98/}

[III.B.3] However, courts should not rely on the issuance of a consent decree alone to retain jurisdiction over a settlement agreement. If the consent decree fails to mention the settlement agreement, a court may not be able to exercise jurisdiction. In *National Presto Industries v. Dazey*, the Federal Circuit still applied the *Kokkonen* analysis to the language of a consent decree.^{99/} The analysis led to the holding that because the district court did not even mention the agreement or any of its terms in its order, jurisdiction was not proper under *Kokkonen*. *National Presto* is an unusual consent decree case. Consent decrees usually embody the settlement agreement reached between the parties, but in this case, the district court's consent decree merely permanently enjoined the defendant from selling a certain product.^{100/} The consent decree did not incorporate any of the other settlement terms.^{101/}

C. Conditional Dismissals Without Prejudice

[III.C.1] Another alternative to a dismissal with prejudice is a conditional dismissal, without prejudice, to address the problem of jurisdiction. A conditional dismissal is generally phrased as a

^{93/} *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992).

^{94/} *Id.* at 391.

^{95/} 282 F.3d 268, 279-81 (4th Cir. 2002).

^{96/} *Id.* at 280 (citing *Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519 (1986) (describing the "hybrid nature" of consent decrees)).

^{97/} *Id.*

^{98/} *Id.* at 283.

^{99/} 107 F.3d 1576, 1582-83 (Fed. Cir. 1997).

^{100/} *Id.* at 1578.

^{101/} *Id.*

dismissal with leave to reinstate within a specified number of days. The idea behind a conditional dismissal is to allow parties an opportunity to finalize settlement documents and to return to court at a later date if there is a problem.

[III.C.2] In *Pratt v. Philbrook*, the district judge entered a sixty-day Settlement Order of Dismissal when the parties announced they had agreed upon settlement terms and the case was dismissed without prejudice.^{102/} The order provided as follows: “this action is dismissed without costs and without prejudice to the right, upon good cause shown within sixty (60) days, to reopen the action if settlement is not consummated by the parties.”^{103/} The First Circuit described this form of order “as a mechanism for the trial courts to bring cases to closure while retaining jurisdiction to enforce a settlement after closure is announced.”^{104/} Although the settlement agreement started falling through soon after the court entered the conditional dismissal, the plaintiff failed to alert the court of any difficulties until shortly after the expiration of the sixty days.^{105/} The district judge declined to exercise jurisdiction. The First Circuit remanded the case to the district judge for consideration of whether the plaintiff had shown excusable neglect for failing to alert the court the settlement had fallen through before the sixty-day period had passed.^{106/}

[III.C.3] In *Bell v. Schexnayder*, the parties advised the district judge of a settlement.^{107/} Subsequently, the court dismissed the case “without prejudice to the right, upon good cause shown within sixty (60) days, to reopen it if settlement is not consummated and seek summary judgment enforcing the compromise.”^{108/} The Fifth Circuit held the district court acted properly by enforcing the settlement agreement because the district court expressly provided for the parties to reopen the case within a certain number of days and the defendants moved to reopen within that time period.^{109/}

^{102/} 109 F.3d 18 (1st Cir. 1997).

^{103/} *Id.* at 21.

^{104/} *Id.* at 21 n.5.

^{105/} *Id.* at 18.

^{106/} *Id.* at 23.

^{107/} 36 F.3d 447 (5th Cir. 1994).

^{108/} *Id.* at 448.

^{109/} *Id.* at 450.

[III.C.4] However, the use of conditional dismissals with leave is not universally condoned. The Seventh Circuit criticized the practice in *Goss Graphics Systems, Inc. v. DEV Industries, Inc.*^{110/} In *Goss*, the parties advised the district court that a settlement was likely, and the court dismissed the case with leave to reinstate within six months.^{111/} The case did not settle and the plaintiff filed a motion to reinstate the case shortly before the deadline.^{112/} The original judge was no longer a district court judge and could not reinstate the case herself; the judge who was assigned the case denied the motion to reinstate.^{113/} On appeal, the Seventh Circuit reinstated the case.^{114/} The court stated that the case should not have been dismissed originally because it was likely to settle; rather the appropriate time to dismiss a case is when the dispute has been “definitively and finally resolved, not when it seems likely to be resolved.”^{115/} The Court cited a number of cases in which it has criticized the practice of dismissal with leave to reinstate.^{116/}

[III.C.5] One problem with conditional dismissals is that the parties and courts do not always understand the consequences of such a dismissal and later reinstatement. Is the case to be reinstated for the purpose of continuing the litigation or enforcing the settlement? Once the settlement document is executed, will a dismissal with prejudice be entered? Once again, precision in the dismissal order is important.

[III.C.6] Alternatively, the court may dismiss the case with leave to reopen within a certain number of days. This approach has worked in practice in some circuits, but it is not without criticism. When using this approach the following are some forms of suggested language.

[III.C.7] The following language is suggested where parties may later seek enforcement of the settlement by the court:

The court retains jurisdiction to enforce the settlement agreement. The case is dismissed without prejudice with leave to reinstate on or before [DATE] for the purpose of enforcing the settlement. In the event a motion to reinstate is not filed on or before the foregoing date, the dismissal will be with prejudice.

^{110/} 267 F.3d 624, 626 (7th Cir. 2001).

^{111/} *Id.* at 625.

^{112/} *Id.* at 625.

^{113/} *Id.* at 626.

^{114/} *Id.* at 628.

^{115/} *Id.* at 626.

^{116/} *Id.* at 626 (citing *Otis v. City of Chicago*, 29 F.3d 1159, 1163 (7th Cir. 1994); *King v. Walters*, 190 F.3d 784, 786 (7th Cir. 1999); *Ford v. Neese*, 119 F.3d 560, 562 (7th Cir. 1997)).

The following language is suggested where the parties intend to renew the litigation in the event a settlement is not finalized:

The case is dismissed without prejudice with leave to reinstate on or before [DATE] for the purpose of proceeding with the litigation in the event a settlement has not been completed prior to that date. In the event a motion to reinstate is not filed on or before the foregoing date, the dismissal will be with prejudice.

IV. CONCLUSION

[IV.1] Settlements are the predominant means of resolving federal litigation. Parties and the court must pay as much attention to the dismissal order and its consequences as they do to any other important stage of the litigation. Failure to enter an appropriate dismissal order can lead to unnecessary problems in the enforcement of settlement agreements. The Supreme Court's decision in *Kokkonen* sets forth guidelines which courts and parties can follow to preserve a court's jurisdiction to enforce a settlement agreement arising out of the litigation.