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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
U.S. Judicial Conference
Washington, D.C. 20544

Dear Mr. McCabe:

I write to suggest the Advisory Committee on Civil Rules consider several changes to Federal Civil Procedure Rule 16. The proposals are founded on the positive experiences in state trial courts with similar provisions as well as on some difficulties encountered by federal district judges. I have written of these experiences and difficulties in several law review articles. Perhaps most significant regarding my compelled attendance proposal is "Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws," 50 Kansas Law Review 347 (2002). Perhaps most significant regarding my settlement enforcement proposal is "Enforcing Settlements in Federal Civil Actions," 36 Indiana Law Review 33 (2003). Both pieces were cowritten by Matthew Walker. Copies are enclosed.

Regarding compelled attendance I suggest the very last sentence in Rule 16(c) be amended to read: "If appropriate, the court may require personally or through a representative that a party, an interested lienholder, an insurer, or any other person or entity who is financially interested in the outcome of the pending or related claims be present or reasonably available by telephone in order to consider possible settlement."

Regarding settlement enforcement I suggest that the present provisions of Rule 16(e) be recharacterized as 16(e)(1) and that a new 16(e)(2) be added as follows: "No complete or partial settlement will be enforced unless it is in writing, signed and allowed by the court to be filed, unless it is made in open court and entered of record, or unless upon special circumstances it is made and transcribed before a magistrate judge or district judge."

Please call or write with any questions. I will be happy to provide additional support to the Committee or its Reporter upon request. I can be reached by phone (815-753-0340) or email (jparness@niu.edu).

Thanks for the consideration.

Sincerely,

Jeffrey A. Parness

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Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws

Jeffrey A. Parness &
Matthew R. Walker

Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws

Jeffrey A. Parness[*] *& Matthew R. Walker*[**]

I. INTRODUCTION

In an American trial court of general or special subject matter jurisdiction, a civil case typically is commenced by filing with the court a complaint or some other affirmative pleading.[1] Within an initial pleading there should be presented, at least, "a claim for relief"[2] or "a cause of action"[3] by a named party who seeks redress from an adverse party.[4] Initial pleadings, and any subsequent requests for redress within or related to pleadings,[5] usually should be processed and heard so as to secure "just, speedy, and inexpensive" resolution.[6]

Frequently, a civil case is resolved through settlement or trial. To facilitate such resolution, a trial judge possesses authority to schedule settlement or trial preparation conferences. Written civil procedure laws explicitly recognize judicial authority to compel attendance by the attorneys for the parties and, at times, by the parties themselves at settlement conferences, as well as to compel attendance by the attorneys and by unrepresented parties at trial preparation conferences.

While the civil case box described in written civil procedure laws normally references only presented claims and their named parties and

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1. *See, e.g.*, FED. R. CIV. P. 3 (requiring a complaint to be filed); 735 ILL. COMP. STAT. 5/2-602 (1992) (same); MO. R. CIV. P. § 53.01 (requiring a petition to be filed).

2. FED. R. CIV. P. 8(a).

3. 735 ILL. COMP. STAT. 5/2-602 (1992). While the phrase "cause of action" generally is employed with fact pleading, "claim for relief" usually accompanies notice pleading. *See generally Claim or Cause of Action*, 13 F.R.D. 253 (describing the differences and proposing to amend Rule 8(a)(2) to require pleading of "facts constituting a cause of action").

4. *See, e.g.*, FED. R. CIV. P. 8(a)(2)–(3) (requiring "a short and plain statement of the claim" and "a demand for judgment"); 735 ILL. COMP. STAT. 5/2-601, 603(a) (1992) (requiring "a plain and concise statement" of a cause of action wherein "substantial allegations of fact are necessary"); TEX. R. CIV. P. 47(a) (requiring "a short statement of the cause of action sufficient to give fair notice of the claim involved").

5. Later requests may be written, as in amendments to initial pleadings or in third-party pleadings. FED. R. CIV. P. 15(a), 14(a). Unwritten later requests may be made where unpleaded claims are "tried by express or implied consent of the parties." FED. R. CIV. P. 15(b).

6. FED. R. CIV. P. 1.

attorneys, many civil cases also involve unpresented claims (i.e., insurance coverage) and other interests (i.e., contingency fee recovery) far removed from any claims presented in pleadings or elsewhere. Here, nonparties and their attorneys can be quite important to civil case resolution. Unpresented claims and nonparty interests should also be handled with a view toward "just, speedy, and inexpensive" resolution. Efficient disposition here too can be facilitated by pretrial conferences. Yet, written civil procedure laws typically are silent on pretrial conferences directed at unpresented claims and nonparty interests. While undoubtedly there is at least some scheduling authority regarding unpresented and nonparty matters, it often goes unrecognized or unemployed due, in part, to the silence of the written laws.

Written pretrial conference laws for civil cases in both federal and state trial courts should be reformulated to encompass matters beyond presented claims and named parties. Judgments upon settlements or trials often speak to lienholders, insurers, and other nonparties. To secure "just, speedy, and inexpensive" resolution, written laws should reflect better all the matters for which pretrial conferences might be scheduled.

As the written laws are significantly influenced by the Federal Rules of Civil Procedure, we review historically the guidelines on pretrial conferences within the Federal Rules. Then we demonstrate, utilizing the United States Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co. of America*[7] on ancillary jurisdiction and inherent power, how all federal rules have failed to address fully judicial authority on pretrial conferencing and how these failures have led to misunderstandings and troubling precedents. We then explain how *Kokkonen* should be properly understood, which we hope will clarify future analysis. We conclude with suggestions for reformulating all written pretrial conference laws to include matters beyond presented claims and named parties, so as to secure more "just, speedy, and inexpensive" resolution of all civil litigation matters.[8]

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7. 511 U.S. 375 (1994).

8. We shall not address when, how and why such broader pretrial conference laws should be used. For such a discussion, see generally Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of* G. Heileman Brewing Co. v. Joseph Oat Corp., 69 WASH. U.L.Q. 1059 (1991).

II. THE FEDERAL RULES OF CIVIL PROCEDURE ON PRETRIAL CONFERENCES

Federal Rule of Civil Procedure 16, effective in 1938, was entitled "Pre-Trial Procedure; Formulating Issues."[9] It made no explicit mention of settlement, though settlement presumably was discussed during many pretrial conferences. As written, the Rule was geared to trial preparation conferences.[10] The Rule allowed the district court to "direct the attorneys for the parties to appear before it for a conference to consider" subjects that would "aid in the disposition of the action," including issue simplification, pleading amendment, avoidance of "unnecessary proof," "limitation" on experts, and referrals of factual issues to masters.[11]

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9. The text of the 1938 version of Rule 16 is found in *Rules of Civil Procedure for the District Courts of the United States*, 308 U.S. 645, 684 (1938) [hereinafter *1938 Rule*] and reads as follows:

> Rule 16. Pre-Trial Procedure; Formulating Issues.
>
> In any action, the court may at its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

10. *See* Hon. Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (noting that the U.S. Judicial Conference in 1944 approved the Pre-Trial Committee's statement "that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge"); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935–36 (2000) (stating that the 1938 Rule was intended to cover meetings about coming trials).

11. *1938 Rule*, *supra* note 9, 308 U.S. at 684. The 1938 version of the Rule operates today in some American states. ARK. R. CIV. P. 16; GA. CODE ANN. § 9-11-16 (1993); KY. R. CIV. P. 16; MASS. R. CIV. P. 16; MISS. R. CIV. P. 16; MO. R. CIV. P. 62.01; N.C.R. CIV. P. 16; PA. R. CIV. P. 212.3; S.D. CODIFIED LAWS § 15-6-16 (Michie 2001); VT. R. CIV. P. 16; VA. SUP. CT. R. 4:13; WASH. SUPER. CT. CIV. R. 16.

Rule 16 remained unchanged until 1983[12] when it was significantly overhauled.[13] Its title then read "Pretrial Conferences; Scheduling; Management."[14] While the original Rule designated six subjects for possible consideration,[15] the new Rule listed five objectives and eleven subjects.[16] The new Rule contemplated required scheduling and planning conferences early on for many civil cases as well as the prospect of multiple conferences thereafter.[17] Judicial authority was broadened to reach not only attorneys, but also "any unrepresented parties."[18] Discovery, pretrial motion, and settlement matters, as well as trial preparation matters, could now guide pretrial conferences.[19]

The 1983 Rule expressly made "facilitating the settlement of the case" a legitimate objective of a pretrial conference.[20] The "participants" at any conference could "consider and take action" on a variety of subjects, including "the possibility of settlement."[21] There is no language in the 1983 Rule describing all possible participants.[22] The Rule did say that "[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."[23]

The Advisory Committee Note to the 1983 Rule, prepared by the Advisory Committee on Civil Rules and first submitted to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,[24] found that settlement discussions at pretrial conferences had "become commonplace"[25] and were "appropriate at

12. There was a proposal in 1955 to broaden a judge's power in "big case[s]" where "protracted litigation" was expected. 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 16 App.02[1] (3d ed. 2001).

13. *Federal Rules of Civil Procedure*, 97 F.R.D. 165, 201–05 (1983) [hereinafter *1983 Rule*]. This version of the Rule operates today in some American states. ALA. R. CIV. P. 16; MONT. R. CIV. P. 16; N.M.R. CIV. P. DIST. CT. 1-016; UTAH R. CIV. P. 16.

14. *1983 Rule*, *supra* note 13, 97 F.R.D. at 201.

15. *1938 Rule*, *supra* note 9, 308 U.S. at 684.

16. *1983 Rule*, *supra* note 13, 97 F.R.D. at 201–05.

17. *Id.*

18. *Id.* at 201.

19. *Id.* at 207 advisory committee's note.

20. *Id.* at 201; FED. R. CIV. P. 16(a).

21. *1983 Rule*, *supra* note 13, 97 F.R.D. at 202–03; FED. R. CIV. P. 16(c)(7) (1983) (repealed 1993).

22. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 667 (7th Cir. 1989) (en banc) (Manion, J., dissenting) ("Rule 16(c) does not say who those 'participants' may be.").

23. *1983 Rule*, *supra* note 13, 97 F.R.D. at 204.

24. *Id.* at 189 conference committee's report; *see also* 28 U.S.C. § 331 (1994) (creating the Judicial Conference of the United States); 28 U.S.C. § 2073(b) (1994) (creating a standing committee on rules of practice, procedure, and evidence).

25. *1983 Rule*, *supra* note 13, 97 F.R.D. at 210 advisory committee's note.

any time."[26] It further said that a pretrial conference devoted exclusively to settlement "may be desirable" and that "settlement should be facilitated at as early a stage of the litigation as possible."[27]

This Advisory Committee viewed the 1938 Rule as "a success," in part, because it improved and facilitated the "settlement process."[28] Yet, it found the 1938 Rule had become outdated because it did not reflect "the significant changes in federal civil litigation."[29] The Advisory Committee said that "the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed" and "thus will be a more accurate reflection of actual practice."[30] The Committee did caution, however, that mandating settlement conferences "would be a waste of time in many cases."[31]

Rule 16 was last amended in 1993,[32] with the most recent changes constituting more refinement than overhaul. The Rule now enumerates sixteen subjects "for consideration at pretrial conferences."[33] The new Rule also contemplates a more active role for judges. While in 1983 the "participants" at a pretrial conference would "consider and take action" with respect to the subjects discussed, in 1993 "the court" was to "take appropriate action" regarding the subjects considered.[34]

The 1993 Rule also expressly authorizes judges to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."[35] The

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26. *Id.*
27. *Id.*
28. *Id.* at 205–06 advisory committee's note.
29. *Id.* at 206 advisory committee's note.
30. *Id.* at 207 advisory committee's note.
31. *Id.* at 210 advisory committee's note.
32. *See Federal Rules of Civil Procedure*, 146 F.R.D. 401, 597–601 (1993) (showing the changes made to Rule 16) [hereinafter *1993 Rule*]. This version of the Rule operates today in some American states. ALASKA R. CIV. P. 16; HAW. R. CIV. P. 16; KAN. R. CIV. P. 60-216; MINN. R. CIV. P. 16.01–16.06; N.D.R. CIV. P. 16; TENN. R. CIV. P. 16.01–16.06; W. VA. R. CIV. P. 16; WYO. R. CIV. P. 16.
33. *1993 Rule*, *supra* note 32, 146 F.R.D. at 598–601.
34. *Id.* at 598–99. Subdivision (c) under the 1983 Rule read: "(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to the subjects discussed." *1983 Rule*, *supra* note 13, 97 F.R.D. at 202. The 1993 Rule reads: "(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to the subjects considered." *1993 Rule*, *supra* note 32, 146 F.R.D. at 598–99; FED. R. CIV. P. 16(c).
35. *1993 Rule*, *supra* note 32, 146 F.R.D. at 601; FED. R. CIV. P. 16(c). The Advisory Committee explained that this addition was expressly directed at the settlement provision, stating that "paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c)." *1993 Rule*, *supra* note 32, 146 F.R.D. at 604–05 advisory committee's note. This portion of the amendments to Rule 16 seems contrary to the Advisory Committee notes to the 1983 amendments,

Advisory Committee explained that this change would help "eliminate questions . . . regarding the authority of the court to make appropriate orders . . . to facilitate settlement."[36] The Committee noted that participation by a party or its representative might involve "an officer of a corporate party, a representative from an insurance carrier, or someone else," depending upon the circumstances.[37] The Committee also said that the "explicit authorization to require personal participation" was not meant "to limit the reasonable exercise of the court's inherent powers."[38]

The 1993 Rule received some criticism. There was concern "that explicit authority to require party attendance at settlement conferences would be misused by some judges to coerce settlements."[39] The rulemakers did not proceed with a few suggested changes. Eliminated was a provision explicitly authorizing "mandatory attendance and participation" of interested insurers in alternative dispute resolution procedures.[40] While the rulemakers did not push an amendment expressly authorizing district courts to require "insurers" to attend pretrial conferences,[41] the Committee noted "the strong feelings of many" that authority "to require that parties, or their insurers, attend a settlement conference" was not only "needed," but also "already within the court's inherent powers."[42] Judicial authority over insurers, and perhaps other

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which state in regard to the last sentence in subsection (c) that "[t]he reference to 'authority' is not intended to insist upon the ability to settle the litigation." *1983 Rule*, *supra* note 13, at 211 advisory committee's note.

36. *1993 Rule*, *supra* note 32, 146 F.R.D. at 603 advisory committee's note.

37. *Id.* at 605 advisory committee's note. The Committee left open who "someone else" might be. *Id.*

38. *Id.* The Committee cites *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), on inherent powers. *1993 Rule*, *supra* note 32, 146 F.R.D. at 605 advisory committee's note. The Committee warned, however, "that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required." *Id.*

39. Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, 146 F.R.D. 519, 526, Attachment B, "Issues and Changes" (May 1, 1992).

40. *Id.* (noting that such mandates may arise under "local experimentation under the Civil Justice Reform Act"). That proposal appears in *Proposed Rules*, 137 F.R.D. 53, 85 (1991).

41. *See Proposed Rules*, *supra* note 40, 137 F.R.D. at 85 ("The court may require that parties, or their representatives and insurers, attend a conference . . . .").

42. *1993 Rule*, *supra* note 32, 146 F.R.D. at 526 advisory committee's note. A detailed history of Rule 16 is found in Resnik, *supra* note 10:

> Throughout the century, some judges and lawyers surely met with each other and talked about settling cases. Settlement was—and is—always on the table . . . . The shift I have traced begins in the 1920s, runs through rulemaking in the 1930s, protracted litigation in the 1950s, and schools for judges in the following decades, and finds current expression in the comments of a federal judge explaining in 1994 to lawyers at a federal bar meeting in Los Angeles that going to trial meant that "the system" had failed.

nonparties, during pretrial conferencing thus remains subject to case precedents.

III. JUDICIAL AUTHORITY UNDER *Kokkonen v. Guardian Life Insurance Co. of America*

Judicial authority during settlement and trial preparation conferences in the federal trial courts, at times extending beyond any written laws, was described in the United States Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co. of America*,[43] rendered a year after Rule 16 was last amended. There, the Court recognized limits on trial court enforcement authority over civil case settlement agreements.[44] Yet the Court in *Kokkonen* went further, inviting pretrial conferences involving, at times, unpresented claims and interests as well as nonparties.[45] Such conferences are exemplified in the *Matsushita*[46] and *Cluett*[47] cases, which follow a review of *Kokkonen*.

A. *The Two Heads of* Kokkonen

The civil litigation parties in *Kokkonen*, involved in a dispute over an agency relationship concerning insurance sales, orally agreed, on the record before a federal district judge in chambers, to resolve all claims and counterclaims.[48] The parties then executed, and the district judge signed, a stipulation and order dismissing the diversity action.[49] The order did not reserve jurisdiction to enforce the agreement; it did not even mention the agreement.[50] Subsequently, a dispute arose under the agreement when the petitioner failed to return certain files to the insurer.[51] The insurer moved in the same district court to enforce the

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Id. at 949.

43. 511 U.S. 375 (1994).

44. *Id.* at 381–82.

45. *See id.* (recognizing courts' ability to "embody" the terms of settlement contracts in dismissal orders). Additionally, the court recognized that ancillary jurisdiction includes the authority to compel a lawyer engaged in litigation misconduct to pay an opposing party's attorney's fees. *Id.* at 380 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991)).

46. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

47. Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251 (2d Cir. 1988).

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

49. *Id.* at 376–77.

50. *Id.* at 377.

51. *Id.*

agreement.[52] The court enforced the agreement under its "inherent power" over the objection that the court lacked subject matter jurisdiction.[53]

The Supreme Court reversed. In assessing the lower court's reference to "inherent power," the Court focused on but one of the "two separate, though sometimes related . . . heads" of ancillary jurisdiction.[54] The Court generally found that "ancillary jurisdiction" had been used

> in the very broad sense . . . for two separate, though sometimes related, purposes: (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.[55]

The Court held that neither purpose "supports the present assertion of jurisdiction."[56] As to "factually interdependent" claims, the Court found, and the parties did not dispute, that the facts relating to the "breach of agency" complaint and to the "breach of settlement agreement [had] nothing to do with each other."[57] As to successful court functioning, seemingly relied on by the insurer seeking enforcement of the settlement,[58] the Court found that if the settlement agreement "had been made part of the order of dismissal," the situation would be "quite different."[59] Then any breach would either violate a specific court order

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52. *Id.*
53. *Id.*
54. *Id.* at 379–80 (citations omitted).
55. *Id.* (citations omitted). While the *Kokkonen* Court described "ancillary jurisdiction" and "inherent power" as including the parameters of judicial authority to decide claims and related issues arising in civil cases, elsewhere the Court seemingly has recognized other forms of inherent powers. In *Mistretta v. United States*, 488 U.S. 361 (1989), Justice Scalia wrote:

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a "restraint of trade," or to adopt rules of procedure, or to prescribe by rule the manner in which their officers shall execute their judgments, because that "lawmaking" was ancillary to their exercise of judicial powers.

Id. at 417 (Scalia, J., dissenting).
56. *Kokkonen*, 511 U.S. at 380.
57. *Id.*
58. *See id.* ("But it is the second head of ancillary jurisdiction, relating to the court's power to protect its proceedings and vindicate its authority, that both courts in the present case appear to have relied upon, judging from their references to 'inherent power.'") (citation omitted).
59. *Id.* at 381.

or fall under a retention of subject matter jurisdiction.[60] The Court concluded, however, that absent such incorporation, "enforcement of the settlement agreement is for state courts."[61]

The Court in *Kokkonen* understood that the types of ancillary and inherent judicial authority it described had been and would continue to be troublesome. It said that "ancillary jurisdiction can hardly be criticized for being overly rigid or precise."[62] Imprecision seemingly results, in part, because inherent and ancillary powers are not wholly derived from "rule or statute but [from] the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[63] While these doctrines encompass broader powers than expressly recognized under written civil procedure laws,[64] these powers often seem "murky."[65]

Recognizing the potential for misunderstanding and abuse, the Supreme Court has urged caution in employing these doctrines. After *Kokkonen*, it has said that inherent and ancillary judicial authority "must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[66] Yet, the

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60. *Id.* Judicial enforcement of civil case settlements occasionally is directed by written civil procedure laws. *E.g.*, CAL. CIV. PROC. CODE § 664.6 (West Supp. 2001).

61. *Kokkonen*, 511 U.S. at 382.

62. *Id.* at 379.

63. Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991) (noting that inherent powers of the federal courts include power to admit to the bar, discipline attorneys who appear before the court, punish for contempt, vacate a judgment on proof of fraud, bar disruptive criminal defendants, dismiss a case on forum non conveniens grounds, and act sua sponte to dismiss a case for failure to prosecute).

64. *See, e.g.*, *Chambers*, 501 U.S. at 47–48 (noting that inherent power can be used, inter alia, to expand sanctioning authority granted by Rule 11 and 28 U.S.C. § 1927).

65. HBE Leasing Corp. v. Frank, 882 F. Supp. 60, 62 (S.D.N.Y. 1995). The *HBE* court is not alone in its confusion:

> Despite historical reliance on inherent powers, including Supreme Court jurisprudence dating back to 1812, the notion of inherent power has been described as nebulous, and its bounds as "shadowy." The conceptual and definitional problems . . . have bedeviled commentators for years . . . . [V]ery few federal cases discuss in detail the topic of inherent powers. More importantly, those cases that have employed inherent power appear to use that generic term to describe several distinguishable court powers. To compound this lack of specificity, courts have relied occasionally on precedents involving one form of power to support the court's use of another.
>
> These observations suggest that it is not always possible to categorize inherent power decisions.

Eash v. Riggins Trucking Inc., 757 F.2d 557, 561–62 (3d Cir. 1985) (en banc) (citations and footnotes omitted).

66. Degen v. United States, 517 U.S. 820, 823 (1996). In *Degen*, the Court describes inherent authority as "power . . . limited by the necessity giving rise to its exercise." *Id.* at 829.

dangers must be faced because such judicial authority "is, at its core, a creature of necessity."[67]

We posit that the doctrines of ancillary and inherent powers are best understood as involving two distinct forms of judicial authority, each capable of operating without express language in written civil procedure laws. One, which we find often is labeled ancillary, pendent, or most recently, supplemental jurisdiction, involves initial judicial authority over disputed civil claims,[68] though all such claims may not be able to be resolved on the merits at a trial should trial become necessary. The other, which we find often is labeled inherent power, involves the determination and implementation of the processes necessary for the resolution of the disputed civil claims in a "just, speedy, and inexpensive" manner.[69] These two forms of judicial authority are illustrated in the following two cases. The first, *Matsushita Electric Industrial Co. v. Epstein*,[70] shows how the first head of *Kokkonen* allows court involvement in settlement talks about factually interdependent claims which could not be brought to trial or otherwise resolved by the same court if no settlement is reached. The other, *Cluett, Peabody & Co. v. CPC Acquisition Co.*,[71] shows how the second head of *Kokkonen* can be employed both to hear and to resolve unpresented civil claims and interests that are not factually interdependent with the disputed civil claims, and that may involve nonparties, so that the court can resolve the disputed civil claims in a fair, efficient, and cost effective manner. We believe that at least some of the confusion over the two forms of judicial authority would dissipate if ancillary jurisdiction was viewed as a form of judicial authority involving initial subject matter jurisdiction over factually interdependent (if not also factually-related) claims, while inherent power was viewed as a form of judicial authority encompassing varying powers necessary for resolving such claims.[72]

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67. Peacock v. Thomas, 516 U.S. 349, 359 (1996).

68. *See* 28 U.S.C. § 1367 (1994) (prescribing the claims over which the federal district courts have supplemental jurisdiction).

69. FED. R. CIV. P. 1.

70. 516 U.S. 367 (1996).

71. 863 F.2d 251 (2d Cir. 1988).

72. While the term ancillary jurisdiction as used in *Kokkonen* includes many asserted exercises of inherent powers, we employ the term only to cover authority over non-diversity state law claims and interests in some significant way factually related to the civil claims properly pending before federal district courts under independent jurisdictional statutes. Such ancillary authority includes, but is not limited to, supplemental jurisdiction over claims under 28 U.S.C. § 1367. *Cf.* Futura Dev., Inc. v. Estado Libre Asociado, 144 F.3d 7, 9 n.1 (1st Cir. 1998) (utilizing the term "supplemental jurisdiction" to cover federal court authority over related state law claims and the term "enforcement jurisdiction" to cover inherent authority necessary for courts to function successfully, without mentioning nonenforcement proceedings involving vindication and management also necessary for suc-

B. *The* Matsushita *and* Cluett *Cases*

The dispute in *Matsushita* arose when Matsushita sought a takeover of MCA.[73] A class action was instituted in a Delaware Court of Chancery on behalf of the MCA stockholders alleging that MCA and its board of directors had failed to maximize the value of MCA stock and had failed to disclose a conflict of interest between the managers of MCA and Matsushita.[74] After the Delaware class action was initiated, a second group of plaintiffs filed a related class action in a California federal district court alleging violations of federal Security and Exchange Commission rules.[75]

Before the California federal case was heard, Matsushita offered a settlement involving a dismissal of the Delaware state action and a release of all claims, including the federal claims then pending in the California action.[76] The Delaware court refused to approve the agreement because there was no monetary benefit to the class members.[77] The Delaware judge determined that it would be unfair to release all claims under a settlement that had no monetary value to class members because the federal claims had arguable merit.[78] After the agreement was rejected, the California court declined to certify the class.[79] This decision was then appealed.[80] Before that appeal was heard, however, the Delaware class action was settled, with the agreement including a release of any federal claims.[81]

Individuals within both the Delaware and California classes that had neither opted out of the Delaware class nor appeared at the hearings in Delaware to contest the settlement or class representation then sought

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cessful court function), *vacated by* U.S.I. Props. Corp. v. M.D. Constr. Co., 230 F.3d 489 (1st Cir. 2000).

73. *See Matsushita*, 516 U.S. at 369–70 (explaining that there was a tender offer that resulted in Matsushita acquiring MCA).

74. *In re* MCA, Inc., 598 A.2d 687, 690 (Del. Ch. 1991). There were also claims involving wasting assets and conspiring to break Delaware law. *Matsushita*, 516 U.S. at 370.

75. *MCA*, 598 A.2d at 690.

76. *Id.* at 690.

77. *Id.* at 696.

78. *Id.* at 695–96. While state judicial consideration of the strength of the federal law claims on the merits may seem to invade the exclusivity of federal court authority, it also seems necessary in order to assure that the settlement was fair to the absent class members.

79. *Matsushita*, 516 U.S. at 370.

80. *Id.*

81. *Id.* at 370–71. The settlement agreement contained an opt-out provision and a $2 million deposit to be distributed to class members. *Id.* at 371.

to proceed further in the California case.[82] The United States Supreme Court had to determine if the Delaware court judgment should be refused full faith and credit by a federal court because it contained a release of federal law claims within exclusive federal court subject matter jurisdiction.[83] The Supreme Court held that deference generally is "applicable in cases in which the state-court judgment . . . incorporates a class-action settlement releasing claims solely within the jurisdiction of the federal courts."[84] Since the agreement would preclude any proceedings in Delaware state courts, the agreement was found by the Supreme Court to be preclusive in the federal courts as well.[85]

In allowing a state court judge to oversee and approve a class settlement containing claims within exclusive federal district court subject matter jurisdiction,[86] the *Matsushita* decision allows the state court to exercise at least some ancillary authority over factually interdependent claims so that it may dispose of all related claims in a single proceeding,[87] though not all claims were suitable for adjudication by a state court trial. State court ancillary authority over certain unpresented federal law claims between named parties is thus appropriate even though the claims could have been neither pleaded nor tried on the merits in the state court.

Inherent authority necessary for the trial court to function successfully was exercised in *Cluett, Peabody & Co. v. CPC Acquisition Co.*[88] There, a fee dispute arose between Paul Bilzerian and the law firm of Latham and Watkins.[89] The fees were incurred by Bilzerian during his attempted takeover of Cluett.[90] The legal services related to the filing of a California federal court lawsuit to enjoin Cluett from resisting a tender

82. *Id.* at 372. Had these individuals opted out of the settlement class or objected to the release of exclusively federal claims in the Delaware state case, they could have proceeded in the California federal case "unimpeded by the Delaware judgment." *Id.* at 385. The court noted that those Delaware plaintiff class members who requested exclusion were still proceeding in federal court. *Id.* Incidentally, a few of these individuals unsuccessfully sought in 1999 to intervene for the purpose of reopening the Delaware court settlement. *In re* MCA, Inc., 774 A.2d 272, 276 (Del. Ch. 2000). The court lamented that its "decision is the latest chapter, probably not the last, in this case." *Id.*

83. *Matsushita*, 516 U.S. at 369.

84. *Id.* at 375.

85. *See id.* at 386 (concluding also that the provision granting exclusive federal jurisdiction does not effect a partial repeal of the general full faith and credit provision).

86. *See id.* at 385–86 (noting that similarly exclusive federal claims have been held to be arbitrable through an arbitration agreement in lieu of trial in federal court).

87. *See In re* MCA, Inc., 598 A.2d 687, 691 (Del. Ch. 1991) (referring to settling the state claims with the federal claims: "As a practical matter, a so-called 'global settlement' is often necessary if any settlement at all will occur.").

88. 863 F.2d 251 (2d Cir. 1988).

89. *Id.* at 252–53.

90. *Id.*

offer by Bilzerian and the defense of a New York federal court lawsuit commenced by Cluett to stop Bilzerian from taking over the company.[91] The fee agreement bound Bilzerian to pay the firm a flat rate for the work of both partners and associates.[92] After the cases settled, Bilzerian refused to pay all the fees sought by the firm, saying he was defrauded because he was charged the flat rate for work done by unlicensed attorneys.[93] Bilzerian filed a declaratory judgment action in a California state court seeking a determination of the disputed legal fees.[94]

Yet, the New York federal court heard the fee dispute. Issues were tried before a jury, which found for Latham and Watkins.[95] On appeal, Bilzerian argued "that the district court abused its discretion in exercising its ancillary jurisdiction over the fee dispute."[96] The Court of Appeals found the trial court properly exercised its inherent power because "the fee dispute was properly related to the main action."[97] Further, in rejecting Bilzerian's argument that only the legal fees tied to the New York lawsuit should have been tried, the appellate court said it "would have been wasteful and duplicative, under the circumstances, to require a bifurcated procedure in which part of the fee dispute would be resolved by a federal court in Manhattan and another part by a state court in Sacramento, California."[98] By allowing all disputes over fees arising from the attempted Cluett takeover to be heard in New York, the appellate court allowed the two trial courts to function successfully.

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91. *Id.*

92. *Id.* at 252 n.1.

93. *Id.* at 254. The fees incurred were $354,569, but as part of the settlement agreement Bilzerian was given $5 million dollars for fees and expenses incurred during his attempted acquisition. *Id.* at 253–54.

94. *Id.* at 253.

95. *Id.* at 254.

96. *Id.*

97. *Id.* at 256. The trial court exercised judicial authority over the fee dispute based upon four factors: (1) the lower court's familiarity with the subject matter; (2) judicial responsibility to protect court officers; (3) that the convenience of the parties would be equally well served wherever the fee dispute was litigated; and, (4) judicial economy. *Id.* While the *Cluett* court employed the term "ancillary jurisdiction," *id.* at 256, we find the judicial authority used in *Cluett* better placed within the inherent powers recognized in the later *Kokkonen* opinion (as related to successful court functioning) as the fee dispute was not "factually interdependent." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–80 (1994).

98. *Cluett*, 863 F.2d at 257. Of course, under its reasoning, the appeals court also would have recognized possible inherent authority in the pending California federal case over fee disputes related to work in that case, if not in all merger activities.

IV. JUDICIAL AUTHORITY DURING PRETRIAL CONFERENCES

We find federal judicial authority can extend under *Kokkonen* beyond powers expressly recognized in written civil procedure laws. Outside the civil case box, federal trial judges may preside over pretrial settlement conferences involving civil claims that they cannot try on the merits under *Kokkonen*. And, they may preside over trials of civil claims which are not "factually interdependent" under *Kokkonen*. There was no written Delaware law used in *Matsushita* on trial judges facilitating settlements of civil claims they could not try,[99] and there was no written federal law used in *Cluett* on trial court resolution of related attorney fee disputes. Such judicial authority should be employed with caution, however, even where appropriate, as there is always a "danger of overreaching."[100]

Where written civil procedure laws on pretrial conferences are silent, some trial judges do not recognize—or experience discomfort recognizing, even cautiously—additional judicial authority. While some judges recognize that additional judicial authority may only be exercised "in harmony" with written rules or statutes,[101] there is significant disagreement among the judges on resolving questions of inconsistency. While certain judges are quite comfortable going beyond the literal wording of general pretrial conference laws, finding no inconsistencies, others are quite reluctant and choose to stay close to the literal terms of the written law.[102] Still other judges exercise expansive pretrial

99. DEL. CT. CH. R. 16(a). The Rule, applicable in *Matsushita* and much like the 1938 Rule, expressly notes that attorneys and unrepresented parties may be directed to appear for a pretrial conference to discuss the issues and processes for trial. *Id.*

100. Degen v. United States, 517 U.S. 820, 823 (1996). This danger occurs "when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Id.*

101. *See, e.g.*, Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1988) (acknowledging that a federal district court's "substantial inherent power to control and manage its docket . . . . must, of course, be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure"); *see also* Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (recognizing that in a "limited domain of judicial autonomy, courts may act notwithstanding contrary legislative direction"). As many state courts are constitutionally established and empowered, unlike the Article III federal courts, some state courts innately possess much broader inherent powers than their federal court counterparts, often in areas involving the regulation of legal practice and contempt. *See, e.g.*, Cripe v. Leiter, 703 N.E.2d 100, 104–07 (Ill. 1998) (reviewing cases on General Assembly constraints on lawyer conduct through consumer protection acts and the like, finding differing state court approaches, and suggesting that in Illinois any such constraints would be an unconstitutional intrusion on the high court's sole authority to regulate and discipline lawyer conduct).

102. Of course, where general pretrial conference laws may be and are supplemented with local court rules, the stretch of the language in the general laws becomes less crucial. *See, e.g.*, S.D. IND.

conferencing authority by significantly stretching written laws to fit. These differing approaches to written civil pretrial conference laws are illustrated in two federal appellate court decisions, each grounded on the 1983 version of Rule 16, the language of which remains today in several state civil procedure laws.[103] The decisions show how many trial judges today may fail to appreciate the types of settlement conferences under *Matsushita* and of trial preparation conferences under *Cluett*.

A. Beyond the Written Laws

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[104] the appellate court went beyond the wording of the 1983 version of Rule 16 to facilitate a just, speedy, and inexpensive resolution of a pending civil case. A federal magistrate judge had ordered a Joseph Oat "corporate representative with the authority to settle" to attend a pretrial settlement conference.[105] The only representative from Joseph Oat who appeared was its attorney.[106] The trial court determined the order was violated and imposed sanctions.[107] Joseph Oat contended on appeal that Rule 16 permitted the trial court to order the attendance of only "attorneys for the parties or any unrepresented parties."[108]

Writing for the majority, Judge Kanne found that Rule 16 did not "completely describe and limit the power of federal courts," though the "concept that district courts exercise procedural authority outside the explicit language of the rules of civil procedure is not frequently documented."[109] He reasoned that "the mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition."[110] Written civil procedure laws only "form and shape certain aspects of a court's inherent powers, yet allow the continued exer-

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LOCAL R. 16.1(h) ("The Court may require the parties or their agents or insurers to [attend] settlement negotiations.").

103. *E.g.*, ALA. R. CIV. P. 16; MONT. R. CIV. P. 16; N.M.R. CIV. P. DIST. CT. 1-016; UTAH R. CIV. P. 16.

104. 871 F.2d 648 (7th Cir. 1989) (en banc).

105. *Id.* at 650. Joseph Oat Corp. also raised the argument that they interpreted the order to mean the attendance of an insurance carrier with the authority to settle should be present. *Id.* at 656.

106. *Id.* at 650.

107. *Id.* The sanction involved the related fees of opposing counsel in the amount of $5860.01 "pursuant to" Rule 16(f). *Id.*

108. *Id.*

109. *Id.* at 651.

110. *Id.* at 652.

cise of that power where discretion should be available."[111] Judge Kanne concluded that "Rule 16 is not designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences."[112]

Thus, to Judge Kanne, the breadth of inherent power, "derived from the very nature and existence" of the judicial office, includes the "broad field over which the Federal Rules of Civil Procedure are applied."[113] "Inherent authority remains the means by which district judges deal with circumstances not proscribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of every action."[114] So, to Judge Kanne, written laws do not limit, but in fact are "enhanced by" inherent judicial power.[115]

B. Staying Within the Written Laws

While Judge Kanne found inherent judicial power could and did enhance Rule 16, the dissenting judges in *Heileman* found varying reasons why the use of such power, at least in the pending case, should not be allowed. Some found that any inherent power should not encompass mandated attendance by a represented party or its agent at any pretrial settlement conference.

In dissent, Judge Posner explained that under the written Federal Rule, the "main purpose of the pretrial conference is to get ready for trial."[116] But, a represented party's presence at a pretrial conference would only be sought if deemed necessary to facilitate settlement.[117] Judge Posner then discussed the "dangers [of] too broad an interpretation of the federal courts' inherent power" to promote settlement.[118] One danger involved encouraging "judicial high-handedness ('power corrupts')."[119] Also, because people hire attorneys to "economize on their own investment of time in resolving disputes," there is a danger in overriding their judgment as judges may "ignore the value of other people's time" in their zeal to settle cases.[120] However, Judge Posner also

111. *Id.*
112. *Id.*
113. *Id.* at 653.
114. *Id.*
115. *Id.* at 656.
116. *Id.* at 657 (Posner, J., dissenting).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

recognized that "*die Not bricht Eisen* ['necessity breaks iron']," finding "a potentially useful tool for effecting settlement, even if there is some difficulty in finding a legal basis for the tool," should not be easily discarded, especially when trial judges face "heavy" workloads.[121] Judge Posner did not further explore the contours of the 1983 version of Rule 16 as he found that, whatever it—or any inherent power—permitted, the order directed against Joseph Oat was impermissible, as the presence of a Joseph Oat corporate representative would not foreseeably prompt settlement since Oat had made it clear it would not agree to pay any money.

In dissent, Judge Coffey was even more cautious about inherent power. He was "convinced that Rule 16 does not authorize a trial judge to require a represented party litigant to attend a pretrial conference together with his or her attorney because the rule *mandates in clear and unambiguous terms that only an unrepresented party litigant and attorneys may be ordered to appear*."[122] While judges do possess some degree of inherent authority, "this authority is limited."[123] Judge Coffey said that if we wish to recognize more expansive power, "let it be accomplished through the accepted channels of the Supreme Court and Congress of the United States."[124]

Judge Coffey outlined a "host of problems" that accompany too broad a recognition of inherent power. Many concern the rights of litigants. One involves the use of inherent power "to substitute for the subpoena power at pretrial conferences," raising "a due process question" because a subpoena is subject to a motion to quash and an exercise of inherent power is not.[125] More generally, Judge Coffey found that the recognition of broad inherent power already "has posed and will continue to pose a substantial invitation for judicial abuse."[126] He feared that the use of inherent power to compel represented parties to talk settlement would undermine the appearance of impartiality and propriety and cause litigants confusion and dismay over judicial participation.[127] Finally, he said that "to permit judicial officers . . . to exercise their personal judgment to require the attendance at pretrial conferences of enti-

121. *Id.*
122. *Id.* at 658 (Coffey, J., dissenting).
123. *Id.*
124. *Id.* at 663.
125. *Id.* at 660.
126. *Id.* at 661.
127. *Id.* at 662.

ties other than those specifically enumerated in Rule 16, upsets the delicate balance the Supreme Court and Congress struck between the needs for judicial efficiency and the rights of the individual litigant."[128]

In his dissent, Judge Ripple found "that the most enduring—and dangerous—impact" of the Kanne opinion was to upset the relationship between Congress and the Judiciary.[129] He said that because the Rules Enabling Act[130] was "designed to foster a uniform system of procedure throughout the federal system,"[131] it "hardly contemplates the broad, amorphous, definition" of inherent power rendered by Judge Kanne.[132] He concluded that "Congressional concern for uniformity of practice in the federal courts" will be damaged and that each individual court will be encouraged "to march to its own drummer."[133]

In his dissent, Judge Manion echoed the views of other dissenters. He reiterated that "judicial high-handedness" will be encouraged, additional expense to litigants will be incurred, and damage will ensue to the "appearance of fairness" in the trial courts.[134] He opined that inherent power cannot be "a license for federal courts to do whatever seems necessary to move a case along"; it should only be employed "to fill gaps left by statute or rule."[135] Thus, "where a statute or rule specifically addresses a particular area, it is inappropriate to invoke inherent power to exceed the bounds the statute or rule sets."[136]

C. *Stretching the Written Laws*

In contrast to the *Heileman* dissents, another appellate court, in *In re Novak*,[137] seemed receptive to stretching the 1983 version of Rule 16 to find that certain parties with attorneys could be ordered personally to attend pretrial settlement conferences.[138] The court explained that in two circumstances problems arise at settlement conferences attended only by attorneys. The first is when the otherwise represented party re-

128. *Id.* at 662–63.
129. *Id.* at 665 (Ripple, J., dissenting).
130. 28 U.S.C. § 2072 (1994).
131. *Heileman*, 871 F.2d at 665 (Ripple, J., dissenting).
132. *Id.*
133. *Id.* at 666.
134. *Id.* at 670 (Manion, J., dissenting). He does not mention Judge Ripple's fear that there will be a move away from uniformity or Judge Coffey's due process concerns.
135. *Id.* at 666. By contrast, Judge Posner would "hesitate to infer inadvertent prohibitions" by federal rulemakers on powers necessary for trial courts to function successfully. *Id.* at 657 (Posner, J., dissenting).
136. *Id.* at 666 (Manion, J., dissenting).
137. 932 F.2d 1397 (11th Cir. 1991).
138. *Id.* at 1407 n.19 (finding that "there is a colorable argument").

fuses to delegate to the attorney full settlement authority.[139] The second is when a nonparty insurer who is in charge refuses to delegate settlement authority to either the named party or its attorney.[140] In these situations, the "pretrial conference participant's ability to discuss settlement is impaired, and the value of the conference may be limited."[141] Thus, while Rule 16 does not expressly allow attendance orders "directed at represented parties or nonparty insurers,"[142] the court found that such orders were nevertheless available under Rule 16.[143] Judicial authority was found in two sources. One was the inherent power of the court;[144] the other involved an interpretation of Rule 16.[145] Beyond inherent power, the court found that "a party who refuses to give full settlement authority to his attorney and who retains control over settlement negotiations is, in fact, his own attorney for settlement purposes."[146] Because that party is then an unrepresented party for settlement purposes, the 1983 version of Rule 16, as interpreted, could permit the court to compel the party's attendance at settlement discussions.[147] If a nonparty insurer is in charge, the insurer's attendance can be accomplished through an order directed at the insured;[148] at least, this is true in a case such as *Novak*, where an employee of the defendant's insurer, Roger Novak, had the authority to make settlement decisions and the interests of the insurer and the insured are "aligned."[149]

139. *Id.* at 1405–06. Such a refusal is not blameworthy and is actually promoted by attorney conduct standards. On such delegations see Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority*, 78 OR. L. REV. 1061 (1999).

140. *Novak*, 932 F.2d at 1405–06. The court ultimately holds that it is this situation which is before it and finds that the court is "unauthorized, by statute, rule, or its inherent power, to order Novak, an employee of the defendants' insurer, to appear before it to facilitate settlement discussions." *Id.* at 1409.

141. *Id.* at 1406.

142. *Id.*

143. *Id.* at 1408.

144. *Id.* at 1406–07 & n.18 (citing G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) (en banc)).

145. *See id.* at 1407 n.19 (construing the Federal Rules of Civil Procedure liberally).

146. *Id.*

147. *See id.* ("[T]here is a colorable argument that Rule 16, on its face, empowers the court to order such a party to attend a pretrial settlement conference; the party is an unrepresented party with respect to settlement, and, thus, his attendance is crucial.").

148. *Id.* at 1408.

149. *Id.* at 1408 & n.20.

D. *Abuses of Authority*

Of course, discretion in the exercise of judicial authority in pretrial conferencing should not be abused. Certain general guidelines on such discretion can be gleaned from a few of the opinions in *Heileman*, including concerns about "ignor[ing] the value of other people's time";[150] undermining the appearance of impartiality and propriety;[151] and, "the expense and imposition on litigants."[152] In *Heileman*, these concerns, of course, involved judicial authority over settlement rather than trial preparation conferences. The potential for judicial abuse seems greater with settlement conferences, especially "at a time of heavy, and growing, federal judicial caseloads."[153]

In *Heileman* there were also findings in some opinions that any assumed judicial authority to schedule settlement conferences requiring attendance by represented parties was employed abusively against Joseph Oat. Here, too, guidelines appear. Judge Posner found particular abuse because at the time of the order demanding an appearance by a Joseph Oat official with "full settlement authority," Joseph Oat "had made clear that it was not prepared to settle the case on any terms that required it to pay money."[154] For Judge Posner, the abuse of Joseph Oat was compounded because "no one officer of Oat may have had authority to settle" and thus "compliance with the demand might have required Oat to ship its entire board of directors" to the conference.[155]

E. *Confusion Illustrated*

Given the differing views and concerns in *Heileman* and *Novak*, it would not be surprising if confusion arose about the parameters of Federal Rule of Civil Procedure 16, its state law counterparts, and unwritten inherent judicial authority in settlement and trial preparation conferencing.[156] Confusion would be less likely if written pretrial con-

150. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 657 (7th Cir. 1989) (en banc) (Posner, J., dissenting).

151. *Id.* at 662 (Coffey, J., dissenting).

152. *Id.* at 670 (Manion, J., dissenting).

153. *Id.* at 657 (Posner, J., dissenting).

154. *Id.* at 658. Judge Posner characterized the demand as "arbitrary, unreasonable, willful, and indeed petulant," *id.*, a view shared by Judge Manion, *id.* at 670 (Manion, J., dissenting).

155. *Id.* at 658 (Posner, J., dissenting).

156. *See, e.g.*, 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 16.04[1][a] (3d ed. 2000) wherein Magistrate Judge Wayne Brazil says this about Rule 16:

> The huge range of practices under Rule 16 among sitting federal judges is one of the more unnerving facts of litigation life that confronts the contemporary lawyer. Because

ference laws, such as Rule 16, were reformulated. Until changes are made, troubling cases will likely continue.

Pratt v. Philbrook[157] is one such troubling case, with a rather bizarre outcome that likely would have been avoided if a more comprehensive pretrial conferencing authority were expressly recognized. *Pratt* involved a two-vehicle accident causing Mary, a passenger in her sister Rita's car, to sue Kelley, the driver of a pick-up truck, in a federal district court.[158] Kelley was represented by counsel provided by his insurer, General Accident.[159] A settlement conference was held at which attorneys for Mary, Rita, and Kelley were present, as was a claims adjuster for General Accident.[160] Plymouth Rock, Rita's insurer, which had a subrogated claim for $5000 against Kelley because Rita had already received money from it for damage to her car, was not present.[161] The lien held by Plymouth Rock "was not explicitly mentioned during the conference," though "[a]ll counsel knew" about it.[162] The settlement conference led to an agreement by General Accident to pay the $100,000 policy limit,[163] with the counsel for Mary and Rita "assur[ing] the court that there would be no problem negotiating the division of the $100,000 between their clients."[164] The conference led to a dismissal without

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this range can be so great, even within the same district court, counsel must take special care to ascertain the specific rules and expectations of each district judge and magistrate judge to whom their cases are assigned. . . .

Although the Federal Rules of Civil Procedure generally promote some commonality of practice between different judges and between different federal courts, so much flexibility has been built into Rule 16 that the Rule itself does relatively little to advance the cause of uniformity. In fact, Rule 16, perhaps more clearly than any other rule, reflects an express rejection of the notion that one procedural size fits all cases. To equip judges to fashion case development plans that are tailored to the needs to individual cases, the Rule necessarily confers a great deal of discretion on the individual judges who apply it. In addition, Rule 16 recognizes the authority of district courts, by local rule, to create specialized sets of procedures for various categories of actions. Responding to this invitation, many courts have adopted elaborate sets of specialized provisions that apply only to certain kinds of cases.

Id. (citation omitted).

157. 38 F. Supp. 2d 63 (D. Mass. 1999).

158. *Id.* at 65.

159. *Id.*

160. *Id.*

161. *Id.* at 65–66.

162. *Id.* at 66 (quoting Pratt v. Philbrook, 174 F.R.D. 230, 232 (D. Mass. 1997)).

163. *Id.*

164. *Id.* At least counsel for Rita may have owed duties to Rita's insurer in negotiating and implementing any division. *Compare* Greenwood Mills, Inc. v. Burris, 130 F. Supp. 2d 949, 960 (M.D. Tenn. 2001) (finding under Tennessee law that "[i]f a beneficiary's lawyer knows that his client's insurer is subrogated to his client's claim to the extent of benefits paid, and the lawyer plays 'a part in attempting' to prevent his client's insurer from collecting the amount due it under the in-

prejudice, subject to a reopening within sixty days if a "settlement is not consummated by the parties."[165] The agreement fell apart because there was no arrangement for payment of the subrogated claim.[166] The sixty days passed, however, and the case was pronounced dead.[167] Thereafter, Mary's counsel asked the court to vacate the dismissal.[168] This request was denied.[169] The denial was appealed, leading to a remand.[170] The case finally ended when the appellate court affirmed a denial of the motion to vacate.[171] Thereafter, Mary sued Kelley in a new federal court lawsuit for wrongfully repudiating the settlement agreement, prompting a counterclaim for abuse of process.[172] Mary lost on her claim.[173]

The trial judge in the first case clearly recognized that he had the authority to preside over a settlement conference attended by interested nonparties.[174] Present at the settlement conference were Rita's attorney (who had been ordered to attend) as well as a claims adjuster working with Kelley, who may not have been an agent of Kelley depending upon the alignment of interests between Kelley and his insurer, General Accident.[175] But that trial judge did not ensure (or perhaps even request) the attendance of all interested nonparties.[176] Thus, Plymouth Rock, an insurer holding a lien on any insurance proceeds benefitting Rita, was absent though its interest was known to all named parties and their counsel, as well as to Rita and to Kelley's insurer. This absence seems to have caused General Accident to refuse to pay the $100,000 because any such payment might not release General Accident from any liability to

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sured's agreement with the insurer, the lawyer will not escape liability") (citing Aetna Cas. & Sur. Co. v. Gilreath, 625 S.W.2d 269, 274 (Tenn. 1981)), *with* Great-West Life & Annuity Ins. Co. v. Hofmann, No. 01-C-2470, 2001 WL 914469, at *2 (N.D. Ill. Aug. 13, 2001) (declining to follow *Greenwood Mills* in an ERISA case, but noting that supplemental jurisdiction should be exercised over related state law claims).

165. *Pratt*, 38 F. Supp. 2d at 66 (quoting *Pratt*, 174 F.R.D. at 233).

166. *Id.* The sisters had agreed on a 85%-15% split, with the bulk going to plaintiff. *Id.* However, the $5000 subrogated claim became a "sticking point" in the finalization of the settlement. *Id.*

167. *Id.* The court explained the sixty-day order of dismissal "means that the case falls off—is disposed of for purposes of my record but remains in limbo for sixty days and can be hauled back to life again if there are any problems wrapping up the case." *Id.* (quoting *Pratt*, 174 F.R.D. at 233).

168. *See id.* (noting that Mary's counsel wrote the court asking for a trial date because settlement was not reached and that the court treated his request as a motion to vacate the dismissal).

169. *Id.*

170. *Id.*

171. *Id.* at 66–67.

172. *Id.* at 65, 70.

173. *Id.* at 70.

174. Pratt v. Philbrook, 174 F.R.D. 230, 232 (D. Mass. 1997). Though Rita was not a named party, her attorney was present at a settlement conference. *Id.*

175. *Id.*; *see also In re* Novak, 932 F.2d 1397, 1408 (11th Cir. 1991) (noting that the interests of an insured and an insurer are "aligned" when there is no dispute over insurance policy coverage).

176. *Pratt*, 174 F.R.D. at 232. Though Plymouth Rock was a nonparty with a lien, it did not attend the conference. *Id.*

Plymouth Rock.[177] A written pretrial conference law recognizing the varying ancillary and inherent powers available under *Kokkonen* easily could have altered the unfortunate approach in *Pratt*, which neglected the interests of Plymouth Rock. As with Rita's claim against Kelley, the claim of Plymouth Rock against the policy proceeds held by General Accident may not have been triable on the merits in a federal district court. Yet, as in *Matsushita*, it nevertheless could have been included in the settlement as it was a factually-related (if not "factually interedependent") ancillary claim to Mary's claim against Kelley. Alternatively, it could have been triable, as was the law firm's claim against Bilzerian in *Cluett*, perhaps pursuant to the inherent powers necessary for successful court functioning.

IV. REFORMULATED PRETRIAL CONFERENCE LAWS

Confusion over the breadth of judicial authority in pretrial conferencing would dissipate considerably if there were more particular written civil procedure laws. Inquiries into the relationships between written laws and any ancillary or inherent power, as well as into the elasticity of the written laws themselves, would become unnecessary, or at least less difficult, if written civil procedure laws explicitly addressed judicial pretrial conferencing authority over unpresented claims and interests and over nonparties.

Consider, for example, how the *Novak* decision would have been approached if the proposal eliminated from the 1993 version of Federal Rule 16 had been in place. It simply declared that a "court may require that parties, or their representatives or insurers, attend a conference to consider possibilities of settlement."[178] Such a rule would have allowed the court to compel directly the attendance of senior insurance analyst Roger Novak, thus eliminating the need for the court to consider em-

177. The U.S. Court of Appeals stated the general rule in *Allstate Insurance Co. v. Mazzola*, 175 F.3d 255 (2d Cir. 1999):

> Where a third party tortfeasor obtains a release from an insured with knowledge that the latter has already been indemnified by the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such release does not bar the insurer's right of subrogation. "The authorities are in agreement that a release given to a tort-feasor who has knowledge of the insurer's rights will not preclude the insurer from enforcing its right of subrogation against the wrongdoer." Otherwise, a release would operate as a fraud upon the insurer.

Id. at 260–61 (citations & footnote omitted) (quoting Silinsky v. State-Wide Ins. Co., 289 N.Y.S.2d 541, 545 (App. Div. 1968)).

178. *Proposed Rules*, *supra* note 40, 137 F.R.D. at 85.

ploying an order against a party to get to its nonparty insurer's agent and thus authorizing the order whether or not the defendant/insured and the nonparty insurer's interests were "aligned."[179] Such a written rule is already in place in Ohio, originating in 1993.[180]

Today, some local federal district court rules also expressly permit settlement conference attendance orders directly against insurers. For example, Local Civil Rule 16.1(c) in the U.S. District Court for the Eastern District of Michigan says: "Furthermore, at all conferences designated as settlement conferences, all parties shall be present, including, in the case of a party represented by an insurer, a claim representative with authority adequate for responsible and effective participation in the conference."[181] And, Local Civil Rule 16.8 in the U.S. District Court for the Western District of Michigan says: "In cases where an insured party does not have full settlement authority, an official of the insurer with authority to negotiate a settlement may be required to attend."[182] Arguably, such rules do prompt the undermining of "Congressional concern for uniformity of practice in the federal courts" feared by some judges in *Heileman*.[183]

Beyond insurers, other nonparties may be quite important in facilitating settlement. Such nonparties might be compelled, or at the very least invited, to attend settlement conferences. Such nonparties were, or were likely, present at pretrial conferences in some of the earlier discussed cases. First, an attorney who has been fired, substituted, or dismissed from a civil action and thus who no longer represents a party in the action may have a fee dispute with the former client who remains a named party in the action.[184] Thus, in *Cluett*, Bilzerian had a fee dispute with Latham and Watkins.[185] Had the applicable pretrial conference law

179. *In re* Novak, 932 F.2d 1397, 1408 & n.20 (11th Cir. 1991). Where their interests are not aligned, as where the insurer denies insurance coverage sought by the insured, the presence of both the insurer and the insured can prompt a settlement of the coverage issue, which may then prompt a settlement of the claim presented by the injured party against the insured wrongdoer.

180. OHIO R. CIV. P. 16. According to the Staff Note accompanying the 1993 amendment, the new provision was "meant to be declarative of existing practice and to work no substantive change in the powers of the court or in the obligations of parties or their attorneys or representatives." *Id.* staff note. The Note cited *Repp v. Horton*, 335 N.E.2d 722 (Ohio Ct. App. 1974), as well as several local rules of common pleas courts. OHIO R. CIV. P. 16 staff note.

181. E.D. MICH. LOCAL R. 16.1(c).

182. W.D. MICH. LOCAL R. 16.8.

183. *E.g.*, G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 666 (7th Cir. 1989) (en banc) (Ripple, J., dissenting).

184. Such attorneys also may have had contingency fee arrangements. *See, e.g.*, Galanis v. Lyons & Truitt, 715 N.E.2d 858, 863 (Ind. 1999) (finding that a successor contingency fee attorney has an obligation to pay an earlier contingency fee attorney out of the successor's contingency fee, if liability for the earlier fees is not explicitly contracted away).

185. Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251, 252–53 (2d Cir. 1988).

expressly allowed the trial court to compel the attendance of the law firm, or at least to invite its presence and to recognize its participatory rights if it attended, Bilzerian's argument that there was no ancillary jurisdiction would have been far less appealing. Second, a named class representative in a state or federal class action may be very interested in related civil actions, perhaps involving similar classes with different named representatives. In *Matsushita*, there were pending at the time of settlement both a state court class action in Delaware and a federal court class action in California.[186] Had the Delaware court possessed and exercised the express authority to compel the attendance of the California class representatives, those representatives would have been less likely to urge later that the Delaware case settlement should not apply to them. Third, interested nonparties include persons who could join or could be joined in a pending civil action. In *Pratt*, Rita's attorney was present at the settlement conference although Rita was not a named party.[187] Seemingly, the settlement was reached only because both sisters were present through their attorney-agents, though the settlement was never enforced because a lienholder with an interest in one of the sister's settlement proceeds was absent.

Written pretrial conference laws compelling attendance of interested persons and entities beyond parties, attorneys, and insurers already appear in some jurisdictions. Michigan Court Rule 2.401(F) states, in a section entitled "Presence of Parties at Conference":

> In the case of a conference at which meaningful discussion of settlement is anticipated, the court may direct that persons with authority to settle the case, including the parties to the action, agents of parties, representatives of lien holders, or representatives of insurance carriers:
>
> (1) be present at the conference; or
>
> (2) be immediately available at the time of the conference. The court's order may specify whether the availability is to be in person or by telephone.[188]

The identity of interested persons and entities can be facilitated by laws like Local Civil Rule 3.1(f) of the U.S. District Court for the Northern District of Texas, which provides that when a complaint is filed, it must be accompanied by "a separately signed certificate of interested persons

186. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 370 (1996).
187. Pratt v. Philbrook, 38 F. Supp. 2d 63, 65 (D. Mass. 1999).
188. MICH. CT. R. 2.401(F).

that contains a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities who or which are financially interested in the outcome of the case."[189] Local Civil Rule 7.4 provides that the "responsive pleading" must also be accompanied by a similar certificate.[190]

Together, the Michigan and Texas laws do not embody fully the judicial authority necessary for trial courts to prompt attendance of nonparties at pretrial conferences. And neither speaks to individual rights when such authority is employed or to guidelines on how expanded judicial pretrial conferencing authority should be employed.[191]

New written civil procedure laws should contain the broad language of Local Texas Rule 3.1 with the clear purpose of the Michigan court rule.[192] These new laws should allow trial court judges not only to compel the attendance of certain persons necessary for just, speedy, and inexpensive resolution, but also to extend invitations to other persons whose presence would be helpful but could not be mandated.[193] By expressly allowing invitations to certain nonparties, trial courts could better strike appropriate balances between individual rights and the needs of judicial administration. Rita, the sister in *Pratt*, is the type of nonparty who the court might only invite. The *Matsushita*[194] and *Cluett*[195] cases illustrate types of nonparties who might be compelled to attend pretrial conferences, for both the absent class members in *Matsushita* and the law firm in *Cluett* appear to have been subject to trial court compulsion. Distinctions between compelled and invited attendees are illustrated in the new Maine Civil Procedure Rule 16B(f), effective January 1, 2002,

189. N.D. TEX. LOCAL R. 3.1(f). If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. *Id.*; *see also* N.J.R. CIV. P. 4:5-1(b) (stating that initial pleadings should include names of any nonparties who are subject to joinder due to potential liability to any party).

190. N.D. TEX. LOCAL R. 7.4.

191. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 662–63 (7th Cir. 1989) (en banc) (Coffey, J., dissenting) (stating that a judge's actions must conform to the balance the Supreme Court and Congress reached between "the needs for judicial efficiency and the rights of the individual litigant").

192. The primary goal behind Rule 3.1 seemingly was to afford trial judges better insight into possible recusal grounds. *See, e.g.*, N.D. Cal. Gen. Order No. 48 (Feb. 22, 2000) (stating that the policy behind a new and similar certification standard involving interested entities or persons is to allow the court to "evaluate any need for disqualification or recusal early in the course of any case"); S.D.N.Y. LOCAL CIV. R. 1.9; E.D.N.Y. LOCAL CIV. R. 1.9.

193. Such a distinction helps insure that judicial power does not employ a broader inherent power as a substitute for the narrower subpoena power. *See, e.g.*, *Heileman*, 871 F.2d at 660 (Coffey, J., dissenting) (expressing concern that judges could use inherent power to expand the subpoena power improperly).

194. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

195. Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251 (2d Cir. 1988).

which says alternative dispute resolution conference "attendees shall include . . . [i]ndividual parties . . . [a] management employee or officer of a corporate party . . . [a]n adjuster for any insurance company providing coverage potentially applicable to the case . . . . Counsel for all parties; and . . . [n]onparties whose participation is essential to settlement discussions—including lienholders—may be requested to attend the conference."[196]

Besides addressing the types of participants, new written laws should provide guidance on how discretionary judicial authority in pretrial conferencing should be exercised.[197] Such laws would prompt more "uniformity of practice" and fewer marches to individual drummers.[198] Guidelines should include the proposition that when "authority to settle" is important, those commanded or invited to attend must be known to have such authority. In *Heileman*, a corporation was ordered to send a representative with settlement authority. Yet it was suggested that "no one officer . . . may have had authority to settle" and thus "compliance with the demand might have required [the corporation] to ship its entire board of directors."[199] Written guidelines should also include protections against undermining the appearance and reality of impartiality of trial court judges at any later trials;[200] recognize the differences between a pretrial settlement conference where there is and where there is not the need for later court approval of any settlement;[201] and promote re-

196. *See* Amendments to Maine Rules of Civil Procedure to Implement Alternative Dispute Resolution Procedures in Superior Ct., No. SJC-11 (effective Jan. 1, 2002) (amending ME. R. CIV. P. 16 and adopting ME. R. CIV. P. 16B).

197. There has been little guidance to date. The Advisory Committee stated in regard to the 1993 amendments to Rule 16:

> Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

1993 Rule, *supra* note 32, 146 F.R.D. at 605.

198. *Heileman*, 871 F.2d at 666 (Ripple, J., dissenting).

199. *Id.* at 658 (Posner, J., dissenting). Surprisingly perhaps, it is sometimes difficult for trial judges to learn who has authority to settle. Judicial inquiries can raise issues of privileged attorney-client communications (where delegation of authority from client to attorney may have occurred). *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 at 161 (1993) (stating that absent the client's consent, an attorney should not reveal to the trial judge any settlement authority limits or the advice of an attorney); *see also* Carver v. Condie, 169 F.3d 469, 473 (7th Cir. 1999) (finding that the settlement authority of the county sheriff on behalf of the county is unclear under Illinois law).

200. *See, e.g.*, C.D. ILL. LOCAL R. 16.1(B) ("The settlement conference in a matter to be tried to the court shall be conducted by a judge who will not preside at the trial of the case.").

201. *See, e.g.*, FED. R. CIV. P. 23(e) ("A class action shall not be . . . compromised without the approval of the court . . . ."); FLA. STAT. ANN. § 768.25 (West 1997) (requiring court approval of

spect for "the value of other people's time"[202] by encouraging distance participation (e.g., by phone).[203]

VI. CONCLUSION

The civil case box described in contemporary written civil procedure laws contains presented claims and named parties. Yet, civil litigation in American trial courts today frequently involves unpresented claims, as well as related interests (e.g., attorney fees) and nonparties (e.g., insurers and lienholders). Written laws are occasionally "enhanced" by ancillary and inherent power case precedents, but the continuing use of such precedents undermines a desired uniformity, undercuts the role of legislators and judges in court rulemaking, and promotes confusion. Written civil procedure laws on pretrial conferences geared to settlement or to trial preparation are particularly in need of reform. As in 1983 with the 1938 version of Rule 16, contemporary written pretrial conference laws are outdated. They should be reformulated to provide clarity[204] and to better reflect the contours of ancillary and inherent power recognized under the *Kokkonen* and the exercises of such authority in cases like *Matsushita* and *Cluett*.

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settlements in certain Wrongful Death Act cases involving minors); 750 ILL. COMP. STAT. 5/502(b) (1999) (limiting the binding effect on trial courts of party agreements in marriage dissolution cases on child custody, support and visitation matters).

202. *Heileman*, 871 F.2d at 657 (Posner, J., dissenting).

203. *See, e.g.*, 42 U.S.C. § 1997e(f)(1) (Supp. V 1999) (stating that to the "extent practicable" in a prisoner civil rights case where "the prisoner's participation is required or permitted," proceedings "shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined").

204. In 1993, the Advisory Committee noted that the explicit expansion of those subject to pretrial conferencing authority would help "eliminate questions . . . regarding the authority of the court to make appropriate orders." *1993 Rule*, *supra* note 32, 146 F. R. D. at 603 advisory committee's note.

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Enforcing Settlements in Federal Civil Actions

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ENFORCING SETTLEMENTS IN FEDERAL CIVIL ACTIONS

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INTRODUCTION

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

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

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

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1. 511 U.S. 375, 378 (1994).
2. *Id.* at 382.
3. *Id.* at 379.
4. *Id.* at 380. Herein, we employ the term "ancillary jurisdiction" as it was used in *Kokkonen*, recognizing that, at times, other terms are used, including pendent, supplemental, residual, derivative, essential, and inherent jurisdiction, as well as jurisdiction of necessity.
5. While the dismissal occurred under FED. R. CIV. P. 41(a)(1)(ii), *id.* at 378, the analysis would have been the same with a dismissal under FED. R. CIV. P. 41(a)(2), *id.* at 381; in both settings, a court order recognizing the settlement was required for any ancillary jurisdiction.
6. *Kokkonen*, 511 U.S. at 380.
7. *Id.* at 381.
8. *Id.*
9. *Id.* at 380.

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

I. SETTLEMENT ENFORCEMENT UNDER *KOKKONEN*

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

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

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

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

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

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

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

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

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

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

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

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

18. *Id.* at 377.

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

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

21. *Id.*

22. *Id.* Kokkonen framed the issue before the Supreme Court by asking,

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

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

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

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

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

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

26. *Id.* at 379-80.

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

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

29. *Id.*

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

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

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

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

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

32. *Id.* at 381-82.

33. *Id.* at 382.

34. *Id.* at 381.

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

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

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

II. DIFFICULTIES IN SETTLEMENT ENFORCEMENT AFTER KOKKONEN

A. Incorporating Settlement Terms into Court Orders

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

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

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

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

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

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

41. *Id.* at 1127-28.

agreement must be 'embodied' in the dismissal order."[42] Therefore, the court found that reference to, or even approval of, the settlement agreement was, by itself, insufficient to prompt later enforcement jurisdiction.[43] It did not explain relevant differences between varying nonembodied agreements.

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

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

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

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42. *Id.* at 1128.

43. *Id.*

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

45. *Id.*

46. *Id.*

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

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

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

50. Consumers Gas & Oil, Inc. v. Farmland Ind., 84 F.3d 367, 371 (10th Cir. 1996). Interestingly, the lower court's order of dismissal stated:

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

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

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

B. Retaining Settlement Enforcement Jurisdiction

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

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

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

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

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

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

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

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

sought?

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

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

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

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

In contrast, a different appeals court held that the mere intent to retain jurisdiction is insufficient.[67] It stated:

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

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56. Geller v. Branic Int'l Realty Corp., 212 F.3d 734, 737 (2d Cir. 2000).
57. *Id.*
58. Re/Max Int'l, Inc. v. Realty One, Inc., 271 F.3d 633, 645 (6th Cir. 2001).
59. *Id.*
60. *Id.* at 643.
61. *Id.* at 645.
62. Sheng v. Starkey Lab., Inc., 53 F.3d 192, 195 (8th Cir. 1995).
63. *Id.*
64. Schaefer Fan Co. v. J&D Mfg., 265 F. 3d 1282, 1287 (Fed Cir. 2001) (quoting McCall-Bey v. Franzen, 777 F.2d 1178, 1188 (7th Cir. 1985)).
65. *Id.*
66. *Id.*
67. Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995) (footnote omitted).

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

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

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

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

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

This holding was later reaffirmed when the same court held that "even a district court's expressed intention to retain jurisdiction is insufficient to confer jurisdiction if that intention is not expressed in the order of dismissal."[69]

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

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68. *Id.* at 1433.

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

70. *See, e.g.*, Lane v. Birnbaum, 910 F. Supp. 123 (S.D.N.Y. 1995). The court stated:

> In this case, the Order of Dismissal preceded the Stipulation by almost two months. It is therefore apparent that compliance with the agreement was not an operative part of the dismissal. That the parties subsequently felt the need to have the terms of their agreement embodied in a stipulation on file with the Court, cannot serve to vest the Court with jurisdiction over the agreement. . . . Clearly, the Court's dismissal of the action was in no way conditioned upon the parties' compliance with the terms of the agreement. Nor did the Court retain jurisdiction over the parties' agreement. Therefore, enforcement of the settlement agreement is a matter of contract between the parties, for

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

C. Discretionary Refusals of Later Settlement Enforcement Jurisdiction

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

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

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the state courts to address.

Id. at 128 (footnote omitted).

71. *See, e.g.*, Sadighi v. Daghighfeker, 66 F. Supp. 2d 752 (D.S.C. 1999). The court stated:

> [A]fter the court was informed that settlement had been reached, there was a delay when no formal settlement documents were executed and no order of dismissal was issued. Consequently, when Defendants decided that the settlement agreement reached earlier was no longer to their satisfaction, the case was still on [the] court's active docket . . . . In short, nothing had been done to divest [the] court of jurisdiction.

Id. at 758.

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

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

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

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

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

Another appeals court ruled a trial court must "ensure that its orders are fair and lawful," meaning that an agreement that is made part of an order necessarily has judicial imprimatur and contemplates judicial "oversight."[81]

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

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

77. *Id.* at 440-41.

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

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

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

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

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

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

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

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

D. Reopening Federal Civil Actions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

91. *Id.*

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

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

Id.

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

94. *Id.* at 503.

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

96. *Id.*

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

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

E. Choosing the Applicable Contract Laws

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

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

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

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

100. *Id.* at 476.

101. *Id.*

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

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

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

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

"a statute conferring lawmaking power on federal courts."[106]

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

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

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

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

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

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

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

110. *Id.* at 398-401.

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

F. Choosing the Applicable Procedures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

126. *Id.*

127. *Id.* at 929.

128. *Id.* at 927-28.

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

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

G. Discretionary Refusals of Settlement Enforcement Requests

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

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129. *Id.* at 928.

130. *Id.*

131. *Id.* (citation omitted).

132. *Id.*

133. *Id.* at 929.

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

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

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

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

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

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

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

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

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

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

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

III. IMPROVING SETTLEMENT ENFORCEMENT IN THE FEDERAL DISTRICT COURTS

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

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

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

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

142. *Id.* at 380-81.

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

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

145. TEX. CIV. PRAC. & REM. §154.071.

And, a California Code of Civil Procedure says:

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

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

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

CONCLUSION

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

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

147. 28 U.S.C. § 1367 (2000).

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

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

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

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

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

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