INSIDE

What Works When Setting a Case Conditioned on Dismissal

Drug Addiction and Alcoholism as a Basis for Disability Benefits

Consideration of Pain in Veterans' Disabilities

Redesigning Legal Services Delivery

Intake Becomes Outstanding with Efficient, Cost-Effective Legal Hot Lines

Food Stamp Benefits and the Waiver Process
Kokkonen Redux: What Works, What Doesn’t, and Why When Settling a Case Conditioned on Dismissal

By Brian Patrick Lawlor and Elizabeth S. Noling

Brian Patrick Lawlor and Elizabeth S. Noling are attorneys with Legal Services of Northern California (LSNC), 515 12th St., Sacramento, CA 95814; (916) 444-6760. Lawlor, LSNC regional counsel, is a member of the Federal Access Group, which prepares an annual summary of Supreme Court developments for Clearinghouse Review. Noling, on leave from LSNC, is currently associated with Northern California Lawyers for Civil Justice, a nonprofit public interest law firm based in Sacramento.

I. Introduction

Two years ago Justice Scalia wrote the decision for a unanimous Supreme Court in Kokkonen v. Guardian Life Insurance Co. of America. /1/ Kokkonen established a relatively bright-line jurisdictional rule for determining whether a party can return to the federal forum to seek enforcement of a settlement agreement obtained on condition of dismissal of the underlying lawsuit. /2/

The problems posed for litigators by the Kokkonen decision bear revisiting. The Kokkonen rule is an equal-opportunity jurisdictional hurdle, applying to federal court cases of all kinds, individual lawsuits as well as class actions. /3/ Therefore, the practical consequences that flow from Kokkonen, including the potential loss of a federal court forum to enforce a prior federal court judgment, remain important to legal services advocates. /4/ To be sure, the wake created by Kokkonen has left many federal court settlements unexpectedly capsized and washed ashore, with the only option being to seek postdismissal relief in state court. But the news is not all bad, and strategic options are available to assure that parties are not inadvertently prevented from later returning to federal court to vindicate the terms of a settlement agreement.

II. Kokkonen Revisited

First, a brief recap of what happened in Kokkonen.

The Kokkonen case originated as a general agency business dispute between Mr. Kokkonen and the Guardian Life Insurance Company. The case had its first life as litigation in California Superior Court but eventually took on a second life once it was removed to federal court on the basis of diversity jurisdiction. After trial, and on the brink of reaching the merits by jury verdict, the parties arrived at an oral agreement to settle all claims and counterclaims. The substance of the settlement
agreement was recited on the record in chambers before the district court judge. Later, pursuant to Federal Rules of Civil Procedure 41(a)(1)(ii), the parties stipulated to a voluntary dismissal with prejudice. The district court subsequently signed this "Stipulation and Order of Dismissal" with the prosaic, summary notation "It is so ordered." The stipulation and order of dismissal made no reference to the settlement agreement that had produced the dismissal, nor by its terms did it reserve jurisdiction in the district court.

So far, so good -- or so thought the Guardian Life Insurance Company until it found itself, in short order, butting heads with Mr. Kokkonen over his obligations under the settlement agreement. Only a month after dismissal, the parties were back in front of the district court on a motion by the Guardian Life Insurance Company to enforce the terms of the settlement. Mr. Kokkonen countered by arguing, among other things, that the district court lacked subject-matter jurisdiction to enforce the settlement agreement. He lost the first two rounds of this match. Both the district court and the Ninth Circuit rejected his jurisdictional argument and held that the district court had "inherent power" to enforce the settlement agreement.

The third, definitive round went to Mr. Kokkonen in the Supreme Court. Invoking the well-worn rubric that "federal courts are courts of limited jurisdiction," the Supreme Court in Kokkonen started from the premise that "[n]either [Rule 41] nor any provision of law provides for jurisdiction of the court over disputes arising out of an agreement that produces the stipulation [of dismissal] . . . . Enforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." /9/

Holding that federal jurisdiction did not exist to enforce the settlement agreement, the Supreme Court firmly rejected the notion that the doctrine of "ancillary jurisdiction" could save the day in this situation. Kokkonen recognized two core purposes served by ancillary jurisdiction: 

"(1) to permit disposition by a single court of claims that are . . . factually interdependent . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." /11/

Neither of these purposes applied in Kokkonen. As for the first purpose, the Supreme Court saw apples and oranges:

"[T]he facts underlying respondent’s dismissed claim for breach of agency agreement and those underlying its claim for breach of settlement agreement have nothing to do with each other. . . . The facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit." /12/

As for the second purpose: "[T]he 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. . . . [A]utomatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business." /13/
In short, the Supreme Court found that under these circumstances an attempt to enforce the settlement agreement was simply a claim for breach of contract, enforcement of which was for state courts, in the absence of some independent basis for federal jurisdiction. /14/

III. Kokkonen in a Nutshell: Two Ways to Go

What should the parties or the court do in such a situation to assure that the federal court has jurisdiction? Kokkonen offers two options: Make the parties’ obligation to comply with the settlement agreement part of the order of dismissal, either by an express provision retaining jurisdiction over the settlement agreement, or by "incorporating" or "embodying" the settlement agreement in the dismissal order. /15/ Why would doing so make a difference jurisdictionally? Because, "[i]n that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." /16/

The ground rules appear to differ somewhat, depending on whether the parties seek dismissal under Rule 41(a)(2) /17/ or Rule 41(a)(1)(ii). /18/ If the dismissal is pursuant to Rule 41(a)(2), the court is in the catbird seat and exclusively makes the call whether language effectively retaining jurisdiction over the settlement agreement will be part of the dismissal order. The parties can neither command nor prohibit such language. /19/ In contrast, under a Rule 41(a)(1)(ii) dismissal, while the district court still ultimately controls whether a dismissal order should include language effectively retaining its jurisdiction, the court’s control is not exclusive. To be effective, the parties must agree to any court-approved terms or conditions of the dismissal order. /20/

IV. What Has Been the Fallout from Kokkonen?

Since Kokkonen was decided, /21/ the federal circuit courts -- with few exceptions /22/ -- have refused to find jurisdiction to permit district court enforcement of settlement agreements. /23/ Despite the expressed desire of some district court judges to enforce the settlements they sometimes helped forge, the circuits have strictly applied the edict of Kokkonen: Without a specific retention of jurisdiction or incorporation of the terms of the agreement in the dismissal order, a federal district judge simply does not have the power to enforce a settlement agreement.

A. What Doesn’t Work?

What is not enough to assure federal court jurisdiction to protect your client’s rights under the terms of a settlement agreement? Be certain of one thing: There are no shortage of examples in the wake of Kokkonen.

Most notably, as in Kokkonen itself, "the court’s mere awareness and approval of the terms of the settlement agreement" is not enough. /24/ But that is only the first among many mistaken assumptions that parties may make. What is most striking about the post-Kokkonen carnage is just how wrong things can go in settling and dismissing a case.
For example, behold what happened to Ms. Sheng in her Title VII sexual harassment case, Sheng v. Starkey Laboratories, Inc., which "through a series of unlikely coincidences" turned out to be a lawyer’s worst nightmare come true. In Sheng, with the assistance of a magistrate judge appointed for the settlement conference, the parties thought they had settled the employment discrimination case, and they agreed to work out the details of the agreement on their own. Unbeknownst to the parties, however, a few days before the apparent agreement was reached, the district court proceeded to issue an order granting the defendants’ pending motion for summary judgment. When the lawyers left the settlement conference and returned to their offices, they discovered that they had received two orders, one granting summary judgment for defendants and the other, dated three days later, vacating the earlier order. The next day the parties received yet a third order that read: "The court having been advised by counsel that the above action has been settled, IT IS ORDERED that this action is hereby dismissed, without prejudice, the court reserving jurisdiction for sixty (60) days to permit any party to move to reopen this action, for good cause shown."

Perhaps all too predictably, and no doubt with their heads still spinning dizzyingly from this series of events, the parties found themselves disputing the existence and enforceability of the settlement agreement. Rejecting the defendants’ jurisdictional and contractual contentions that the settlement agreement was unenforceable, the district court granted the plaintiff’s motion to enforce the settlement agreement. The Eighth Circuit reversed and remanded the case to the district court for an evidentiary hearing to determine whether a binding agreement had in fact been made. More to the point at hand, the court of appeals also determined that even if an agreement had been reached the district court’s dismissal order -- in light of Kokkonen -- did not contain language sufficient for the district court to retain jurisdiction for purposes of an enforcement action, which must instead be brought in state court.

Sheng is but the tip of very large iceberg. Even when the stipulation and order of dismissal are "based on," "entered in accordance with," or otherwise make generic reference to the settlement agreement, the post-Kokkonen decisions have uniformly held that the district court lacks power to enforce the agreement.

Nor is the district court’s ostensible "approval" of the settlement agreement enough to confer enforcement power on the district court. For example, in Miener v. Missouri Department of Mental Health, a case involving the State of Missouri’s obligation to provide mental health services to the disabled plaintiff, the trial judge at the request of the parties approved the settlement agreement and then dismissed the action with prejudice under Rule 41(a)(1)(ii). On appeal from a postdismissal district court order enforcing the agreement, the Eighth Circuit rejected the argument that the settlement agreement had been made an order of the court by virtue of the district court’s approval of the agreement. The court of appeals noted that in their motion requesting court approval the parties had asked the court to make the stipulation of dismissal, but not the settlement agreement, an order of the court.

Even the district judge’s explicitly stated, unambiguous "intention" to retain jurisdiction to enforce a settlement agreement is not enough, if the dismissal documents do not specifically retain jurisdiction or incorporate the terms of the settlement agreement. A dramatic example of this pitfall
is Hagestad v. Tragesser. /33/ The district court judge in Hagestad stated on the record at a 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 the proceedings which I designate in the manner that I designate, and that decision will be final without any opportunity to appeal. /34/

From the judge’s view, no doubt, that was the name of that tune and all were expected to dance to it. But then Kokkonen intervened, and the rules changed dramatically. Unfortunately for the plaintiff, the order of dismissal stated only: "Counsel having informed the court that this action has been settled, [t]his action is dismissed with prejudice, without costs and with leave for good cause shown within ninety (90) days, to have the dismissal set aside and the action reinstated if the settlement is not consummated." /35/

Thus, despite the district court’s clear intention expressed elsewhere to retain jurisdiction to enforce the settlement agreement, the Ninth Circuit concluded that the judge’s dismissal order did not reflect this intention and did not incorporate the terms of the settlement agreement. /36/ The court of appeals concluded that the dismissal order provided only a 90-day reservation to "set aside" the dismissal "if the settlement is not consummated" and noted that this reservation was concerned only with the monetary terms of the settlement. /37/

The parties to a federal court settlement agreement might, in some cases, be able to persuade the court to enter an order providing for exclusive federal court jurisdiction over any subsequent enforcement action, effectively eliminating any right to enforcement in state court. /38/ However, the parties’ "settlement agreement providing for exclusive jurisdiction in the federal court [must be] approved or incorporated into the district court’s final judgment" in order for the court to exercise subject-matter jurisdiction over the enforcement action. /39/

By the same token, parties might find the district court judge unwilling to accept continuing jurisdiction to enforce a settlement agreement. For example, in Lelsz v. Kavanagh, /40/ a case filed in 1974 challenging conditions at three large state institutions for the mentally retarded, the district court refused to retain jurisdiction to enforce the parties’ settlement agreement. /41/

Of obvious significance to the outcome in Lelsz is that the parties disagreed whether the court should retain enforcement jurisdiction. When plaintiff and defendant have agreed to enforcement by the district court in their settlement agreement, a court might be willing to accept those terms. But even when the parties agree in settlement negotiations to the court’s jurisdiction over subsequent enforcement actions, a district court judge weary of the case or overburdened with other cases might be reluctant or unwilling to agree to such an order. /42/

**B. How Does One Get It Right?**
So, what does a lawyer have to do to get a district court to enforce a settlement agreement? Or, rather, what are the "magic words" that open the courthouse door for consideration of an enforcement motion?

Beckless v. Chater, /43/ offers a good example of how to draft a stipulation and order that works. /44/ In Beckless, a class action involving supplemental security income applicants residing in Illinois and Wisconsin, the court granted plaintiffs’ motion to enforce the terms of a stipulation of dismissal. The district court specifically incorporated the parties’ stipulation conferring enforcement jurisdiction on the court into the order of dismissal. The stipulation stated: "In the event of the failure of defendant to comply with the terms of this Stipulation, defendant agrees that the named plaintiff may file an appropriate motion for enforcement in court, and any other class member in whose favor the Stipulation is made may do the same." /45/

To avoid potential barriers to enforcement, the settlement agreement should authorize an enforcement action, where appropriate, by all intended beneficiaries of the agreement, not just the named plaintiffs. In Beckless, those seeking to enforce the settlement agreement were class members but not named plaintiffs. The parties’ stipulation specifically provided that any class member would be entitled to move to enforce the agreement. This provision of the settlement, incorporated in the order of dismissal, effectively protected the enforcement rights of all members of the class. /46/

In the vast majority of cases, the advantages of being able to return to federal court to enforce a settlement agreement are as significant as they are obvious. For example, in MET Laboratories, Inc. v. Reich, /47/ the district court incorporated the settlement agreement into its orders disposing of the case. Part of the settlement required the federal Department of Labor to promulgate and implement certain regulations. /48/ In a subsequent motion to enforce the settlement, the court rejected the Department’s argument that exclusive jurisdiction to consider plaintiff’s challenge to those regulations resided elsewhere, namely, in the Federal Circuit Court of Appeals. Citing Kokkonen for its authority to retain jurisdiction to enforce a settlement agreement, MET Laboratories held that "[a] federal agency cannot avoid the requirements of a settlement agreement into which it has entered merely by enshrining the violation in a published standard." /49/

In some instances, courts have retained jurisdiction following dismissal pursuant to settlement to consider only limited aspects of a case. For example, in Bell v. Schexnayder, /50/ the district court’s order of dismissal stated: "[H]aving been advised by counsel for the parties that the above action has been settled, [the case is dismissed] without prejudice to the right, upon good cause shown within sixty (60) days, to reopen it if settlement is not consummated and seek summary judgment enforcing the compromise." /51/

Within the 60 days provided by the order, plaintiffs’ counsel filed an application for attorney fees under 42 U.S.C. Sec. 1988. Defendants responded with a motion to enforce the settlement and argued that fees had been compromised in the agreement. Distinguishing its dismissal order from the one in Kokkonen, the Bell court found jurisdiction to consider the enforcement order and noted that its order had expressly provided that the parties could move to reopen the case to enforce the settlement agreement within 60 days. /52/
In another case involving attorney fees, Baer v. First Options of Chicago, Inc., the district court specifically retained jurisdiction to resolve a fee dispute between the plaintiffs’ two attorneys. The Baer court concluded that the dispute fell within the district court’s supplemental jurisdiction, pursuant to 28 U.S.C. Sec. 1367, because the court’s order dismissing the case specifically retained jurisdiction over the fee dispute and set forth a mechanism for resolving that dispute.

And in Mullins v. City of Griffin, a case involving a Rule 41(a)(2) dismissal order, the court found jurisdiction to consider a request for access to a confidential settlement agreement by a newspaper that was not even a party to the original action. The court’s dismissal order provided:

The parties having consented hereto, it is hereby ORDERED that the above-captioned civil action be dismissed with prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Having entered into a Confidential Settlement Agreement and Full and Final Release of All Claims, the parties are hereby ORDERED not to divulge the terms of the Agreement except as may be provided for in the Agreement itself.

Because the Mullins court in its dismissal order required the parties to comply with the confidentiality provisions of the settlement agreement, the court found that it retained jurisdiction to consider the intervenor’s motion to amend its order to delete those same provisions.

V. Kokkonen and the Rule 60 Option

"Technical" compliance with the Kokkonen rubric, such as it is, is not the end of the matter. In Kokkonen, the Supreme Court commented on a factual distinction with an apparent difference: "It must be emphasized that what respondent seeks in this case is enforcement of the settlement agreement, and not merely reopening of the dismissed suit by reason of the breach of the agreement that was the basis for dismissal." Without taking any position on the matter, the Supreme Court observed that some circuits recognize, while others do not, breach of a settlement agreement as a basis for relief under Federal Rules of Civil Procedure 60(b)(6).

This passing observation in Kokkonen is obviously inconclusive and could hardly be characterized as encouragement to invoke Rule 60, but undeniably Kokkonen leaves an opening. There may be particular circumstances in particular cases where one could invoke one of the various grounds articulated by Rule 60 to set aside a prior order of dismissal, reopen or reinstate the original lawsuit, and thereby effectively invoke the district court’s jurisdiction on the same basis that supported the original suit.

"There may be" are the operative words here. As discussed above, in the wake of Kokkonen some circuits have determined that the order of dismissal warranted retention of federal jurisdiction to enforce the underlying settlement agreement, and some have not. Of these, only two have directly considered the Rule 60 gambit. Neither case relied specifically on that rule as an affirmative ground to set aside the dismissal and reinstate the underlying case.

However, these cases by implication at least suggest that the promise of invoking Rule 60 in such situations has not been correctly attempted or fully realized. For example, in Sheng v. Starkey
Laboratories, Inc., discussed above, Rule 60 was invoked by the corporate defendant to defeat, not vindicate, enforcement of the settlement agreement. /65/ In contrast, the Title VII plaintiff who prevailed below on a straightforward motion to enforce the settlement agreement, but without reference to Rule 60, effectively lost on appeal. She lost not simply because the defendant’s appeal successfully cast doubt on the actual existence of a settlement agreement but because the language in the order of dismissal did not satisfy Kokkonen’s technical requirements for retaining jurisdiction over the settlement agreement. /66/

In a more quirky context, the bankruptcy creditor in Kalt v. Hunter unsuccessfully invoked the bankruptcy rule corollary to Rule 60 by seeking relief from his earlier "acknowledgment of satisfaction" on the theory that it had been obtained by fraud. The Ninth Circuit deemed the filing of the satisfaction of judgment to be "functionally equivalent to filing a voluntary dismissal . . . from which Rule 60(b) relief can be granted." /67/ However, the specific "fraud" provisions of the rule did not apply to the facts presented. /68/ Addressing the so-called savings clause of Rule 60(b) that recognizes "the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding," the court deemed the creditor to have brought an "independent action" to enforce his prior monetary judgment against the debtor. But this proved to no avail in the absence of an independent basis for federal jurisdiction. Drawing direct analysis from Kokkonen, the Ninth Circuit held that "Kalt’s independent action’s tie to the prior adversary proceeding is not sufficient for the court to assert ancillary jurisdiction over the independent action. Kalt’s independent action is a garden variety state law fraud claim." /69/

But then the kicker. The Ninth Circuit noted "a possible exception" to the holding in Kokkonen -- namely, relief sought under Rule 60(b)(6) -- but declined to consider or apply it because the creditor did not seek relief under that particular provision. /70/

In both Sheng and Kalt, it is not apparent whether the results would have differed had the party seeking to support enforcement of the particular agreement invoked Rule 60(b) as a basis to reclaim federal jurisdiction. But it is clear that Rule 60(b)(6), which was not directly considered in those instances, might have prompted a different result in each case if the district court had viewed the breach of the agreement as a valid basis for reopening the dismissed suit. /71/

VI. Conclusion

The Kokkonen rule presents an easily understood jurisdictional bar to postdismissal enforcement of an underlying federal court judgment. The harsh lessons taught by Kokkonen are reason enough for litigators to be vigilant of the rule’s adverse effects. Litigators should consider any number of options to protect a client’s interest in later enforcement of a settlement agreement conditioned on dismissal of the underlying lawsuit. The most obvious option is to assure technical compliance with the rule in Kokkonen so that the district court retains jurisdiction over the settlement agreement. Other strategic decisions may include the following:

"It’s not over ’til it’s over." Oral agreements, handshakes, and similar understandings do not cut it in this context. If you do not have it in writing, you do not have anything. /72/
"Let’s make a deal." If you cut a deal, make sure you have what you think you have, and make sure you have what you need. If you do not, do not sign off and do not dismiss the case. The settlement agreement itself is only one part of the potential deal. Be sure you know what forum you will have access to for later enforcement should problems arise. Rest assured, they will. /73/

"Get Real." Ground zero with Kokkonen is the language in the court order of dismissal or its functional equivalent. /74/ It is all well and good to have a settlement agreement signed off by the parties. But to be enforceable later by the district court, the settlement agreement must be part not only of that court’s record but also explicitly of the order of dismissal by either asserting retention over the settlement agreement or incorporating all or some of its terms. /75/ It is a recipe for postdismissal disappointment to assume that the agreement will be enforceable in federal court if it is made part of some order but not necessarily the order of dismissal. /76/

"Time for a reality check." Make sure the judge is in sync with the parties cutting the deal. Remember what happened in Sheng, where the court dismissed the case on the mistaken impression that the case had been settled and without direct participation by the parties. /77/ Ask yourself whether the judge, even if on board with the status of settlement negotiations, is willing to deal with postdismissal enforcement issues /78/ And do not forget Hagestad, in which the judge viewed himself as the all-powerful "czar" over the settlement agreement but ended up a mere postdismissal "wannabe" in the wake of Kokkonen. /79/

"Think about it." Do you really want to return to federal court to enforce the settlement agreement? There may be strategic reasons why a party may simply be better off in state court seeking postdismissal enforcement. (See "reality check," supra.)

"Tomorrow is another day." Seriously consider placing conditions on the dismissal that protect your client. For example, in some instances you may be satisfied with a dismissal order that provides for selective rather than wholesale enforcement of terms of the settlement agreement /80/ or with a structured delay in actual dismissal, such as a 60-day or 90-day dismissal order, /81/ or -- arguably, the best of all possible worlds -- with a court order that only "administratively" closes the case but does not relinquish actual jurisdiction so that the parties can reopen the case as needed. /82/

"Highway 60(b) Revisited." Recourse to Rule 60(b) may offer the only potential source of salvation for the most forlorn among the Kokkonen acolytes. That having been said, be mindful that Rule 60(b) has limited application /83/ and, if successfully invoked, only serves to reopen a case previously dismissed. It does not assure enforcement of the settlement agreement itself.

In the end, caveat Kokkonen.

Footnotes

In states with rules that mimic the Federal Rules, there is the tangible risk that state courts may develop Kokkonen-like rules requiring specific retention of jurisdiction or incorporation of the terms of the settlement agreement in orders of dismissal as a condition for a party to seek later judicial enforcement. See, e.g., Quaranto v. Di Carlo, 648 N.E.2d 451, 453 (Mass. Ct. App. 1995). Thus, attorneys practicing in state court should determine whether applicable procedural or substantive rules require a specific retention of enforcement power or incorporation of the terms of the settlement agreement to assure that one can return to that same court to obtain its effective enforcement.

Some of the problems presented by Kokkonen, and possible solutions, were highlighted in a sidebar to the Federal Access Group’s 1994 article on Supreme Court developments. See "The Wrath of Kokkonen: What If You Have Already Settled?" in Davison, supra note 2, at 513.

Rule 41(a)(1)(ii) provides:
(a) Voluntary Dismissal: Effect Thereof. (1) By Plaintiff: By Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Voluntary dismissal under Rule 41(a)(1) does not require the district court to issue an "order" of dismissal. Although Fed. R. Civ. P. 5(a) requires service of the notice of voluntary dismissal on all parties, "the notice is effective at the moment it is filed with the clerk." 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure Sec. 2363 (1995), at 266. Thus, as provided by Rule 41(a)(1), an action may be dismissed "without order of the court" by (1) the plaintiff alone upon the filing of a notice of dismissal prior to service by the adverse party of either an answer or a motion for summary judgment (Rule 41(a)(1)(i)), or (2) upon the filing of a stipulation of dismissal signed by all the parties (Rule 41(a)(1)(ii)).

See Kokkonen, 114 S. Ct. at 1674 -- 75.

Id. at 1675.

Id. at 1675 -- 76. See also Fed. R. Civ. P. 82 (federal rules "shall not be construed to extend or limit the jurisdiction of the United States district courts").

"Kokkonen eliminates any contention that enforcing a settlement of federal litigation automatically comes within the ancillary jurisdiction." Lucille v. City of Chicago, 31 F.3d 546, 548 (7th Cir. 1994).

/12/ Kokkonen, 114 S. Ct. at 1676, 1677.

/13/ Id. at 1677.

/14/ Id.

/15/ Id.

/16/ Id.

/17/ Rule 41(a)(2) provides:

(a) Voluntary Dismissal: Effect Thereof. . . . (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

/18/ See Fed. R. Civ. P. 41(a)(1)(ii), supra note 5. Pursuant to a Rule 41(a)(2) dismissal, which specifically requires a court order, the district court at its discretion may include in its dismissal order a provision for retaining jurisdiction over the settlement agreement or a provision for the parties’ compliance with the terms of the settlement agreement. In Kokkonen, the parties proceeded with dismissal pursuant to Rule 41(a)(1)(ii), which by its terms does not require a court order to be effective. See supra note 6. But assuming that an actual order of dismissal is entered by the district court, as occurred in Kokkonen, the order can be equally effective for retention of jurisdiction or for incorporating the settlement agreement to assure a federal forum for purposes of enforcement. See Kokkonen, 114 S. Ct. at 1677 (under a Rule 41(a)(1)(ii) dismissal, "the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree").
The grant or denial of a dismissal on motion under Rule 41(a)(2) is within the sound discretion of the trial court, and its order is reviewable only for abuse of that discretion.” Wright & Miller, supra note 6, at Sec. 2364, 274 -- 75 (footnotes omitted).

Kokkonen, 114 S. Ct. at 1677 (Rule 41(a)(1)(ii) "does not by its terms empower a District Court to attach conditions to the parties’ stipulation of dismissal"). See generally Wright & Miller, supra note 6, at Sec. 2363, 252 -- 72. At the same time, the party voluntarily dismissing of right under Rule 41(a)(1) cannot unilaterally place conditions on the district court: "Because the Rule 41(a)(1) procedure operates in this simple and routine fashion, the plaintiff may not attach conditions to the voluntary dismissal." Id. at 268. However, Kokkonen recognizes that if the district court issues an order of dismissal pursuant to Rule 41(a)(1), conditions can be attached to the dismissal "if the parties agree." Kokkonen, 114 S. Ct. at 1677.

Even before Kokkonen was decided, it was the law in several of the circuits that a district court lacked subject-matter jurisdiction to enforce a settlement agreement following dismissal of the case where the court had not manifested an intention to retain jurisdiction or made the agreement part of the order of dismissal. See, e.g., Sawka v. Healtheast, Inc., 989 F.2d 138, 141 (3d Cir. 1993); United Steelworkers of Am. v. Libby, McNeil & Libby, Inc., 895 F.2d 421, 423 -- 24 (7th Cir. 1990); and Adduono v. World Hockey Ass’n, 824 F.2d 617, 621 -- 22 (8th Cir. 1987).

See Scottish Air Int’l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224 (2d Cir. 1996); Bell v. Schexnayder, 36 F.3d 447 (5th Cir. 1994); Manges v. McCamish, Martin, Brown & Loeffler, P.C., 37 F.3d 221 (5th Cir. 1994) (decided after, but not referring to, Kokkonen); and Baer v. First Options of Chicago, Inc., 72 F.3d 1294 (7th Cir. 1995).

See Scelsa v. City Univ. of N.Y., 76 F.3d 37 (2d Cir. 1996); Downey v. Clauer, 30 F.3d 681 (6th Cir. 1994), appeal after remand, 54 F.3d 776 (6th Cir. 1995); Lucille, 31 F.3d 546; Miener v. Missouri Dep’t of Mental Health, 62 F.3d 1126 (8th Cir. 1995); Sheng v. Starkey Lab., Inc., 53 F.3d 192, 195 (8th Cir. 1995); William Keeton Enter. v. A All Am. Strip-O-Rama, 74 F.3d 178 (9th Cir. 1996); O’Connor v. Colvin, 70 F.3d 530 (9th Cir. 1995); Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995); Kalt v. Hunter, 66 F.3d 1002 (9th Cir. 1995); and Morris v. City of Hobart, 39 F.3d 1105 (10th Cir. 1994), cert. denied, 115 S. Ct. 1960 (1995); cf. Consumers Gas & Oil, Inc. v. Farmland Indus., Inc., 84 F.3d 367, 371 -- 72 (10th Cir. 1996) (even though order retained jurisdiction, it did not expressly set forth provision of settlement agreement prohibiting communication with media, and therefore violation of that provision not enforceable via contempt).

Kokkonen, 114 S. Ct. at 1677.

Sheng, 53 F.3d 192.

See id. at 193.

Id.

Id. at 195.
Numerous cases offer examples of dismissal documents with direct references to the corresponding settlement agreements but later are found to be inadequate to confer jurisdiction for enforcement. See, e.g., Scelsa, 76 F.3d at 39 -- 40 (stipulation and dismissal stating that "the above-captioned action is dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties"); Lucille, 31 F.3d at 549 (judgment entered "in accordance with" settlement agreement); O’Connor, 70 F.3d at 532 ("Based on the settlement agreement amongst the parties . . . it is hereby ordered that the Action . . . is dismissed in its entirety with prejudice"); Hagestad, 49 F.3d at 1432 -- 33 (dismissal stating "action has been settled"); and Board of Trustees of the Hotel & Restaurant Employees Local 25 v. Madison Hotel, 896 F. Supp. 14, 16 (D.D.C. 1995) (stipulation of dismissal stating that it is "in accordance with the Settlement Agreement" entered into by the parties).

Miener, 62 F.3d 1126.

Id. at 1128. See also Hagestad, 49 F.3d at 1433 (even though the judge was actively involved in drafting, construction, and execution of settlement agreement, district court’s dismissal order failed to reserve jurisdiction over or incorporate settlement agreement); and Lucille, 31 F.3d at 548 -- 49 (judgment incorporating some but not all terms of settlement agreement thereby identifies which terms the court will enforce, and which it will not).

Hagestad, 49 F.3d 1430.

Id. at 1433.

Id. at 1432.

Arguably, the district judge’s interpretation of his or her dismissal order might be used to determine whether an ambiguous order reflects the judge’s intention to retain jurisdiction. See, e.g., Scelsa, 76 F.3d at 42 ("judge was construing her own order when she held there was no jurisdiction. . . . there are few persons in a better position to understand the meaning of an order of dismissal than the district judge who ordered it"); but see Hagestad, 49 F.3d at 1433 (subjective intent of district judge to retain jurisdiction, extrinsic to dismissal order, deemed irrelevant in light of Kokkonen). See also MET Lab., Inc. v. Reich, 875 F. Supp. 304, 307 (D. Md. 1995) (judge presiding over settlement is in best position to construe the agreement, citing Wilkinson v. Federal Bureau of Investigation, 922 F.2d 555, 559 (9th Cir. 1991)); but see Neuberg v. Michael Reese Hosp. & Medical Center, 166 F.R.D. 398, 1996 WL 238850, at *2 (N.D. Ill. May 3, 1996) ("court acknowledges that the terms of the agreement may be ambiguous, but it is not within the court’s province to determine [its] terms . . . without prior retention of jurisdiction, which this court did not do, or reassertion of jurisdiction by the granting of this motion, which this court will not do").

Hagestad, 49 F.3d at 1433 & n.4.

See Manges, 37 F.3d at 224.
In Manges, the stipulation and settlement agreement included the following provision: Defendants agree that the jurisdiction and venue of any suit, hearing, or legal action of any nature, to which [Plaintiff] is a party, one effect of which could be to halt, enjoin, impair, or hinder the enforcement of this Agreement, or the enforcement or collection of the Final Judgment, shall be in the United States District Court for the Western District of Texas, San Antonio Division. Id. at 222.


In Lelsz, mindful of Kokkonen, the district court observed that the question "is not whether the Court can dismiss with prejudice and retain jurisdiction, but whether the Court should." Id. at 1040. The court determined that the last of three settlement agreements in the case called for dismissal with prejudice once defendants had complied with certain conditions. In rejecting plaintiffs’ assertion that the court should retain jurisdiction to assure defendants’ compliance, the judge concluded that the parties did not bargain for dismissal with continuing jurisdiction. Id.

See, e.g., Neuberg, 166 F.R.D. 398, 1996 WL 238850, at *2 (at time of dismissal order, district court judge understood that a dispute concerning enforcement of settlement agreement might arise, but "specifically refused to retain jurisdiction" and "intentionally did not set forth the terms and conditions of the settlement agreement").


See also Scottish Air Int’l, 81 F.3d at 1230 (jurisdiction found to consider a motion to enforce a settlement agreement which had been incorporated into the court’s dismissal order).

For Legal Services Corporation -- funded programs, postdismissal enforcement of the rights of plaintiff class members will need to be evaluated in light of the restrictions recently imposed by Pub. L. No. 104-134, signed into law on April 26, 1996. Section 504(a)(7) of that Act restricts programs from "participating" in class actions. However, a recent Legal Services Corporation directive notes: Whether activity related to enforcement of a final order entered in a class action amounts to "participation" in a class action will have to be determined on a case-by-case basis. Among the factors to be considered are whether the court has relinquished or only nominally retained jurisdiction, and the extent to which assistance is limited to individual beneficiaries of the class as opposed to activities to benefit the class as a whole. Legal Services Corporation Program Letter 96-1, at 6 -- 7 (May 17, 1996).

MET Lab., 875 F. Supp. 304.

Id. at 306.

Id. at 307.
Bell, 36 F.3d 447.

Id. at 448.

Id. at 449 n.2.

Baer v. First Options of Chicago, Inc., 72 F.3d 1294 (7th Cir. 1995).

See supra note 11.

Baer, 72 F.3d at 1301 n.7.


See supra note 17.

Mullins, 886 F. Supp. at 22.

Id.

Kokkonen, 114 S. Ct. at 1675.

Id. at 1675 (listing circuit court cases). Rule 60(b)(6) provides: "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: . . . (6) any other reason justifying relief from the operation of the judgment." Although subsection (b)(6) of Rule 60 appears broadly worded, "[c]ourts have found few narrowly defined situations that clearly present 'other reasons justifying relief.'" See Wright & Miller, supra note 6, at Sec. 2864, 351 -- 52. However, one recognized basis is where one party fails to comply with the terms of a settlement agreement, with the result that Rule 60(b)(6) is used "to return the parties to the status quo." Id. at 352. Even so, a Rule 60(b) order vacating a dismissal "is an extraordinary remedy granted only in exceptional circumstances . . . and is not intended to enable litigants to avoid the consequences of a decision to settle or compromise which in retrospect appears unfortunate." See Neuberg, 166 F.R.D. 398, 1996 WL 238850, at *1 (internal quotes and citations omitted). Essentially, the party seeking to vacate the dismissal order needs to show that there has been a repudiation of the settlement agreement that terminated the litigation pending before the court. "Repudiation is much more than a disagreement with conditions of the settlement; repudiation is a 'complete frustration' of the agreement." Id. at *2, citing Keeling v. Sheet Metal Workers Int’l Ass’n, 937 F.2d 408, 410 (9th Cir. 1991).

For a broader discussion of the grounds for relief under Rule 60(b), see Wright & Miller, supra note 6, at Secs. 2857 -- 64, 254 -- 376.

See Sheng, 53 F.3d 192 (Rule 60(b)(1) and (b)(6)); Kalt, 66 F.3d 1002 (Rule 60(b)(3) & Rule 60(b) "savings clause").
One state court has considered the Rule 60 argument in the context of analogous state practice rule. In Quaranto, 648 N.E.2d 451, a Massachusetts appellate court overturned a trial court order granting relief under the state counterpart to Fed. R. Civ. P. 60(b)(6) affording relief from judgment for "any other reason justifying relief from the operation of judgment." The plaintiffs had sought relief to obtain enforcement of a collateral written agreement between the parties alleged to be part of the ultimate "agreement for judgment" filed by parties and effectively disposing of the case. However, the judgment entered by the court did not incorporate the "external understanding" of the terms of settlement. Reversing, the appellate court cited Kokkonen in support of the proposition that there were no grounds for granting Rule 60(b)(6) relief "on the basis of alleged failure to act in accordance with a collateral but extrinsic and unmentioned agreement." Id. at 452. On the facts of the case, the court concluded that "[w]hat the Quarantos really want is not an alteration of the judgment, but enforcement of an underlying settlement agreement which they say paved the way for the judgment[,]" enforcement of which has "its own basis for jurisdiction." Id. at 453 (citing Kokkonen, 114 S. Ct. at 1675 -- 76). See also Alfab, Inc. v. CNA Fin. Corp., 877 F. Supp. 1538 (M.D. Ala. 1995) (state court action alleging fraud in procurement of settlement agreement in federal court case improperly removed to federal court on basis of Fed. R. Civ. P. 60(b)(3) because no independent basis for federal subject-matter jurisdiction alleged).

In Sheng, after dismissal of the case, the district court was confronted by dual Rule 60 motions filed by the corporate defendant, Starkey Laboratories. It brought under Rule 60(b)(1) a motion arguing that it should obtain relief from the order of dismissal because it was premised on a "mistake," and therefore no actual agreement existed; it also brought under Rule 60(b)(6) a motion arguing that, even assuming the existence of an agreement, it gave the plaintiff a windfall, and as such this was an "other reason justifying relief." Sheng, 53 F.3d at 194. The Eighth Circuit summarily rejected the latter argument but saw merit in the former and remanded the case for further evidentiary hearing. Id. at 194 n.5, 195.

The Eighth Circuit held that it was insufficient that the order of dismissal included language "reserving jurisdiction" to permit any party to reopen the case later. Id.

In relevant part, Rule 60 provides:

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: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . .
The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court.

Kalt, 66 F.3d at 1005.

Id. at 1006.
See Kokkonen, 114 S. Ct. at 1675; Kalt, 66 F.3d at 1006.

See, e.g., Sheng, 53 F.3d at 193.

See, e.g., Kokkonen, 114 S. Ct. at 1675; Sheng, 53 F.3d at 194.

See Kalt, 66 F.3d at 1004 (filing of the satisfaction of judgment functionally equivalent to voluntary dismissal).

See Hagestad, 49 F.3d at 1433 (predissmissal order referring to enforceability of agreement by district court not effective to retain continuing jurisdiction); see also Linebarger v. United States, 1996 WL 324735, *2 n.4 (N.D. Cal. May 14, 1996) (jurisdiction retained over settlement agreement because terms incorporated in the dismissal order, not because embodied in stipulation and order approving compromise settlement).

See Supra note 61.