

# **What's an Attorney to Do? Ensuring Federal Jurisdiction Over Settlement Agreements in Light of Recent Seventh Circuit Cases**

**--Morton Denlow\***

## **Introduction**

You represent a small company involved as a plaintiff in a trademark dispute. The answer has been filed. You have engaged in limited discovery, but rather than waste tens of thousands of dollars on further discovery and possible cross-motions for summary judgment, you agree to participate in a settlement conference before the magistrate judge assigned to your case.

The conference goes well. You reach agreement on all of the material terms, which include quarterly payments to the plaintiff over three years, a licensing agreement, confidentiality, and a dismissal of the litigation with prejudice. The clients do not trust one another and want the comfort of knowing that the judge who helped broker the settlement will be the one to enforce it in the event of a dispute.

As you discuss the terms of the proposed dismissal order, your trusted associate reminds you that three recent Seventh Circuit opinions require you to tread very carefully in this area. "It's simple," you tell her, "just state in the dismissal order that the judge is

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retaining jurisdiction to enforce the settlement agreement.” “Not if you want to dismiss it with prejudice,” she tells you, “and we may need to put the terms of the settlement into the order.” Sure that you are correct, you tell her to re-read *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). She suggests you read three recent Seventh Circuit cases that appear to change the post-*Kokkonen* landscape.

Your associate was right. Despite the very simple and straightforward instructions *Kokkonen* provides for retaining jurisdiction to enforce a settlement agreement after the underlying claims are dismissed with prejudice, the Seventh Circuit has recently grafted additional, and potentially troublesome, requirements onto *Kokkonen* in *Lynch v. SamataMason Inc.*, 279 F.3d 487 (7th Cir. 2002); *Shapo v. Engle*, 463 F.3d 641 (7th Cir. 2006); and *Blue Cross Blue Shield Ass’n v. American Express Co.*, 467 F.3d 634 (7th Cir. 2006). This article identifies the issues raised by the Seventh Circuit’s recent decisions, describes their apparent conflict with *Kokkonen* and other Seventh Circuit cases, and tries to answer the question, “What’s an attorney to do?”

### ***Kokkonen***

In *Kokkonen*, the parties reached an oral settlement agreement and executed a “Stipulation and Order of Dismissal with Prejudice” pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), which the district court entered. The Stipulation and Order did not refer to the settlement agreement or reserve jurisdiction to enforce it.

A dispute arose and the defendant moved to enforce the settlement agreement thirty-eight days after entry of the dismissal order. Plaintiff challenged the court’s subject-matter

jurisdiction and opposed the motion. The district court asserted an “inherent power” to enforce the settlement agreement and entered an enforcement order. Plaintiff appealed and the court of appeals affirmed.

The Supreme Court reversed and remanded, holding that enforcement of a settlement agreement is not a mere continuation or renewal of the dismissed suit, but requires its own basis for jurisdiction. 511 U.S. at 376-78. The Court analyzed the two separate, though sometimes related purposes of 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. *Id.* at 380. The Court held the first prong of ancillary jurisdiction did not apply because the facts concerning the underlying claim in the litigation and those involving the breach of the settlement agreement “have nothing to do with each other.” *Id.* Neither did the second prong of ancillary jurisdiction apply, because “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.” *Id.*

The Court then went on to explain how a court could retain jurisdiction to enforce the settlement agreement under the second prong of ancillary jurisdiction:

The situation would be quite different if the parties’ obligation to comply with the terms of the settlement agreement had been made part of the 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. 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.

*Id.* at 381. Later in the opinion the Court gave additional guidance:

If the parties wish to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so. When the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2), which specifies that the 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," the parties' compliance with the terms of the settlement contract (or the court's "retention of jurisdiction" over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order. Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties' stipulation of dismissal) we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree.

*Id.* at 381-82.

Therefore, *Kokkonen* teaches that a court may retain jurisdiction to enforce a settlement agreement, even if the underlying litigation is dismissed with prejudice, so long as the dismissal order does at least one of the following:

- Method One: requires the parties' compliance with the terms of the settlement agreement;
- Method Two: incorporates the terms of the settlement agreement in its dismissal order; or
- Method Three: retains jurisdiction over the settlement agreement if the parties agree.

## *Lynch and Shapo*

In *Lynch v. SamataMason, Inc.*, 279 F.3d 487 (7th Cir. 2002), the case was dismissed with prejudice and the order stated the court was retaining jurisdiction to enforce the settlement agreement. The Seventh Circuit criticized this practice:

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

*Id.* at 489 (citing *Kokkonen* and *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002)).

In *Shapo*, the district court dismissed the underlying litigation “without prejudice, with leave to reinstate by or on [the expected execution date of the settlement agreement,] at which time the dismissal will be with prejudice,” and “retain[ed] jurisdiction to enforce the terms of the Settlement Agreement.” 463 F.3d at 642. The Seventh Circuit condemned the practice of dismissing a case with prejudice while retaining jurisdiction to enforce the settlement agreement, and suggested that judges or litigants who wish to “preclude further litigation of the same claim between the same parties, by operation of the doctrine of res judicata, but to retain jurisdiction over [the settlement agreement]” should either include a release of the plaintiff’s claims in the settlement agreement, or use an order dismissing the case without prejudice but stating the “‘without prejudice’ language shall not allow [the

parties] to reopen issues resolved by the judgment.” *Id.* at 646.

The suggestion that a court can use only a dismissal without prejudice if it wishes to retain jurisdiction to enforce a settlement agreement is inconsistent with *Kokkonen*. *Kokkonen* involved a dismissal *with prejudice*, and all three of the Supreme Court’s methods of ensuring jurisdiction over a settlement agreement contemplate the underlying litigation is dismissed with prejudice so as to bar relitigation of the dismissed claims.

In addition to its inconsistency with *Kokkonen*, the dismissal without prejudice procedure suggested by *Lynch* and *Shapo* does not offer parties the same protection as a dismissal with prejudice. When defendants settle a case, they want to know the underlying litigation is gone forever and has been replaced with the settlement agreement. A dismissal with prejudice is a final judgment entitled to *res judicata* effects, and is the tried and true method of permanently disposing of the underlying litigation. *See e.g., T.W. by Enk v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997) (noting that a dismissal with prejudice results in *res judicata* effect).

*Lynch* and *Shapo* notwithstanding, a dismissal without prejudice does not create *res judicata* effect. Therefore, the Seventh Circuit’s suggestion that the order state that the judgment “is being entered in order to allow the parties to enforce [the settlement] and that the ‘without prejudice’ language shall not allow them to reopen issues resolved by the judgment,” *Shapo*, 436 F.3d at 646, is of no help, because by virtue of the dismissal being without prejudice, nothing was “resolved by the judgment.” *Cooter & Gell v. Hartmax*, 496 U.S. 384, 396 (1990) (“Dismissal without prejudice is a dismissal that does not operate as

an adjudication upon the merits, Rule 41(a)(1), and thus does not have a *res judicata* effect.”) (internal quotation marks omitted). Further, the cases cited in *Shapo*—*Brunswick Corp. v. Chrysler Corp.*, 408 F.2d 335 (7th Cir. 1969) and *Wallace Clark & Co. v. Acheson Industries Inc.*, 532 F.2d 846 (2d Cir. 1976)—involved the unique situation of consent decrees in patent cases. See *Brunswick*, 408 F.2d at 338 (“We hold that by reason of the consent decree, the issues of validity and infringement . . . were *res judicata* . . . .”); *Wallace Clark*, 532 F.2d at 849 (“We conclude that the interests of litigants and the public in general will be best served by according *res judicata* effect to consent decrees adjudicating a patent’s infringement as well as its validity.”).

Because there is no *res judicata* effect from the dismissal without prejudice language suggested by the *Shapo* court, protection must instead come from the release contained in the settlement agreement. A release, however, does not offer the same comfort as a dismissal with prejudice. Releases can be challenged, in which case the defendant must incur the costs and headaches of defending it. Indeed, the releases cited in *Shapo* were challenged up to the Seventh Circuit. Fortunately, this uncertainty is mitigated when the judge who dismissed the case without prejudice is the one to hear the attempt to relitigate the issues.

It may be possible to avoid the uncertainty of a dismissal without prejudice posed by *Lynch* and *Shapo* yet still comply with those decisions through a very carefully crafted dismissal with prejudice. *Shapo* described as the relevant problem “the paradox of a court’s at once relinquishing jurisdiction by dismissing a suit with prejudice and retaining jurisdiction.” 463 F.3d at 646. This statement confuses relinquishing jurisdiction over the

underlying litigation through the dismissal with prejudice, with relinquishing jurisdiction to enforce the settlement agreement. These are two separate jurisdictional issues that resemble dismissal of one count of a two-count complaint. Perhaps *Lynch* and *Shapo* could be satisfied if the dismissal order more clearly reserved jurisdiction to enforce the settlement agreement and carved out a specific exception to the dismissal with prejudice. This was implied in the dismissal order in *Shapo*, but could be made explicit through a dismissal order that states: “The Court shall retain jurisdiction for the purpose of enforcing the terms of the settlement agreement. Except as necessary to enforce the terms of the settlement agreement, this case is hereby dismissed with prejudice.” Whether the Seventh Circuit would approve of this order is unknown. *Kokkonen* does not support *Shapo*’s analysis and conclusions, however, nor does it require lawyers to jump through complex semantic hoops to preserve jurisdiction over a settlement agreement.

*Shapo* also involved the related issue of so-called “springing” dismissal orders. As noted above, the district court dismissal order in *Shapo* was without prejudice, but purported to convert automatically to a dismissal with prejudice on the “Execution Date,” which was defined as the date on which the parties “sign[ed] all related agreements and exchange[d] consideration.” 463 F.3d at 642. The Seventh Circuit described this practice as “a potent source of confusion with no redeeming virtues in a case such as this in which the ripening depends on conditions (the signing of all agreements constituting the settlement and the exchange of the consideration required by the agreements) the fulfillment of which may require additional litigation.” *Id.* at 643. The court further stated that “[t]he judge should

have waited before entering any order of dismissal until the various undertakings constituting the settlement were completed. Then the case would be over and dismissal with prejudice appropriate.” *Id.* It would seem that the dismissal without prejudice could convert automatically to with prejudice so long as the conversion took place on a date certain, thus alleviating the Seventh Circuit’s concern about possible confusion.

The eventual dismissal with prejudice is more complicated if there are payments over a period of years or prohibitory terms to the agreement, such as confidentiality or an agreement to refrain from using a certain trademark forever. In those circumstances, there is either a long-term obligation or no real end date to the agreement by which the terms will have been satisfied. A dismissal with prejudice means loss of jurisdiction under *Shapo* and *Lynch*.

To summarize, *Lynch* and *Shapo* set forth the following:

1. A court may not dismiss a case with prejudice while retaining jurisdiction to enforce the terms of the settlement agreement. Carving out an exception to the dismissal with prejudice in order to retain jurisdiction to enforce the settlement agreement might be permissible, but there is no guarantee that the Seventh Circuit would accept this semantic exercise.
2. A court may dismiss a case without prejudice, make clear in the order that the parties are barred from relitigating, and retain jurisdiction to enforce the settlement agreement, but this proposition rests on untested ground and an unfounded premise that a dismissal without prejudice bars relitigation.

3. A court may dismiss the case with prejudice only when it is prepared to relinquish jurisdiction to enforce the agreement, such as when the agreement has been satisfied. A dismissal without prejudice that automatically converts to a dismissal with prejudice on a date certain is probably permissible, but jurisdiction would end upon the conversion.
4. A court may dismiss with prejudice and later enforce the settlement agreement if the agreement is embodied into the order or consent decree.

### ***Blue Cross***

*Blue Cross* imposes a new and far greater obstacle to the ability of a federal court to retain jurisdiction to enforce a confidential settlement than either *Shapo* or *Lynch*. The case involved trademark litigation that ended in a settlement agreement. Under the agreement, American Express agreed not to use certain terms in its marketing. The district court entered an order dismissing the case with prejudice, stating: “This court shall retain jurisdiction over this matter for purposes of enforcing the terms of the settlement agreement.” When, four years later, Blue Cross brought a motion to enforce the settlement agreement, the court denied the motion for lack of jurisdiction based on *Lynch*. Instead, the court granted a motion to amend the original dismissal and under Fed. R. Civ. P. 60(b) entered a new dismissal order, *nunc pro tunc* to the original order, which stated: “The parties are directed to comply with the terms of the settlement agreement [(*Kokkonen* method one)], which is hereby incorporated into the judgment [(*Kokkonen* method two)]. The Court shall retain jurisdiction for the purpose of enforcing the terms of the settlement agreement [(*Kokkonen*

method three)].” *Blue Cross*, 467 F.3d at 635-37.

After criticizing the use of Rule 60(b) for such purposes, the Seventh Circuit made a novel determination. In describing the first dismissal order, the court stated:

The settlement provided that the Association would dismiss its suit with prejudice but that ‘the District Court will retain jurisdiction to enforce this Agreement in the event of an allegation of its breach.’ A provision of this sort logically implies entry of a consent decree, for the settlement contemplates long-term undertakings. Instead, however, the court dismissed the suit and asserted a right to enforce the settlement. The only pertinent language is: “This court shall retain jurisdiction over this matter for the purposes of enforcing the terms of the settlement agreement.”

The district court did not set out those terms, so the order did not serve as an injunction under Fed. R. Civ. P. 65(d).

*Blue Cross*, 467 F.3d at 636. The court went on to say of the second dismissal order:

Neither the district judge nor the parties paid any attention to the fact that the revised judgment, which is a form of injunction (the parties are “directed to comply”), *still* does not satisfy Rule 65(d), which provides (among other things): “Every order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail, *and not by reference to the complaint or other document*, the act or acts sought to be restrained” . . . .

*Id.* The court described the failure to comply with Rule 65(d) as a “jurisdictional defect,” but found diversity jurisdiction to exist, and concluded that it was not necessary to bring a new suit to enforce the agreement on the basis of diversity jurisdiction. *Id.* at 636, 638.

Finally, having resolved the jurisdictional issue, the court turned to the enforceability of a consent decree that does not comply with Rule 65(d). Because the district court found

that there had been no violation of the settlement agreement, it was unnecessary for the Seventh Circuit to decide whether a violation of Rule 65(d) makes a consent decree unenforceable. Still, the court described the proceedings to enforce the settlement agreement as “in the nature of a petition to hold American Express in civil contempt of court,” but after noting two inconsistent Seventh Circuit opinions where parties brought contempt proceedings to enforce settlement agreements incorporated by reference into consent decrees—*D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455 (7th Cir. 1993) and *DuPay v. Samuels*, 465 F.3d 757 (7th Cir. 2006)—declined to decide the issue. *Id.* at 638-39.

It appears from *Blue Cross* that there is simply no way to avoid application of Rule 65(d) where a party seeks to enforce a settlement agreement, even if the dismissal order omits any “directed to comply” language, because the court conflated mere retention of jurisdiction with a consent decree. This means that if parties wish to have their settlement enforced in federal court, it must be made into a consent decree. This is not supported by *Kokkonen* or prior Seventh Circuit case law.

Further, *Blue Cross* rests on a fundamental misunderstanding of the settlement enforcement process. The opinion equates a motion to enforce a settlement with a petition to hold a party in contempt. This conclusion ignores the two-tiered process employed for enforcing settlement agreements. If a party is not living up to its side of the settlement agreement, the enforcing party begins not with a contempt motion, but rather with a motion to enforce the settlement agreement using a prospective injunction requiring compliance with whatever terms are not being followed. If the court finds that the non-moving party has not

complied with the settlement agreement, it would then enter an injunction order requiring compliance with the agreement, and would use its contempt power only if the non-compliant party fails to obey the injunction. In fact, this was exactly the procedure used in the district court proceedings in *Blue Cross*. See *Blue Cross*, Case No. 99-CV-6679, Motion to Enforce Parties' Settlement Agreement, Docket Entry 43 (N.D. Ill. Sept. 10, 2004).

The purpose of Rule 65(d) is to “minimize disputes over what has been enjoined” and to ensure that the injunction is sufficiently understandable to be enforceable. See *Dupuy*, 465 F.3d at 758-59. Under the two-tiered approach just discussed, those purposes are served if the injunction issued following the motion to enforce the settlement complies with Rule 65(d), because that is the injunction out of which any contempt proceeding will arise. So long as the moving party does not seek a finding of contempt until the court orders compliance with specific terms of the settlement agreement and that order is ignored, it is irrelevant whether the dismissal order complies with Rule 65.

An open question after *Blue Cross* is whether a *Lynch/Shapo* dismissal without prejudice would trigger application of Rule 65(d). If so, *Blue Cross* is inconsistent with those cases, because those cases offer a consent decree as an alternative to a dismissal without prejudice, which logically implies that if the dismissal without prejudice option is chosen, the dismissal order need not be treated as a consent decree. On the other hand, *Blue Cross* described retention of jurisdiction to enforce a settlement agreement as “contemplat[ing] long-term undertakings,” and therefore “logically imply[ing] entry of a consent decree.” 467 F.3d at 636. The undertaking is no less “long-term” where a dismissal

without prejudice per *Lynch* and *Shapo* is used, so taking *Blue Cross* on its own logic, even a *Lynch/Shapo* dismissal without prejudice would require compliance with Rule 65(d).

Compliance with Rule 65(d) would, unfortunately for many settling litigants, require the terms of the settlement agreement to be placed in the publicly-available dismissal order. Another option, however, may be an agreement among the parties to waive the requirements of Rule 65(d). There is support for this proposition in Seventh Circuit case law. See *Brumby Metals, Inc. v. Borgen*, 275 F.2d 46, 49 (7th Cir. 1960) (“We believe that Rule 65(d) is controlling and mandatory under these circumstances, or any other circumstances except by complete agreement of counsel.”).

This option does pose some risk because there are no other Seventh Circuit cases dealing with whether Rule 65(d) can be waived. Given that Rule 65(d) is meant to protect parties from being held in contempt of an unclear injunction, however, it would make sense to permit parties to waive that right where a written settlement exists because the parties themselves executed the settlement contract and were aware of the terms. Further, while an injunction binds third parties with notice of the injunction who act in concert with a party to the litigation, a settlement agreement binds only the litigants, obviating any need to protect third parties from an injunction of whose terms they may be unaware. If this option is chosen, parties should make sure the dismissal order clearly identifies the settlement agreement.

In sum, *Blue Cross* appears to require a consent decree compliant with Rule 65(d) in order to retain jurisdiction to enforce a settlement agreement, probably even where the

*Lynch/Shapo* dismissal without prejudice device is used. Because *Lynch* and *Shapo* permit a dismissal with prejudice if used in conjunction with a consent decree, there is little reason to use the dismissal without prejudice device. Parties who wish to keep their settlement out of the public record should include an express waiver of Rule 65(d).

### **Seventh Circuit Cases Consistent With *Kokkonen***

*Lynch* and *Shapo* reject a “with prejudice” dismissal as part of any judicial attempt to retain jurisdiction to enforce a settlement agreement, and *Blue Cross* requires that the settlement terms be made part of the public record through compliance with Federal Rule of Civil Procedure 65(d). These requirements are inconsistent with other Seventh Circuit cases.

First, the Seventh Circuit has held numerous times, in cases that were dismissed with prejudice, that to ensure jurisdiction to enforce a settlement agreement, a court need only state in its dismissal order that it was retaining jurisdiction. *McCall-Bey v. Franzer*, 777 F.2d 1178, 1182, 1189-90 (7th Cir. 1985) (“There must be a deliberate retention of jurisdiction, as by issuing an injunction or stating that jurisdiction is retained for a particular purpose.” Dismissal with prejudice.); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994) (noting that *McCall* was effectively approved in *Kokkonen*); *In re VMS Securities Litigation*, 103 F.3d 1317 (7th Cir. 1996) (same); *Goulding v. Global Medical Products Holdings, Inc.*, 394 F.3d 466, 468 (7th Cir. 2005) (“*Kokkonen* adds that the court’s ancillary jurisdiction includes a settlement that the court has either entered as a judgment or reserved authority to enforce.” Dismissal with prejudice.); *Hill v. Baxter Healthcare Corp.*, 405 F.3d 572, 576 (7th Cir. 2005) (similar).

Second, with respect to placing the settlement terms on the record, the Seventh Circuit has previously rejected such a requirement, and has acknowledged the potential problems it would create. The court stated in *McCall-Bey*:

In suggesting that the district judge would have been well advised to disclose his intention to retain jurisdiction more clearly, we do not mean to suggest that to retain jurisdiction to enforce a settlement agreement a judge must make the agreement a part of the record of the case. Such a requirement would discourage settlements, at least settlements the terms of which are judicially unenforceable without the filing of a new suit, because the parties to settlements frequently do not want the terms to be made public. It would be quite enough if the judge, having read the settlement and satisfied himself that specific enforcement of its terms would not be contrary to public policy, issued an order retaining jurisdiction to enforce the settlement. We point out in this connection that Rule 41(a)(1)(ii) (dismissal by stipulation) does not require that the settlement be filed in court, only that the stipulation be filed, and the stipulation need not, and in this case did not, recite the terms of the settlement.

777 F.2d at 1189-90; *see also Goulding*, 394 F.3d at 468 (offering option of reserving authority to enforce *or* entering settlement as a judgment); *Hill*, 405 F.3d at 576 (same).

Neither *Lynch*, *Shapo*, nor *Blue Cross* deal with these cases directly or attempt to distinguish or over-rule them expressly. Nor does this trio of Seventh Circuit cases find support among the other circuits, who follow the clear language of *Kokkonen*. *See, e.g., Baella-Silva v. Hulsey*, 454 F.3d 5, 10-11 (1st Cir. 2006) (“Ancillary jurisdiction exists where the district court has ensured its continuing jurisdiction to enforce a settlement agreement either by ‘including a provision explicitly retaining [enforcement] jurisdiction’ or ‘by incorporating the terms of the settlement agreement in the court’s order.’”) (quoting *Kokkonen*); *Henley v. Cuyahoga County Bd. of Mental Retardation and Developmental*

*Disabilities*, 141 Fed. Appx. 437, 441-42 (6th Cir. 2005) (“A district court may establish its jurisdiction to enforce a settlement in one of two ways: (1) by expressly including a provision retaining jurisdiction in the order of dismissal; or (2) by incorporating the terms of the settlement agreement in the order.”) (citing *Kokkonen*); *Brandner Corp. v. V-Formation, Inc.*, 98 Fed. Appx. 35, 37 (2d Cir. 2004) (finding jurisdiction under *Kokkonen* to enforce a settlement agreement where “the district court . . . entered final judgment retaining exclusive jurisdiction to enforce” the settlement agreement). *See also* Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 FED. CTS. L. REV. 2 (March 2003).

### **A Note on *Kokkonen* Method Two**

*Lynch*, *Shapo*, and *Blue Cross* deal directly with the first and third *Kokkonen* methods for achieving federal jurisdiction to enforce a settlement agreement—ordering compliance with the agreement and including a retention of jurisdiction clause in the dismissal order. But what of the second method—by “embody[ing] the settlement contract in [the] dismissal order”?

*Lynch* states that a settlement agreement is subject to federal jurisdiction if it has been “embodied in a consent decree or some other judicial order.” 279 F.3d at 489. While this implies that incorporation alone ensures jurisdiction, something stated outright in *Kokkonen*, what remains uncertain is whether incorporation can be done by reference to the settlement agreement without actually including the terms of the settlement in the order.

*Blue Cross* says incorporation may not be done by reference where the order is a form

of injunction directing the parties to comply with the terms of the settlement agreement. The dismissal order in *Blue Cross* incorporated the settlement by agreement of the parties, but the Seventh Circuit still required compliance with Rule 65(d), which does not permit incorporation by reference of the act or acts sought to be restrained.

### **What's an Attorney to Do?**

Because *Lynch*, *Shapo*, and *Blue Cross* are inconsistent with *Kokkonen* and with other Seventh Circuit cases, it is unclear whether this recent trio will survive the test of time, either in the Seventh Circuit or beyond. In the meantime, this article offers some suggestions for navigating through the obstacles this trio has created.

An option that avoids entirely both the *Blue Cross* and *Lynch/Shapo* issues is to wait until the entire settlement has been resolved before asking that the dismissal order be entered. Under these circumstances, retention of jurisdiction is unnecessary and confidentiality is maintained. This option is likely unattractive in any settlement with ongoing obligations, but may be preferable where the settlement involves only a single payment or periodic payments over a short time period and where confidentiality after dismissal is not a serious concern.

More work is required if the desired end is a dismissal now with the ability to enforce the settlement agreement later. There are several alternatives and multiple concerns at play. The available alternatives are these: (1) whether the court retains jurisdiction over the settlement while dismissing the case with prejudice or without prejudice; (2) whether barring relitigation is achieved through the *res judicata* effect of the dismissal order and/or through a release of claims in the settlement agreement; (3) whether to enter the dismissal order as

part of a consent decree and incorporating the settlement terms expressly in the order or by reference; and (4) whether to waive Rule 65(d). The concerns are: (1) complying with *Lynch* and *Shapo*; (2) complying with *Blue Cross*; (3) ensuring the *res judicata* effects of the dismissal; and (4) maintaining confidentiality. The following chart presents various combinations of these components and their effects of the various concerns:

Type Of Dismissal	<i>Lynch/Shapo</i>	<i>Blue Cross</i>	<i>Res Judicata</i>	Confidential?
<b>(1) Dismissal With Prejudice</b>	Satisfied if no enforcement after dismissal.	N/A	Clear	Yes
<b>(2) Consent Decree Dismissal With Prejudice That Includes All Settlement Terms Expressly</b>	Satisfied through consent decree	Satisfied through express inclusion of terms	Clearest	No
<b>(3) Consent Decree Dismissal Without Prejudice That Includes All Settlement Terms Expressly</b>	Satisfied through consent decree	Satisfied through express inclusion of terms	Less clear, must rely on release	No
<b>(4) Dismissal Without Prejudice + Retention of Jurisdiction Clause + Relitigation Bar + Automatically Converts to Dismissal With Prejudice on Date Certain</b>	Satisfied through dismissal without prejudice if no enforcement after the date of conversion.	Probably not satisfied	Some uncertainty	Yes
<b>(5) Dismissal With Prejudice That Incorporates Settlement Agreement By Reference and Includes Rule 65(d) Waiver</b>	Not if it fails to be recognized as a consent decree	Not if waiver found impermissible	Clearest because dismissed with prejudice	Yes
<b>(6) Dismissal Without Prejudice Order That Incorporates Settlement Agreement By Reference + Rule 65(d) Waiver + Bars Relitigation + Retention of Jurisdiction Clause</b>	Satisfied through dismissal without prejudice	Not if waiver found impermissible unless <i>Blue Cross</i> does not apply to <i>Lynch/Shapo</i> device	Some uncertainty	Yes
<b>(7) Dismissal With Prejudice That Retains Jurisdiction + Incorporates the Settlement Agreement By Reference + Orders Compliance With the Settlement Agreement</b>	Not satisfied	Not Satisfied	Clear	Yes

This table illustrates all of the issues at play and should facilitate the process of choosing the type of dismissal order to use. As mentioned above, if the settlement obligations can be achieved in the short-term, option one is best. If the obligations are long-term, the analysis turns first to the importance of confidentiality.

If confidentiality is not a concern, a traditional consent decree as part of a dismissal with prejudice (option two) makes the most sense. Because *Lynch* and *Shapo* permit a consent decree with a dismissal with prejudice, there is no reason to use a dismissal without prejudice (option three) and forfeit the greatest *res judicata* certainty. Nor is there any sense to using the *Lynch/Shapo* dismissal without prejudice device (option four). Attorneys should remember, however, that the consent decree option raises the possibility of contempt sanctions in the first instance if there is non-compliance with the terms of the settlement agreement.

If confidentiality is a priority, the issue is more complicated. Options four through six all offer confidentiality. Option four, the *Lynch/Shapo* dismissal without prejudice device alone, does not require the terms of the settlement agreement to be made an express part of the order, but banks on *Blue Cross* being found inapplicable to the *Lynch/Shapo* device. Option five, a consent decree that incorporates the settlement by reference, dismisses the case with prejudice, and expressly waives rights under Rule 65(d), complies with *Blue Cross* unless the Seventh Circuit determines that Rule 65(d) cannot be waived, but should the order not be recognized as a consent decree, the dismissal with prejudice would run afoul of *Lynch* and *Shapo* and jurisdiction would be destroyed. Option six, which combines option four and

the *Lynch/Shapo* device, offers the most jurisdictional security, because if waiver was found impermissible but *Blue Cross* was found inapplicable to the *Lynch/Shapo* device, the *Lynch/Shapo* device would serve as a back-up source of jurisdiction. Option six sacrifices some *res judicata* certainty, but a carefully drafted release combined with retained jurisdiction over the case by the judge who entered the dismissal order mitigates much of that uncertainty. Thus, option six is preferable if the parties require confidentiality.

The final option is to distinguish these three Seventh Circuit cases or follow other Seventh Circuit precedent, and enter an order that complies with the Supreme Court's decision in *Kokkonen* and the other Seventh Circuit cases. This option has maximum *res judicata* and confidentiality benefits, but has a risk on appeal depending upon which panel of the Seventh Circuit is sitting.

In light of these observations, attorneys should consider the following sample orders. The first is a simple dismissal with prejudice entered after the terms of the settlement agreement have been completely fulfilled. A similar alternative is to enter a dismissal without prejudice that automatically converts to a dismissal with prejudice on a date certain by which all settlement obligations are expected to be completed, with leave to reinstate before that date. This option is best when the anticipated fulfillment date for the settlement agreement is not too far in the future. *See* Sample Order A at the end of this article.

Next is the traditional consent decree. This option is best if confidentiality is unimportant and if the parties want the option of bringing a contempt motion after there has been a violation of the agreement without first bringing a motion to enforce. *See* Sample

Order B at the end of this article.

If confidentiality is important and there are long-term obligations in the settlement agreement, the best option is number six. This offers the maximum jurisdictional security while presenting manageable *res judicata* risks. While this order does not guarantee confidentiality, its waiver of Rule 65(d) offers the best chance of complying with *Blue Cross* without making the settlement terms an express part of the dismissal order. See Sample Order C at the end of this article.

Finally, those who wish to follow *Kokkonen* and other Seventh Circuit cases rather than *Lynch*, *Shapo*, and *Blue Cross* should chose option seven. This order could also be customized to challenge only *Blue Cross* or only *Shapo* and *Lynch* by adding language from the previous order that satisfies whichever case the parties do not wish to challenge. See Sample Order D at the end of this article.

### **Conclusion**

The Supreme Court recognized in *Kokkonen* that federal jurisdiction can accomodate the practical considerations involved in settlements: (1) encouraging settlement by providing clear and uncomplicated rules on how federal courts can retain jurisdiction, (2) preserving the confidentiality that is a “must have” in the vast majority of settlements, (3) clearly and definitively barring relitigation by means of a dismissal with prejudice; and (4) allowing for a two-step enforcement mechanism that avoids a contempt proceeding as the intial means of enforcing a settlement agreement. While the Supreme Court has recognized the importance of settlement and provided specific guidance on how federal courts can enforce those

settlements, the Seventh Circuit, in *Lynch*, *Shapo*, and *Blue Cross*, has created unnecessary roadblocks and confusion. This confusion has resulted from the inconsistency with other Seventh Circuit cases and the failure to follow the plain language of *Kokkonen*. Until Seventh Circuit case law is clarified, attorneys and judges must exercise caution and careful drafting if they wish the court to retain jurisdiction to enforce a settlement.

## **SAMPLE ORDER A**

### **AGREED ORDER OF DISMISSAL**

The parties hereby agree that this case has been settled and that all issues and controversies have been resolved to their mutual satisfaction.

#### **IT IS HEREBY ORDERED:**

1. This case is dismissed without prejudice with leave to reinstate on or before *[date far enough in the future to fulfill all settlement terms]*.
2. In the event a motion to reinstate is not filed on or before *[date used in paragraph 1]*, the case shall be deemed dismissed with prejudice without further order of the Court.
3. Each party shall bear its own attorney's fees and costs.

## **SAMPLE ORDER B**

### **CONSENT DECREE**

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

#### **IT IS HEREBY ORDERED:**

1. [*insert all settlement terms*]
2. By consent of the parties, the Court shall retain jurisdiction for the purpose of enforcing the terms of this consent decree.
3. Except as necessary to enforce the terms of this consent decree, this case is hereby dismissed with prejudice. Each party shall bear its own attorney's fees and costs.

## SAMPLE ORDER C

### AGREED ORDER OF DISMISSAL

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

#### **IT IS HEREBY ORDERED:**

1. The parties shall comply with the signed settlement agreement dated [date of settlement agreement]. The parties expressly waive their rights under Federal Rule of Civil Procedure 65(d) to the extent Rule 65(d) requires this order to be specific in terms or to describe in reasonable detail and without reference to the settlement agreement, the act or acts to be restrained.

2. By consent of the parties, the Court shall retain jurisdiction for the purpose of enforcing the terms of the settlement agreement.

3. This case is dismissed without prejudice with leave to reinstate on or before [date far enough in the future to fulfill all settlement terms] for the purpose of enforcing the settlement. This Agreed Order of Dismissal is entered without prejudice in order to allow the Court to enforce the settlement agreement. The parties are barred from relitigating any claims raised in this litigation or any claims released by means of the settlement agreement.

4. In the event a motion to reinstate or motion to enforce settlement is not filed on or before [date used in paragraph 3], the Court shall relinquish jurisdiction and the case shall be deemed dismissed with prejudice without further order of the Court. Each party shall bear its own attorney's fees and costs.

## **SAMPLE ORDER D**

### **AGREED ORDER OF DISMISSAL**

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

#### **IT IS HEREBY ORDERED:**

1. The parties shall comply with the terms of their settlement agreement entered into on [*date of settlement agreement*].

2. By consent of the parties, the Court shall retain jurisdiction for the purpose of enforcing the terms of the settlement agreement through [*date far enough in the future to fulfill all settlement terms*].

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