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## Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation

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# Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation

## ARTICLES

### SIX DECREES OF SEPARATION: SETTLEMENT AGREEMENTS AND CONSENT ORDERS IN FEDERAL CIVIL LITIGATION

ANTHONY DISARRO\*

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INTRODUCTION

At last, the parties to a prolonged and bitterly fought commercial dispute in federal court have agreed to a settlement. As lead counsel for one of the parties, there are a few things you need to do right away. First, you need to call the experts and trial consultants and tell them to stop working on the case (or, more to the point, stop billing time on the case). Then, you need to inform the presiding judge of the settlement so that she does not upset the apple cart by suddenly ruling on one of those motions that have been pending before her for months.

But, once you do those things, there is something else to which you should turn your attention. The parties are going to prepare a settlement agreement; should you seek to put some or all of the terms into a consent

decree?<sup>1</sup> A consent decree is a judgment or order that reflects the settlement terms agreed to by the parties, and that contains an injunction.<sup>2</sup>

This Article identifies and analyzes the six key distinctions between consent decrees and settlement agreements so that counsel can make an informed choice when deciding which to use at the time of settlement. This Article also describes two areas—enforcement jurisdiction and fee shifting—where misguided courts have pronounced erroneous results due to a failure to appreciate these distinctions. Finally, the Article prescribes a correct rule of law that should be applied in these areas.

The first distinction between a consent decree and a settlement agreement is the mode of enforcement.<sup>3</sup> The presence of an injunction in the consent decree makes non-compliance with the settlement terms contempt of court.<sup>4</sup> By contrast, failure to comply with a settlement agreement is simply a breach of contract.<sup>5</sup>

Second, a consent decree is a public document that can be accessed by anyone.<sup>6</sup> Therefore, the settlement terms included in a consent decree will not remain secret. A settlement agreement is a private document and its terms can be kept confidential.<sup>7</sup>

Third, because a consent decree is a court order, the issuing federal court has the inherent power to enforce the consent decree.<sup>8</sup> The parties will be able to return to the issuing court to enforce the decree, even where the original action has been dismissed and there is no independent basis for federal jurisdiction. An action to enforce a settlement agreement must be brought in state court, unless the parties are diverse.<sup>9</sup>

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1. Understandably, this is not an “either/or” proposition. Parties will want a written agreement even if they intend to put some or all of the terms into a consent decree as well. Consequently, the question is really whether the agreement will be the sole instrument or will there be a consent decree as well?

2. *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1218 (9th Cir. 2004) (“[A] consent decree is ‘no more than a settlement that contains an injunction.’” (quoting *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1025 (2d Cir. 1992))); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (“[W]hen a decree commands or prohibits conduct, it is called an injunction.”). When the settlement involves no injunctive relief but simply the payment of money, the often-used term is “consent judgment.” See *Limbright v. Hofmeister*, 566 F.3d 672, 673 (6th Cir. 2009) (term “consent judgment” used where monetary obligations are involved).

3. See *infra* Part I.

4. *Local No. 93, Int’l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986).

5. See *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993) (noting that, in the absence of the judicial imprimatur necessary to render a settlement agreement a consent decree, a settlement agreement is nothing more than a contract).

6. See *infra* Part II.

7. See *Janus Films, Inc. v. Miller*, 801 F.2d 578, 585 (2d Cir. 1986).

8. See *infra* Part III.

9. See *Fairfax Countywide Citizen Ass’n v. Cnty. of Fairfax*, 571 F.2d 1299, 1305 (4th Cir. 1978) (noting that, where a party to a settlement agreement lacks independent grounds

Some courts have concluded that parties stipulating to the jurisdiction of a federal court to resolve settlement disputes is the functional equivalent of a consent decree.<sup>10</sup> This reasoning is flawed. The retention of jurisdiction does not transform the terms of a settlement agreement into the requirements of a court order, nor would it permit the court to enforce its terms by using the contempt power. Federal jurisdiction over settlement disputes should be limited to the enforcement of consent decrees.

Fourth, the injunctive provisions of a consent decree must be stated in reasonable detail and cannot incorporate other documents by reference, even publicly available court records.<sup>11</sup> In contrast, settlement agreements are not held to any requisite level of particularity (although specificity in a contract can be a good thing), and the drafters are free to incorporate other documents by reference.

Fifth, a consent decree will be the court's document, and thus the court can insist that a proposed decree be changed.<sup>12</sup> Furthermore, consent decrees can subsequently be modified or terminated by the court, even over the objections of one of the parties.<sup>13</sup> A settlement agreement is the parties' document. It will reflect whatever the parties have agreed to, irrespective of what the court thinks, and cannot be changed, except to reflect their mutual consent.

Sixth, a consent decree represents a court-ordered change in the legal relationship between the parties.<sup>14</sup> Accordingly, it can form the basis of attorney's fees awarded to the plaintiff under statutes that permit such awards to "prevailing parties."<sup>15</sup> A settlement agreement does not bear the requisite judicial imprimatur to confer prevailing party status to a plaintiff.<sup>16</sup>

Here, too, courts have employed a false correlation of consent decrees with settlement agreements that stipulate to enforcement jurisdiction. These decisions have awarded attorneys' fees under the erroneous theory that where a court possesses jurisdiction to enforce a settlement, the contractual duties become judicially imposed obligations.<sup>17</sup> These

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for federal jurisdiction to litigate a breach of contract claim, the party must seek enforcement in state court).

10. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994); see also *infra* notes 141–142 and accompanying text.

11. See *infra* Part IV.

12. See *infra* Part V.A.

13. See *infra* Part V.B.

14. See *infra* Part VI.

15. See *infra* Part VI.A.

16. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

17. See *infra* notes 302–306.

decisions are a transparent attempt to evade a Supreme Court pronouncement that settlement agreements cannot bestow prevailing party status on a plaintiff.

Much of the scholarship devoted to consent decrees focuses on their utility in public interest litigation.<sup>18</sup> Settlement of litigation is also a frequent topic of academic articles, mostly concerning whether courts should approve settlements,<sup>19</sup> encourage settlements,<sup>20</sup> or require that settlements be publicly revealed.<sup>21</sup> Relatively little has been written about the pros and cons of consent decrees and settlement agreements in ordinary civil litigation between private parties.<sup>22</sup> Hopefully, this Article will help to fill this lacuna.

### I. ENFORCEMENT: CONTEMPT VERSUS BREACH

One significant distinction between a settlement agreement and a consent decree concerns how the settlement terms will be enforced. When settlement terms are part of a consent decree, they can be enforced via the court's contempt powers.<sup>23</sup> This procedure will likely be quicker and simpler—and lead to a more complete and effective remedy—than when the terms are solely put into a settlement agreement.<sup>24</sup>

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18. The virtues and shortcomings of consent decrees in “public interest” or “institutional reform” litigation are explored at length in a series of scholarly articles presented at a 1987 symposium sponsored by the University of Chicago Legal Forum. See *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1. See generally Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988). For more of the shortcomings and less of the virtues, see generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003).

19. E.g., Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9 (1996) (encouraging courts to promote the public policy of dispute settlement).

20. E.g., Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55 (1999) (studying the economic efficiency of judicial review for every settlement agreement).

21. E.g., Emily Fiftal, Note, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RES. L. REV. 503 (2003) (offering a general balancing approach for when to respect litigants' desire for secrecy in settlement agreements and when, for public policy reasons, to publish a settlement agreement).

22. For one of the few scholarly articles on this topic, see Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33 (2003).

23. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986) (“Noncompliance with a consent decree is enforceable by citation for contempt of court.” (citing *United States v. City of Miami*, 664 F.2d 435, 440 & n.8)); *United States v. Armour & Co.*, 402 U.S. 673, 676–77 (1971).

24. See *infra* notes 46–58 and accompanying text; see also Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 20 (1987) (“When the settlement includes a court order the parties can resolve disputes and get enforcement without filing a new suit and starting at the end of the queue.”).

### A. Requirement of a Court Order

A prerequisite to the exercise of a court's contempt power is the existence of a court order.<sup>25</sup> A party can be held in contempt for disobeying a court order, but not for disregarding a statute or breaching a private agreement.<sup>26</sup> Courts have consistently ruled that judicial enforcement of settlement terms cannot be effected through contempt unless those terms are part of a court order.<sup>27</sup>

A settlement agreement that provides that the court retains jurisdiction to enforce the agreement merely allows the court to entertain a breach of contract action, and potentially award damages or a decree of specific performance.<sup>28</sup> It neither converts the contractual terms into court-mandated duties, nor does it authorize the court to enforce the agreement through the use of its civil contempt powers.<sup>29</sup>

These principles have been applied even in a situation where the parties have expressly stipulated that the court retains jurisdiction to enforce the settlement through use of its contempt powers.<sup>30</sup> The Seventh Circuit concluded that, because the settlement obligations were not contained in the court order, a failure to comply with them could not be punished by contempt.<sup>31</sup> The court stated:

[T]he district court never entered an order spelling out the parties' rights and obligations [under the settlement]; only the settlement agreement

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25. *Harris v. City of Philadelphia*, 47 F.3d 1311, 1326 (3d Cir. 1995); *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989).

26. *See Stotler*, 870 F.2d at 1163 (stating that, in order to hold a party in contempt, a trial court must have made a decree to that party which the party willfully violated).

27. *Tranzact Techs., Inc. v. 1Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005) (rejecting party's claim that settlement agreement was unenforceable through a contempt proceeding because its terms were "specifically set forth in the order itself"); *Smyth v. Rivero*, 282 F.3d 268, 283 (4th Cir. 2002); *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370 (10th Cir. 1996); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460–61 (7th Cir. 1993) (holding that, although the district court reserved jurisdiction to enforce the settlement agreement, the agreement was not enforceable by contempt).

28. *See H. K. Porter Co. v. Nat'l Friction Prods. Corp.*, 568 F.2d 24, 27 (7th Cir. 1977); *Hanna v. Lane*, No. 84 C 1635, 1989 U.S. Dist. LEXIS 5910, at \*12–14 (N.D. Ill. May 22, 1989); *Smith v. Schermerhorn*, No. 85 C 07372, 1989 U.S. Dist. LEXIS 1571, at \*4–5 (N.D. Ill. Feb. 10, 1989) (awarding specific performance). *But see Davis v. City of San Francisco*, 890 F.2d 1438, 1450–51 (9th Cir. 1989) (concluding that the district court's failure to attach a consent decree to a subsequent injunction does not invalidate the injunction).

29. *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) (en banc) (Rubin, J., concurring) (per curiam) ("If the parties agree to compromise their differences by a settlement agreement, . . . the only penalty for failure to abide by the agreement is another suit.").

30. *D. Patrick, Inc.*, 8 F.3d at 460–61. The district court entered a dismissal order that reiterated these terms. *Id.* at 461.

31. *Id.*

purports to do that. Standing alone, a settlement agreement is nothing more than a contract; the imprimatur of an injunction is required to render it a consent decree enforceable through contempt.<sup>32</sup>

The Court of Appeals for the Tenth Circuit applied the same reasoning to a situation where the district court included some settlement terms in an order but not others.<sup>33</sup> The court concluded that the settlement provisions that were not set forth in the order could not be enforced by contempt, notwithstanding the district court's retention of jurisdiction to enforce the entire settlement.<sup>34</sup> The terms must be made part of the order for contempt to become an enforcement tool.

The Court of Appeals for the Second Circuit's ruling in *Hester Industries, Inc. v. Tyson Foods, Inc.*,<sup>35</sup> is instructive in this regard. The parties entered into a settlement agreement that expressly stated that the action would be dismissed without any judgment or injunction.<sup>36</sup> However, the settlement agreement further provided that its terms were subject to enforcement by the district court and the agreement was attached to a stipulated order of dismissal that was signed by the judge.<sup>37</sup>

The district court held that, as a result of the attachment and jurisdictional retention, the settlement agreement had been incorporated into the dismissal order and that it could hold a party in contempt for nonperformance.<sup>38</sup> The Second Circuit reversed, concluding that the district court lacked the power to issue a contempt citation.<sup>39</sup> Circuit Judge Roger Miner reasoned that compliance with the settlement agreement could not have been intended to be court-ordered because that would be "tantamount to a mandatory injunction" and the parties' agreement provided that no injunction would be entered.<sup>40</sup> Noncompliance with the

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32. *Id.* at 460 (citing *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992); *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1025 (2d Cir. 1992)); *see also H.K. Porter Co.*, 568 F.2d at 25–27.

33. *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370–71 (10th Cir. 1996).

34. *Id.* at 371. The Tenth Circuit explained that Federal Rule of Civil Procedure 65(d) which applies to consent decrees, *see infra* note 224 and accompanying text, requires a federal court to explicitly set forth in the decree or order those terms that are enforceable by contempt. *Consumers Gas & Oil, Inc.*, 84 F.3d at 370 (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2955 (2d ed. 1995)).

35. 160 F.3d 911 (2d Cir. 1998).

36. *Id.* at 913.

37. *Id.* at 913–14.

38. *Id.* at 914.

39. *Id.* at 917.

40. *Id.* at 916. The court further held that the district court could not include settlement terms in a court order absent consent of all parties. *Id.*

agreement, the court explained, could amount to a contractual breach, but it could not serve as the basis for a contempt finding.<sup>41</sup>

To ensure enforcement by contempt, the parties must actually put the settlement terms into a court order that directs the parties to perform those obligations.<sup>42</sup>

### B. *Advantages of the Contempt Route to the Movant*

The contempt route fulfills the “need for speed” by enabling a party to use a single-step enforcement process.<sup>43</sup> The party seeking enforcement simply files a motion to hold the violator in contempt of court. Some district courts will even permit a party seeking to hold another in contempt to proceed by way of an expedited procedure known as an “order to show cause” or “rule to show cause,” which will set a more abbreviated briefing schedule than is typical for motions.<sup>44</sup>

Where they are part of a contract, settlement terms can only be enforced via the breach-of-contract route.<sup>45</sup> This entails a two-step process.<sup>46</sup> First, the party seeking enforcement will have to commence a plenary action to obtain a decree of specific performance.<sup>47</sup> Then, the party can enforce the specific performance decree through a contempt proceeding.<sup>48</sup> The two-step enforcement process is lengthier and consumes more judicial resources.

The consent decree route is also quicker because a party can use a summary proceeding to enforce the decree, instead of initiating a plenary action.<sup>49</sup> In a summary contempt proceeding, the district court will proceed

41. *Id.* at 917.

42. Courts refer to this as “incorporating” or “embody[ing]” the settlement terms into a court order. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994).

43. *See Sacher v. United States*, 343 U.S. 1, 21 (1952) (Black, J., dissenting) (“[C]ourts must have power to act immediately, and upon this need the power of contempt rests.”).

44. *Tranzact Techs., Inc. v. 1Source Worldsite*, 406 F.3d 851, 853–54 (7th Cir. 2005) (rule to show cause); *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 369 (10th Cir. 1996) (order to show cause); *see also Quilling v. Trade Partners, Inc.*, No. 1:03-CV-236, 2010 WL 565155, at \*2 (W.D. Mich. Feb. 12, 2010) (“Contempt proceedings are ‘summary in form and swift in execution.’” (quoting *Am. Airlines, Inc. v. Allied Pilots Assoc.*, 228 F.3d 574, 583 (5th Cir. 2000))).

45. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003); *Hazen v. Reagen*, 208 F.3d 697, 699 (8th Cir. 2000); *Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999) (en banc).

46. Morton Denlow, *What’s an Attorney to Do? Ensuring Federal Jurisdiction Over Settlement Agreements in Light of Recent Seventh Circuit Cases*, THE CIRCUIT RIDER, May 2007, at 24, 26 (characterizing a settlement agreement as requiring a two-tier enforcement procedure).

47. *See Roberson v. Giuliani*, 346 F.3d 75, 83 (2d Cir. 2003).

48. *Id.*

49. *See generally D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993); *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988). The benefits of summary

expeditiously, and parties will have limited rights to conduct discovery.<sup>50</sup> The party charged with contempt is entitled to due process and an opportunity to be heard, but not an evidentiary hearing.<sup>51</sup>

The law is unclear regarding whether a party can use a summary proceeding to enforce a settlement contract.<sup>52</sup> Moreover, even when permissible, a summary action to enforce a settlement agreement can easily devolve into a prolonged fact-driven proceeding, particularly where issues—such as whether there was a meeting of the minds or the signatories had the proper authority—are disputed.<sup>53</sup>

In addition to speed, there is the efficacy of the remedy to consider. Being adjudicated a contemnor has a stigmatizing effect that a party and its lawyers will be anxious to avoid. The threat of a contempt charge will cause parties to take precautions to ensure that their settlement obligations are performed and to perform tasks that arguably are not even required out of an abundance of caution.<sup>54</sup> No similar apprehension arises from the prospect of being adjudicated as a party in breach. For this reason, the obligor will typically be reticent to incorporate settlement terms into a court order.

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enforcement may be overstated. As one court observed, the preparation and filing of a summary motion to enforce a settlement agreement may be as expensive as the preparation and filing of a complaint and a summary judgment motion in a plenary action. *Woodcock Bros. Transp. Grp. v. Transp. Res., Inc.*, No. 01 C 8067, 2003 WL 1873928, at \*4 n.2 (N.D. Ill. Apr. 14, 2003) (“As to economies, it would not have been any more expensive to have drafted a new complaint than to have drafted the allegations in the motion to enforce the settlement agreement . . .”).

50. *D. Patrick, Inc.*, 8 F.3d at 459; *In re Grand Jury Matter*, 906 F.2d 78, 85–86 (3d Cir. 1990); *Ferrell v. Pierce*, 785 F.2d 1372, 1383 (7th Cir. 1986) (per curiam).

51. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 77 (1st Cir. 2002); *Alexander v. Chi. Park Dist.*, 927 F.2d 1014, 1025 (7th Cir. 1991); *Leadsinger, Inc. v. Cole*, No. 05 Civ. 5606(HBP), 2006 WL 2266312, at \*7 (S.D.N.Y. Aug. 4, 2006).

52. *Compare Municipality of San Juan v. Rullan*, 318 F.3d 26, 31 (1st Cir. 2003) (determining that the settlement agreement did not grant summary enforcement power to the district court), *and Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 954 (7th Cir. 1997) (affirming district court’s refusal to summarily enforce settlement agreement), *and Geiringer v. Pepco Energy Servs., Inc.*, No. CV05-4172 (WDW), 2007 WL 4125094, at \*1 (E.D.N.Y. Nov. 16, 2007), *and Cross Media Mktg. Corp. v. Budget Mktg. Inc.*, 319 F. Supp. 2d 482, 483 (S.D.N.Y. 2004), *with Limbright v. Hofmeister*, 566 F.3d 672, 675 (6th Cir. 2009) (following its own precedent in affirming the use of a summary enforcement proceeding) (citing *Bobonik v. Medina Gen. Hosp.*, 126 F. App’x 270, 273 (6th Cir. 2005)), *and Blue Cross & Blue Shield Ass’n v. Am. Express Co.*, 467 F.3d 634, 638 (7th Cir. 2006) (noting that refusing to allow a summary enforcement proceeding in this case would only compound already extensive delays and expenditures).

53. *See Millner v. Norfolk & W. Ry. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1980) (holding that where there is a factual dispute regarding the enforceability of a settlement agreement, a plenary evidentiary hearing is required); *see also Ford v. Citizens & S. Nat’l Bank*, 928 F.2d 1118, 1121–22 (11th Cir. 1991).

54. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Gene Shreve, Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 389 (1983).

The contempt procedure also offers a broader range of monetary recoveries.<sup>55</sup> In addition to requiring the contemnor to compensate the other party for losses sustained as a result of the non-compliance—the traditional remedy for a breach of contract—the court can also require the contemnor to disgorge its profits, which is typically not available in a contract action.<sup>56</sup> Disgorgement can be a valuable remedy where the party seeking enforcement is unable to prove, with sufficient certainty, actual damages arising from the non-compliance.

The court can also impose a monetary sanction or fine against the contemnor to coerce it to comply with the order.<sup>57</sup> In coercing the parties to a consent decree to comply with settlement terms, a court can assess per diem fines, and even incarcerate a contemnor, so long as the primary purpose of these measures is to produce compliance with the order, and not to punish the contemnor.<sup>58</sup>

Lastly, the movant can recover attorneys' fees in a contempt proceeding.<sup>59</sup> Attorneys' fees are viewed as a cost that the movant is deemed to have incurred as a result of defendant's non-compliance with the

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55. *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004); *John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 554 (3d Cir. 2003) ("District courts hearing civil contempt proceedings are afforded broad discretion to fashion a sanction that will achieve full remedial relief." (citing *McComb*, 336 U.S. at 193–94)).

56. *FTC v. Trudeau*, 579 F.3d 754, 771–72 (7th Cir. 2009) (holding that a defendant's profits can be a proper measure for sanctions in contempt proceedings); *Abbott Labs. v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1242 (11th Cir. 2000) ("Where a plaintiff's harm is difficult to calculate, the court may disgorge the party in contempt of any profits it may have received." (citing *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1487–88 (11th Cir. 1987))).

57. *See, e.g.*, *United States v. Dowell*, 257 F.3d 694, 699–700 (7th Cir. 2001); *Robin Woods Inc. v. Woods*, 28 F.3d 396, 400 (3d Cir. 1994) ("Sanctions for civil contempt serve two purposes: 'to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience.'" (quoting *McDonald's Corp. v. Victory Invs.*, 727 F.2d 82, 87 (3d Cir. 1984))); *United States v. Pozsgai*, 999 F.2d 719, 735 (3d Cir. 1993).

58. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828–29 (1994); *Connolly v. J.T. Ventures*, 851 F.2d 930, 932–34 (7th Cir. 1988). Essentially, if confinement will end, or per diem fines will cease, as soon as the contemnor obeys the order, then the measures are deemed non-punitive and permissible. *Bagwell*, 512 U.S. at 828.

59. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 78 (1st Cir. 2002)); *Abbott Labs.*, 218 F.3d at 1242 (citing *Rickard v. Auto Publisher, Inc.*, 735 F.2d 450, 458 (11th Cir. 1984)).

court order.<sup>60</sup> Attorneys' fees are not recoverable in breach of contract or other ordinary civil actions.<sup>61</sup>

*C. Deciding Whether the Availability of Contempt is Important*

The remedy of contempt is ineffectual where the monetary terms of the settlement are concerned. Financial inability to pay a court-ordered obligation is a defense to contempt.<sup>62</sup> Consequently, access to a court's contempt powers is of little value when there is a settlement payment default.<sup>63</sup>

When it comes to material non-monetary obligations, however, the availability of contempt has significant benefits.<sup>64</sup> Settlement agreements often include significant obligations besides those mandating the payment of money. For example, a settlement agreement in a patent infringement action can contain provisions obligating the defendant to redesign its product so as to obviate the disputed infringement.<sup>65</sup> Also, settlements in employment-related litigation can include obligations to promote the

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60. *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1063 (2d Cir. 1995); *see also Robin Woods Inc.*, 28 F.3d at 399 (noting that remedial contempt awards should ensure that the innocent party receive the full benefits of performance, including requiring the contemnor to pay for the movant's attorneys' fees incurred to secure compliance with the court order); *Rickard*, 735 F.2d at 458.

61. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (holding that awarding attorneys' fees is at the court's discretion, in the absence of legislative authorization).

62. *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995) ("[A] party's complete inability, due to poverty or insolvency, to comply with an order to pay court-imposed monetary sanctions is a defense to a charge of civil contempt."); *SEC v. AMX Int'l, Inc.*, 7 F.3d 71, 73 (5th Cir. 1993) (per curiam) (citing *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984)); *see Badgley v. Santacrocce*, 800 F.2d 33, 36 (2d Cir. 1986) (explaining that a party may defend against contempt by showing that his compliance is "factually impossible" (citing *United States v. Rylander*, 460 U.S. 752, 757, (1983))).

63. There is some benefit to having a monetary obligation reflected in a consent judgment, instead of a settlement agreement. If there is a default, the judgment creditor can immediately seek to enforce the judgment against the assets of the judgment debtor using the ordinary judgment enforcement procedures available under the Federal Rules of Civil Procedure, instead of initiating a breach of contract action. *See* FED. R. CIV. P. 55 (laying out the procedure by which default judgment can be entered). On the other hand, in a settlement agreement, the parties can simply include a provision providing for the ex parte entry of a consent judgment in the event of a payment default. *See, e.g., Limbright v. Hofmeister*, 566 F.3d 672, 673 (6th Cir. 2009) (reaching a settlement agreement for \$950,000, provided that upon default the district court would enter a consent judgment for \$1.3 million, less the amount of any prior payments). This procedure makes the first step of the two-step enforcement process a simple ministerial act that can quickly be accomplished.

64. *See SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) ("A consent decree offers more security to the parties than a settlement agreement where 'the only penalty for failure to abide by the agreement is another suit.'" (quoting *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) (en banc) (Rubin, J., concurring) (per curiam))).

65. *See Nat'l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1577-78 (Fed. Cir. 1997) (agreeing that a redesign of the product would not infringe any of the plaintiff's rights).

employee or to evaluate the employee's future job performance in accordance with specific criteria.<sup>66</sup>

Further, settlements in trademark or trade-dress disputes frequently involve commitments to alter product packaging or labeling, or to cease using certain marks.<sup>67</sup> In false advertising litigation, parties commonly agree to refrain from making certain advertising claims or to add qualifying disclosures to the claims.<sup>68</sup> Settlements between business competitors often involve promises not to hire or solicit each other's employees, or to refrain from certain business practices.<sup>69</sup> If a business contract dispute is resolved amicably, the parties might include commitments for preferential treatment of the other party.<sup>70</sup>

The types of long-lasting, non-monetary obligations that can be put into a settlement agreement are limited only by the creativity of the parties' counsel and the desires of the settling parties. Therefore, serious consideration should be given to using a consent decree for these types of obligations. Litigants should also consider using a consent decree for material non-monetary obligations, but keeping the monetary terms, for which the decree will be of limited use, in the settlement agreement.

#### *D. Why the Consent Decree Route Might Be Acceptable to the Obligor*

Although the party saddled with significant obligations under a settlement would obviously prefer that the obligations be memorialized in a simple contract as opposed to a court order, agreeing to a consent decree might also be in the obligor's interest. The obligor can leverage his willingness to agree to a consent decree in order to reduce his monetary obligations to the other party. Because settling parties are frequently confident that they will be able to discharge the non-monetary obligations

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66. *See* *Dillard v. Starcon Int'l, Inc.*, 483 F.3d 502, 505 (7th Cir. 2007) (illustrating how provisions such as the reinstatement of the employee and specific procedures for training and testing employee were being negotiated for inclusion in the settlement agreement); *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 39 (2d Cir. 1996) (describing a settlement agreement that provided the procedures used for appointing and granting tenure to faculty).

67. *See* *Bear U.S.A., Inc. v. Kim*, 71 F. Supp. 2d 237, 241 (S.D.N.Y. 1999) (consenting to an injunction to prohibit the defendant from using "any colorable or confusingly similar imitation of [plaintiff's mark]"), *aff'd*, 216 F.3d 1071 (2d Cir. 2000).

68. *See* *Dyson, Inc. v. Oreck Corp.*, 647 F. Supp. 2d 631, 633 (E.D. La. 2009) (agreeing to refrain from certain advertising claims such as assertions "that either product is unsanitary, dirty, [or] unhealthy").

69. *Ranco Indus. Prods. Corp. v. Dunlap*, 776 F.2d 1135, 1137 (3d Cir. 1985).

70. *Woodcock Bros. Transp. Grp. v. Transp. Res., Inc.*, No. 01 C 8067, 2003 WL 1873928, at \*1 (N.D. Ill. Apr. 14, 2003) (requiring defendant to designate plaintiff as the preferred carrier for certain freight).

they undertake—otherwise, why undertake them—they may not mind facing greater adverse consequences in the event of a breach.

There are other considerations that can persuade an obligor to agree to a consent decree. First, the standard of proof to compel enforcement is higher. To prevail on an application for civil contempt, the movant bears a higher burden—the “clear and convincing evidence” standard—rather than the “preponderance of the evidence” standard that applies to contract actions.<sup>71</sup>

Second, the party seeking a contempt order must show that the adversary breached a provision that is “within the four corners” of the consent decree.<sup>72</sup> That is, the alleged noncompliance must circumvent an express provision of the decree.<sup>73</sup> In contrast, breach of contract actions can be predicated on the implied terms of a contract, such as obligations of good faith and fair dealing or those based on prior course of dealing or industry custom and usage.<sup>74</sup>

Third, an application for contempt must be based on an obligation that is clear and unequivocal.<sup>75</sup> Ambiguity in a consent decree will doom a

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71. *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004); *King v. Allied Vision, Inc.*, 65 F.3d 1051, 1058 (2d Cir. 1995); *Robin Woods, Inc. v. Woods*, 28 F.3d 396, 399 (3d Cir. 1994). Although there is a higher burden of proof associated with contempt, proof of willfulness is not required. *Robin Woods*, 28 F.3d at 399 (citing *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148–49 (3d Cir. 1994)); *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984). Nor is good faith or reliance on the advice of counsel a defense. *Star Fin. Servs., Inc. v. AASTAR Mortg. Corp.*, 89 F.3d 5, 13 (1st Cir. 1996).

72. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 233 (1975); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (“Courts must find the meaning of a consent decree ‘within its four corners’ . . . .” (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971))); *Harley-Davidson, Inc.*, 19 F.3d at 148; *Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1028 (2d Cir. 1993) (“[A] consent decree ‘must be discerned within its four corners’ . . . .” (quoting *Armour*, 402 U.S. at 682)).

73. *See Drywall Tapers, Local 1974 v. Local 530 of Operative Plasters*, 889 F.2d 389, 395 (2d Cir. 1989) (holding that a consent order is unambiguous if the forbidden acts could be ascertained from four corners of the order).

74. *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 127 (2d Cir. 2004) (explaining that “the implied warranty of good faith [and fair dealing] is read into all contracts” (citing *Celentano v. Oaks Condo. Ass'n*, 830 A.2d 164, 188 (Conn. 2003))); *see Baer v. Chase*, 392 F.3d 609, 619–20 (3d Cir. 2004) (describing how courts can imply contractual terms based on commercial practice, custom or usage).

75. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995).

motion for contempt.<sup>76</sup> A breach of contract action, however, can be premised on an ambiguous contractual provision.<sup>77</sup>

These considerations might persuade a settling defendant to agree to a consent decree, particularly when doing so will inure to its benefit when haggling over the monetary provisions.

## II. A CONSENT DECREE IS A PUBLIC DOCUMENT

Including settlement terms in a consent decree will preclude confidentiality because they will become part of a public document that is available for inspection. The confidentiality of a private agreement, however, will be lost only if and when enforcement of the agreement is sought, and even then, the parties may be able to protect the financial terms of settlement.

### A. *Common Law and First Amendment Rights of Access to Consent Decrees*

Courts have recognized the right of public access to civil proceedings under both common law and the First Amendment.<sup>78</sup> Public access to civil proceedings is not limited to lawsuits that contain specific issues of public interest. Rather, the right applies to all civil actions on the theory that broad public access to civil proceedings serves strong societal interests in promoting judicial and lawyer accountability and deterring court and advocate misconduct.<sup>79</sup> Unfettered access to court proceedings promotes

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76. See *John T. ex rel. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003); *Gates*, 98 F.3d at 468 (“If an injunction does not clearly describe prohibited or required conduct, it is not enforceable by contempt.”); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993) (holding that although it is appropriate to consider extrinsic evidence when the terms of a settlement agreement are unclear, the same ambiguity will defeat a contempt motion); see also *Ferrell v. Pierce*, 785 F.2d 1372, 1383 (7th Cir. 1986) (per curiam); *N. Shore Labs. Corp. v. Cohen*, 721 F.2d 514, 521 (5th Cir. 1983).

77. See, e.g., *Nadherny v. Roseland Prop. Co.*, 390 F.3d 44, 48 (1st Cir. 2004) (“If a contract is ambiguous, the meaning of the ambiguous terms often, but not always, presents a question of fact for a jury.”); *First Bank & Trust v. Firststar Info. Servs., Corp.*, 276 F.3d 317, 322 (7th Cir. 2001) (same); *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992) (same) (citations omitted). As the *Nadherny* court observed, ambiguity in a contract will merely preclude summary adjudication of the dispute. 390 F.3d at 48.

78. See *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (explaining that denial of access must be necessitated by a compelling government interest); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (holding that access to civil trials ensures a “fairer administration of justice”). The Supreme Court has addressed the question of a First Amendment right only in the criminal context. See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508–10 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). But cf. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing a common law right of access to civil proceedings).

79. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *B.H. v. McDonald*, 49

“public respect for the judicial process”<sup>80</sup> and instills public confidence in the integrity and conscientiousness of court proceedings.<sup>81</sup>

A necessary corollary to these rights is that the public should have the opportunity to inspect various court papers, such as motion papers, transcripts, orders or docket sheets, which are relevant to understanding what has transpired in a civil case.<sup>82</sup> The right of access to civil proceedings and accompanying court papers is only worthwhile if members of the public can ascertain the material aspects of the case. The public and press should be able to monitor the adjudication and disposition of cases by reviewing the court files. Accordingly, there is a strong presumption of access to court papers filed in a civil case that can only be overcome by “a compelling interest in secrecy, as in the case of trade secrets, the identity of informers, [or] the privacy of children . . . .”<sup>83</sup>

Therefore, when settlement terms are incorporated into a consent decree, those terms irretrievably enter the public domain.<sup>84</sup> The public has a right to know about the entry of consent decrees, as well as their modification, and their enforcement through contempt proceedings.<sup>85</sup> Consent decrees are highly relevant to the performance of the judicial function, play a central role in the exercise of Article III judicial power, and have

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F.3d 294, 301 (7th Cir. 1995); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (citation omitted).

80. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

81. *Amodeo*, 71 F.3d at 1048; *see Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343–44 (3d Cir. 1986) (recognizing a strong presumption in favor of public access); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (positing that “[t]he public’s right of access to judicial records [is] ‘fundamental to [democracy]’” and thus insures “quality, honesty and respect for our legal system”).

82. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 85, 92 (2d Cir. 2004) (analyzing case law to determine if the public and press have a right to inspect civil case docket sheets); *In re Providence Journal Co.*, 293 F.3d 1, 10–13 (1st Cir. 2002) (allowing access to memoranda of law by rejecting a blanket non-filing policy in the district court); *Phx. Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 948 (9th Cir. 1998) (asserting that access to criminal case transcripts increases the fundamental fairness of a criminal trial); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (stating that a delay in access to court documents is improper).

83. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (citing *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)); *see Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1999); *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)); *see also Chi. Tribune Co. v. Bridgestone/Firestone Inc.*, 263 F.3d 1304, 1314–15 (11th Cir. 2001) (noting that, upon a finding that court papers include trade secrets, “the district court must balance [the secret holder’s] interest in keeping the information confidential against . . . the public’s legitimate interest” in the matter).

84. *Jessup*, 277 F.3d at 929; *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

85. *Nat’l Children’s Ctr., Inc.*, 98 F.3d at 1409; *see B.H. v. McDonald*, 49 F.3d 294, 300 (7th Cir. 1995) (recognizing that when parties utilize the judicial process to interpret and enforce settlements, they are no longer entitled to confidentiality).

significant informational value to those monitoring the federal courts.<sup>86</sup> They are no less critical to understanding a civil proceeding than summary judgment motion papers, to which a strong presumption of access applies.<sup>87</sup>

### B. *Partial Confidentiality*

The loss of confidentiality that comes with using a consent decree is not an all-or-nothing proposition. Parties may include only certain settlement terms in a consent decree, and memorialize the rest of the terms in a private settlement agreement. This will permit the parties to use a consent decree for the significant non-monetary obligations of a settlement while keeping the monetary terms secret.<sup>88</sup>

It is usually the financial terms of a settlement that the parties are most concerned about keeping confidential. This observation is plainly evident from a research study conducted by the Federal Judicial Center (“the Center”) on the practice of sealing settlement agreements filed in federal court.<sup>89</sup> The Center examined close to 290,000 cases that were terminated in 2001 and 2002 across 52 federal districts.<sup>90</sup> The study concluded that the practice of sealing a filed settlement agreement was rare, occurring in less than half of one percent of the actions reviewed.<sup>91</sup> Significantly, in most of those instances, the only part of the agreement sealed was the settlement amount.<sup>92</sup>

It is not surprising that parties are most concerned about the confidentiality of the amount of money paid to settle a case. Defendants want to keep the amounts secret to avoid appearing like an “easy mark” for

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86. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (citing *Amodeo*, 71 F.3d at 1048).

87. *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir. 1988); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1309–10 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982). By contrast, documents relating to discovery motions are deemed to have very little protection under the First Amendment or common law. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12–13 (1st Cir. 1986).

88. *See Janus Films, Inc. v. Miller*, 801 F.2d 578, 584–85 (2d Cir. 1986) (noting that allowing the parties not to make full disclosure of the terms in the side agreements encourages the consummation of some settlements).

89. *See generally* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439 (2006).

90. *See id.* at 444 (explaining the research method employed by the Center). The author notes that settlement agreements are typically not filed with the court, except in cases where the court is asked to enforce the agreement or is required to approve the settlement, such as cases involving minors, class actions or claims under the Fair Labor Standards Act. *Id.* at 459.

91. *Id.* at 452.

92. *Id.* at 439, 452, 460.

more lawsuits.<sup>93</sup> Plaintiffs may also favor confidentiality so that they can extract greater monetary consideration in exchange for their commitment to secrecy.<sup>94</sup> Parties using a consent decree are able to prevent public disclosure of settlement amounts by not incorporating those obligations into the consent decree and keeping them in a separate settlement agreement.

### C. *The Confidentiality of Settlement Agreements*

A settlement agreement will be afforded whatever confidentiality the parties desire.<sup>95</sup> There is no First Amendment or common law right to access confidential settlement agreements.<sup>96</sup> Settlement agreements are also difficult for parties to obtain in discovery, requiring that a particularized showing of relevance be made.<sup>97</sup>

Conversely, a few courts have concluded that the confidentiality of a settlement agreement is forfeited when the parties seek to have it enforced in court.<sup>98</sup> Because the agreement itself is now the subject of litigation, these courts reason that the agreement must be opened to the public.<sup>99</sup>

93. *Herrnreiter v. Chi. Hous. Auth.*, 281 F.3d 634, 637 (7th Cir. 2002); Fital, *supra* note 21, at 504.

94. Fital, *supra* note 21, at 504, 527; Anne Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 117 (1990).

95. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004) (“There is no established presumption of access . . . with respect to the information contained in [settlement agreements].”) (citing *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 857 (2d Cir. 1998); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993)); *see also Janus Films, Inc. v. Miller*, 801 F.2d 578, 585 (2d Cir. 1986) (clarifying that “[i]f the parties to a dispute . . . are reluctant to disclose the terms of their agreement . . . they remain free to forgo entry of a judgment and settle their litigation by a withdrawal of action, keeping confidential all aspects of their settlement”).

96. *See Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211–12 (9th Cir. 2002) (discussing that the right of access issue does not apply to confidential settlement information, and courts must determine if a protective order is needed based on a “good cause” analysis).

97. *See Multi-Tech Sys., Inc. v. Dialpad.com, Inc.*, No. 00-1540 ADM/RLE, 2002 WL 27141, at \*2 (D. Minn. Jan. 8, 2002) (“When the requested discovery concerns a confidential settlement agreement, the majority of courts considering the issue have required the requesting party to meet a heightened standard . . . .” (quoting *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72, 76 (S.D. W. Va. 1996))); *see also Hear-Wear Techs., LLC v. Oticon, Inc.*, No. 07-CV-212 CVE/SAJ, 2008 WL 3388455, at \*2 (N.D. Okla. Aug. 8, 2008) (protecting the settlement agreement even when a case settles after a court ordered settlement conference).

98. *Herrnreiter v. Chi. Hous. Auth.*, 281 F.3d 634, 636 (7th Cir. 2002) (“A settlement agreement is a contract, and when parties to a contract ask a court to interpret and enforce their agreement, the contract enters the record of the case and thus becomes available to the public . . . .” (citing *Union Oil Co. v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002))); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) (the confidentiality afforded a settlement agreement by the parties is forfeited

The legal principle enunciated in these cases is overbroad and should be refined. A motion to enforce a settlement agreement should cause the provisions for which enforcement is sought to enter the public domain, as well as any provisions relevant to the arguments of the parties or the reasoning of the court; however, there is no reason why settlement terms that are irrelevant to the enforcement issues at bar should become public knowledge simply because enforcement of some aspects of the agreement is sought. Parties to a breach of contract action are able to seal or redact portions of the contract that are not relevant to the dispute.<sup>100</sup> The result should be no different when a settlement agreement is involved.

For example, if the parties are contesting whether the defendant has complied with her settlement agreement obligation to modify a product's trade dress, what difference does it make that the defendant paid \$675,000 to settle the claim? The fact that most of the sealed settlement agreements that have been filed in federal courts are sealed only in part indicates that courts are willing to permit parties to seal portions of settlement agreements deemed irrelevant to an enforcement motion.<sup>101</sup> Therefore, an enforcement action should not automatically waive all confidentiality over the agreement.

Regardless, a settlement agreement is the route to take if the parties would like to keep the settlement terms confidential. If the parties are only concerned with keeping the settlement amount confidential, they can best protect that from disclosure by not including that term in the consent decree.

### III. A CONSENT DECREE ENSURES THE RIGHT TO RETURN TO FEDERAL COURT

Another distinction between consent decrees and settlement agreements pertains to the parties' ability to return to federal court to enforce the settlement terms. Because a consent decree is an order of the court, the

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when they seek judicial enforcement).

99. *Herrnreiter*, 281 F.3d at 637. As Judge Easterbrook remarked, parties may be concerned with disclosure of settlement payments, but they are "not nearly on a par with national security and trade secret information." *Id.*

100. *See, e.g.,* *Converdyn v. Blue*, No. 06-CV-00848-REB-CBS, 2007 WL 4570556, at \*1 (D. Colo. Dec. 26, 2007) (listing the various motions that were filed under seal or redacted).

101. The Federal Judicial Center, in its study, noted that many of the sealed settlement agreements had been filed because a party had sought to enforce the agreement. Reagan, *supra* note 89, at 459 (citing Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 798–800 (2004)).

right to return to federal court is assured under the doctrine of ancillary enforcement jurisdiction.<sup>102</sup> Meanwhile, the enforcement of settlement agreements is typically relegated to state court, in the absence of diversity of citizenship between the parties, where all other contractual disputes must be adjudicated.<sup>103</sup>

Parties may include a jurisdictional retention provision in a settlement agreement in an effort to preserve their ability to return to federal court to resolve settlement disputes.<sup>104</sup> Some courts do not honor those provisions, while others have sought to discourage them by imposing time restrictions or language conditions.<sup>105</sup> Regardless, the rationale for using these provisions is flawed and they should not be given effect.

#### A. *The Settling Parties' Natural Desire to Preserve Jurisdiction*

Parties seeking to enforce settlements often want to return to the court where the action was originally tried. Those anxious to preserve the fruits of an intensely-negotiated settlement are inclined to presume that the trial court will be predisposed to enforce a settlement that the court viewed as a welcome reduction in its crowded docket. That predisposition will be stronger where the court has invested time in producing the settlement. For these reasons, appellate courts have commented that trial courts are likely to be biased in favor of finding that a binding settlement exists.<sup>106</sup>

This “separation anxiety” is typically not presented in settlements involving a single lump-sum settlement payment. Those settlements usually require that the payment be made before the dismissal papers are

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102. See *Harbor Venture, Inc. v. Nichols*, 934 F. Supp. 322, 323–24 (E.D. Mo. 1996) (explaining that if the order incorporates the terms of the settlement agreement, the court has ancillary jurisdiction); see also *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1538–39 (3d Cir. 1984) (illuminating a federal court’s power to enforce consent decrees as long as the original order came “within the general scope of the case made by the pleadings” and was issued under the court’s valid jurisdictional powers (quoting *Pac. R.R. v. Ketchum*, 101 U.S. 289, 297 (1879))).

103. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381–82 (1994) (holding that a federal district court lacks jurisdiction over a breach-of-contract claim absent some independent basis).

104. *Id.*; cf. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993–94 (8th Cir. 2003) (failing to view the court’s retained enforcement jurisdiction on a settlement agreement as a judicial “*imprimatur*” on the settlement contract).

105. See *Lopez Morales v. Hosp. Hermanos Melendez Inc.*, 460 F. Supp. 2d 288, 294 (D.P.R. 2006) (holding a judgment that “does not explicitly state that [the court] will honor the parties’ request that it retain jurisdiction over the settlement agreement” is not clear enough); *Purcell v. Town of Cape Vincent*, 281 F. Supp. 2d 469, 474 (N.D.N.Y. 2003) (elucidating “that in some circumstances, the words, context, or subsequent order of the federal court might show that retention of jurisdiction was not intended to be exclusive”).

106. *Lynch, Inc. v. Samatamason Inc.*, 279 F.3d 487, 490 (7th Cir. 2002) (“[T]rial judges have a natural desire to see cases settled and off their docket, which may shape their recollection of settlement conferences.” (citing *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001))).

filed and the releases become effective.<sup>107</sup> Thus, there is little reason to be concerned in these circumstances about being able to return to the same judge after the case is dismissed.

Settlements involving multiple payments over time are different in that the case will be dismissed before all the payments are made. The benefits of having the same judge are mostly illusory in these settlements as well. An installment payment default is a simple breach of contract, in which familiarity with the parties or the underlying issues in the settled case are not likely to facilitate prompt resolution.<sup>108</sup> A state court judge that is new to the scene is unlikely to be more sympathetic to a defaulting party than the previous judge. A settlement payment schedule, moreover, is like a standard installment contract or note, which is typically enforced by state court judges and does not implicate any issues within the expertise of federal judges.<sup>109</sup>

It is mostly in the interpretation and enforcement of the non-monetary terms of the settlement that the trial court's familiarity with the parties and settled claims will be beneficial.<sup>110</sup> Even if some of that familiarity has dissipated by the time the settlement dispute develops,<sup>111</sup> the federal judge is still better situated to handle the case than a state court judge completely unfamiliar with the parties and issues.

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107. See, e.g., *Flores v. Jewels Mktg. & Agribusiness*, No. CIV F 07-334 AWI DLB, 2010 WL 341409, at \*1 (E.D. Cal. Jan. 22, 2010) (re-opening a case closed upon settlement due to failure of defendant to pay the agreed upon settlement amount: "Under the settlement agreement, dismissal with prejudice was conditioned upon a receipt of settlement funds.").

108. See *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 592, 599–600 (D. Del. 2008) (declining to be swayed by equitable considerations of judicial economy and convenience in refusing to exercise supplemental jurisdiction over a breach of contract claim); see also *Downey v. Clauder*, 30 F.3d 681, 687 (6th Cir. 1994) (holding that district courts do not have an inherent authority to enforce settlement agreements, and that a claim regarding breach of contract requires its own basis for jurisdiction (citing *Kokkonen*, 511 U.S. at 380)). But see *Kasperek v. City Wire Works, Inc.*, No. 03-CV-3986(RML), 2009 WL 691945, at \*2 (E.D.N.Y. Mar. 12, 2009) (maintaining that when the order specifically retains jurisdiction, "it would be irresponsible to burden another court with [the] dispute").

109. Cf. *City of Springfield v. Comcast Cable Commc'ns, Inc.*, 670 F. Supp. 2d 100, 106 (D. Mass. 2009) (recognizing that the state court judge was fully competent to adjudicate claims arising out of the settlement agreement).

110. See *supra* text accompanying notes 64–70 (describing the types of non-monetary obligations that can be memorialized in a settlement agreement).

111. *Lynch*, 279 F.3d at 490–91 (remarking that the scheduling of an evidentiary hearing concerning what transpired at a settlement conference held many months ago would probably not produce a reliable record, since "memory is fallible, even of events only two weeks in the past" (citing *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001)).

*B. The Non-Statutory Doctrine of Ancillary Jurisdiction*

Whether the parties can return to the same judge when a settlement dispute arises is determined by the common law doctrine of ancillary jurisdiction. Historically, ancillary jurisdiction had two components: (1) allowing a federal court to adjudicate factually interdependent claims where only one of those claims comes within the subject matter jurisdiction of the court;<sup>112</sup> and (2) enabling a federal court to “manage its proceedings, vindicate its authority, and effectuate its decrees . . . .”<sup>113</sup> The first branch, what I will refer to as “ancillary claims jurisdiction,” concerns situations where a defendant or a non-party seeks to assert claims authorized under the liberal joinder provisions of the Federal Rules of Civil Procedure, such as: counterclaims against additional parties, impleader, joinder, and intervention.<sup>114</sup> The doctrine of ancillary claims jurisdiction arose because courts needed jurisdictional guidance where the use of these provisions destroyed the complete diversity required to maintain a state law action in federal court.<sup>115</sup>

The doctrine of ancillary claims jurisdiction was combined with the related pendant jurisdiction doctrine and codified as supplemental jurisdiction in 1990.<sup>116</sup> The statute expressly recognized the jurisdiction of federal courts over interrelated claims in an action, including claims that involve the joinder or intervention of additional parties.<sup>117</sup> The statute does allow federal courts to decline to exercise that jurisdiction at their discretion.<sup>118</sup>

A second aspect of ancillary jurisdiction, sometimes referred to as “ancillary enforcement jurisdiction,” is the power of a federal court to enforce its own orders in separate or subsequent proceedings.<sup>119</sup> This

112. *Kokkonen*, 511 U.S. at 379 (1994) (citing *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 491 n.1 (1974); *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926)).

113. *Id.* at 379–80 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *United States v. Hudson*, 7 Cranch 32, 34 (1812)).

114. FED. R. CIV. P. 13, 14, 19, 20, 24 (2009).

115. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978), *superseded by statute*, 28 U.S.C. § 1367(b); *Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1215–16 (10th Cir. 1992); *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 810 (2d Cir. 1979). *See generally* Richard A. Matasar, *A Pendant and Ancillary Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 114–15, 189 (1983).

116. Judicial Improvements Act of 1990 § 310(c), Pub. L. No. 101-650, 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367 (2006)). Pendant jurisdiction generally involves a situation where federal and non-federal claims are asserted in the same lawsuit. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

117. 28 U.S.C. § 1367(a) (2006).

118. For example, a court may decline to exercise supplemental jurisdiction over a claim that raises a novel or complex issue of state law. *Id.* § 1367(c)(1); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 926–27 (9th Cir. 2001).

119. *See Fed. Sav. & Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1040–42

doctrine has been relied on by federal courts to support the exercise of jurisdiction over proceedings to enforce a federal court judgment,<sup>120</sup> or to seek relief from that judgment.<sup>121</sup>

Ancillary enforcement jurisdiction, in contrast to ancillary claims jurisdiction, was not subsumed within § 1367 of the U.S. Code.<sup>122</sup> This is evident from the statutory text, which refers to asserting jurisdiction over separate but interrelated claims in a single case or controversy, but makes no mention of asserting jurisdiction over subsequent proceedings.<sup>123</sup>

The Supreme Court's 1994 decision in *Kokkonen v. Guardian Life Insurance Co. of America*,<sup>124</sup> which post-dates the enactment of the supplemental jurisdiction statute, established that federal courts do not have the inherent power to resolve post-dismissal settlement disputes under

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(9th Cir. 2004) (holding that an attorneys' fees dispute was not collateral to the main action; therefore, the federal court could not establish ancillary jurisdiction); *Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 104–05 (2d Cir. 2001) (referring to the "enforcement branch of ancillary jurisdiction" as encompassing subsequent proceedings to enforce or protect a judgment).

120. See *Sandlin*, 972 F.2d at 1216.

121. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990).

122. *Myers v. Richland County*, 429 F.3d 740, 747 (8th Cir. 2005) ("[A]ncillary enforcement jurisdiction is a viable doctrine that was not codified in § 1367."); *Hudson v. Coleman*, 347 F.3d 138, 142 (6th Cir. 2003); see *Fafel v. Dipaola*, 399 F.3d 403, 412 (1st Cir. 2005) (illustrating the justification given for ancillary enforcement jurisdiction); *Ferrante*, 364 F.3d at 1040–42 (distinguishing ancillary jurisdiction over post-judgment proceedings from supplemental jurisdiction under § 1367, which requires the claims to be related); *Epperson*, 242 F.3d at 108 (analyzing the "enforcement branch of ancillary jurisdiction" without regard to § 1367); see also 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3523.2 (3d ed. 2008) ("It seems clear that § 1367 does not apply to this form of jurisdiction" and that the doctrine is "still governed by case law").

123. *Ortolf v. Silver Bar Mines, Inc.*, 111 F.3d 85, 87 (9th Cir. 1997) (explaining that the statutory language "require[s] that supplemental jurisdiction be exercised [on claims] in the same case, not in a separate or subsequent case"); *Brummer v. IASIS Healthcare of Ariz., Inc.*, No. CV-07-1223-PHX-DGC, 2007 WL 2462174, at \*1 (D. Ariz. Aug. 24, 2007) (reiterating that the statutory language limits the exercise of supplemental jurisdiction to the same case); *Int'l Union of Painters Dist. Council No. 78 v. Old Republic Surety Co.*, No. 8:06-CV-2222-T-24 EAJ, 2007 WL 1363135, at \*1 (M.D. Fla. May 8, 2007) (providing for supplemental jurisdiction over related claims in a single civil case); *Dimitri v. Canada, Inc.*, No. Civ.A. 03-3154, 2003 WL 22948345, at \*2 (E.D. La. Dec. 9, 2003) ("Section 1367 appears to contemplate related claims asserted in a single civil action."); *Keene v. Auto Owners Ins. Co.*, 78 F. Supp. 2d 1270, 1274 (S.D. Ala. 1999) ("[S]ection 1367 applies only to claims within a single action and not to claims within related actions . . ."); *Sebring Homes Corp. v. T.R. Arnold & Assocs., Inc.*, 927 F. Supp. 1098, 1101–02 (N.D. Ind. 1995) ("Section 1367 provides no original jurisdiction over a separate, but related suit . . ."); *USA One BV v. Delmont Fire Protective Serv., Inc.*, No. Civ. A. 93-1320, 1993 WL 140514, at \*1 (E.D. Pa. May 3, 1993) (holding the statutory language "clearly contemplates supplemental jurisdiction arising only from claims within a single action"); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 106.05[9][a] (3d ed. 2010) (noting that § 1367 fails to speak to the issue of jurisdiction over post-judgment proceedings).

124. 511 U.S. 375 (1994).

principles of ancillary jurisdiction.<sup>125</sup> Significantly, the decision makes no reference whatsoever to § 1367 and instead relies on pre-enactment case law pertaining to the doctrine of ancillary jurisdiction. If the Supreme Court viewed the doctrine of ancillary enforcement jurisdiction as subsumed by § 1367, it would have made at least some mention of the statute and its language in the decision.<sup>126</sup>

A few years after *Kokkonen*, the Supreme Court considered whether a federal court could exercise ancillary jurisdiction over an attempt to enforce a federal judgment against a non-party under a “piercing the corporate veil” theory.<sup>127</sup> In concluding that a federal court lacked jurisdiction, the Court again made no significant mention of § 1367.<sup>128</sup>

Indeed, the Court drew a sharp distinction between ancillary claims jurisdiction and ancillary enforcement jurisdiction: “In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.”<sup>129</sup> The Court held that ancillary jurisdiction could not be asserted over claims in a subsequent proceeding on the ground that they are factually interdependent with claims brought in an earlier federal lawsuit.<sup>130</sup> Once the original suit is concluded, the Court explained, “the ability to resolve simultaneously factually intertwined issues vanishe[s].”<sup>131</sup>

125. *Id.* at 380–81.

126. *See* *Myers v. Richland County*, 429 F.3d 740, 746 (8th Cir. 2005) (noting that the Supreme Court in *Kokkonen* ignored § 1367, which indicates that the ancillary enforcement jurisdiction doctrine is not governed by that statute).

127. *Peacock v. Thomas*, 516 U.S. 349, 352 (1996).

128. The only reference to the statute is a footnote remark that “Congress codified *much* of the common law doctrine of ancillary jurisdiction.” *Id.* at 354 & n.5 (emphasis added). *See* MOORE ET AL., *supra* note 123, § 106.05[9][c] (the Court’s failure to give meaningful attention to § 1367 in the *Peacock* decision strongly suggests that the doctrine of ancillary proceeding jurisdiction survives as a non-statutory concept). Some federal courts have exercised what they called supplemental jurisdiction over post-judgment proceedings without careful regard as to whether the exercise comports with the language of § 1367. *See* *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 335 (2d Cir. 2006) (rejecting but recognizing that some district courts have refused to exercise supplemental jurisdiction for claims related to the initial claim); *Kalyawongsa v. Moffett*, 105 F.3d 283, 286–88 (6th Cir. 1997) (finding that fee arrangements are contracts subject to state law but nevertheless allowing federal courts to exercise jurisdiction over attorney fee disputes related to the main issue); *Vukadinovich v. McCarthy*, 59 F.3d 58, 62 (7th Cir. 1995) (“[T]he party holding the judgment . . . ought to be able to [enforce the judgment] without having to start a new lawsuit in a different court system.”).

129. *Peacock*, 516 U.S. at 355; *Nat’l Presto Indus. Inc. v. Dazey Corp.*, 107 F.3d 1576, 1581 (Fed. Cir. 1997) (stating that entry of judgment terminates the basis for jurisdiction over factually interdependent claims).

130. *Peacock*, 516 U.S. at 355.

131. *Id.*

*Peacock v. Thomas*<sup>132</sup> makes it clear that a federal court cannot assert ancillary jurisdiction over post-dismissal proceedings based on the notion that those claims are factually interrelated with the claims in the dismissed suit.<sup>133</sup> Ancillary claims jurisdiction requires an anchor to which the ancillary claims can attach, and when the initial proceeding has been dismissed, the anchor is gone.<sup>134</sup>

The doctrine of ancillary enforcement jurisdiction, being reflected in federal common law and not in § 1367, has two implications.<sup>135</sup> First, in the enforcement context, there is no need to consider the statutory language of § 1367; specifically the degree of factual or legal inter-relatedness between the claims in the original, settled case and the application to enforce the consent decree. Second, the court should not be able to exercise the discretion conferred by § 1367 that would allow the court to decline to entertain an action to enforce a consent decree it has entered.<sup>136</sup>

### C. *Kokkonen and the False Correlation of Consent Decrees with Settlement Agreements*

In *Kokkonen*, the Supreme Court held that jurisdiction over settlement agreements is “in no way essential to the conduct of federal-court business” and thus the doctrine of ancillary enforcement jurisdiction could not be used to adjudicate claims alleging noncompliance with a private settlement

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132. 516 U.S. 349 (1996).

133. *Id.* at 355.

134. Some commentators have opined that ancillary jurisdiction can be asserted over post-dismissal proceedings where the claims are factually interrelated to the claims in the dismissed action. See Parness & Walker, *supra* note 22, at 37 (concluding that a federal district court can enforce a settlement in the post-dismissal environment where the “settlement claims [are] factually interdependent” with the dismissed claims, “making adjudication before one trial court ‘efficient’”). The commentators do not address the *Peacock* decision, which contradicts this assertion. Nor do they cite any case supporting the proposition that ancillary jurisdiction can be asserted in the post-dismissal context so long as the claims are factually interdependent with the dismissed claims.

135. Another aspect of ancillary jurisdiction that is not subsumed within § 1367 concerns the power of federal courts to adjudicate matters that are ancillary to a criminal case. See *Garcia v. Teitler*, 443 F.3d 202, 206–10 (2d Cir. 2006) (“Although § 1367 says nothing of criminal matters, it does not follow that a court may not exercise ancillary jurisdiction in a criminal case. Indeed, a district court’s jurisdiction over criminal matters is defined by an entirely separate title of the United States Code.”). By its terms, § 1367 applies only civil actions. See 28 U.S.C. § 1367(a) (2006) (expressly addressing only “civil action[s]”).

136. The conclusion that a court cannot decline to adjudicate a dispute regarding a consent decree it has entered inescapably follows from the case law holding that a court’s jurisdiction over its own consent decrees is exclusive. See *supra* note 154–57. But see Parness & Walker, *supra* note 22, at 43–44, 53–54 (opining that federal courts have discretion to refuse to exercise ancillary enforcement jurisdiction).

agreement.<sup>137</sup> Recognizing that the key to ancillary enforcement jurisdiction is the court's inherent powers to enforce its own orders, the unanimous Court proceeded to provide what the Justices no doubt considered to be helpful guidance to practitioners desirous of returning to federal court to enforce settlement agreements:

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.<sup>138</sup>

The Court presented litigants with two separate avenues for returning to federal court after dismissal of the case—inclusion of a jurisdictional retention provision in the agreement or incorporation of the agreement's terms into an order.<sup>139</sup> The use of the disjunctive words “either” and “or” plainly indicates that, in the Court's view, each approach could adequately confer post-dismissal jurisdiction.<sup>140</sup> Moreover, the Court considered both avenues as functionally equivalent; each had the effect of transforming the settlement agreement into a court order. This is clear from the last sentence indicating that, under either approach, a breach of the agreement would constitute a violation of a court order.<sup>141</sup>

The Court's remarks regarding the effect of a jurisdictional retention provision were not a correct recitation of the law, and they did not become law. Federal circuit courts have uniformly rejected the notion that the obligations of a private settlement agreement become court-ordered when the court retains jurisdiction to enforce the agreement.<sup>142</sup> Rather, only

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137. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381–82 (1994).

138. *Id.* These remarks are plainly dicta, as the case did not involve a situation where the settlement agreement contained a jurisdictional retention provision or was incorporated in a court order. Nevertheless, lower courts have not dismissed these remarks on that basis. Ironically, the quoted statements appear in the written opinion soon after a passage where the Court chides the parties for relying upon language from several cases that are not essential to their rulings. The Court admonished: “It is to the holdings of our cases, rather than their dicta, that we must attend . . .” *Kokkonen*, 511 U.S. at 379.

139. *Id.* at 381.

140. *Id.*

141. If there could be any doubt that this is what the court meant, it reiterated this very point a few sentences later in the opinion. *Id.* at 381–82 (“[W]e 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*) . . .” (emphasis added)).

142. *Hester Indus., Inc. v. Tyson Food, Inc.*, 160 F.3d 911, 917 & n.2 (2d Cir. 1998); *Nat'l Presto Indus. Inc. v. Dazey Corp.*, 107 F.3d 1576, 1581 (Fed. Cir. 1997) (holding that application to enforce settlement agreement does not invoke the district court's contempt power); *Consumers Gas & Oil, Inc. v. Farmland Indus. Inc.*, 84 F.3d 367, 370–71 (10th Cir. 1996).

where a settlement agreement is embodied in a consent decree will noncompliance be treated as a violation of a court order and become subject to enforcement via the court's contempt powers.<sup>143</sup> The *Kokkonen* Court was wrong to view these two concepts as functionally indistinct.<sup>144</sup>

*D. The Distinction between Consent Decrees and Settlement Agreements from a Jurisdictional Perspective*

A requirement that settlement terms be incorporated into a court order for the court to retain jurisdiction—is wholly consistent with the concept of ancillary enforcement jurisdiction.<sup>145</sup> Enforcement of a consent decree plainly implicates the court's interest in vindicating its authority and effectuating its orders. It is easy to see why federal courts view incorporation as effective in ensuring that litigants can return to federal court to enforce settlement terms.<sup>146</sup>

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143. *Al C. Rinaldi Inc. v. Bach To Rock Music Sch., Inc.*, 235 F. App'x 866, 869–70 (3d Cir. 2007); *Tranzact Technologies, Inc. v. 1Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005); *T.D. v. La Grange Sch. Dist.*, 349 F.3d 469, 478 (7th Cir. 2003). *See also* *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 144, 146 (3d Cir. 1994) (where the provisions of a settlement agreement are incorporated into a court order, they effectively become terms of a court order that are enforceable through the judicial contempt procedure).

144. The *Kokkonen* decision is not the only instance where the Supreme Court overlooked this key distinction between consent decrees and settlement agreements. The Court made the same mistake a few years earlier in determining whether a plaintiff is a “prevailing party” for purposes of shifting attorneys’ fees. *See supra* text accompanying notes 298–303. The Court acknowledged and corrected the error in 2001. *See* *Buckhannon Board & Care Home, Inc. v. W. Va. Dep’t of Health & Human Servs.*, 532 U.S. 598, 604 & n.7 (2001) (noting that private settlements differ from consent decrees in that private settlements do not have the judicial approval and oversight normally applied to consent decrees).

145. Courts have held that simply inserting phrases into a dismissal order, such as “pursuant to the terms of the settlement agreement,” or making general references to settlement in such an order, does not incorporate the settlement terms. *See, e.g.,* *F.A.C., Inc. v. Cooperativa De Seguros De Vida De Puerto Rico*, 449 F.3d 185, 190 (1st Cir. 2006); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 642 (6th Cir. 2001) (finding that reference to “settlement talks” fails to incorporate agreement); *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 497, 502 (6th Cir. 2000) (holding that reference to fact that parties “have settled” is not sufficient); *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 917 (6th Cir. 2000); *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274 (3d Cir. 1999); *Meiner v. Mo. Dep’t of Health*, 62 F.3d 1126, 1128 (8th Cir. 1995). Rather, the settlement terms have to be physically incorporated—incorporation by reference does not suffice—so that they appear in the decree itself. *See supra* notes 233–42.

146. *See* *DiMucci v. DiMucci*, 91 F.3d 845, 847 (7th Cir. 1996) (per curiam) (“Once the terms of a settlement agreement are incorporated into the court’s order, ancillary jurisdiction exists because ‘breach of the agreement violates the district court’s judgment.’” (quoting *Meiner*, 62 F.3d at 1127)); *Meiner*, 62 F.3d at 1127 (“Ancillary jurisdiction to enforce a settlement agreement exists only ‘if the parties’ obligation to comply with the terms of the settlement agreement [is] made part of the order of dismissal—either by . . . a provision ‘retaining jurisdiction’ over the settlement agreement [ ] or by incorporat[ion of] the terms of the settlement agreement in the order.’” (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*,

Other federal statutory provisions recognize that a federal court has the jurisdiction to enforce its own decrees. For example, the All Writs Act<sup>147</sup> authorizes federal courts to issue injunctions where necessary to aid in effectuating its orders.<sup>148</sup> This power has been used by federal courts to prevent parties from re-litigating matters in other federal or state courts in contravention of a settlement embodied in the federal court's order.<sup>149</sup> Implicit in the power of a federal court to restrain proceedings in other courts where they implicate its consent decree is that the federal court is *the* appropriate forum to resolve all litigation concerning the decree.

Similarly, the Anti-Injunction Act,<sup>150</sup> while prohibiting federal courts from enjoining most state court proceedings, permits a federal court to do so in order "to protect or effectuate its judgments."<sup>151</sup> This authorization allows federal courts to issue injunctions preventing state court litigation from interfering with consent decrees issued by a federal court.<sup>152</sup> Thus, the statute recognizes that the issuing federal court, to the exclusion of all other forums, is the place to go to enforce its decrees.

In addition to statutes, federal common law provides that federal courts have the inherent power to enforce their own orders.<sup>153</sup> In *Flanagan v. Arnaiz*,<sup>154</sup> the Court of Appeals for the Ninth Circuit held that a jurisdictional retention provision in a judgment should be interpreted as providing for exclusive jurisdiction, notwithstanding its failure to expressly say so:

The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own

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511 U.S. 375, 381 (1994)).

147. 28 U.S.C. § 1651 (2006).

148. *Id.*

149. *See, e.g., In re Int'l Bhd. of Teamsters*, 907 F.2d 277, 280–81 (2d Cir. 1990) (stating that a federal court can enjoin proceedings in other federal courts pursuant to the All Writs Act where such proceedings would be subject to the consent decree).

150. 28 U.S.C. § 2283 (2006).

151. *Id.* The non-statutory counterpart to the Anti-Injunction Act is the Younger abstention doctrine. *See* Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 269 n. 19 (1976).

152. *See, e.g., Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) (asserting that federal courts can enjoin state court proceedings, notwithstanding the Anti-Injunction Act, where such proceedings are in derogation of a federal court judgment incorporating a settlement agreement); *see also* *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880–83 (11th Cir. 1989); *United States v. Am. Soc. of Composers*, 442 F.2d 601, 603 (2d Cir. 1971).

153. *See In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993); *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) ("If a federal court can validly enter a consent decree, it can surely enforce that decree.").

154. 143 F.3d 540 (9th Cir. 1998).

judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment.<sup>155</sup>

Other federal circuit courts have similarly concluded that a jurisdictional retention provision in a federal court judgment is presumed to be exclusive.<sup>156</sup>

In sum, there is ample statutory and common law authority supporting the jurisdictional competence of federal courts to enforce their own decrees. By contrast, reaching the same conclusion when private parties merely stipulate to settlement agreement enforcement jurisdiction before a federal district court runs counter to core jurisdictional principles.

A cardinal rule of federal subject matter jurisdiction prohibits parties from stipulating to the jurisdiction of a federal court.<sup>157</sup> They cannot provide for the exclusive jurisdiction of a federal court in a contractual forum selection clause.<sup>158</sup> Additionally, parties cannot tacitly agree to federal court jurisdiction by relying upon the principles of estoppel or waiver.<sup>159</sup> Thus, federal jurisdiction cannot be manufactured by the parties' conduct or inaction. Jurisdiction does not exist simply because one party has alleged its existence and the other party has failed to deny it, or has not done so in a timely manner.<sup>160</sup> A federal court has the responsibility, *sua sponte*, to examine its subject matter jurisdiction throughout the pendency of a case and must dismiss the case when jurisdiction is lacking, even if that fact is discovered after trial or after judgment has been entered.<sup>161</sup>

In light of these well-settled principles, it is difficult to understand why the Supreme Court suggested in *Kokkonen* that parties could effectively stipulate federal court jurisdiction by including a retention provision in a settlement agreement.

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155. *Id.* at 545.

156. *In re Karmen*, 32 F.3d 727, 731–32 (2d Cir. 1994); *Battle*, 877 F.2d at 880–81.

157. *See, e.g.*, *California v. LaRue*, 409 U.S. 109, 112 & n.3 (1972); *Hays v. Bryan Cave LLP*, 446 F.3d 712, 714 (7th Cir. 2006); *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1357 (11th Cir. 2003); *Presidential Garden Assocs. v. United States*, 175 F.3d 132, 140 (2d Cir. 1999).

158. *Micro Focus (US), Inc. v. Bell Canada*, 686 F. Supp. 2d 564, 569 & n.2 (D. Md. 2010).

159. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18 (1951).

160. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (asserting that no action or inaction of the parties can confer subject matter jurisdiction upon a federal court); *Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 83–84 (2d Cir. 1990) (stating subject matter jurisdiction is unwaivable and necessary for a federal court to exercise jurisdiction).

161. *Newman-Green Inc. v. Alfonso-Larrain*, 490 U.S. 826, 832 (1989); *Herrick Co. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001); *see also Finn*, 341 U.S. at 7, 17–18 (defendant who removed case was allowed to challenge jurisdiction after verdict for plaintiff).

*E. The Prison Litigation Reform Act Codifies the Distinction*

The distinction between consent decrees and settlement agreements, which the Supreme Court overlooked in *Kokkonen*, was recognized by Congress and codified in the Prison Litigation Reform Act (the PLRA).<sup>162</sup> The PLRA was intended to address what was perceived as excessive federal court interference into the operations and administration of state and municipal detention facilities.<sup>163</sup> Congress determined that, contrary to principles of federalism and comity, federal courts were frequently enforcing requirements for operation of state and municipal prisons that went beyond what was required to comply with federal law.<sup>164</sup>

The PLRA provides for the termination of federal court consent decrees of which it cannot be said that “the relief is narrowly drawn, extends no farther than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”<sup>165</sup> The PLRA defines consent decrees as “any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties” and expressly excludes “private settlements” from that definition.<sup>166</sup> The PLRA defines “private settlement agreements” as agreements that are subject to judicial enforcement as contracts in state court.<sup>167</sup>

As the Second Circuit explained, the PLRA “distinguish[es] between consent decrees and private settlement agreements” in that only the former are enforceable in federal court and are conditioned on need-narrowness-intrusiveness findings.<sup>168</sup> The latter are enforceable in state court and are not subject to such findings.<sup>169</sup> Significantly, the court, sitting en banc, rejected the notion that a settlement agreement could qualify as both a consent decree and a “private settlement agreement” under the PLRA,

162. 18 U.S.C. § 3626 (2006).

163. *Rowe v. Jones*, 483 F.3d 791, 794–95 (11th Cir. 2007).

164. *Benjamin v. Jacobson (Benjamin II)*, 172 F.3d 144, 158–60, 165 (2d Cir. 1999) (en banc).

165. 18 U.S.C. § 3626(b)(2)–(3). The PLRA also provides for the termination of pre-existing consent decrees unless they can be supported by “need-narrowness-intrusiveness” findings. *Id.*

166. *Id.* § 3626(g)(1).

167. *See id.* § 3626(g)(6) (“[T]he term ‘private settlement agreement’ means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled.”); *id.* § 3626(c)(2)(B) (“Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.”). Courts have remarked that the distinction drawn by Congress exists in contexts other than institutional reform litigation. *Rowe v. Jones*, 483 F.3d 791, 796 & n.6 (11th Cir. 2007).

168. *Benjamin II*, 172 F.3d at 156.

169. *Id.*

which would have made it so that if the district court could not make need-narrowness-intrusiveness findings with respect to a settlement that was embodied in a consent decree, the parties could still seek to enforce the settlement in state court.<sup>170</sup> The court found that the two terms were intended to be mutually exclusive under the statute, noting that while the statute explicitly provided that private settlement agreements could be enforced in state court, no similar provision existed for consent decrees.<sup>171</sup>

To support its conclusion, the court pointed to the distinction between consent decrees and settlement agreements with respect to enforcement. Consent decrees contain obligations that are enforceable “through the court’s exercise of its contempt power” and are subject to the court’s inherent power to enforce its own orders and judgments.<sup>172</sup> Settlement agreements are not enforceable except through the commencement of a new lawsuit for breach of contract under state law.<sup>173</sup>

Thus, even Congress, albeit in a specialized context, has recognized the jurisdictional implications of the distinction between consent decrees and settlement agreements.<sup>174</sup>

#### F. *The Seventh Circuit Rejects Jurisdictional Retentions*

In a series of decisions authored by Judge Richard Posner, the Court of Appeals for the Seventh Circuit has concluded that jurisdictional retention provisions, even when contained in court orders, will not enable parties to return to federal court to litigate settlement disputes.<sup>175</sup> In *Lynch v. Samatamason Inc.*,<sup>176</sup> the court explained that when a district court retains jurisdiction to enforce a settlement agreement, it necessarily implies that

170. The original panel had adopted this view of the statute. *Benjamin v. Jacobson (Benjamin I)*, 124 F.3d 162, 167–78 (2d Cir. 1997) *rev’d en banc*, 172 F.3d 144 (2d Cir. 1999).

171. *Benjamin II*, 172 F.3d at 157–58. Other circuit courts have reached a similar conclusion. See *Rowe*, 483 F.3d at 796 (reasoning that Congress intended to distinguish consent decrees from settlement agreements); *Hazen ex rel. LeGear v. Reagen*, 208 F.3d 697 (8th Cir. 2000) (noting the different definitions of “consent decree” and “private settlement” contained in the PLRA).

172. *Benjamin II*, 172 F.3d at 157 (citing *Peacock v. Thomas*, 516 U.S. 349, 356–57 (1996); *Shillitani v. United States*, 384 U.S. 364, 370 (1966)).

173. *Id.*; see *Rowe*, 483 F.3d at 796 (indicating that private settlement agreements are not automatically subject to enforcement except through a new proceeding).

174. *Benjamin II*, 172 F.3d at 155, 157.

175. *Dupuy v. McEwen*, 495 F.3d 807, 809 (7th Cir. 2007); *Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir. 2006); *Lynch v. Samatamason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002). Prior to these decisions, the Seventh Circuit had upheld a district court’s ability to retain jurisdiction retention so long as it was “apparent” that the district court intended to retain it. *In re Bond*, 254 F.3d 669, 676–77 (7th Cir. 2001); *Ford v. Neese*, 119 F.3d 560, 562 (7th Cir. 1997).

176. 279 F.3d 487 (7th Cir. 2002).

the suit is not being dismissed with prejudice.<sup>177</sup> A federal court cannot, therefore, dismiss a case with prejudice, which is invariably a condition of the parties' settlement, and simultaneously retain jurisdiction to enforce a settlement contract.<sup>178</sup>

In *Shapo v. Engle*,<sup>179</sup> the court reiterated the point. Judge Posner declared that the termination of federal jurisdiction, accomplished through the entry of an order of dismissal with prejudice, could not be undone by the district court's retaining jurisdiction to enforce a settlement.<sup>180</sup> The court stated that the only way for jurisdiction to survive dismissal would be to embody the settlement agreement in a consent decree. In that instance, a federal court has inherent power to enforce a litigation-ending injunction by means of its contempt powers.<sup>181</sup>

In *Dupuy v. McEwen*,<sup>182</sup> Judge Posner went for the hat trick, stating that "when a suit is dismissed with prejudice, it is gone, and the district court cannot adjudicate disputes arising out of the settlement that led to the dismissal merely by stating that it is retaining jurisdiction."<sup>183</sup> Absent the embodiment of the settlement in a consent decree, the court reasoned, the parties' only other option is to dismiss the case without prejudice, with the releases becoming effective upon that dismissal. This would duplicate the res judicata effect of a dismissal with prejudice, while "avoid[ing] the paradox of dismissing a case with finality yet at the same time retaining it."<sup>184</sup>

177. *Id.* at 489.

178. *Id.* In a decision a few months prior to *Lynch*, Judge Posner suggested that jurisdictional retentions were not valid. *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002). In that case, he noted that ancillary enforcement jurisdiction exists only where a settlement agreement is "embodied" in a judicial order. *Id.* at 929.

179. 463 F.3d 641 (7th Cir. 2006).

180. *Id.* at 643.

181. *Id.* District courts in the Seventh Circuit have observed that the circuit's approach is inconsistent with *Kokkonen*. *Hope Sch., Inc. v. Woodside Township*, No. 05-CV-3153, 2009 WL 1707958, at \*4-6 (C.D. Ill. June 12, 2009); *Woodcock Bros. Trans. Group v. Transp. Res., Inc.*, No. 01 C 8067, 2003 WL 1873928, at \*3 (N.D. Ill. Apr. 14, 2003). Nevertheless, these courts have followed the Seventh Circuit's teaching in this regard. See *Indianapolis Fruit Co. v. SCI, Inc.*, No. 3:08-CV-46-TS, 2008 WL 2626671, at \*2 (N.D. Ind. June 26, 2008) (advising parties that the court cannot approve proposed orders or stipulations providing for a dismissal of the case with prejudice and the retention of jurisdiction to enforce a settlement agreement).

182. 495 F.3d 807 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2932 (2008).

183. *Id.* at 809.

184. *Id.* at 810. *But see* Denlow, *supra* note 46, at 24-25. Magistrate Denlow, who presides in the Northern District of Illinois within the Seventh Circuit, has criticized this option, arguing that a release is not the effective equivalent of a dismissal with prejudice because releases can be collaterally attacked. Judge Posner has replied that a dismissal with prejudice can be collaterally attacked as well. *Dupuy*, 495 F.3d at 810. It is not realistic to expect settling parties to be satisfied with a dismissal without prejudice. No party wants to pay money to settle a case and not get a dismissal with prejudice in return.

A fourth Seventh Circuit decision by Judge Frank Easterbrook—who wrote on behalf of a panel that did not include Judge Posner—likewise suggests that the inclusion of settlement terms into a consent decree is the only sure way for a federal district judge to acquire post-dismissal enforcement jurisdiction.<sup>185</sup> The court further noted that, when a settlement contemplates long-term undertakings, logic dictates that a consent decree be used.<sup>186</sup> In particular, where long-lasting obligations are involved, the parties will not want a dismissal to be without prejudice.

According to the Seventh Circuit's decisions, the problem with jurisdictional retentions is based on what Judge Posner describes as “the paradox” of dismissing a case with prejudice while at the same time retaining jurisdiction for future settlement disputes.<sup>187</sup> Certainly, there is an incongruity here, but the situation is no more paradoxical than where the court dismisses a case with prejudice yet exercises jurisdiction to grant attorneys' fees applications or to resolve motions to enforce a judgment.<sup>188</sup> Both circumstances involve the court continuing to act on a case that has been finally (i.e., with prejudice) dismissed.

Indeed, in all circumstances, post-judgment enforcement proceedings in federal court represent a true paradox. Proceedings in federal court are supposed to be governed by federal procedural law, even in diversity cases where state substantive law applies.<sup>189</sup> In the post-judgment context, however, state procedural rules determine how that judgment will be enforced.<sup>190</sup>

Regardless, paradoxes are not the problem. The real difficulty with jurisdictional retentions as a means to secure enforcement jurisdiction is that they are based on the false premise that the provisions convert a settlement agreement into a court order. This faulty syllogism plainly ignores the fact that, unless an agreement is embodied in a consent decree, its terms do not become part of an order, meaning that its terms cannot be

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185. See *Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 636 (7th Cir. 2006) (finding that the district court approved a settlement rather than a consent decree and, therefore, did not adequately retain jurisdiction).

186. *Id.*

187. *Dupuy v. McEwen*, 495 F.3d 807, 810 (7th Cir. 2007).

188. See *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997) (explaining that granting attorneys' fees when an action has been dismissed with prejudice may be proper where there are exceptional circumstances).

189. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

190. FED. R. CIV. P. 69(a) (providing that a federal judgment creditor can use any execution method that is authorized by the procedural rules of the state in which the rendering district court sits).

enforced via the court's contempt power and the federal court does not retain jurisdiction.

To adjudicate a settlement dispute in the absence of a consent decree, the court needs what the Supreme Court referred to in *Peacock* as the "threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction."<sup>191</sup> If the case has not been dismissed with prejudice, that threshold power may still exist.<sup>192</sup> If, however, the case has been dismissed with prejudice, the threshold power is gone, and no jurisdictional retention provision can resuscitate it.

### G. Other Circuits Endorse Temporal Limitations on Retentions

Other circuits have also manifested discomfort with the concept of dismissing cases with prejudice while retaining jurisdiction to resolve settlement disputes, but have approached the issue differently from the Seventh Circuit. Instead of refusing to honor jurisdictional retentions, they have endorsed rigid time limits on them.<sup>193</sup>

The Court of Appeals for the First Circuit has approved the use of a "60-day Settlement Order of Dismissal" procedure, whereby the district court dismisses a case without prejudice to the right of the parties to re-open the action within sixty days if the settlement is not consummated.<sup>194</sup> If neither party asks the court to re-open the case within that period, the dismissal automatically becomes a dismissal with prejudice.<sup>195</sup> Should a party make a request of the court within the period, federal court jurisdiction to enforce a settlement will exist.<sup>196</sup>

The First Circuit describes the procedure "as a mechanism for the trial courts to bring cases to closure while retaining jurisdiction to enforce a

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191. *Peacock v. Thomas*, 516 U.S. 349, 355 (1996) ("[O]nce judgment was entered in the original ERISA suit, the ability to resolve simultaneously factually intertwined issues vanished.>").

192. *T Street Dev., LLC v. Dereje & Dereje*, 586 F.3d 6, 10 (D.C. Cir. 2009); *see also* *Bailey v. Potter*, 478 F.3d 409, 412 (D.C. Cir. 2007) (finding that *Kokkonen's* limitations on the ability of federal courts to enforce settlement agreements do not apply if the underlying case has not been dismissed).

193. *E.g.*, *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1018 (9th Cir. 2007); *Pratt v. Philbrook*, 109 F.3d 18, 21 n.5 (1st Cir. 1997), *aff'd*, 141 F.3d 1150 (1st Cir. 1998); *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994).

194. *Pratt*, 109 F.3d at 18, 21 n.5.

195. The failure to communicate within the period may not be determinative if the failure was due to "excusable neglect" under Federal Rule of Civil Procedure 60(b)(1). *Pratt*, 109 F.3d at 22. Rule 60(b)(1) permits a party to challenge, within a one-year period, judgments flowing from excusable neglect. FED. R. CIV. P. 60(b)(1).

196. *Metro-Goldwyn Mayer, Inc. v. Safety Prods., Inc.*, 183 F.3d 10, 13–14 (1st Cir. 1999).

settlement for a period of time after closure is announced.”<sup>197</sup> The Court of Appeals for the Fifth Circuit has sustained a similar procedure,<sup>198</sup> as did the Ninth Circuit, albeit with a longer time period.<sup>199</sup>

These decisions permit jurisdictional retentions to be effective, but only for circumscribed periods of time during which a dismissal will be without prejudice. These federal courts do not allow parties to stipulate to federal court enforcement jurisdiction for a prolonged or indefinite period of time.<sup>200</sup>

#### *H. Other Federal Courts Begrudgingly Give Effect to Jurisdictional Retentions*

Because *Kokkonen* suggests that federal court jurisdiction over post-dismissal settlement disputes can be secured simply upon an agreement by the parties,<sup>201</sup> one would expect that federal courts would give effect to retentions so long as the parties’ intent is evidenced in the judicial record. An express jurisdictional retention provision in a dismissal order is but one manifestation of such an intention.<sup>202</sup>

Many federal courts, however, have refused to extend federal court jurisdiction to post-dismissal settlement disputes unless there is an express retention provision in the order of dismissal.<sup>203</sup> It does not matter that there are other overt manifestations of the parties’ (or the court’s) intent to retain jurisdiction.<sup>204</sup> In one case, the district court stated on the record: “I will

197. *Pratt*, 109 F.3d at 21 n.5; see *In re Mal de Mer Fisheries, Inc.*, 884 F. Supp. 635, 637–38 (D. Mass. 1995) (articulating the limits on federal court jurisdiction to enforce settlement agreements).

198. *Bell*, 36 F.3d at 448 (recognizing that a district court properly retains jurisdiction by including language in its dismissal order that gives the parties the right to reopen the judgment if a settlement is not consummated within sixty days).

199. In *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007), the court acknowledged the parties’ agreement that the district court would retain jurisdiction over a settlement agreement for a one-year period, but that ancillary jurisdiction would expire thereafter. *Id.* at 1018.

200. *Id.* (one year); *Pratt*, 109 F.3d at 21 (sixty days); *Bell*, 36 F.3d at 448 (sixty days).

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

202. See *infra* notes 204, 211 and accompanying text.

203. *National Presto Indus. v. Dazey Corp.*, 107 F.3d 1576, 1583 (Fed. Cir. 1997); *Miener v. Mo. Dep’t of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995).

204. See *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 190 (1st Cir. 2006) (stating that the court did not retain jurisdiction by dismissing “pursuant to that [settlement] agreement”); *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274 (3d Cir. 1999) (holding that the court did not retain jurisdiction by dismissing “pursuant to the terms of the Settlement”); *Ortolf v. Silver Bar Mines*, 111 F.3d 85, 87 (9th Cir. 1997) (finding no jurisdiction where the parties provided that the plaintiff may “restitute this action”); *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 41 (2d Cir. 1996) (construing a dismissal with prejudice “except as set forth in the Settlement Agreement” as ineffective to retain jurisdiction). Courts have held that a reference in a dismissal order to a settlement agreement or an

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.”<sup>205</sup> The order of dismissal, however, made no mention of this undertaking, stating that “[c]ounsel having informed the court that this action has been settled, [t]his action is dismissed with prejudice.”<sup>206</sup> The Ninth Circuit held that the district court’s oral statements were not sufficient.<sup>207</sup>

In another case, the Court of Appeals for the Third Circuit held that a dismissal order providing that the action would be reinstated if the settlement were not consummated was ineffective.<sup>208</sup> The court reasoned that reinstatement of an action is of a completely different character from enforcement of a settlement agreement, which requires its own basis for jurisdiction.<sup>209</sup>

The rigidity displayed in these decisions suggests that courts are concerned with the jurisdictional soundness of the retention procedure. In contrast, the Court of Appeals for the Sixth Circuit stands alone in not requiring that the retention of jurisdiction be explicitly set forth in the dismissal order.<sup>210</sup> That court has observed that *Kokkonen* merely requires a “reasonable indication” that the federal court intends to retain jurisdiction, and an express provision retaining jurisdiction is but one example of that indication.<sup>211</sup> There should be no “magic form of words

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indication that the order is being entered “pursuant to” or “based on” a settlement agreement does not confer jurisdiction. *See, e.g., F.A.C.*, 449 F.3d at 190 (stating that the court did not retain jurisdiction by dismissing “pursuant to that [settlement] agreement”); *Phar-Mor*, 172 F.3d at 274 (holding that the court did not retain jurisdiction by dismissing “pursuant to the terms of the Settlement”); *Miener*, 62 F.3d at 1127–28 (denying that merely stating “[a]ll matters hav[e] been settled” creates ancillary jurisdiction); *O’Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995) (per curiam) (finding that an order explicitly “based on” the settlement agreement does not create ancillary jurisdiction).

205. *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995).

206. *Id.* at 1432; *see also In re Valdez Fisheries Dev. Ass’n*, 439 F.3d 545, 549 (9th Cir. 2006) (refusing to find jurisdictional retention where bankruptcy court approved of settlement and stated in the dismissal order that the “conditions of the settlement hav[e] been fulfilled”). The court retained jurisdiction only over monetary issues. *Hagestad*, 49 F.3d at 1433 n.4.

207. *Hagestad*, 49 F.3d at 1433. *Compare O’Connor*, 70 F.3d at 532 (“[E]ven a district court’s expressed intention to retain jurisdiction is insufficient to confer jurisdiction if that intention is not expressed in the order of dismissal.”), *with Harris v. Ark. State Highway & Transp. Dep’t.*, 437 F.3d 749, 751 (8th Cir. 2005) (noting that an oral settlement agreement could confer jurisdiction to enforce the settlement if specifically reserved in the court’s dismissal order).

208. *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 504 (3d Cir. 2002).

209. *Id.* at 503–04; *see also Phar-Mor*, 172 F.3d at 275 (stating that “unexpressed intent is insufficient to confer subject matter jurisdiction”).

210. *Re/Max Int’l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 644 (6th Cir. 2001).

211. *Id.* at 643. The district court’s order provided that any “subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.” *Id.* at 645. The court reasoned that a court can only enter subsequent superseding orders where it retains jurisdiction. Thus, the court concluded that “a continued role” for the district court “was contemplated” and that this

that the judge must intone” in order to make a retention effective.<sup>212</sup> Nevertheless, the Sixth Circuit’s reasoning has not persuaded any of the other circuits to follow its lead.

Federal courts should not honor parties’ stipulated retentions of jurisdiction in the post-judgment context because they do not further the courts’ interest in vindicating its authority or effectuating its decrees—two of the three touchstones for the exercise of ancillary enforcement jurisdiction.<sup>213</sup> Nor do they further a court’s interest in managing its own proceedings—the third and final touchstone<sup>214</sup>—because, by the time the settlement dispute arises, the case has been dismissed with prejudice and there is no proceeding left to manage.<sup>215</sup> Instead, courts should exercise ancillary enforcement jurisdiction only where the settlement terms have been incorporated into a court order.

### *I. Eliminating Jurisdictional Retentions Will Not Hinder Settlements*

Precluding stipulated jurisdictional retentions will not have an adverse impact on the desirability or likelihood of settlements. Settlement is driven mostly by the defendant’s fear of being forced to pay more at trial than they would through settlement, and the plaintiff’s fear of getting less at trial than at settlement.<sup>216</sup> These fears will still exist with the same intensity if parties are unable to use jurisdictional retention to return to federal court.

Any argument that parties will be less inclined to settle if they cannot secure federal court jurisdiction over settlement disputes (unless they use a consent decree) is wholly speculative. There are no indications that federal circuit court decisions that have refused to give effect to jurisdictional retentions have adversely impacted settlements. Logic suggests that parties will simply adjust their practices accordingly and either use consent decrees or look to state courts to enforce settlement agreements.

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sufficed under *Kokkonen*. *Id.*; see also *Lucille v. City of Chicago*, 31 F.3d 546, 549 (7th Cir. 1994) (Cudahy, J., concurring) (finding that the language “pursuant to settlement agreement” or “in accordance with settlement agreement” will suffice to retain jurisdiction).

212. *Re/Max*, 271 F.3d at 643 (quoting *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985)); see *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 190 (1st Cir. 2006) (suggesting that “[h]ard and fast rules” may be inappropriate).

213. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379–80 (1994).

214. *Id.* at 380.

215. Courts have plainly recognized that the requirements of ancillary enforcement jurisdiction enunciated in *Kokkonen* do not have to be met if the main action is still pending when enforcement of the settlement agreement is sought. *T Street Dev. v. Dereje & Dereje*, 586 F.3d 6, 10–11 (D.C. Cir. 2009); *Bailey v. Potter*, 478 F.3d 409, 412 (D.C. Cir. 2007).

216. *Easterbrook*, *supra* note 24, at 19–20.

The Supreme Court has given short shrift to speculative assertions that procedural considerations can negatively impact the desirability of settlement.<sup>217</sup> In *Digital Equipment Corp. v. Desktop Direct, Inc.*,<sup>218</sup> the Court rejected the argument that precluding interlocutory appeals from orders vacating settlements would hinder settlements and frustrate the strong federal policy favoring voluntary resolution of disputes.<sup>219</sup> The Court stated that it:

[D]efies common sense to maintain that parties' readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court's decision to let allegedly barred litigation go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff's favor.<sup>220</sup>

The contention that the parties' inability to use jurisdictional retention provisions will dissuade them from settling is similarly unfounded.

#### IV. CONSENT DECREES ARE SUBJECT TO A SPECIFICITY REQUIREMENT

The fourth area of distinction is that the injunctive provisions of a consent decree are subject to a specificity requirement. Injunctive orders are governed by Rule 65(d) of the Federal Rules of Civil Procedure, which provides that every order granting an injunction “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.”<sup>221</sup> The term “injunction” in Rule 65(d) has been held to include all equitable decrees compelling obedience under the threat of contempt, including consent decrees.<sup>222</sup>

##### A. *The Reasonable Detail Requirement*

The purpose of the reasonable detail requirement in Rule 65(d) is to provide clear notice of what is permissible to persons and entities that are subject to an injunctive decree.<sup>223</sup> Enjoined parties should not be confused

217. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 881 (1994).

218. 511 U.S. 863 (1994).

219. *Id.* at 881.

220. *Id.* In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the Court refused to permit parties to vacate prior judicial rulings as a condition of settlement. 513 U.S. at 29. The Court again was not persuaded by the conjectural assertion that precluding parties from vacating prior rulings as part of a settlement would make settlement less attractive to litigants. *Id.* at 27–28. The Court deemed it “impossible to assess the effect of our holding . . . upon the frequency or systemic value of settlement.” *Id.* at 28.

221. FED. R. CIV. P. 65(d)(1) (2009).

222. See *Int'l Longshoremen's Ass'n v. Phil. Marine Trade Ass'n*, 389 U.S. 64, 75 (1967) (finding that an equitable decree compelling obedience is an injunction within Rule 65(d)); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (“The consent decree is an injunction.”); see also WRIGHT & MILLER, *supra* note 122, § 2955, at 309.

223. *Int'l Longshoremen*, 389 U.S. at 74 (1967); *Epstein Family P'ship v. Kmart Corp.*,

about what they can and cannot do when the penalty they face is contempt.<sup>224</sup> They must be “able to ascertain from the four corners of the order precisely what acts are forbidden.”<sup>225</sup>

Because it is such a “potent weapon,” the Supreme Court has cautioned against the use of the contempt citation where there is any doubt as to the claimed violation.<sup>226</sup> As the Seventh Circuit has explained:

Because of the risks of contempt proceedings, civil or criminal, paramount interests of liberty and due process make it indispensable for the chancellor or his surrogate to speak clearly, explicitly, and specifically if violation of his direction is to subject a litigant . . . to coercive or penal measures, as well as to payment of damages.<sup>227</sup>

The reasonable detail rule also facilitates appellate review.<sup>228</sup> Injunctive decrees are among the narrow group of interlocutory orders that are immediately appealable.<sup>229</sup> Precision as to what is enjoined will narrow the range of issues that are to be resolved on appeal.<sup>230</sup>

### *B. No Incorporating By Reference*

Rule 65(d)’s prohibition against incorporation of other documents by reference has been rigorously enforced.<sup>231</sup> A dismissal order cannot make

13 F.3d 762, 771 (3d Cir. 1994).

224. *See* *Schmidt v. Lessard*, 414 U.S. 473, 475–76 (1974) (per curiam) (noting that Rule 65 was designed to prevent uncertainty on the part of those facing injunctive orders); *Patriot Homes, Inc. v. Forest River Hous., Inc.*, 512 F.3d 412, 415 (7th Cir. 2008) (finding Rule 65 violated when the party being enjoined cannot tell whether it is violating an injunction); *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411–12 (11th Cir. 1998) (finding a violation of Rule 65 where portions of an injunction do not give sufficient notice of what actions it means to prohibit); *Gates*, 98 F.3d at 467 (“Specificity in the terms of consent decrees is a predicate to a finding of contempt.”); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1057 (2d Cir. 1995) (stating that an injunctive portion of a court order must leave “no uncertainty in the minds of those to whom it is addressed” (quoting *Hess v. N.J. Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988))).

225. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002) (quoting *Gilday v. Dubois*, 124 F.3d 277, 282 (1st Cir. 1997)); *see* *Drywall Tapers, Local 1974 v. Local 530 of Operative Plasterers*, 889 F.2d 389, 395 (2d Cir. 1989); *see also* *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148 (3d Cir. 1994) (indicating that the scope of the consent judgment must be discernable from within the four corners).

226. *Int’l Longshoremen*, 389 U.S. at 76 (“The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.”); *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885) (“Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt . . .”).

227. *H.K. Porter Co. v. Nat’l Friction Prods.*, 568 F.2d 24, 27 (7th Cir. 1977).

228. *Schmidt*, 414 U.S. at 477 (1974).

229. 28 U.S.C. § 1292(a)(1) (2006).

230. *See* *Dupuy v. Samuels*, 465 F.3d 757, 758 (7th Cir. 2006) (rejecting imprecise language in the injunction as creating unnecessary disputes over what has been enjoined).

231. *See id.* (rejecting the Ninth Circuit’s approach of allowing incorporation by reference); *see also* *Consumers Gas & Oil, Inc. v. Farmland Indus. Inc.*, 84 F.3d 367, 371

the breach of a referenced settlement agreement enforceable by powers of contempt.<sup>232</sup> Nor can a litigant simply attach a copy of a settlement agreement to the dismissal order, because this does not make it clear that compliance with that agreement is mandated by the order itself and not by the principles of contract law.<sup>233</sup> The settlement terms must appear on the face of the injunction.<sup>234</sup>

In *Blue Cross & Blue Shield Ass'n v. American Express Co.*,<sup>235</sup> the district court entered an amended judgment that incorporated by reference the parties' settlement agreement, directed the parties to comply with the settlement agreement, and retained jurisdiction for purposes of enforcement.<sup>236</sup> The Seventh Circuit stated that the incorporation by reference violated Rule 65(d).<sup>237</sup> The court remarked rather testily: "It is an old rule, easy to understand and easy to follow; that it should be ignored repeatedly by both the judge and counsel in large-stakes commercial litigation is unfathomable."<sup>238</sup>

While courts in a few instances have ignored the proscription against incorporation by reference where the party charged with contempt unquestionably knew the contents of the referenced document,<sup>239</sup> better-

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(10th Cir. 1996) (explaining that the "no reference" requirement in Rule 65 should be strictly construed to prohibit incorporation by reference); *Dunn v. N.Y. Dep't of Labor*, 47 F.3d 485, 489 (2d Cir. 1995) (finding that an injunction impermissibly referred to a prior consent judgment); *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799–800 (5th Cir. 1990) (concluding that an order referencing the findings of a magistrate judge violates Rule 65, although the referenced materials would give the defendants specific guidance); *Thomas v. Brock*, 810 F.2d 448, 450 (4th Cir. 1987) (holding that incorporation by reference of findings of fact and conclusions of law filed the same day violates Rule 65). *But see* *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1132–33 (9th Cir. 2006) (stating minority rule that incorporation by reference is permissible, but only where document is physically attached to injunctive order). *See generally* WRIGHT & MILLER, *supra* note 122, § 2955, at 309 (arguing that the Rule 65(d) prohibition on incorporation by reference protects those who are enjoined by informing them of the specific conduct regulated by the injunction and subject to contempt).

232. *Consumers Gas & Oil*, 84 F.3d at 371; *Thomas*, 810 F.2d at 450.

233. *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 431–32 (5th Cir. 2002).

234. *Id.* at 432.

235. 467 F.3d 634 (7th Cir. 2006).

236. *Id.* at 636.

237. *Id.* *See also* *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1356 (10th Cir. 1972) (reiterating the mandatory nature of compliance with Rule 65); *Mayflower Indus. v. Thor Corp.*, 182 F.2d 800, 801 (3d Cir. 1950) (per curiam) (construing the "mandatory language" of Rule 65(d)).

238. *Blue Cross*, 467 F.3d at 636–37; *Dupuy v. Samuels*, 465 F.3d 757, 758 (7th Cir. 2006) ("Rule 65(d) is simple, clear, sensible, easily complied with and not even new; we are distressed by the failure of the parties and the district judge to have complied with it in this case . . .").

239. *See* *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1450 (9th Cir. 1989) (asserting that an injunction incorporating fire department rules passes muster because officers were already bound by such rules and could not claim that they were unaware of them); *Perfect Fit Indus. v. Acme Quilting Co.*, 646 F.2d 800, 809 (2d Cir. 1981) (finding an injunction referring to exhibits not impermissibly vague where defendants

reasoned authorities hold that incorporation by reference is impermissible regardless of the ease by which the enjoined party could obtain and read the incorporated document.<sup>240</sup>

In light of the ease with which contents from one document can be today inserted into another document via the copy-and-paste functions on a standard computer, the practice of incorporating other documents by reference saves nowhere near as much time as it used to, and thus there is even less reason to excuse the disregard of Rule 65(d).<sup>241</sup> While there is not unanimity among courts as to the effect of non-compliance with Rule 65(d) on an injunction,<sup>242</sup> there is ample authority for the proposition that failure to abide by the rule precludes enforcement.<sup>243</sup> At a minimum, the appellate court should remand the case to the district court to reform the decree so that it complies with Rule 65(d).<sup>244</sup>

Courts should demand adherence to Rule 65(d) as both a condition to enforcement and to the exercise of ancillary enforcement jurisdiction. First, the language of the Rule is mandatory, using the word “must.”<sup>245</sup> The word “must” only has meaning when there are consequences of disobeying

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clearly knew of exhibits and grasped their contents). Sometimes courts suggest that incorporation by reference is permissible without addressing Rule 65(d) at all. *See, e.g.*, *Crompton v. Bridgeport Educ. Ass’n*, 993 F.2d 1023, 1028 (2d Cir. 1993) (stating that documents incorporated by reference become part of a consent decree).

240. *See* *William Keeton Enters. v. All Am. Strip-O-Rama, Inc.*, 74 F.3d 178 (9th Cir. 1996) (per curiam) (highlighting that Rule 65(d) prohibits incorporation of terms from settlement agreement); *Seattle-First Nat’l Bank v. Manges*, 900 F.2d 795, 799–800 (5th Cir. 1990) (clarifying that although defendants could not have been confused by the order’s reference to magistrate’s findings, such reference failed to comply with Rule 65(d)); *Meltzer v. Bd. of Pub. Instruction*, 480 F.2d 552 (5th Cir. 1973) (per curiam) (disallowing incorporation of rulings from a prior court order); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1117 (8th Cir. 1969) (finding a violation of Rule 65(d) where names were incorporated from an exhibit).

241. *See* *Blue Cross*, 467 F.3d at 636–37 (asserting that Rule 65(d) is “easy to follow”); *Dupuy*, 465 F.3d at 758 (reminding that Rule 65(d) is “easily complied with”).

242. *Blue Cross*, 467 F.3d at 639. One Seventh Circuit panel characterized as “unorthodox” the view that Rule 65(d) infractions preclude enforcement of the injunction. *Dupuy*, 465 F.3d at 759.

243. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 461 (7th Cir. 1993) (holding that violation of the no-incorporation-by-reference principle in Rule 65(d) prevents enforcement of the injunction); *see also* *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (“If an injunction does not clearly describe prohibited or required conduct, it is not enforceable by contempt.”); *Seattle-First*, 900 F.2d at 800 (stating that a district court’s power to enforce an injunction depends on compliance with Rule 65(d)); *Thomas v. Brock*, 810 F.2d 448, 450 (4th Cir. 1987) (ruling that language in violation of Rule 65(d) be stricken from the order).

244. *Rosen v. Siegel*, 106 F.3d 28, 33 (2d Cir. 1997); *Seattle-First*, 900 F.2d at 800; *In re Energy Co-op., Inc.*, 886 F.2d 921, 930 (7th Cir. 1989).

245. FED. R. CIV. P. 65(d); *Consumers Gas & Oil, Inc. v. Farmland Indus.*, 84 F.3d 367, 370–71 (10th Cir. 1996) (“The rule is phrased in mandatory language.”); *Thomas*, 810 F.2d at 450 (the requirements of Rule 65(d) “must be observed in every instance”).

it, and the logical negative consequence of doing so would be the inability to enforce the decree.

Second, an injunctive order binds the party against whom it is entered—as well as that party’s officers, agents, servants, employees, and attorneys—so long as they have notice of it, and even constructive notice will suffice in some cases.<sup>246</sup> Also, people who act in concert or otherwise participate with the party will be bound as well.<sup>247</sup> Non-parties who aid or abet a party in violating an injunction are subject to contempt, along with the party who enlisted their illicit help.<sup>248</sup>

These non-parties may not be able to locate materials incorporated by reference into an injunction. The reasonable detail and no-incorporation-by-reference requirements help eliminate unknowing violations of an injunction and disputes regarding what an alleged contemnor knew. While it is true that individuals cannot be charged with contempt if they have never seen materials that are incorporated by reference into an injunction, it is equally true that injunctions will not be as effective as Rule 65 intended them to be if non-parties cannot be bound by them.<sup>249</sup>

Third, the prohibition on incorporation by reference ensures that the public’s common law and First Amendment right to know about consent decrees is honored.<sup>250</sup> Settlement agreements are typically kept confidential and not filed with the court.<sup>251</sup> Thus, a settlement agreement incorporated by reference into a court order is not likely to be available to the public. In fact, the parties may not even send the court a copy of the

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246. FED. R. CIV. P. 65(d); *see also* *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987) (employees); *Polo Fashions Inc. v. Stock Buyers Int’l, Inc.*, 760 F.2d 698, 700 (6th Cir. 1985) (officers); *Pasco Int’l, Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 (7th Cir. 1980) (agents).

247. FED. R. CIV. P. 65(d)(2)(C); *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000) (those in “active concert or participation” with the enjoined party); *Portland Feminist Women’s Health Ctr. v. Advocates For Life, Inc.*, 859 F.2d 681, 684, 687 (9th Cir. 1988) (non-parties acting in concert); *Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985) (non-party aiders and abettors).

248. *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945) (stating that defendant cannot circumvent decree by carrying out prohibited acts through non-parties); *SEC v. Homa*, 514 F.3d 661, 673–75 (7th Cir. 2008) (holding non-parties who knowingly violate injunctive order subject to court sanction); *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002) (holding in violation a third-party that acts in concert with a party to the injunction).

249. *See Regal Knitwear*, 324 U.S. at 14 (warning that without liability for aiders and abettors, a decree could be nullified); *Homa*, 514 F.3d at 674 (stating that to compel compliance with an order, a court must have jurisdiction over those who defy it); *see also Thomas*, 810 F.2d at 450 (stating that Rule 65(d) helps avoid confusion regarding who is enjoined).

250. *See supra* Part II.A.

251. *See supra* Part II.C.

settlement agreement, even when it is incorporated by reference into the court's order of dismissal.<sup>252</sup>

The incorporation of a publicly inaccessible settlement agreement by reference contravenes the at least the common law right to inspect consent decrees and perhaps even the First Amendment as well.<sup>253</sup> Members of the public and press would lack material portions of a court order because those provisions would be secret. Thus, the rule prohibiting incorporation by reference of settlement agreements serves to protect important rights.

Rule 65(d)'s prohibition on incorporation by reference requires parties to make careful and informed choices about what settlement terms to include in a consent decree. Keeping monetary terms of settlement in a settlement agreement will ensure that the financial terms remain confidential. What parties cannot do is incorporate an entire settlement agreement by reference into a court order and then not file the agreement.

#### V. A CONSENT DECREE IS THE COURT'S DOCUMENT

The fifth area of distinction arises from the fact that a consent decree "contemplates judicial interests apart from those of the litigants."<sup>254</sup> Courts have an interest in the contents of their orders. Absent a statutory obligation to approve the terms of settlement, courts have no interest in the contents of private settlement agreements.<sup>255</sup>

##### A. *Consent Decree as Both Contract and Order: Entry of the Decree*

A consent decree embodies an agreement of the parties that "serves as the source of the court's authority" to enter the decree.<sup>256</sup> A court should not unilaterally alter a proposed consent decree that has

252. *Limbright v. Hofmeister*, 566 F.3d 672, 673 (6th Cir. 2009).

253. *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 906 (D.C. Cir. 1996) (stating that documents submitted to or filed with the court are subject to the presumption of public access); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408-09 (1st Cir. 1987) (finding that the common law public right of access extends to financial statements referenced in consent decree).

254. *EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers (Local 580)*, 925 F.2d 588, 593 (2d Cir. 1991); *see also United States v. Int'l Bus. Machs. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998) (highlighting the court's obligation to consider whether a consent decree is in the "public interest").

255. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995) ("Our federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal court system."); *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986) (discussing court's "indifferen[ce] to the terms the parties have agreed to").

256. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("[T]he decree itself cannot be said to have a purpose; rather the parties have purposes . . .").

been submitted to it for entry.<sup>257</sup> Nor should it refuse to enter a consent decree merely because it would afford greater relief than that which could have been awarded after trial.<sup>258</sup>

However, a court does have the prerogative to at least make the “minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree.”<sup>259</sup> A consent decree should bear some relationship to the case and pleadings that have invoked the federal court’s jurisdiction in the first place<sup>260</sup> and “further the objectives of the law upon which the complaint was based.”<sup>261</sup> The decree should not undermine judicial integrity.<sup>262</sup>

The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them.<sup>263</sup> If the court’s concerns are not adequately addressed, it may refuse to endorse the proposed decree because when court orders are involved, courts have a say in their contents.<sup>264</sup>

The court’s role here is discretionary, not mandatory.<sup>265</sup> A court can opt not to scrutinize a consent decree when it is submitted for endorsement. It might not want to interfere with the terms of a proposed consent decree

257. *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1218 (9th Cir. 2004). A court should not expand or contract the agreement of the parties, *Crompton v. Bridgeport Educ. Ass’n*, 993 F.2d 1023, 1028 (2d Cir. 1993), or enter a decree that purports to bind a party that did not agree to its terms, *Int’l Ass’n of Firefighters*, 478 U.S. at 529; *United States v. Ward Baking Co.*, 376 U.S. 327, 330 (1964); *King v. Walters*, 190 F.3d 784, 788 (7th Cir. 1999). The court’s goal in construing a consent decree is “to ascertain the intent of the parties at the time of settlement.” *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 477–78 (6th Cir. 2007) (quoting *Huguley v. Gen. Motors Corp.*, 67 F.3d 129 (6th Cir. 1995)).

258. *See Int’l Ass’n of Firefighters*, 478 U.S. at 525 (stating that federal court is not barred from entering consent decree that would grant greater relief than trial); *Kindred v. Duckworth*, 9 F.3d 638, 641 (7th Cir. 1993) (“Consent decrees often embody outcomes that reach beyond basic constitutional protections.”).

259. *Int’l Bus. Machs.*, 163 F.3d at 740 (quoting *Janus*, 801 F.2d at 582); *see Local 580*, 925 F.2d at 593 (“Where equitable remedies which exceed the confines of the consent judgment are reasonably imposed . . . the court has not overstepped its bounds . . .”).

260. *Int’l Ass’n of Firefighters*, 478 U.S. at 525.

261. *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

262. For example, the Second Circuit held that it was inappropriate for a court to enter a consent decree that discloses a settlement amount that could actually be satisfied by payment of a lesser amount pursuant to a private, side agreement. *Janus*, 801 F.2d at 584–85. The court reasoned that the other potential defendants would be misled by the fictitious settlement amount disclosed in the consent decree. *Id.* at 585.

263. *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1218 (9th Cir. 2004); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

264. *Geller v. Branic Int’l Realty Corp.*, 212 F.3d 734, 737–38 (2d Cir. 2000) (discussing the court’s wide discretion in deciding whether to “so order” a stipulated settlement providing for sealing and other protective measures); *City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) (highlighting types of consent judgment that merit careful scrutiny).

265. *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 68–69 (2d Cir. 1995) (holding that courts have “equitable discretion” when it comes to entering and enforcing consent decrees).

when doing so could undermine a settlement that removes a case from the court's docket. A court might prefer instead to summarily approve the consent decree and defer any potential concerns about its terms for a later date.

Those concerns may, after all, become academic. The parties may never return to court to present a dispute regarding the decree. If the parties do return to enforce or modify the decree, the court can address its concerns at that time, if they still exist. The consent decree will be publicly available and, thus, if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Deferring concerns about a consent decree for a later date enables the court to determine, based on the parties' actual experience under the consent decree, whether those concerns are real or merely hypothetical.

Nevertheless, while there are weighty reasons why a court might not apply exacting scrutiny to a proposed consent decree at the time of entry, the fact remains that the court has the discretion to do so, or to insist that the parties change portions of the proposed decree as a condition to entry.<sup>266</sup> As one court aptly put it, a federal court is "more than a 'recorder of contracts' from whom parties can purchase injunctions."<sup>267</sup> Parties need to understand that by choosing the consent decree route, they are inviting the court to have a say on the terms of settlement.<sup>268</sup>

### B. *Modification of Consent Decrees*

A consent decree is subject to the rules generally applicable to orders or judgments.<sup>269</sup> This includes Rule 60(b)(5), which provides that a party may obtain relief from a court order when it is no longer equitable that the judgment should have prospective application.<sup>270</sup> Thus, the court can, and indeed may be required to, modify or terminate a consent decree over the objections of one (or both) of the consenting parties.<sup>271</sup>

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266. Indeed, it is said that the court has "independent juridical interests" in consent decrees "beyond the remedial 'contractual' terms agreed upon by the parties." *EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Workers*, 925 F.2d 588, 593 (2d Cir. 1991).

267. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986); *In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993) ("Put bluntly, 'parties cannot, by giving each other consideration, purchase from the court of equity a continuing injunction.'" (quoting *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 651 (1961))).

268. Of course, at that point, the parties are free to use a settlement agreement instead of a consent decree to avoid changing the deal terms to satisfy the court.

269. *Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992) (citing *Wright*, 364 U.S. at 650–51).

270. FED. R. CIV. P. 60(b)(5).

271. This is not to suggest that a court can never modify a contract over the objections of

A court can modify a consent decree in light of “changed circumstances.”<sup>272</sup> The court’s power to modify a decree of injunctive relief based on changes in the law or the facts is “broad and flexible.”<sup>273</sup> Modification also can be ordered when necessary to carry out the purposes of the original decree<sup>274</sup> or when the effects of the decree are inconsistent with the objectives of the statute that was the basis of the suit.<sup>275</sup> In modifying a decree, the court is not “rigidly confined only to the terms contained within the four corners of the parties’ agreement.”<sup>276</sup>

Much of the Supreme Court case law enunciating principles for lower federal courts to apply in modifying consent decrees arose in the area of public interest law, such as government-initiated antitrust lawsuits or institutional reform litigation. These are atypical fields. In the antitrust context, Congress has prescribed public notice and comment procedures to be followed in connection with the entry of consent decrees.<sup>277</sup> It has also

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one of the parties. However, when it does so, the focus is completely different. When a court reforms a contract, its purpose is to change the contract so that it mirrors the intent of the parties at the time it was created. *Roberson Enters., Inc. v. Miller Land & Lumber Co.*, 700 S.W.2d 57, 58 (Ark. 1985) (modifying a decree to omit the conditional cancellation order); *Chimart Assocs. v. Paul*, 489 N.E.2d 231, 234 (N.Y. 1986) (quoting *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978)).

272. *Rufo*, 502 U.S. at 380–81, 383 (citing *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119–21 (3d Cir. 1979)); *Wright*, 364 U.S. at 647.

273. N.Y. State Ass’n for Retarded Children v. Carey, 706 F.2d 956, 970 (2d Cir. 1983) (stating that “a consensus is emerging among commentators in favor of modification with a rather free hand”).

274. *Kozlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989) (quoting *Badgley v. Santacroce*, 853 F.2d 50, 53 (2d Cir. 1988)). In a 1932 Supreme Court decision authored by Justice Cardozo, the Court imposed a rigorous standard upon parties seeking to modify consent decrees: “Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed.” *United States v. Swift*, 286 U.S. 106, 119 (1932). The Supreme Court relaxed that standard in subsequent decisions. See, e.g., *Rufo*, 502 U.S. at 380–81 (calling for a flexible approach when modifying decrees); *United States v. United Shoe Mach.*, 391 U.S. 244, 248 (1968).

275. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 582–83 (1984). An obligation in a federal consent decree may be enforced against a state, notwithstanding the Eleventh Amendment, even when there was no finding that the state violated federal law. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 439–40 (2004). The significance of this ruling is that the Supreme Court has previously ruled that a federal court cannot compel a state to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Thus, a consent decree is not viewed as simply imposing a state law contractual obligation, but as a federal court order implementing federal law or furthering a federal objective. *Frew*, 540 U.S. at 438–39.

276. *Juan F. ex rel. Lynch v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994); *Kindred v. Duckworth*, 9 F.3d 648, 644 (7th Cir. 1993) (stating that the passage of time may impact the need for the decree).

277. The Tunney Act, 15 U.S.C. § 16(b)–(d) (2006), requires that the government publish a proposed consent decree in the Federal Register, public comments received regarding the proposed decree, and government responses to such comments, prior to entry of the decree. See *United States v. AT&T*, 552 F. Supp. 131, 151–52 (D.D.C. 1982) (discussing a court’s approach to its public interest review responsibilities), *aff’d in part sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

imposed a rigorous “public interest” standard that must be satisfied before a court can enter a consent decree.<sup>278</sup>

In institutional reform litigation, consent decrees will likely have a substantial effect on the rights of third parties.<sup>279</sup> In addition, consent decrees pertaining to federal courts overseeing the operations of state or local institutions present federalism concerns, which are largely absent in private party litigation.<sup>280</sup> Despite the unique aspects of these two areas, federal courts have repeatedly held that the consent decree modification standards developed therein apply in other, more general contexts.<sup>281</sup> Consequently, the standards enunciated by the Supreme Court in institutional reform cases or antitrust lawsuits are frequently cited and applied in ordinary commercial disputes.<sup>282</sup>

The longer a consent decree remains in effect and the more frequently the parties (or non-parties) come to court raising issues under the decree, the more receptive a court will be to arguments that the decree needs to be revised or ended altogether. At this point, the court may give serious consideration as to whether the decree is actually furthering the objectives of the statute that formed the basis of the suit or is unfairly impinging on the rights of third parties.<sup>283</sup> A district court will not want to spend more

278. 15 U.S.C. § 16(e); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995) (per curiam).

279. Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 103 (1987).

280. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 298 (1987); Burt Neuborne & Frederick A.O. Schwartz, Jr., *A Prelude to the Settlement of Wilder*, 1987 U. CHI. LEGAL F. 177, 184 (1987); cf. Peter M. Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 267 (1987) (discussing limits of judicial power).

281. *Bldg. & Constr. Trades Council v. NLRB*, 64 F.3d 880, 887–88 (3d Cir. 1995) (stating that standards enunciated in institutional reform cases apply to all types of disputes (citing *Alexis Lichine & Cie v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582 (1st Cir. 1995))); *United States v. W. Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995); *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993); MOORE ET AL., *supra* note 123, § 60.47[2][b], at 60–176 & n.17; WRIGHT & MILLER, *supra* note 122, § 2961, at 402.

282. *Hendrix v. Page*, 986 F.2d 195, 198 (7th Cir. 1993) (adopting a “flexible standard” in institutional reform is no less suitable to other types of cases (quoting *Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 380 (1992))); *Playtex Prods., Inc. v. Procter & Gamble Co.*, No. 02 Civ. 8046 (WHP), 2008 WL 399295, at \*5 (S.D.N.Y. Feb. 11, 2008) (quoting *Rufo*, 502 U.S. at 384–85, 393); *Gismondi, Paglia, Sherling v. Franco*, 206 F. Supp. 2d 597, 599 (S.D.N.Y. 2002) (citing *Rufo*, 502 U.S. at 380); see also *Alexis Lichine & Cie*, 45 F.3d at 586 (affirming the need for flexibility but voicing concerns). *But see* *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561–63 (Fed. Cir. 1992) (“The institutional reform cases present considerations not found in consent decrees settling commercial disputes.”).

283. One commentator has argued that consent decree jurisprudence is so contradictory that it is unprincipled, and a court can emphasize whatever aspect of a consent decree—

time monitoring a settlement than it would have to spend if it simply tried the case and entered a nonconsensual, final judgment.

In short, choosing a consent decree will mean that the parties relinquish some control over the settlement terms to the court. The court may not be inclined to exercise that control at the inception of the consent decree, but as the consent decree ages and becomes the cause of repeated trips to the courthouse, a court will be increasingly likely to assume ownership of the decree. This risk is a factor for the parties to consider at the time of settlement.

#### VI. A CONSENT DECREE CAN CONFER PREVAILING PARTY STATUS

The sixth distinction is that consent decrees can form the basis of an award of attorneys' fees to a plaintiff where a federal statute permits such awards.<sup>284</sup> A settlement agreement, in contrast, does not confer prevailing party status on a plaintiff.<sup>285</sup>

##### A. *Parties Will Need to Consider Whether to Address Attorneys' Fees in Settlement*

In the course of negotiating settlement of any case, the parties will be mindful of the attorneys' fees they have incurred to prosecute or defend the action. The plaintiff will view any settlement consideration offered by a defendant in terms of the amount by which it exceeds their attorneys' fees and other litigation expenses incurred in the case. A defendant, too, will be cognizant of its fees and expenses, as well as those likely to be incurred if the case proceeds to trial, when making settlement offers.

Under the traditional "American Rule" followed in federal courts, parties are required to bear their own attorneys' fees and cannot collect them from the losing party absent explicit contractual or statutory authority.<sup>286</sup> If no such authority exists, parties are forced to shift some or all of these expenditures to the other party by including them in, or deducting them from, the total monetary consideration to be paid in settlement.<sup>287</sup>

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contract or court order—that will support the result it announces. Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 293 (1988). There is, however, nothing unprincipled about a court emphasizing the contractual aspects of a consent decree when it affects only the consenting parties and emphasizing the court order aspects when it impacts third parties or judicial resources.

284. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975).

285. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 605 (2001).

286. *Alyeska*, 421 U.S. at 247; *accord* *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994) (citing *Alyeska*, 421 U.S. at 262).

287. *Cf. Gray v. Phillips Petroleum Co.*, 971 F.2d 591, 595 (10th Cir. 1992) (articulating plaintiff's argument that expenses can be included in a settlement even where there is no

There are numerous federal statutory provisions authorizing a court to require one party to pay the attorneys' fees incurred by the other party.<sup>288</sup> These provisions typically confer discretion on a court to award attorneys' fees to the "prevailing party" and courts have interpreted these nearly-identically worded provisions consistently.<sup>289</sup> Although the "prevailing party" provisions are facially neutral, courts have interpreted and applied them with a bias, so that losing defendants usually pay, but losing plaintiffs rarely pay.<sup>290</sup>

When parties are settling a case brought under a statute that authorizes fee shifting, they will want to address the issue in the settlement.<sup>291</sup> Depending on their relative negotiating positions, the plaintiff may agree to waive any claim to such fees, or the defendant may agree to reimburse the plaintiff for them.<sup>292</sup> The parties may simply agree to disagree on the issue and reserve their respective rights to fight it out in court after the settlement is consummated.<sup>293</sup>

The common law doctrine of ancillary jurisdiction enables a federal court to resolve fees disputes between a client and attorney arising during

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explicit statutory authority).

288. *See, e.g.*, 5 U.S.C. § 552 (a)(4)(E) (2006) (Freedom Of Information Act); 15 U.S.C. §§ 1681n(c), 1681o(b) (Fair Credit Reporting Act) (2006); 29 U.S.C. § 216(b) (2006) (incorporating a fee shifting provision into the Age Discrimination in Employment Act); 42 U.S.C. § 19731(e) (2006) (Voting Rights Act); 42 U.S.C. §§ 1988, 2000e-5(k) (2006) (Civil Rights); 42 U.S.C. § 3613(c)(2) (2006) (Fair Housing Act); 42 U.S.C. § 12205 (2006) (Americans With Disabilities Act).

289. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (quoting *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

290. *Easterbrook*, *supra* note 24, at 29. To recover attorneys' fees, a plaintiff need not prevail on all or most of his claims, nor even his primary claim. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-93 (1989). He prevails even when he is awarded merely nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 105 (1992). A defendant, on the other hand, must prevail on all of the claims asserted against it and prove that the claims were either frivolous or groundless. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Outside the civil rights arena, the bias does not apply and the provisions are applied neutrally. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (copyright).

291. Indeed, they may be required to address the issue in the settlement papers. Some courts have held that a party intending to file such a motion must reserve the right to do so in the settlement agreement or consent decree, or he will be barred by the release provisions. *See, e.g.*, *Bell v. Schexnayder*, 36 F.3d 447, 449-50 (5th Cir. 1994) (finding that settlement negotiations were meant to resolve all claims); *Young v. Powell*, 729 F.2d 563, 566-67 (8th Cir. 1984).

292. *See Evans v. Jeff D.*, 475 U.S. 717, 731-32 (1986) (noting that nothing in language used by Congress indicates that statutory entitlement to attorneys' fees is "nonwaivable or nonnegotiable").

293. *See, e.g.*, *Smalbein ex rel. Smalbein v. City of Daytona Beach*, 353 F.3d 901, 908 n.9 (11th Cir. 2003) (per curiam) (stating that the settlement agreement provides that the parties will litigate attorneys' fees issue subject to a cap on the amount that could be awarded).

the litigation,<sup>294</sup> as well as post-judgment motions for fees under fee-shifting statutes.<sup>295</sup> A court can rule on an application to award attorneys' fees even if it is made after the case has been dismissed.<sup>296</sup>

*B. The Supreme Court's Efforts to Distinguish between Consent Decrees and Settlement Agreements in the Prevailing Party Context*

The *Kokkonen* decision is not the only instance where the Supreme Court mistakenly blurred the distinction between consent decrees and settlement agreements.<sup>297</sup> The Court committed a similar misstep in its jurisprudence concerning prevailing party status under fee-shifting provisions.

In *Maher v. Gagne*,<sup>298</sup> the Supreme Court concluded that a settlement embodied in, and enforced through, a consent decree could serve as the basis for an award of attorneys' fees under a prevailing party fee-shifting statute.<sup>299</sup> The Court remarked that the legislative history for the fee-shifting statute indicated that "parties may be considered to have prevailed when they vindicated rights through a consent judgment."<sup>300</sup> The Court

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294. *Shapo v. Engle*, 463 F.3d 641, 644 (7th Cir. 2006); *Baer v. First Options of Chi., Inc.*, 72 F.3d 1294, 1300–01 (7th Cir. 1995) (discussing how other circuits have treated ancillary jurisdiction); *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 217 (3d Cir. 1987); *Jenkins v. Weinshienk*, 670 F.2d 915, 918 (10th Cir. 1982). This authorization includes claims by a former attorney against the client for outstanding fees owed as well as disputes arising from a discharged attorney's placement of a retaining lien on the client's files. *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 64 (2d Cir. 1991) (holding that a court has ancillary jurisdiction over a dispute between a litigant and its attorney that is related to the main action (quoting *Cluett, Peabody, & Co. v. CPC Acquisition Co.*, 863 F.2d 251, 256 (2d Cir. 1988))); *Marrero v. Christiano*, 575 F. Supp. 837, 839 (S.D.N.Y. 1983) (finding that a dispute regarding withdrawing counsel's right to interpose retaining lien is subject to ancillary jurisdiction). That such a dispute would impair a federal court's ability to manage its proceedings—one of the touchstones to ancillary jurisdiction—is apparent. A withdrawing attorney's retaining lien interferes with the orderly adjudication of the case because the new attorney cannot proceed if she lacks access to the files needed to prosecute or defend the case.

295. Applications for attorneys' fees are collateral to the merits of the case. *Bell v. Bd. of Cnty. Comm'rs*, 451 F.3d 1097, 1101 n.2 (10th Cir. 2006) (quoting *Utah Women's Clinic, Inc. v. Leavitt*, 75 F.3d 564, 567 (10th Cir. 1995)); *Fed. Sav. & Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1040–42 (9th Cir. 2004). Thus, the fact that the issue is unresolved at the conclusion of the case does not prevent the district court from entering judgment on the merits or that judgment from being "final and appealable." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988).

296. Federal Rule of Civil Procedure 54(d)(2)(B)(i) expressly provides that a motion for attorneys' fees can be made up to fourteen days after judgment has been entered. An appeal from a judgment does not prevent a district court from ruling on a motion for attorneys' fees. See *Budinich*, 486 U.S. at 202–03 (holding that the status of attorneys' fees provision does not have to be known at the time that the merits of the case are appealed); *Allison v. Bank One-Denver*, 289 F.3d 1223, 1242–43 (10th Cir. 2002).

297. See *supra* Part III.C.

298. 448 U.S. 122 (1980).

299. *Id.* at 129–30.

300. *Id.* at 129 (quoting S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912).

subsequently mischaracterized that holding twice, referring to the *Maher* case as authorizing an award of attorneys' fees for consent decrees or settlement agreements.<sup>301</sup> The Court owned up to the error in its 2001 decision in *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Resources*.<sup>302</sup>

The *Buckhannon* Court clarified that consent decrees, not settlement agreements, confer prevailing party status.<sup>303</sup> The Court reasoned that a consent decree effects a court-ordered change in the legal relationship of the parties.<sup>304</sup> The Court emphasized the unique role that courts can play with respect to consent decrees.<sup>305</sup> Justice Scalia, in a concurrence, indicated that it "is at least the product of, and bears the sanction of, judicial action in the lawsuit."<sup>306</sup>

The Court noted that, in contrast, "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees."<sup>307</sup> The Court further observed that, while federal jurisdiction always exists with respect to enforcing consent decrees, "federal jurisdiction to enforce a private contractual agreement will often be lacking unless the terms of the settlement are incorporated into the order of dismissal."<sup>308</sup>

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301. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (stating that the plaintiff must obtain "comparable relief through a consent decree or settlement" (citing *Maher*, 448 U.S. at 129)); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (characterizing *Maher* as obtaining judgment via "consent decree or settlement" (citing *Maher*, 448 U.S. at 129)).

302. 532 U.S. 598, 604 n.7 (2001) (noting that the Court's prior "dictum ignores that *Maher* only 'held that fees may be assessed . . . after a case has been settled by the entry of a consent decree'" (quoting *Evans v. Jeff D.*, 475 U.S. 717, 720 (1986))); *see also id.* at 621 (Scalia, J., concurring) (acknowledging the Court's "own misleading dicta (to which I, unfortunately, contributed)").

303. *Buckhannon*, 532 U.S. at 605–06.

304. *Id.* at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)).

305. *Id.* at 603 n.5.

306. *Id.* at 618 (Scalia, J., concurring). Justice Scalia expressed reservations that a consent decree was a viable platform for a fee award, but opined that it was "at least some basis for saying that the party favored by the settlement or decree prevailed in the suit. *Id.* However, he opined, extending the principle "to a case in which no judicial action whatever has been taken" stretched the "prevailing party" concept beyond its breaking point. *Id.* at 618–19.

307. *Id.* at 604 n.7 (majority opinion); *see Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002) (describing judicial prerogative to review consent decrees); *United States v. City of Miami*, 664 F.2d 435, 441 n.13 (5th Cir. 1981) (en banc) (per curiam) (citing *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)).

308. *Buckhannon*, 532 U.S. at 604 n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)). It is noteworthy that the Court in *Buckhannon* referred to incorporation as a means of obtaining post-judgment jurisdiction in federal court but not the jurisdictional retention method suggested in *Kokkonen*. The Court, when focusing on the distinction between consent decrees and settlement agreements as it relates to prevailing party analysis, intimated that these distinctions also impact ancillary enforcement

The judicial oversight attendant in consent decrees, combined with the court-ordered nature of these devices, is sufficient to be determinative in the prevailing party debate.

*C. The Distinction Is Applied in Determining Prevailing Party Status*

Most federal courts have abided by the Supreme Court's pronouncement in *Buckhannon* and have held that settlements embodied in court orders can confer prevailing party status, but private settlement agreements cannot.<sup>309</sup> The federal courts, moreover, have not insisted that the underlying order be formally denominated as a consent decree. As explained by the Court of Appeals for the Fourth Circuit:

Where a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court's approval and the attendant judicial oversight (in the form of continuing jurisdiction to enforce the agreement) may be equally apparent. We will assume, then, that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such.<sup>310</sup>

The Court of Appeals for the Third Circuit has concluded that a document is tantamount to a consent decree for prevailing party purposes if it: bears the title "order"; sets forth settlement terms using mandatory language; contains the signature of the district court judge instead of the parties' counsel; and gives the plaintiff the right to seek judicial enforcement of the settlement terms.<sup>311</sup> Similarly, other circuit courts have held that where a district court incorporates a private settlement into an order, and signs or otherwise indicates written approval of the order's terms, the result is sufficiently analogous to a consent decree to confer prevailing party status.<sup>312</sup>

These courts have correctly refused to exalt form over substance by insisting that the order be labeled a consent decree. This approach is sensible as many practitioners, perhaps wary of the fact that consent decrees are so often associated with public interest litigation, might be less inclined to use the term "consent decree" to describe orders that embody settlement terms.<sup>313</sup>

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jurisdiction analysis.

309. *Id.* at 605–06.

310. *Smyth*, 282 F.3d at 281–82 (citing *Buckhannon*, 532 U.S. at 604 n.7).

311. *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002); *see also* *John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (citing *Truesdell*, 290 F.3d at 165).

312. *Bell v. Bd. of Cnty. Comm'rs*, 451 F.3d 1097, 1103 (10th Cir. 2006) (citing *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003)).

313. *See supra* notes 310–12.

In contrast, a court order that merely records an obligation that a party has agreed to undertake, without indicating that the court is directing that the obligation be performed, is not sufficiently analogous to a consent decree.<sup>314</sup> Also, where the judge was actively involved in settlement discussions, held a settlement conference in his chambers, and made suggestions regarding the terms of settlement, the resulting agreement does not reflect the requisite “judicial imprimatur” so that it will be regarded as analogous to a consent decree.<sup>315</sup>

The determinative factor in these cases is the presence of a court order that includes the settlement terms. This inclusion makes the obligation to comply with those terms a court-ordered one, punishable by contempt.<sup>316</sup> This transformation constitutes the court-ordered change in the parties’ legal relationship that is essential to a prevailing party fee award.<sup>317</sup>

#### *D. Some Courts Blur the Distinction that the Supreme Court Clarified*

A few circuit court decisions have seized upon the misleading comments by the Court in *Kokkonen* to confer prevailing party status on a party to a settlement agreement. The Courts of Appeals for the Eleventh and Second Circuits have both concluded that a settlement agreement containing a jurisdictional retention provision is the functional equivalent of a consent decree and, thus, can serve as the basis for an attorneys’ fees award.<sup>318</sup>

The Eleventh Circuit, relying on *Kokkonen*, stated that when a district court expressly retains jurisdiction to enforce a settlement, it achieves “precisely the same result as would have been achieved pursuant to a

314. *See Rice Servs. Ltd. v. United States*, 405 F.3d 1017, 1027 (Fed. Cir. 2005) (determining the order did not materially alter a legal relationship).

315. *LaGrange Sch. Dist.*, 349 F.3d at 479. Court orders that merely confirm a party’s concessions during settlement or that reiterate proposed terms to keep settlement talks moving forward are not sufficiently analogous to consent decrees. *Smith v. Fitchburg*, 401 F.3d 16, 26–27 (1st Cir. 2005).

316. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (quoting *Hazen ex rel. LeGear v. Reagen*, 208 F.3d 697, 699 (8th Cir. 2000)).

317. *Carbonell v. INS*, 429 F.3d 894, 900–01 (9th Cir. 2005) (holding that stipulated stay of deportation was incorporated into court order); *Pres. Coal. of Erie Cnty. v. Fed. Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) (determining that court-ordered change in parties’ relationship was key); *Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2003) (concluding that the absence of a court order precluded a finding of prevailing party status); *Christina A.*, 315 F.3d at 993 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)); *see also Oil, Chemical & Atomic Workers Int’l Union v. Dep’t of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002), *superseded by statute*, Open Government Act of 2007, 5 U.S.C. § 552(a)(4)(E), *as recognized in Davis v. Dep’t of Justice*, 606 F. Supp.2d 1 (D.D.C. 2009) (holding that, after a motion to dismiss is awarded, there is nothing left for the district court to oversee).

318. *Roberson v. Guiliani*, 346 F.3d 75, 83 (2d Cir. 2003); *Am. Disability Ass’n v. Chmielarz*, 289 F.3d 1315, 1318–20 (11th Cir. 2002).

consent decree.”<sup>319</sup> The Second Circuit took the *Kokkonen* dicta one step further, suggesting that a breach of a settlement agreement containing a jurisdictional retention provision would be a violation of a court order.<sup>320</sup>

The flaw in the reasoning employed by these two courts is that a breach of an agreement cannot be a violation of a court order unless the agreement is incorporated into the order. These decisions used the false correlation drawn in *Kokkonen* to circumvent the Supreme Court’s prevailing party teaching in *Buckhannon*.

The Second Circuit further held that the agreement effectuated a court-ordered change in the parties’ legal relationship because the settlement was conditioned on the court signing the dismissal order.<sup>321</sup> This argument overlooks the fact that most private settlement agreements are conditioned on the court dismissing the case. Under this logic, it can always be argued that a settlement agreement constitutes a court-ordered change in the parties’ relationship. This faulty reasoning eviscerates the distinction drawn in *Buckhannon* between consent decrees and settlement agreements.

The third case in this trilogy is *Barrios v. California Interscholastic Federation*.<sup>322</sup> In that case, the court disregarded the Supreme Court’s comments in *Buckhannon* as non-binding dicta,<sup>323</sup> and reasoned that, because a settlement agreement is a “legally enforceable instrument,” it constitutes a material change in the legal relationship between the parties.<sup>324</sup> This rationale ignores the distinction between an “instrument enforceable as a matter of contract law and a court order enforceable as a matter of judicial oversight.”<sup>325</sup> It also renders the *Buckhannon* distinction between consent decrees and settlement agreements meaningless because all settlement agreements are legally enforceable.<sup>326</sup>

Whatever merit there is to the significance attributed by the Court in *Buckhannon* to the distinction between consent decrees and settlement agreements, that decision is now the law. Courts should not seek to

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319. *Chmielarz*, 289 F.3d at 1321. Significantly, nowhere in its decision did the Eleventh Circuit state or imply that compliance with the settlement’s terms could be enforced by a contempt citation. Accordingly, it is hard to see how the court could claim that settlement agreements are the functional equivalent of consent decrees.

320. *Roberson*, 346 F.3d at 83. The Second Circuit did acknowledge that a court likely could not use its contempt powers to enforce a settlement agreement that had not been incorporated into a court order. *Id.* at 83 & n.9.

321. *Id.* at 83.

322. 277 F.3d 1128 (9th Cir. 2002).

323. *Id.* at 1134 & n.5 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Resources*, 532 U.S. 598, 604 n.7 (2001)). The Supreme Court’s remarks in *Kokkonen* were also dicta.

324. *Barrios*, 277 F.3d at 1134.

325. *Bell v. Bd. of Cnty. Comm’rs*, 451 F.3d 1097, 1103 n.7 (10th Cir. 2006).

326. *Id.*

circumvent the *Buckhannon* Court's teaching by falsely equating the two devices. Courts should refuse to grant prevailing party status to parties to settlement agreements, regardless of whether they contain jurisdictional retention provisions.

#### CONCLUSION

Certainly, there will be times when one or more of the six points of distinction between consent decrees and settlement agreements will be immaterial to the parties. For instance, there may not be any applicable fee-shifting statute for the parties to fight over.

But in most instances, each of the points will be important. The threat of a contempt citation is a powerful motivating factor to secure performance of an obligation. Confidentiality of settlement protects parties from becoming exposed to numerous lawsuits from other potential plaintiffs. The right to reappear before a judge who is familiar with the issues and parties, or thinks an opposing party was unreasonable or untrustworthy, is a valuable asset that parties should strive to maintain.

An injunction can be neutered by an unwitting failure to comply with the specificity requirement of Rule 65(d). Counsel will need to consider the likelihood that the court will modify a consent decree against their client's wishes, or whether, by agreeing to a consent decree, they will walk straight into a judicial award of attorneys' fees to the adversary. These six factors will merit careful consideration in deciding which route counsel should prefer and which route their client can afford to accept.

Courts should eschew reliance upon the *Kokkonen* canard, that a jurisdictional retention provision converts a breach of contract into a contemptuous violation of a court order. To secure post-dismissal enforcement jurisdiction in federal court, parties should be required to insert settlement terms into a consent decree and not simply incorporate them by reference. Similarly, parties that have the right to seek attorneys' fees under a fee-shifting statute should not be deemed a prevailing party on the basis of a settlement agreement unless its terms have been included in a court order.