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Articles

Settlement Agreements and the Supreme Court

by

MARGARET MERIWETHER CORDRAY*

American law treats the settlement agreement as a member of the larger family of private contracts. As a consequence, since contract actions typically belong in the realm of the state common law, the United States Supreme Court has had few occasions in the last half-century to decide cases involving legal disputes over settlement agreements. It is thus noteworthy, and deserving of careful attention, that in 1994 the Supreme Court decided three cases—Kokkonen v. Guardian Life Insurance Co. of America, Digital Equipment Corp. v. Desktop Direct, Inc., and U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership—which involved issues relating to settlement agreements.

In light of the relative rarity of such cases in the Supreme Court, this trilogy of decisions provides significant insight into the Court’s views about settlements and, more specifically, about the established public policy favoring the private settlement of disputes. Prior to these cases, the Court had strongly endorsed the principle that courts should construe statutes, rules of court, and legal doctrines with an emphasis on this public policy. It is thus striking, and potentially quite

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1. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (repudiating the notion that there is a “federal general common law”).
significant, that the Court gave very little weight and only passing attention to this policy in resolving the settlement issues presented in these three cases.

The Court’s dismissive treatment of the traditional policy favoring settlement in these decisions is puzzling, and it suggests a need for reconsideration of the meaning and significance of the policy. Although the Court has consistently invoked the policy, it has never directly analyzed how the policy should be understood and how much dispositive force it should have when weighed against countervailing institutional interests. As the lower courts confront new issues that involve settlement agreements in future cases, it is essential that they have a clear sense of the proper place of this long-standing policy in judicial decision-making.

This Article will begin with a review of the three Supreme Court cases in order to explain the novel issues that the Court resolved. In doing so, it will also discuss the Court’s treatment of the policy favoring settlement in these decisions. The Article will then attempt to consider more thoroughly both the significance of the policy and its place in the legal analysis of issues involving settlements. In particular, the Article will suggest that because the policy serves important institutional interests, it is more than a narrow concern that focuses on the interests of the specific parties in settling their case; instead, it is a substantial public policy that should receive much more careful attention than the Court gave it in these decisions. Finally, the Article will address two additional issues concerning settlement agreements that have troubled the lower courts. These issues will be examined in terms of both the Court’s new decisions and the treatment of the policy favoring settlement that has been presented, in an effort to suggest how other legal issues involving settlements should be approached in future cases.

I. The Supreme Court Decisions

A. Kokkonen v. Guardian Life Insurance Co. of America

The first case in the trilogy was Kokkonen v. Guardian Life Insurance Co. of America. Kokkonen presented the issue of whether a federal court has the power to enforce a settlement agreement in a case that the court had already dismissed.

The issue arises because federal courts are courts of limited jurisdiction, possessing only such power as is conferred upon them under

the Constitution and by statute. Thus, in order for a federal district court to act in a case, it must be authorized to exercise jurisdiction over the cause of action. With respect to the dispute that originally brings the parties to court, this jurisdiction may exist because, for instance, the dispute involves a question "arising under the Constitution, laws, or treaties of the United States," or because there is diversity of citizenship between the parties and the amount in controversy exceeds $75,000. Only if jurisdiction exists may the district court proceed to resolve the parties' dispute.

In most cases, the parties enter into an agreement settling their dispute before the court issues a final judgment in the case. Under accepted legal principles, this settlement agreement is regarded as a contract between the parties, enforceable on the same terms as any other private contract. When a case is settled, the court generally closes the case by issuing an order of dismissal, often with prejudice. In doing so, the district court formally relinquishes jurisdiction over the original cause of action. Moreover, unless the court expressly retains jurisdiction over the settlement agreement, the court is not engaged in active supervision of the parties' performance of their settlement agreement.

6. Id. at 1675. See also Willy v. Coastal Corp., 503 U.S. 131, 135 (1992) (noting that the Federal Rules of Civil Procedure cannot extend or restrict a federal court's jurisdiction); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (stating that federal courts only have the power authorized in Article III and congressional statutes).


9. See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1339-40 (1994) (citing a study by Herbert M. Kritzer finding that over two-thirds of cases are settled before any authoritative decision in the case is made by a judge or other decisionmaker); Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 502 (1985) (stating that over 90% of all cases, both civil and criminal, are settled).

10. See, e.g., United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975); Village of Kaktovik v. Watt, 689 F.2d 222, 231 (D.C. Cir. 1982). See also Larry Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 325 (1988) ("The agreement by which the plaintiff agrees to dismiss his lawsuit is an ordinary contract, and it can be enforced, modified or set aside as such.").

11. Federal Rule of Civil Procedure 41(a)(1)(ii) provides for dismissal of an action "by filing a stipulation of dismissal signed by all parties who have appeared in the action," and allows the parties to stipulate that the dismissal is to be with prejudice. Federal Rule of Civil Procedure 41(a)(2) allows an action to be dismissed "upon order of the court and upon such terms and conditions as the court deems proper."
In some cases, though, the parties quarrel over one another's compliance with the terms of the settlement agreement. In that situation, the complaining party may, of course, file an action for breach of contract in state court, which is normally the appropriate forum for the adjudication of contract disputes. The complaining party, however, may prefer to return directly to the original court—a federal district court—to seek enforcement of the terms of the settlement agreement. The question presented in *Kokkonen* was whether the district court has the power to act in response to such a request. In other words, the issue was whether the district court has jurisdiction to enforce a settlement agreement in a case that the court had dismissed earlier, where the court does not have an independent basis for jurisdiction over the contract claim and did not expressly retain jurisdiction when it dismissed the case.

When this situation arose in *Kokkonen*, the district court concluded that it had the "inherent power" to enforce the settlement agreement. On appeal, the Ninth Circuit affirmed, holding that a
district court has jurisdiction under its “‘inherent supervisory power’” to enforce the terms of a settlement agreement after dismissal of a case. In reaching this conclusion, the court of appeals emphasized that the “authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation.”

jurisdiction over the settlement agreement: although the parties remained diverse, the amount in controversy following the settlement of the case was no longer sufficiently high to meet the requirement for diversity jurisdiction. Kokkonen, 114 S. Ct. at 1675. It should be noted that a federal court also generally has no independent basis for jurisdiction over a settlement agreement in cases where jurisdiction was originally based on the existence of a federal question. Id. at 1677; McCall-Bey v. Franzen, 777 F.2d 1178, 1187 (7th Cir. 1985). Cf. Board of Trustees of the Hotel and Restaurant Employees Local 25 v. The Madison Hotel, Inc., 97 F.3d 1479, 1484 (D.C. Cir. 1996) (holding that the district court had an independent basis for jurisdiction over an agreement settling ERISA claims because “enforcement of the settlement agreement itself will require adjudication of substantive federal law issues over which federal courts have exclusive jurisdiction under the ERISA statute”). See generally infra note 178.


It should be noted, however, that the Sixth Circuit’s holding in Aro was more limited than the Ninth Circuit’s holding in Kokkonen. In Aro, the Sixth Circuit held that, after the district court has vacated its prior dismissal pursuant to Federal Rule of Civil Procedure 60(b), the court has “the inherent power . . . to enforce the agreement which had settled the dispute pending before it.” 531 F.2d at 1371. In Hinsdale v. Farmers Nat’l Bank & Trust Co., 823 F.2d 993, 996 (6th Cir. 1987), the Sixth Circuit clarified that, under Aro, in order for the court to enforce the settlement contract, it must first reinstate the case pursuant to Federal Rule of Civil Procedure 60(b), which permits the court to relieve a party from a final judgment, order, or proceeding in enumerated circumstances. The Ninth Circuit went further in Kokkonen, holding that the court has the inherent power to enforce a settlement contract even without reopening the case under Rule 60(b). The effect of the Supreme Court’s holding in Kokkonen on the Aro/Hinsdale line of cases is discussed, infra, in Part III.A at notes 184-209 and accompanying text.

17. Kokkonen, slip op. at A-2 - A-3 (quoting Dacanay v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978)). See also Aro, 531 F.2d at 1372 (“Public policy strongly favors settlement of disputes without litigation.”); Hamilton, 725 F. Supp. at 643 (“Jurisdiction is necessary to implement the federal policy in favor of settlements.”).
The Supreme Court, however, granted review of *Kokkonen* and reversed the Ninth Circuit's assertion of inherent power.\textsuperscript{18} The Court unanimously held that a federal court does not have the power to enforce a settlement agreement after it has dismissed a case, unless the court had retained jurisdiction over the settlement agreement in its dismissal order or otherwise has some independent basis for jurisdiction.\textsuperscript{19}

The opinion, written by Justice Antonin Scalia, is noteworthy for the narrowness of its holding on a federal court's ability to obtain jurisdiction over a settlement agreement after it had unconditionally dismissed a case. The opinion, however, is also noteworthy for the breadth of its dicta on a federal court's ability to retain jurisdiction over a settlement agreement when it dismisses a case.

The opinion began with a forceful admonition that the federal courts, as courts of limited jurisdiction, must have a proper jurisdictional basis before they may undertake to act at all.\textsuperscript{20} The Court then proceeded to consider whether the doctrine of ancillary jurisdiction could serve as a basis for jurisdiction to enforce a settlement agreement.\textsuperscript{21} In doing so, the Court explained that it has recognized ancil-

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\textsuperscript{18} *Kokkonen*, 114 S. Ct. at 1677.

\textsuperscript{19} *Id.*

\textsuperscript{20} *Id.* at 1675.

\textsuperscript{21} The doctrine of ancillary jurisdiction "recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Id.* at 1676. It is interesting that the Court did not reference the relatively new "supplemental jurisdiction" statute, which is generally understood to have codified the doctrines of ancillary and pendent jurisdiction. *See* 28 U.S.C. § 1367 (1996); 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.2, at 37 (2d ed. Supp. 1994) ("In 1990 Congress codified the doctrines of 'pendent jurisdiction' and 'ancillary jurisdiction' under a new name, 'supplemental jurisdiction.'").
lary jurisdiction "for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . .; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."\(^{22}\)

The Court quickly dismissed the first justification for ancillary jurisdiction on the ground that the facts underlying the parties’ original dispute will be separate and distinct from those underlying a claim for breach of the settlement agreement.\(^{23}\) The Court then disposed of the second justification, stating: “the power asked for here is quite remote from what courts require in order to perform their functions . . . [T]he only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement."\(^{24}\) The Court therefore concluded that ancillary jurisdiction to enforce the agreement did not exist.

An interesting aspect of the Court’s opinion is the narrowness of its focus in its discussion of the second justification for ancillary jurisdiction, regarding a court’s ability to manage its proceedings, vindicate its authority, and effectuate its decrees. In its discussion, the Court looked only at whether the order of dismissal itself was jeopardized by breach of the settlement agreement, and found that it was not. The Court did not consider whether it is necessary for the federal courts to have jurisdiction in order to facilitate the federal courts’ long-standing policy favoring settlement. Indeed, although both parties had discussed this point in their briefs,\(^{25}\) and some of the lower courts had explicitly relied on it,\(^{26}\) the Court’s opinion did not even discuss the potential impact of its holding on the policy favoring settlement.

Refusing to allow the federal courts to exercise jurisdiction to enforce settlement agreements, however, may disserve the policy favoring settlement because it makes settlement a less attractive method of resolving a dispute. Settlement is made less attractive because litigants will expect that if some problem arises with performance of the settlement agreement, they will have to file a new lawsuit in a different court alleging breach of the settlement contract, rather than re-

\(^{22}\) Kokkonen, 114 S. Ct. at 1676.
\(^{23}\) Id. at 1677.
\(^{24}\) Id.
\(^{25}\) Respondent’s Brief at 29-30, Kokkonen (No. 93-263); Petitioner’s Brief at 39-41, Kokkonen (No. 93-263).
turning directly to the federal court for help.\textsuperscript{27} Litigants may thus be less inclined to settle, because they will anticipate that enforcement of their rights under the terms of a settlement agreement will be costly and cumbersome. To the extent that this disinclination to settle leads to fewer settlements, significant savings to both the litigants and to the judicial system will be lost.

While consideration of the possible effect on the policy favoring settlement ultimately may not have been sufficient to persuade the Court that ancillary jurisdiction to enforce settlement agreements is proper, it is significant that the Court apparently gave it no weight whatsoever in its analysis of the ancillary jurisdiction issue. It is possible that the Court felt that this concern was unrelated to the jurisdictional issue, but the second justification for the ancillary jurisdiction doctrine seems sufficiently open-ended to permit, and perhaps even to suggest, its consideration.\textsuperscript{28} By ignoring the point, therefore, the Court indicated that any concern about a possible negative impact on the policy favoring settlement is insufficiently important to influence its resolution of the ancillary jurisdiction question. At the very least, the Court seems to have indicated its view that the policy favoring settlement cannot compete with the federal courts’ institutional interest in maintaining strict limits on the discretionary doctrines that permit them to expand their jurisdiction—an interest that reflects concerns about preserving the resources of the federal courts and maintaining a good relationship with the state courts.

The \textit{Kokkonen} opinion thus rests upon a strict interpretation of the jurisdictional requirement. The Court insisted that the federal courts act only with a solid basis for jurisdiction, and it interpreted the doctrine of ancillary jurisdiction narrowly so as not to permit a federal court to reach out and enforce a settlement agreement in a case that the court had unconditionally dismissed.

At the same time, however, the opinion is noteworthy for its apparently inconsistent dicta, which presents a generous view of the federal courts’ power to retain jurisdiction over private settlement agreements and then to exercise that jurisdiction to enforce the terms

\textsuperscript{27} See supra note 13 and accompanying text (discussing the reasons why parties might prefer to return to the federal court for enforcement of their settlement agreement).

\textsuperscript{28} Under the second rationale for ancillary jurisdiction, the Court has found, for example, that federal courts have the power to compel payment of attorney’s fees as a sanction for misconduct, Chambers v. NASCO, Inc., 501 U.S. 32, 43-55 (1991), and the power to appoint counsel to prosecute the violation of a court’s order, Young v. United States \textit{ex rel. Vuitton et Fils S.A.}, 481 U.S. 787, 793-801 (1987). See generally 13 \textit{WRIGHT ET AL.}, \textit{supra} note 21, § 3523, at 82-118 (discussing the doctrine of ancillary jurisdiction).
of those agreements. After deciding that the federal courts do not have ancillary jurisdiction over a settlement agreement after an unconditional dismissal, the Court took pains to explain that ancillary jurisdiction to enforce the agreement does exist where the court has expressly retained jurisdiction over the settlement agreement in its order of dismissal. The Court reasoned that “if the parties’ obligation to comply with the terms of the settlement agreement has been made part of the order of dismissal... then a breach of the agreement would be a violation of the order.” The Court then emphasized that the federal courts have broad power to retain jurisdiction over a settlement agreement:

When the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2), which specifies that the action “shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper,” the parties’ compliance with the terms of the settlement contract (or the court’s “retention of jurisdiction” over the settlement contract) may, in the court’s discretion, be one of the terms set forth in the order. Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties’ stipulation of dismissal) we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree.

In according the federal courts such wide latitude to retain jurisdiction in the order granting dismissal, the Supreme Court undercut the principle behind its actual holding in the case. In one remarkable paragraph, the Court brushed off the argument for jurisdiction to enforce a settlement agreement after an unconditional dismissal, emphasizing that the claim for enforcement is a contract dispute, which is unrelated to the facts of the original dispute and “is in no way essential to the conduct of federal-court business.” The Court even hinted that a federal statute providing for jurisdiction to enforce a settlement agreement in this situation might be unconstitutional.

In the wake of this strong rejection of jurisdiction, however, the Court immediately proceeded to make clear that, by simply adding a

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29. Kokkonen, 114 S. Ct. at 1677.
30. Id.
31. Id.
32. Id.
33. The Court stated: “The short of the matter is this: The suit involves a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute.” Id.
provision to the order of dismissal "retaining jurisdiction" over the settlement agreement, the federal court would indeed preserve jurisdiction to enforce the agreement. Moreover, the Court suggested no substantive, policy-based limits on this power to retain jurisdiction over claims arising out of the settlement agreement despite the fact that the content of such claims would be functionally indistinguishable from those arising out of settlement agreements in cases that were unconditionally dismissed. Indeed, the only limit that the Supreme Court placed on the district court's authority to retain jurisdiction over a settlement agreement was that when the dismissal is pursuant to Rule 41(a)(1)(ii), the parties must agree to the retention. Although this limitation could potentially come into play in most cases because settlement-based dismissals are typically effected through Rule 41(a)(1)(ii), it does not act as a substantive limit on the court's authority. In other words, this limit does not cabin the court's power to retain jurisdiction over settlement agreements in cases where the parties do agree. The Court did not suggest any limits on the district court's discretion in that situation; the Court provided no guidance on when it is or is not appropriate, as a matter of policy,

34. It is hard to see why it is inappropriate for a district court to enforce a settlement agreement in a case that it had unconditionally dismissed, while at the same time it is appropriate for a district court to enforce that same settlement agreement in a case where it had included a provision "retaining jurisdiction" in the order of dismissal. Any concerns about federalism or the competence of the federal courts seem equally valid in both situations.

35. *Kokkonen*, 114 S. Ct. at 1677. The Court even interpreted Rule 41(a)(1)(ii) to authorize a court to retain jurisdiction over the settlement agreement in its dismissal order, despite the fact that the terms of the rule do not authorize a district court to attach conditions to the dismissal. *Id.* But see *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993, 995 n.1 (6th Cir. 1987) ("where a lawsuit is dismissed by stipulation pursuant to Rule 41(a)(1)(ii), the district court may not condition dismissal upon performance of or retain jurisdiction to enforce terms of a settlement agreement"); *9 WIGET*, supra note 21, § 2366, at 302 ("The district court has no power to impose terms and conditions if a plaintiff properly dismisses by notice under Rule 41(a)(1). Nor may the plaintiff seek a conditional dismissal under that portion of the rule.").

36. Most settlements result in dismissals under Rule 41(a)(1)(ii), which allows parties to dismiss a case "by filing a stipulation of dismissal." Dismissals pursuant to Rule 41(a)(2), which expressly allows the court to impose terms and conditions on the dismissal, rarely follow settlements; that provision is designed to enable the court to protect the defendant when the plaintiff seeks dismissal after the case is underway. *See McCall-Bey v. Franzen*, 777 F.2d 1178, 1183-84 (7th Cir. 1985).

The Court's limitation—that the parties must agree—is mandated by the terms of Rule 41(a)(1)(ii). Fulfillment of that requirement, however, cannot in itself serve as a basis for jurisdiction. The Court has long held that the parties in the case cannot by agreement confer subject matter jurisdiction on the federal courts. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 & n.17 (1951).
for a federal court to maintain jurisdiction over the parties' settlement agreement.\footnote{37}

In *Kokkonen*, the Court thus sent somewhat contradictory messages: if the district court did not have the foresight to retain jurisdiction over the settlement agreement in its order of dismissal, then it has no power to enforce the agreement later. On the other hand, if the district court anticipates that it might want to participate in enforcing the agreement, it can effectively preserve its ability to do so by including a provision retaining jurisdiction over the settlement agreement, or embodying the settlement agreement itself, in the order of dismissal.\footnote{38}

In addition, *Kokkonen* leaves open another possibility for the federal courts. In its opinion, the Court explicitly left open the question of whether a federal court may, under Federal Rule of Civil Procedure 60(b)(6), reopen an unconditionally dismissed case because the settlement agreement that produced the dismissal has subsequently been breached.\footnote{39} Embedded within that question is another which has divided the circuit courts of appeals: whether a federal court may reopen a dismissed case based on breach of the settlement agreement and then proceed to enforce the settlement agreement.\footnote{40}

\footnote{37. Although in *Kokkonen* the Court did not suggest any substantive limitations on the district courts' authority to retain jurisdiction over settlement agreements, the requirements set forth in Local 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), would presumably apply. In that case, the Supreme Court held that a court may not approve a consent decree unless the decree: (1) serves to resolve a dispute within the court's subject matter jurisdiction; (2) comes within the general scope of the case, as defined by the pleadings; and (3) furthers the objectives of the law. \textit{Id.} at 525.}

\footnote{38. It is worth noting that the Ninth Circuit has recently held that even if the district court explicitly retained jurisdiction over the settlement agreement, it has the authority to terminate that jurisdiction and refuse to enforce the settlement agreement. Arata v. Nu-Skin Int'l, Inc., 96 F.3d 1265, 1268-69 (9th Cir. 1996). The court reasoned that because the district court's initial retention of jurisdiction is a discretionary act, the district court also has discretion to terminate its continuing jurisdiction. \textit{Id.}}

\footnote{39. *Kokkonen*, 114 S. Ct. at 1675. An analysis of this issue is provided, \textit{infra}, in Part III.A.}

\footnote{40. Compare McCall-Bey v. Franzen, 777 F.2d 1178 (7th Cir. 1985) (holding that the court does not have jurisdiction to enforce the settlement agreement even after reopening the case under Rule 60(b)(6)) and Fairfax Countywide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299 (4th Cir.) (holding that the court has the power to reopen the case under Rule 60(b)(6), but does not thereby have jurisdiction to enforce a settlement agreement), \textit{cert. denied}, 439 U.S. 1047 (1978) with Aro Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir.) (holding that the court has the power to enforce the settlement agreement after it has reopened the case under Rule 60(b)(6)), \textit{cert. denied}, 429 U.S. 862 (1976) and Joy Mfg. Co. v. National Mine Serv. Co., 810 F.2d 1127 (Fed. Cir. 1987) (same). An analysis of this issue is also provided, \textit{infra}, in Part III.A.}
B. Digital Equipment Corp. v. Desktop Direct, Inc.

The issue presented in Digital Equipment Corp. v. Desktop Direct, Inc., the second in the trilogy of cases, was whether a party has a right to appeal immediately a district court’s decision to reopen a case, when the case previously had been dismissed on the basis of a settlement agreement between the parties.

When parties settle a case, their settlement agreement typically provides the parties with a right not to stand trial on the matter resolved in the agreement. When a district court vacates a dismissal that was predicated on a settlement and reopens the case, the court overrides that bargained-for right. If a party disagrees with the district court’s decision to reopen the case, then the party would prefer to appeal the ruling immediately, rather than having to wait until after it has endured the very trial on the merits that it had specifically sought to avoid by assenting to the settlement agreement. The question whether the party has a right of immediate appeal in this situation turns on the proper application of the “collateral order” doctrine of the final judgment rule.

The final judgment rule, which is contained in section 1291 of the Judicial Code, provides for the right to appeal only from “final decisions of the district courts.” The purpose of the statute is to promote the efficient administration of justice by preventing piecemeal litigation. A decision is final when it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” When a district court vacates an earlier dismissal and reopens the case, its decision is not a final decision within the terms of the statute; indeed, rather than ending the litigation on the merits, the order serves to restart the litigation.

In construing the final judgment rule, however, the courts have extended it to include a “narrow class of decisions that do not termi-

42. The Supreme Court recognized this point in Digital Equipment: “it would be the rare settlement agreement that could not be construed to include (at least an implicit) freedom-from-trial ‘aspect . . . .’” Id. at 2000.
nate the litigation, but must, in the interest of ‘achieving a healthy legal system,’ . . . nonetheless be treated as final.”47 This extension of the final judgment rule, known as the collateral order doctrine, has been tightly confined to those decisions “that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action.”48

The circuit courts of appeals had divided over the question of whether a district court’s order vacating a dismissal—thereby rescinding the parties’ settlement agreement and reopening the case—falls within the collateral order doctrine.49 In analyzing this question, the courts of appeals had found that such orders were conclusive and completely separable from the merits, thus meeting two of the requirements of the collateral order test.50 Further, the courts had generally agreed that the essence of the right to avoid trial could not be vindicated effectively after the trial had occurred, thus meeting the “effectively unreviewable” requirement.51 But the courts had parted company over whether the asserted right was sufficiently important to merit immediate appeal.52

50. See Digital Equipment, 993 F.2d at 757; Forbus, 958 F.2d at 1039-40; Grillet, 927 F.2d at 219; Jannneh, 887 F.2d at 434. Cf. Transtech, 5 F.3d at 57 (noting that it had “substantial doubts” about whether a reinstatement order is completely separable from the merits).
51. See Digital Equipment, 993 F.2d at 758; Forbus, 958 F.2d at 1040; Grillet, 927 F.2d at 220; Jannneh, 887 F.2d at 436. But cf. Transtech, 5 F.3d at 57 (finding it “quite clear that the settlor-defendants’ contentions can be raised on direct appeal after final judgment”).
52. In Jannneh, the leading case permitting immediate appeal, the Second Circuit discussed the importance of the right in conjunction with the second requirement—separability. 887 F.2d at 434-35. In Digital Equipment, both the Tenth Circuit and the Supreme Court discussed the importance of this right in conjunction with the third requirement—whether the order is effectively unreviewable. 993 F.2d at 757-58; 114 S. Ct. at 2001.
The leading case in the courts of appeals was *Janneh v. GAF Corp.* In *Janneh*, the Second Circuit viewed the bargained-for right to avoid trial as inextricably linked to the policy favoring the private settlement of disputes:

That right implicates our nation’s strong judicial and public policies favoring out-of-court settlement. Litigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration. Foregoing formal courtroom procedures, including discovery, trial, briefs and arguments, brings substantial benefits to the parties. The costs of litigation are reduced and crowded dockets are relieved.

The court thus considered this privately negotiated right to avoid trial to be important from two perspectives. First, from an institutional point of view, allowing immediate appeal would provide an opportunity to decrease the burden on the judicial system by allowing the courts of appeals to weed out cases that had in fact been effectively settled. Second, from the parties’ point of view, denying immediate appeal would deprive them of the “vital” rights that they had negotiated in their settlement agreement. The Second Circuit thus held that protection of the bargained-for right not to stand trial is sufficiently important to accord a right of immediate appeal under the collateral order doctrine.

Until the Tenth Circuit’s decision in *Digital Equipment*, the Second Circuit’s reasoning in *Janneh* had generally been decisive in the

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54. Id. at 435.
55. Id. at 433. Indeed, the Second Circuit began its opinion by asking: “Should a court system awash in backlog delay further the disposition of a case where there is convincing proof that a settlement has been reached?” Id.
56. Id. at 435.
57. Id. at 435-36. The Second Circuit also looked for guidance to the Supreme Court’s decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). In *Carson*, which involved a Title VII class action suit, the Court had held that a district court’s order refusing to approve a settlement agreement that provides for injunctive relief is immediately appealable under another exception to the final judgment rule—the exception for interlocutory orders that refuse injunctions. 28 U.S.C. § 1292(a)(1) (1994). In reaching that conclusion, the Supreme Court reasoned that such an order would create a “serious, perhaps irreparable, consequence,” because it would effectively force the parties to proceed to trial, and thus would deprive the parties of “the opportunity to compromise their claim and to obtain the injunctive benefits of the settlement agreement they negotiated.” *Carson*, 450 U.S. at 84, 89. In *Janneh*, of course, the Second Circuit was interpreting a different exception to the final judgment rule. But in *Carson*, the Supreme Court had emphasized the need to protect private settlement agreements through according a right of immediate appeal, and the Second Circuit relied on that emphasis.
other circuit courts of appeals that faced the issue. But the Tenth Circuit disagreed, concluding that a claimed right to avoid trial based on a private settlement agreement was insufficiently compelling to meet the importance requirement of the collateral order doctrine. The court thus refused to allow the appeal.

The Supreme Court granted certiorari in *Digital Equipment* to resolve the issue. A unanimous Court affirmed the Tenth Circuit, holding that an order denying effect to a settlement agreement is not immediately appealable under the collateral order doctrine. In doing so, the Supreme Court was willing to assume that two of the requirements of the collateral order test—conclusiveness and separability—were met. The Court instead focused on the require-

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59. *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755, 760 (10th Cir. 1993), aff'd, 114 S. Ct. 1992 (1994). In that case, Desktop Direct, Inc. sued Digital Equipment Corp., alleging that Digital Equipment had unlawfully used the "Desktop Direct" name. The parties settled prior to trial, and pursuant to the settlement agreement, Desktop Direct filed a notice of dismissal in the district court. Several months later, however, Desktop Direct moved to vacate the dismissal and rescind the settlement agreement on the ground that Digital Equipment had engaged in misrepresentation during settlement negotiations. The district court granted the motion. Desktop Direct, Inc. v. Digital Equipment Corp., No. 92-C-178G, slip op. at 1 (D. Utah Mar. 15, 1993), appeal dismissed, 993 F.2d 755, 760 (10th Cir. 1993), aff'd, 114 S. Ct. 1992 (1994). Although the district court did not specify the statutory authority for its order, it presumably relied on Federal Rule of Civil Procedure 60(b). Digital Equipment's appeal of this order led to the Tenth Circuit's decision.


61. *Id.* at 1994. The Court was careful to note, however, that while its decision foreclosed appeal as of right under the collateral order doctrine, a party could still seek review of the district court's order under the discretionary appeal provision contained in 28 U.S.C. § 1292(b) (1994) (permitting discretionary interlocutory appeal from district court orders that "involve a controlling question of law as to which there is substantial ground for difference of opinion"). *Id.* at 2003-04.

Also, it is worth noting that the Court's holding will affect parties that seek to have their case reopened, based on breach of their settlement agreement, pursuant to Rule 60(b)(6). If a party is successful in having a case reopened on that basis, the other party will not be entitled to immediate review of the court's decision. The issue of whether a federal court may reopen a dismissed case based on breach of the settlement agreement that produced the dismissal is discussed, *infra*, in Part III.A.

ment that an important issue would be effectively unreviewable on appeal from a final judgment, and it concluded that a privately negotiated right to avoid trial "does not rise to the level of importance needed for recognition under § 1291."\(^63\)

Justice David Souter's discussion of the importance requirement provides insight into the Supreme Court's attitude toward settlement agreements and the public policy favoring settlement. Analysis of this requirement called upon the Court to weigh the importance of rights embodied in a settlement agreement against the importance of institutional interests of the courts, and in particular, the interest in orderly judicial administration and efficiency.

In balancing these rights and interests, the Supreme Court placed little value on the rights that private parties have negotiated and embodied in their private settlements. Indeed, the Court seemed almost to belittle such rights:

Including a provision in a private contract . . . is barely a prima facie indication that the right secured is "important" to the benefited party (contracts being replete with boilerplate), let alone that its value exceeds that of other rights not embodied in agreements (e.g., the right to be free from a second suit based on a claim that has already been litigated), or that it qualifies as "important" in Cohen's sense, as being weightier than the societal interests advanced by the ordinary operation of final judgment principles.\(^64\)

This discussion of privately negotiated rights is all the more striking given the privately negotiated right at issue—the right to avoid the expense, delay, and risk of trial. The Court seemed to equate the importance of that right with the importance of rights that are contained in the boilerplate of a contract. But surely a provision in a settlement contract that provides for the right to avoid trial is of the utmost importance to the settling parties. In its opinion, the Court sought to minimize this right by separating it from the right in the settlement contract that limits exposure to liability.\(^65\) These rights, however, are closely intertwined: when parties settle, they not only want to fix a sum certain to eliminate the possibility of a larger (or smaller) award after trial, they also want to eliminate the expense and delay of trial, with all of the attendant debilitating effects of the lingering uncer-

\(^{63}\) Id. at 2001.

\(^{64}\) Id. at 2001-02 (referring to Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

\(^{65}\) In the opinion, Justice Souter stated: "Judged within the four corners of the settlement agreement, avoiding trial probably pales in comparison with the benefit of limiting exposure to liability (an interest that is fully vindicable on appeal from final judgment)." Digital Equipment, 114 S. Ct. at 2003.
tainty. It is this combination of rights that is the driving motivation behind almost any settlement that the parties reach, and thus the provision in their contract which secures this objective is the centerpiece of the settlement agreement.

By characterizing the parties' privately negotiated right to avoid trial as potentially unimportant even to the parties, however, the Court had no trouble finding that such a right was insufficiently important to outweigh the judiciary's interest in efficient administration. Indeed the Court viewed such a contractual right as "far removed" from rights "more deeply rooted in public policy" that warrant immediate appeal.

However, the particular contractual right at issue does implicate an established public policy: the public policy favoring the private settlement of disputes. The Court's discussion of the impact that its decision would have on that public policy is also of considerable interest.

The petitioner in Digital Equipment had argued that failure to provide an immediate appeal of orders abrogating a party's bargained-for right to avoid trial would undermine the policy favoring settlement. The Court acknowledged the argument, but refused to find that "settlement-agreement 'immunities'" advance "the public

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66. The Court's tone with respect to the importance of settlement agreements in Digital Equipment is a marked departure from its tone in Carson v. American Brands, Inc., 450 U.S. 79 (1981). In Carson, the Court recognized that settlement agreements might "be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation." Id. at 87. But rather than finding the loss of that privately negotiated right insufficiently important to justify immediate appeal, as it did in Digital Equipment, the Court in Carson saw the loss as a "serious, perhaps irreparable, consequence." Id. To be sure, the issue in Carson was different: the Court was considering a different exception to the final judgment rule and it saw the order in that case—which refused to approve the parties' settlement agreement and thus forced them to go to trial—as jeopardizing the parties' ability to enter into a settlement agreement at all. Id. In addition, the Court may have been more comfortable in giving a broad interpretation to the exception at issue in Carson, because it was a statutory exception to the final judgment rule (not a judge-made exception as in Digital Equipment), and the Court may have been especially concerned that the collateral order doctrine remained limited, so that it did not "swallow the general rule." Digital Equipment, 114 S. Ct. at 1996. But even so, the Court's concern in Carson about the parties' ability to realize the benefits of their settlement agreement seems inconsistent with the deprecating treatment that the Court gave to settlement-based rights in Digital Equipment. The Court did not cite Carson in its opinion in Digital Equipment, and thus did not discuss the apparent inconsistency between these two cases.


68. Petitioner's Brief at 22-28, Digital Equipment (No. 93-405).
policy favoring voluntary resolution of disputes.”\textsuperscript{69} The Court reasoned that it “defies 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” after trial on the merits.\textsuperscript{70}

The interesting aspect of the Court’s observation is not its conclusion (which seems correct as far as it goes), but rather its focus, which was narrowly directed at the impact that the rule would have on a party’s incentives to enter into a settlement \textit{ex ante}. The Court did not consider the impact that its rule might have on a party’s incentives to try to \textit{upset} an existing settlement agreement or, more broadly, the impact that its rule might have on the achievement of the goals that form the basis for the policy favoring settlement.

Once a settlement has been reached, a party will be inclined to seek to have the agreement set aside where it later determines that it has made a bad bargain or where it believes that its chances of prevailing in the underlying case have significantly improved. One party or the other is likely to arrive at this view in many cases that have been settled. It is in this situation that the effects of the ruling in \textit{Digital Equipment} are most likely to be felt. If a district court agrees to reopen a case, and if immediate appeal of its decision to do so is not available, then the parties face going to trial, unless they enter into a new settlement agreement. The party who opposed reinstatement of the case has already evidenced a significant interest in avoiding the expense and delay of trial, by entering into the settlement in the first place and then by seeking to preserve it. Because that party will likely maintain that same interest, it will again be under substantial pressure to settle once the case has been reinstated. Any such settlement almost certainly will be on less favorable terms because the initiating party was willing to reinstate the case rather than abide by the previous settlement. Whenever a subsequent settlement is reached, moreover, the initiating party will have avoided any appellate review of the trial court’s decision to reopen the case. Under the ruling in \textit{Digital Equipment}, therefore, the initiating party will have an excellent opportunity to achieve a more advantageous result by seeking to set aside an existing settlement agreement. This effect upon the parties’ incentives increases the likelihood that one party or the other will try

\textsuperscript{69} \textit{Digital Equipment}, 114 S. Ct. at 2002.

\textsuperscript{70} \textit{Id.} at 2002-03.
to upset an existing settlement and reopen the case, with detrimental consequences for the policy favoring settlement.

More fundamentally, however, the Court did not discuss the broader effect that its rule might have on the achievement of the goals that form the foundation of the policy favoring settlement. Public policy favors the private settlement of disputes because settlements ease the burden on courts, conserve judicial resources, reduce the expense and risk of litigation for parties, and promote more lasting conciliation. When a district court overrides a settlement agreement and reopens a case, these important benefits to the judicial system are necessarily lost in that case unless or until another settlement is reached. If the appellate court determines only after full trial on the merits that the district court’s decision to reopen was wrong, then the benefits were lost without good reason.

In the end, these detrimental effects upon the goals underlying the policy favoring settlement might not have outweighed the interests in orderly judicial administration and efficiency that the final judgment rule promotes. But it is significant that the Court focused almost exclusively on those other interests and apparently did not even consider the effect on the policy favoring settlement from this more comprehensive perspective. Instead, the Court brushed aside any concerns about the policy, and provided only a superficial analysis of how its ruling would affect the incentives that parties have to enter into settlements ex ante.

C. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership

The final case in this trilogy of decisions was U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership. Bonner Mall presented the issue of whether an appellate court should vacate the lower court’s judgment in a case that is settled during the appellate process.

Parties settle cases not only before trial, but also after trial, when an appeal is pending in the court of appeals or even in the Supreme Court. A settlement during the appellate process terminates the litigation, just as a pre-trial settlement does. Normally, the case is simply dismissed at that juncture, leaving the parties to perform their respective obligations under the privately negotiated agreement that re-

71. See infra notes 116-19 and accompanying text.
72. Even if a subsequent settlement is reached, these important benefits will have been lost in the interim in any case where an appellate court would have determined that the district court’s decision to reopen the case was wrong.
73. 115 S. Ct. 386 (1994).
solved their dispute. But sometimes the parties ask the court to do more: to vacate the subordinate court's judgment in the case.74

Vacatur can be attractive to the losing party for related reasons. First, if the losing party is concerned about collateral consequences, vacatur enables the party to eliminate any res judicata or collateral estoppel effects of the judgment.75 Second, if the losing party is concerned about the adverse decision serving as precedent in other cases, vacatur enables the party to undermine the decision's precedential value.76 In addition, when vacatur is desirable for the losing party, it can also be attractive to the winning party, because it gives the winning party more bargaining power during settlement negotiations. If the losing party wants vacatur, the winning party has added leverage to demand greater concessions in return for its joining in, or at least not opposing, a request for vacatur.77

A request for vacatur following settlement gives rise to two issues. The first is whether the appellate court is required to vacate the decision of the lower court on the ground that settlement of the action mooted the case. The second is whether the appellate court should, in its discretion and as a matter of policy, vacate the lower court's decision.78

With respect to the first question, litigants seeking vacatur had argued that under the doctrine of United States v. Munsingwear, Inc.,79 the court must vacate the judgment below because settlement renders the case moot. In Munsingwear, the Supreme Court established that

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74. For a useful discussion of the mechanics of a motion to vacate following settlement, see Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 CORNELL L. REV. 589, 593-99 (1991) [hereinafter Rewriting History].

75. Without vacatur, the prior judgment would continue to have collateral consequences, because dismissal of a case on appeal does not automatically affect the prior judgment, which continues to have full force and effect. See 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.416[5]-[6] (2d ed. 1988).

76. See In re Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988) (explaining that vacatur "clouds and diminishes the significance of the holding").


78. There is no question that the federal courts are authorized to vacate decisions, even if they are not required to do so. See Fed. R. Civ. P. 60(b), 59(e); Lake Coal Co. v. Roberts & Schaefer Co., 474 U.S. 120 (1985) (per curiam) (granting vacatur after a case became moot due to settlement); Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384 (2d Cir. 1993) (stating that "the appellate court has discretion to order such a vacatur [following settlement], and this discretion has been exercised both by the Supreme Court . . . and by this Court").

when a case becomes moot while an appeal is pending, the judgment below must be vacated if review was "prevented through happen-
stance." Most of the circuit courts of appeals, however, had refused
to apply the *Munsingwear* doctrine to cases in which mootness was
produced by settlement. Reasoning that *Munsingwear* only requires
vacatur when mootness occurred due to circumstances beyond the
parties’ control, these courts had refused to vacate when the case had
become moot due to a voluntary decision to forgo an appeal by set-

tting the litigation.

The more troubling issue for the circuit courts of appeals had
been the second issue—whether the courts should, as a matter of
policy, vacate the lower court’s decision upon the parties’ request. On
this issue the courts were deeply divided. The courts that favored
granting the parties’ request for vacatur had focused on the impor-
tance of promoting settlements, concluding that concerns about the
finality of judgments should yield to the policy favoring settlement of

80. *Id.* at 39-40. In *Munsingwear*, the United States sought injunctive relief and dam-
ages for alleged violations of a price control regulation. The claim was first litigated with
respect to injunctive relief only. The district court held that Munsingwear’s pricing com-
plied with the regulation, and dismissed the case. While the United States’ appeal was
pending, the commodity involved was deregulated. Munsingwear then moved to dismiss
the appeal based on mootness, the United States acquiesced in the motion, and the court
of appeals dismissed the case as moot. Later, the United States sought damages in a sepa-
rate action. Munsingwear successfully moved to dismiss the damages action on grounds of
res judicata. The United States argued that it was unfair to accord res judicata effect to a
judgment that it had been unable to appeal because of mootness. The Supreme Court
ultimately held that, because the United States had failed to request vacatur of the district
court’s decision, it had “slept on its rights” and could not complain. *Id.* at 37-41.

81. See, e.g., *Oklahoma Radio Assocs. v. FDIC*, 3 F.3d 1436, 1437-39 (10th Cir. 1993);
Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 130 (3rd Cir. 1991); *In re United
States*, 927 F.2d 626, 627-28 (D.C. Cir. 1991); National Union Fire Ins. Co. v. Seafirst Corp.,
891 F.2d 762, 765-67 (9th Cir. 1989); *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d
1299, 1301-02 (7th Cir. 1988); Nestle Co. v. Chester’s Market, Inc., 756 F.2d 280, 281-82 (2d
Cir. 1985). *But see* U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728, 731 (Fed. Cir.
1992), cert. granted, 507 U.S. 907 (1993), and cert. dismissed, 510 U.S. 907 (1993); *Kennedy
v. Block*, 784 F.2d 1220, 1223 (4th Cir. 1986).

82. See, e.g., *Oklahoma Radio*, 3 F.3d at 1437-39; Clarendon, 936 F.2d at 130; *In re
United States*, 927 F.2d at 627-28; *National Union*, 891 F.2d at 765-67; *Memorial Hosp.*, 862
F.2d at 1301-02; *Nestle*, 756 F.2d at 281-82.

83. Compare Clarendon, 936 F.2d at 130 (denying vacatur), *In re United States*, 927
F.2d at 627-28 (same), Clipper v. Takoma Park, 898 F.2d 18, 19 (4th Cir. 1989) (same), and
*Memorial Hosp.*, 862 F.2d at 1301-02 (same) with Federal Data Corp. v. SMS Data Prod-
ucts Group, Inc., 819 F.2d 277, 279-80 (Fed. Cir. 1987) (granting vacatur) and *Nestle*, 756
F.2d at 281-82 (same). *See also Oklahoma Radio*, 3 F.3d at 1437-39 (employing a case-by-
case balancing approach); *National Union*, 891 F.2d at 765-67 (same); *Westmoreland v.
National Transp. Safety Bd.*, 833 F.2d 1461-63 (11th Cir. 1987) (same).
In addition, these courts had stressed the effect of refusing vacatur on the parties, finding "no justification to force these defendants, who wish only to settle the present litigation, to act as unwilling private attorneys general and to bear the various costs and risks of litigation." Other courts, however, had concluded that parties’ requests for vacatur should be denied. Although the courts taking this view agreed that settlement of disputes is valuable, they emphasized that a judicial opinion is a formal act of the government that has significant social value as precedent. These courts were loath to allow that precedent, which was created at public expense and might benefit future litigants, to be “a bargaining chip in the process of settlement.”

In its first attempt to resolve this conflict of authority in the courts of appeals, the Supreme Court granted certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.* *Izumi* grew out of a lawsuit between Windmere Corporation and U.S. Philips Corporation, alleging unfair competition and antitrust claims. Windmere and Philips settled the suit while the case was on appeal to the Federal Circuit. Pursuant to the settlement, Windmere and Philips requested that the court of appeals vacate the district court’s judgment. *Izumi*, which had a significant interest in preserving the collateral benefits of the district court’s judgment, then sought to intervene to oppose the

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84. In *Nestle*, for instance, the Second Circuit stated: “[H]ere we are faced with a settlement that will bring pending litigation to an end. Because the policies favoring finality of judgments are intended to conserve judicial and private resources, the denial of the motion for vacatur is counterproductive because it will lead to more rather than less litigation.” 756 F.2d at 282. See also Federal Data Corp., 819 F.2d at 279-80 (agreeing with the reasoning of the *Nestle* court); 13A WRIGHT ET AL., supra note 21, § 3533.10, at 432 (“All of the policies that make voluntary settlement so important a means of concluding litigation apply.”).

85. *Nestle*, 756 F.2d at 284. See also Federal Data Corp., 819 F.2d at 280 (observing that it would be unjust to require parties who had settled their dispute to continue to litigate).

86. In *Memorial Hospital*, for instance, the Seventh Circuit stated: “It is hard to be against settlement. Any disposition that the parties to the litigation unanimously endorse has much to be said for it—it produces peace for the parties and frees scarce judicial time to attend to litigants who need it.” 862 F.2d at 1302. See also Clarendon, 936 F.2d at 129 (“[w]e share the view that voluntary settlements should be encouraged.”).

87. See *Memorial Hosp.*, 862 F.2d at 1302; *In re United States*, 927 F.2d at 628.

88. *Memorial Hosp.*, 862 F.2d at 1302. See also *In re United States*, 927 F.2d at 628 (quoting *Memorial Hosp.*, 862 F.2d at 1302); Clarendon, 936 F.2d at 129 (same).

vacatur motion. The court of appeals denied Izumi’s motion to intervene and granted the motion for vacatur.

Izumi then sought certiorari, and the Supreme Court agreed to review the issue of whether the courts of appeals should grant motions to vacate district court decisions when cases are settled during the appellate process. After briefing, however, the Supreme Court dismissed the writ of certiorari as improvidently granted, finding that Izumi had not properly preserved the intervention issue and therefore had no standing to seek review of the question presented. In his dissent, however, Justice Stevens made clear his view of the merits: “Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur.”

Several months later, the Supreme Court found another opportunity to address the issue. The Court had granted certiorari in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership to consider an issue of bankruptcy law. Prior to oral argument, however, the parties agreed to a consensual plan of reorganization, which effectively settled the case. The parties thus asked the Court to dismiss the case as moot. In addition, Bancorp, which had lost below, asked the Court to vacate the decision of the court of appeals. Bonner Mall opposed that request, and the Court called for briefing on the vacatur issue.

In a unanimous decision, the Court held that mootness resulting from settlement does not justify vacatur of a judgment. In reaching that conclusion, the Court considered both aspects of the vacatur.

90. The parties had asked the Federal Circuit to vacate the district court's judgment holding against Philips on unfair competition and antitrust claims. Izumi sought to use that judgment as collateral estoppel in another action that Izumi was involved in against Philips. For a helpful discussion of the complicated litigation among these various parties, see Resnik, Role of Adjudication, supra note 77, at 1480-81.


93. Id. at 40 (Stevens, J., dissenting).


96. Bonner Mall, 115 S. Ct. at 393. The Court expressly affirmed that it had the power to consider the vacatur question, even though the case had become moot: “If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require.” Id. at 390 (quoting Walling v. Reuter Co., 321 U.S. 671, 677 (1944) (brackets in original)).
question: whether a court is required to vacate the decision below under *Munsingwear*, and if not, whether a court should do so as a matter of policy.

In analyzing these issues, the Court began by clarifying the scope and meaning of *Munsingwear*. The Court explained that *Munsingwear* is grounded in the "equitable tradition of vacatur." Under that equitable tradition, a judgment is not allowed to stand when the party adversely affected is prevented from seeking review by circumstance or the unilateral action of the prevailing party. The Court made clear, however, that this equitable tradition extends only to situations in which the losing party does not cause the mootness. Emphasizing this limitation, the Court concluded: "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur."

Having disposed of the *Munsingwear* issue, the Court then considered the question of vacatur from a policy standpoint. This discussion, authored by Justice Scalia, is of particular interest. Although the facts of the case presented only the question of whether the Court should grant vacatur following settlement even over the objection of one party, the Court also addressed the broader question of whether it should grant vacatur when all parties have agreed to request it and the parties' settlement agreement so provides. To reach this broader question, the Court had to weigh the institutional interests in orderly administration, finality, and precedent against the opposing interests in facilitating settlement of cases.

In its discussion, the Court first affirmed that there is a significant public interest in judicial precedents, which are "'valuable to the legal community as a whole.'" The Court then addressed the institutional interest in the orderly administration of the judicial system. Noting that the "primary route" for parties to seek relief from the consequences of a judgment is appeal as of right and certiorari, the Court expressed its concern that allowing vacatur to serve as "a refined form of collateral attack on the judgment would disturb . . . the orderly operation of the federal judicial system." The Court

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97. *Id.*, 115 S. Ct. at 391.
98. *Id.* at 391-92.
99. *Id.* at 392.
100. *Id.* at 392-93.
102. *Id.*
stressed that the public interest is best served when the demands of orderly procedure are honored.

Working from that premise, the Court then considered whether vacatur could be justified on systemic grounds. First, the Court considered whether it was appropriate to vacate on the ground that holdings in decisions on which certiorari is granted are of questionable quality. Although acknowledging that such cases are reversed more often than affirmed, the Court found it inappropriate to grant vacatur "on the basis of assumptions about the merits." The Court then considered whether it would be useful to vacate a moot decision, leaving the legal question unresolved, and thus generating continued examination of the issue among the lower courts. The Court rejected that ground, opining that the value of additional debate is far outweighed by the benefits of clear resolution of legal questions.

Finally, the Court considered the effect of granting vacatur on the public policy favoring the settlement of disputes. Looking at the question from a systemic point of view, the Court observed that while granting vacatur might facilitate settlement at the appellate level, it might deter settlement at an earlier stage (where the savings in judicial resources will generally be much greater). This delay in reaching settlement could occur because parties might be more willing to risk an adverse judgment if they knew that they would have an opportunity to dissolve it later through settlement and vacatur. This counterargument had been noted in one of the lower court opinions rejecting vacatur, and it significantly complicates the analysis of the overall effect this practice would have on promoting or impeding the policy favoring settlement.

One would expect, therefore, that the Court would have undertaken a more detailed analysis of the likely magnitude of these countervailing factors in an effort to gauge the potential consequences on the policy favoring settlement. Surprisingly, however, the Court did

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103. Id. at 392-93.
104. Id. at 393.
105. In the briefs, the parties argued back and forth about whether granting vacatur would facilitate settlement. Petitioner's Brief at 30, Bonner Mall (No. 93-714); Respondent's Brief at 37-41, Bonner Mall (No. 93-714). The courts of appeals had explicitly relied on the policy favoring settlement in holding that vacatur should be granted when it will facilitate settlement. See, e.g., Nestle Co. v. Chester's Market, Inc., 756 F.2d 280, 282 (2d Cir. 1985).
106. Bonner Mall, 115 S. Ct. at 393.
107. See In re Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988) (pointing out that "our approach encourages" earlier settlement "before the district court renders a decision").
no more than briefly speculate about these possible effects. Indeed, without undertaking any careful or serious examination of the issue, the Court almost immediately threw up its hands, complaining that it was "quite impossible" to assess the effect of vacatur on the "frequency or systemic value of settlement." In reaching that conclusion, the Court apparently made no attempt to determine empirically, or even as a matter of common sense, whether routine refusal of vacatur would undermine or promote the policy favoring the private settlement of disputes.

Another interesting aspect of the decision in Bonner Mall is the extent to which the Court admittedly reached beyond the question presented in the case in order to advise the courts of appeals on how to handle requests for vacatur of district court opinions. On this point, the Court noted that a Second Circuit opinion had held that vacatur should be granted more freely of district court decisions than appellate decisions because district court decisions are subject to review as of right. Rejecting this distinction, the Court emphasized that the policy considerations weighing against vacatur were equally strong in both instances. The Court thus instructed the federal courts of appeals not to grant vacatur on grounds of mootness due to settlement, except in "exceptional circumstances." Moreover, the Court made clear that these exceptional circumstances must have their basis in something more than the interest in facilitating settlement: "It should be clear from our discussion . . . that those exceptional circum-

108. Bonner Mall, 115 S. Ct. at 393.

109. The Court's analysis of this issue was perhaps hampered by the fact that the Court was reaching beyond the issue presented on the facts of the case—whether vacatur should be granted following settlement even though one party objects—to decide the broader issue of whether vacatur should be granted when the parties' settlement provides for it, or is even contingent upon it.

A more extensive attempt to engage in an analysis of the effect of refusing vacatur on the policy favoring settlement is provided in part III.B, on the closely related issue of whether a court should accede to the parties' request for vacatur of coercive contempt sanctions. See infra notes 227-31 and accompanying text.

110. Acknowledging that "the case before us involves only a motion to vacate, by reason of settlement, the judgment of a court of appeals," the Court nonetheless felt it "appropriate to discuss the relevance of our holding to motions at the court of appeals level." Bonner Mall, 115 S. Ct. at 393. The Court thus pressed on, despite the fact that Bancorp, which was seeking vacatur, specifically limited its argument to one in favor of discretionary vacatur in cases that become moot due to settlement while pending before the Supreme Court. Petitioner's Reply Brief at 2-3, Bonner Mall (No. 93-714).


112. Bonner Mall, 115 S. Ct. at 393.
stances do not include the mere fact that the settlement agreement provides for vacatur . . . ”

II. The Public Policy Favoring Settlement

In each of these cases—Kokkonen, Digital Equipment, and Bonner Mall—the Supreme Court was called upon to resolve issues involving settlement agreements. In view of the infrequency with which the Court addresses such issues, this trilogy of decisions provides important insight into the Court’s current thinking about settlements. It also provides significant new guidance for the lower courts as they inevitably will confront an array of related but distinct issues involving settlements in future cases.

By far the most notable feature of these decisions is the Court’s unexpectedly cursory treatment of the public policy favoring the private settlement of disputes in its analysis of the issues presented. To begin with, the Court consistently declined to give dispositive weight to the policy in deciding these cases. The Court’s neglect of the policy is all the more surprising in view of the fact that leading decisions in the lower courts had relied heavily on the policy in considering and resolving each of these issues.

Interestingly, some of the lower courts have continued to apply an ad hoc, balancing approach to the issue of whether a court should vacate a decision in response to the parties’ settlement-based request. See, e.g., Dilley v. Gunn, 64 F.3d 1365, 1370-71 (9th Cir. 1995) (reaffirming that a court should “decide whether to vacate its judgment in light of ‘the consequences and attendant hardships of dismissal or refusal to dismiss’ and ‘the competing values of finality of judgment and right to relitigation of unreviewed disputes’”) (quoting Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982)); Aetna Casualty and Surety Co. v. Home Ins. Co., 882 F. Supp. 1355, 1356-57 (S.D.N.Y. 1995) (stating that the court must “balance the ends of justice on the one hand, e.g., by honoring a settlement, and the public interest in the finality of judgments on the other”). But see Bailey v. Blue Cross/Blue Shield of Va., 878 F. Supp. 54, 55-56 (E.D. Va. 1995) (requiring that the parties demonstrate exceptional circumstances beyond the fact that the settlement agreement provides for vacatur); EFS Mktg., Inc. v. Russ Berrie & Co., No. 91 CIV. 5515 (JFK), 1995 WL 77924, at *1 (S.D.N.Y. Feb. 23, 1995) (same); Hiller v. Hiller, 179 B.R. 253, 257-62 (Bankr. D. Colo. 1994) (same).

113. Id. Interestingly, some of the lower courts have continued to apply an ad hoc, balancing approach to the issue of whether a court should vacate a decision in response to the parties' settlement-based request. See, e.g., Dilley v. Gunn, 64 F.3d 1365, 1370-71 (9th Cir. 1995) (reaffirming that a court should “decide whether to vacate its judgment in light of ‘the consequences and attendant hardships of dismissal or refusal to dismiss’ and ‘the competing values of finality of judgment and right to relitigation of unreviewed disputes’”) (quoting Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982)); Aetna Casualty and Surety Co. v. Home Ins. Co., 882 F. Supp. 1355, 1356-57 (S.D.N.Y. 1995) (stating that the court must “balance the ends of justice on the one hand, e.g., by honoring a settlement, and the public interest in the finality of judgments on the other”). But see Bailey v. Blue Cross/Blue Shield of Va., 878 F. Supp. 54, 55-56 (E.D. Va. 1995) (requiring that the parties demonstrate exceptional circumstances beyond the fact that the settlement agreement provides for vacatur); EFS Mktg., Inc. v. Russ Berrie & Co., No. 91 CIV. 5515 (JFK), 1995 WL 77924, at *1 (S.D.N.Y. Feb. 23, 1995) (same); Hiller v. Hiller, 179 B.R. 253, 257-62 (Bankr. D. Colo. 1994) (same).

114. See, e.g., Janneh v. GAF Corp., 887 F.2d 432, 435 (2d Cir. 1989) (relying on the policy favoring settlement in granting immediate review of a district court’s decision to reopen a case that had been dismissed on the basis of a settlement agreement), cert. denied, 498 U.S. 865 (1990); Nestle Co., v. Chester’s Market, Inc., 756 F.2d 280, 282 (2d Cir. 1985) (relying on the policy favoring settlement in holding that courts should grant vacatur of district court opinions when both parties agree to vacate the decision in a settlement agreement); Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371 (6th Cir.) (relying on the policy favoring settlement in holding that a federal court has inherent power to enforce a settlement agreement), cert. denied, 429 U.S. 862 (1976).
Even more striking, however, is the fact that the Court did not simply decline to rely on the policy favoring settlement in deciding these cases, but in the end the Court gave it little or no weight in analyzing the issues presented. Although it never offered any explanation of the reasons why the policy was receiving such short shrift in these cases, it appears from the Court's limited analysis that the Court recognized the broader institutional interests reflected in the policy, and was aware that these might reach beyond the narrow, party-focused concerns. Nonetheless, the Court's treatment of the policy in these cases suggests that the Court failed to recognize the true significance of those interests and their proper place in analysis of settlement issues. Before turning to a more thorough discussion of the role that the policy should play in the resolution of such issues, however, it is important first to restate the foundations of the policy favoring settlement.

A. The Foundations of the Policy Favoring Settlement

The public policy favoring the private settlement of disputes has generally received enthusiastic support from the commentators and the courts. Settlement is favored in the law for a variety of reasons. From a practical standpoint, settlements significantly ease the burden on courts. When parties resolve their dispute through settlement rather than full litigation, the growing pressure on court dockets is relieved. Settlement thus enables courts to conserve scarce judicial resources and to reduce their considerable backlog. Settlement is, as a result, "indispensable to judicial administration."

Settlement also decreases the expense and risk of litigation for parties. Litigation of a dispute imposes significant costs on the parties.

115. See supra notes 25-28 and accompanying text (discussing the Court's treatment of the policy in Kokkonen); notes 68-72 and accompanying text (discussing the Court's treatment of the policy in Digital Equipment); and notes 105-109 and accompanying text (discussing the Court's treatment of the policy in Bonner Mall).

116. Janneh, 887 F.2d at 435. See also In re Smith, 926 F.2d 1027, 1029 (11th Cir. 1991) ("Settlement is generally favored because it conserves scarce judicial resources."); American Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1060 n.5 (D.C. Cir. 1986) ("[S]ettlements produce a substantial savings in judicial resources and thus aid in controlling backlog in the courts . . ."); Stephen Bundy, The Policy in Favor of Settlement in an Adversary System, 44 Hastings L.J. 1, 48 (1992) ("The dramatic increase in both the number of cases filed per federal judge and in the percentage of those cases that impose severe time demands on judges may suggest that individual settlements could substantially reduce the federal backlog.") (footnotes omitted). But see Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) (opining that settlement should be treated "as a highly problematic technique for streamlining dockets. . . . [A]lthough dockets are trimmed, justice may not be done.").
Some of these costs are obvious, such as fees for attorneys and expert witnesses, court costs, and the cost of the party's own time spent in responding to discovery requests and otherwise preparing for the litigation. Other costs are more subtle, but nonetheless can be quite substantial. These costs include the debilitating effects of uncertainty and exposure to risk that exist while a dispute remains unresolved, and the toll taken by the aggravation and distress that so often plague a party as a lawsuit grinds its way through the court system.117

Settlement may also be preferable to litigation when viewed from the very different perspective of the potential substantive content of the resolution of a dispute. In particular, settlement can result in a more satisfying resolution than would occur in litigation, because in negotiation the parties are free to consider the entire spectrum of relevant facts and principles, whether or not they are formally cognizable in law. Further, the parties have the flexibility to craft more creative—and potentially more responsive—solutions to their problems, because they are neither limited to the traditional legal remedies nor "binary, win/lose results."118 In addition, the parties' participation in working out a resolution of their dispute may produce greater commitment to and cooperation in seeing through that resolution.119

Recognizing the benefits that flow from the private settlement of disputes, the Supreme Court has repeatedly endorsed the policy favoring settlement. Indeed, at the turn of the century, the Court declared

117. See, e.g., Marek v. Chesny, 473 U.S. 1, 10 (1985) (noting that "settlements rather than litigation will serve the interests of plaintiffs as well as defendants"); American Sec. Vanlines, Inc., 782 F.2d at 1060 n.5 (stating that "settlements promote efficient use of private resources by reducing litigation and related costs"); Aro, 531 F.2d at 1372 ("By [settlement] agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter."); Autera v. Robinson, 419 F.2d 1197, 1199 & n.7 (D.C. Cir. 1969) (noting that settlement is in "high judicial favor," because "the parties avoid the expense and delay incidental to litigation of the issues").

118. Menkel-Meadow, supra note 9, at 487. See also id. at 504-05 (discussing the ways in which settlement offers a "substantive justice that may be more responsive to the parties' needs than adjudication"); Melvin Aron Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 Harv. L. Rev. 637, 653-60 (1976) (discussing the advantages of private dispute negotiation over adjudication). But see Galanter & Cahill, supra note 9, at 1354, 1359, 1388 (challenging the argument that settlement is more responsive to parties' needs, and stating that "[S]ettlement is not intrinsically good or bad, any more than adjudication is good or bad. Settlements do not share any generic traits that commend us to avoid them per se or to promote them."); Bundy, supra note 116, at 37-58 (critically assessing the claim that settlement better serves the public interest).

119. See Menkel-Meadow, supra note 9, at 502 ("If the parties make their own agreement they are more likely to abide by it, and it will have greater legitimacy than a solution imposed from without.").
that "settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."\textsuperscript{120} Shortly thereafter, the Court reiterated that "[c]ompromises of disputed claims are favored by the courts."\textsuperscript{121}

Over the ensuing decades, the lower courts embraced these strong signals about the policy favoring settlement and applied them in a variety of cases.\textsuperscript{122} Citing this early Supreme Court authority, for instance, the District of Columbia Circuit stated:

Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial, and the preparation and proceedings that must forerun it. By the same token, there is everything to be gained by encouraging methodology that facilitates compromise.\textsuperscript{123}

Many other cases also emphasized the strength and importance of the policy,\textsuperscript{124} and this approach had been supported in the leading treatises as well.\textsuperscript{125}

The Supreme Court's own endorsement of the policy also had remained consistent in its more recent decisions. In 1985, for instance, the Court gave an expansive construction to Federal Rule of Civil

\begin{footnotes}
\footnotetext{120}{St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898).}
\footnotetext{121}{Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910).}
\footnotetext{122}{For recent lower court cases quoting the language in Williams, see, for example, American Sec. Vanlines, Inc., 782 F.2d at 1060; Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967); Austin v. Pennsylvania Dept. of Corrections, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995); Reed v. United States, 717 F. Supp. 1511, 1515 (S.D. Fla. 1988), aff'd, 891 F.2d 878 (11th Cir. 1990).}
\footnotetext{123}{Auten v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969) (footnotes omitted).}
\footnotetext{124}{See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."), cert. denied, 464 U.S. 818 (1983); Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426, 428 (5th Cir. 1977) ("Settlement agreements are 'highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.'") (quoting Pearson v. Ecological Science Corp., 522 F.2d 171, 176 (5th Cir. 1975), cert. denied, 425 U.S. 912 (1976)); Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc., 489 F.2d 974, 978 (7th Cir. 1973) ("It cannot be gainsaid that in general settlements are judicially encouraged and favored as a matter of sound public policy."); Miller v. Pyrites, Co., 71 F.2d 804, 810 (4th Cir.) ("Compromises of disputed claims are favored by the court . . . ."), cert. denied, 293 U.S. 604 (1934).}
\footnotetext{125}{See, e.g., E. ALLAN FARNSWORTH, CONTRACTS § 2.12, at 71 (2d ed. 1990) ("The law favors settlement by the parties of disputed claims in the interests of alleviating discord and promoting certainty."); 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1268, at 72-73 (1962) ("Compromises are known to be favored by the law.").}
\end{footnotes}
Procedure 68, which allows for offers of judgment, in order to further the rule's purpose of encouraging settlements. The Court reiterated the policy favoring settlement, emphasizing that "settlements rather than litigation will serve the interests of plaintiffs as well as defendants." The following year, the Court again relied heavily on the policy favoring settlement in holding that, under the Civil Rights Attorney's Fees Awards Act of 1976, a district court has discretion to permit a negotiated waiver of attorney's fees in a settlement on the merits. The Court stressed its concern that prohibiting waiver of fees "would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." Indeed, the Court's fear that "parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and diserving civil rights litigants," led directly to the Court's conclusion that it was not necessary to construe the Fees Act to preclude waivers of attorney's fees. Following this lead, the lower courts have continued consist-

127. Id. at 10.
129. Id. at 732.
130. Id. at 736-37 (footnote omitted). The Court believed that a defendant would be less likely to settle if its potential liability for fees, which could be quite large, remained unresolved in the merits settlement. Id. at 734-36 & n.23. Further, the Court noted that if a defendant lowered the amount of the settlement offer to account for the risk of attorney's fees, the plaintiff might be more likely to reject the settlement. Id. at n.23.
131. Id. at 737-38. See also United States v. Mezzanato, 115 S. Ct. 797, 804 (1995) (recognizing that the policy favoring settlement in criminal cases is a "substantial 'public policy' interest["]); McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1467 (1994) (rejecting a rule of pro tanto setoff with right of contribution against the settling defendant in admiralty cases, "because it discourages settlement and leads to ancillary litigation"); Carson v. American Brands, Inc., 450 U.S. 79, 87-90 (1981) (allowing immediate appeal of a district court's order refusing to approve the parties' negotiated settlement, where that settlement contained injunctive relief); Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 343-44 (1971) (rejecting the common law rule that the release of one joint tortfeasor releases other tortfeasors who are not parties to the release, because the rule would frustrate partial settlements). But cf. United States v. Reliable Transfer Co., 421 U.S. 397, 407-08 (1975) (considering whether the potential beneficial effect on the promotion of settlement justified continued use of the divided damages rule in admiralty cases; finding that a comparative negligence rule would likely not undermine settlement, but in any event "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations").
ently to articulate their support for the public policy favoring the private settlement of disputes.\textsuperscript{132}

In addition, the policy has received strong support in other legal sources. The courts and Congress have institutionalized their approval of the policy by adopting rules that are designed to facilitate and encourage settlements. For instance, Rule 68 of the Federal Rules of Civil Procedure provides for offers of judgment; the "plain purpose of Rule 68 is to encourage settlement and avoid litigation."\textsuperscript{133} Rule 16 gives federal judges authority to seek to facilitate settlement during pretrial conferences.\textsuperscript{134} Rule 26(f) generally requires attorneys to discuss "the possibilities for a prompt settlement or resolution of the case" at an initial planning meeting.\textsuperscript{135} And Federal Rule of Evidence 408 protects offers to settle and settlement discussions from admission into evidence at trial in order to promote "the public policy favoring the compromise and settlement of disputes."\textsuperscript{136}

Support for the policy has also come to be reflected in a variety of statutes. For example, in the Civil Justice Reform Act of 1990, Congress encouraged federal district courts to consider and employ various mechanisms to facilitate a settlement between the parties,\textsuperscript{137} and the policy favoring settlement is also reflected in Title VII of the Civil Rights Act of 1964.\textsuperscript{138}

This broad approval of the policy favoring settlement has strongly influenced matters of ordinary judicial practice, especially in the trial courts. Perhaps most important, the procedural rules and reforms—notably the emphasis on settlement in pretrial conferences, the rules governing offers of judgment, and the expanded use of settlement

\textsuperscript{132} See, e.g., Justine Realty Co. v. American Nat'l Can Co., 976 F.2d 385, 391 (8th Cir. 1992) ("Settlement agreements are generally encouraged and favored by the courts."); Hemstreet v. Spiegel, Inc., 851 F.2d 348, 350 (Fed. Cir. 1988) ("The law strongly favors settlement of litigation, and there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into."); MWS Wire Indus., Inc. v. California Fine Wire Co., 797 F.2d 799, 802 (9th Cir. 1986) ("There is an 'overriding public interest in settling and quieting litigation.'") (quoting United States v. McInnes, 556 F.2d 436, 441 (9th Cir. 1977)).

\textsuperscript{133} Marek, 473 U.S. at 5.

\textsuperscript{134} Fed. R. Civ. P. 16. A number of the circuit courts of appeals have also set up programs to help facilitate settlement at the appellate level. The Second Circuit's Civil Appeals Management Program (CAMP) is an example.

\textsuperscript{135} Fed. R. Civ. P. 26(f).

\textsuperscript{136} Fed. R. Evid. 408 advisory committee's note.


conferences and various other alternative dispute resolution procedures—have encouraged judges to become increasingly active in trying to broker settlements between parties. Indeed, these practices have been taken so far in many courtrooms that they have now spawned something of a backlash in the legal literature, as a number of scholars have begun to question the extent to which the judicial role should be potentially distorted in single-minded pursuit of the otherwise laudable goal of promoting settlement.

It is therefore clear that the dominant principle on settlement issues prior to the Supreme Court's recent trilogy of decisions had been consistent allegiance to the advancement of the public policy favoring the private settlement of disputes. Indeed, this point had come to be so well established that one scholar has observed: "It is a truism that the law favors a policy of settlement and compromise."

B. Reconsideration of the Policy in the Wake of the Trilogy

Despite this impressive pedigree, the Supreme Court treated the policy favoring settlement with indifference in this recent trilogy of settlement cases. Although the policy favoring settlement was implicated in each of Kokkonen, Digital Equipment, and Bonner Mall, the Court apparently gave the policy little, if any, weight in deciding the cases. Indeed, the Court's analysis of the issues in these cases raises the prospect that the Court may view the policy as commendable in

139. See Fed. R. Civ. P. 16, 68; 28 U.S.C. §§ 471, 473; Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366 (1986) (describing and evaluating summary jury trials, court-annexed arbitration, and private alternative dispute resolution). See generally Bundy, supra note 116, at 3-4 (discussing the procedural innovations that have led to increased judicial involvement in the settlement process); Galanter & Cahill, supra note 9, at 1340 ("Over the past five decades, first state and then federal judges have embraced active promotion of settlement as a major component of the judicial role.").

140. The discussion in the academic literature about judicial promotion of settlements focuses not on whether settlements should be favored, but rather on the extent to which judges should become enmeshed in brokering settlements. See, e.g., Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 378-380, 404 (1982) (describing and criticizing the increasingly managerial role that judges now have); Galanter & Cahill, supra note 9, at 1342-50, 1364, 1387-91 (arguing that, "if settlements on the whole represent a gain for courts, it does not follow that judges' spending their time promoting settlement leads to such gains. Simply, since most cases will settle anyway, the benefits of using judges' time to promote settlement are hard to discern"); in general, the authors contend that the "task for policy is not promoting settlements or discouraging them, but regulating" their quality; Bundy, supra note 116, at 58-78 (discussing the appropriate judicial role in settlement and advocating a moderate approach); Menkel-Meadow, supra note 9, at 491-514 (discussing the relative merits of the mandatory settlement conference).

141. Bundy, supra note 116, at 3.
theory, but insufficiently significant in practice to compete with other values, such as the institutional interests in maintaining strict limits on jurisdiction, improving efficiency, following orderly procedures, and promulgating precedent. If so, this would represent a marked departure from the Court's previous statements about the importance of the policy favoring settlement.\textsuperscript{142} The Court's treatment of the policy in these decisions thus calls for reconsideration of both the meaning and the significance of that policy.

As an initial matter, the Court's analysis in these cases exposes a potential confusion about the proper understanding of the policy favoring settlement. In each of these cases, the Court relied on policy-based, institutional interests in deciding the issues presented: in \textit{Kokkonen}, the Court stressed the need for strict limits even on some of the discretionary aspects of the jurisdiction of the federal courts;\textsuperscript{143} in \textit{Digital Equipment}, the Court focused on the benefits of efficiency that result from application of the final judgment rule;\textsuperscript{144} and in \textit{Bonner Mall}, the Court emphasized the value of maintaining orderly procedures and preserving judicial precedents.\textsuperscript{145} Although the Court evaluated the issues presented from this essentially policy-based perspective, it nonetheless failed to place any emphasis on the policy favoring settlement. The Court's approach is all the more striking because in each instance, it rejected positions that many lower courts had adopted by strongly emphasizing the policy favoring settlement.\textsuperscript{146}

A possible explanation for this rejection is that the lower courts may have seemed to take a simplistic view of the policy, which the Court judged to be of little value in its analysis of these issues. Several of the leading lower court decisions appeared to approach the policy favoring settlement from a narrow, party-centered perspective. On the vacatur issue, for example, the Second Circuit had stressed the

\textsuperscript{142} See supra notes 120-21, 126-31.
\textsuperscript{143} Kokkonen v. Guardian Life Ins. of Am., 114 S. Ct. 1673, 1676-77 (1994).
\textsuperscript{146} See, e.g., Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.) (relying on the policy favoring settlement in holding that a federal court has inherent power to enforce a settlement agreement), \textit{cert. denied}, 429 U.S. 862 (1976); Janneh v. GAF Corp., 887 F.2d 432, 435 (2d Cir. 1989), \textit{cert. denied}, 498 U.S. 865 (1990) (relying on the policy favoring settlement in granting immediate review of a district court's decision to reopen a case that had been dismissed on the basis of a settlement agreement); Nestle Co. v. Chester's Market, Inc., 756 F.2d 280, 282 (2d Cir. 1985) (relying on the policy favoring settlement in holding that courts should grant vacatur of district court opinions on request).
particular interests of the parties before them in discussing the effects of the policy favoring settlement:

Should we refuse to vacate the judgment, the appellees will be forced to bear the costs and risks of further litigation, including the non-trivial risk of a reversal on the merits. . . . We see no justification to force these defendants, who wish only to settle the present litigation, to act as unwilling private attorneys general and to bear the various costs and risks of litigation. 147

From this perspective, the policy favoring settlement might be understood simply to mean that courts should attempt to give effect to the wishes of the particular parties in front of them in particular cases, as a means of facilitating their efforts to achieve a settlement and helping to effectuate the terms of their private contractual agreements.

It is understandable that courts might be tempted to adopt such a party-centered formulation of the policy favoring settlement, given that the policy arises from a desire to encourage parties to resolve disputes by mutual agreements which are embodied in the form of private contracts. Under the traditional model of the judiciary's role, moreover, courts were often viewed as mere servants of the litigants: their purpose was simply to assist the particular parties before them in resolving their disputes. 148 Within this conception of the role of the courts, it would be natural enough for the policy favoring settlement to be regarded as nothing more than a formal recognition that courts should do everything possible to facilitate the parties in settling, if the parties so desire.

The Supreme Court appears to have been correct in rejecting this more simplistic view of the policy favoring settlement. To begin with, the Court clearly has moved beyond the limited, party-driven model of litigation to a more sophisticated model which views the courts not as passive servants of the parties, but rather as having “an indepen-

147. Nestle, 756 F.2d at 284. See also Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277, 279-80 (Fed. Cir. 1987) (finding the reasoning in Nestle persuasive).

148. See, e.g., Fisch, Rewriting History, supra note 74, at 591 & n.11 (describing the view that “the function of litigation is the resolution of private disputes, and no public interest can outweigh the private interests of the litigants in resolving their dispute,” and referring to this “model of litigation, in which the individual choices of the litigants reign supreme” as the “traditional model”); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282-83 (1976) (describing the traditional lawsuit as “party-initiated and party-controlled,” and also as “a vehicle for settling disputes between private parties about private rights”); Stephen R. Barnett, Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court, 26 Loy. L.A. L. Rev. 1033, 1033 (1993) (noting that there are “radically opposed conceptions of the purpose of courts—the purpose of resolving disputes for the parties on the one hand, of making law for society on the other”).
dence from the parties, not only as voices of other parties’ interests, but as institutions expressive of and accountable to the public.”149 In this context, a party-centered formulation of the policy might well have appeared irrelevant to the Court’s analysis: resolution of particular disputes in accordance with the stated wishes of the parties is simply too limited a consideration to justify the subordination of any substantial institutional interests of the courts.

More fundamentally, however, the policy favoring settlement is not merely a case-specific concern, but instead represents a public policy in its own right, embodying goals that clearly reflect the public interest. The policy cannot be understood as a mere admonition that courts should facilitate parties in settling their cases as they wish. Rather, the policy favoring settlement reflects institutional interests of the courts—the interests in conserving judicial resources, in reducing the pressure on court dockets, and in helping litigants to achieve a satisfying and lasting resolution of their dispute.150 To be sure, some of the goals that the policy advances benefit the parties directly—most particularly, the goals of decreasing the expense and risk of litigation for parties and of achieving the most substantively satisfactory resolution of the dispute.151 But these aspects of the policy work in tandem with those that reflect a more institutional focus, and together they

149. Resnik, Role of Adjudication, supra note 77, at 1527. See also Fiss, supra note 116, at 1085 (arguing that the job of courts “is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”); Jill E. Fisch, The Vanishing Precedent: Eduardo Meets Vacatur, 70 NOTRE DAME L. REV. 325, 339-40 (1994) (questioning “why courts would accept a role purely as arbiters of private disputes”); Chayes, supra note 148, at 1288-1316 (describing and defending the public law litigation model).

The Supreme Court seems clearly to have endorsed this broader model of the role of the courts. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (approving a comprehensive, county-wide school desegregation plan); Hutto v. Finney, 437 U.S. 678 (1978) (approving a district court order that required broad-based reforms in the Arkansas prison system). General acceptance of the broader model is also demonstrated by the increasing willingness of courts to limit party autonomy to serve institutional concerns. Courts, for example, have forced litigants to consolidate their actions in order to enable the courts to address related issues uniformly and efficiently. Fed. R. Civ. P. 42 (providing for consolidation); 28 U.S.C. § 1407 (providing for multi-district litigation). See also Local Number 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (“To be sure, a federal court is more than ‘a recorder of contracts’ from whom parties can purchase injunctions; it is ‘an organ of government constituted to make judicial decisions . . .’” (quoting IBJ. MOORE ET AL., supra note 75, ¶ 0.409(5). See generally Resnik, Role of Adjudication, supra note 77, at 1485-86 (discussing the ways in which judges have limited party control over the course of litigation).

150. See supra notes 116, 118-19 and accompanying text.

151. See supra notes 117-19 and accompanying text.
form a foundation for the policy that should be understood to benefit not only the litigants before the court, but also to benefit the litigants in future cases, the courts as an institution, and the public in general.

In *Bonner Mall* and *Digital Equipment*, the Court clearly comprehended the broader, institutional purposes underlying the policy favoring settlement. In *Bonner Mall*, for instance, the Court specifically advised the lower courts that they should not defer to the parties' request for vacatur of a judgment, even when the parties' ability to settle their case is contingent on whether they can obtain vacatur. In doing so, the Court evidenced no concern about the interests of particular parties in settling their cases: although the courts of appeals had carefully included consideration of the interests of the parties before them in their analysis of the vacatur issue, the Supreme Court did not even mention such interests. Rather, to the extent that the Court addressed the policy favoring settlement, it focused on the benefits—in the Court's words, the "judicial economies"—that the courts as an institution enjoy as a result of settlement. Similarly, in *Digital Equipment*, the Court considered the policy only from an institutional perspective. The Court did not concern itself with the wishes of the parties before it, but rather focused on the effect that its rule would have on incentives for parties to settle in future cases. This focus reflects institutional concerns: if parties are more inclined to settle in the future, then the savings to the courts will be increased, crowded dockets will be relieved, and the queue will be shorter for future litigants.

Although the Supreme Court recognized in these cases that the policy favoring settlement reflects institutional interests of the courts, the Court's treatment of the policy indicates that it misunderstood the true significance of those interests. In other words, after correctly recognizing that the policy is not just a party-centered concern, the Court inexplicably failed to give any real weight to the interests that the policy serves. These interests, however, are of substantial importance to the judicial system, and moreover, they are similar in nature to the other institutional interests that the Court relied on in resolving these issues. The interests served by the policy thus should have received

152. *Bonner Mall*, 115 S. Ct. at 393.
153. See supra note 84 and accompanying text.
155. Indeed, it would not have been productive for the Court to do so, as the wishes of the parties were diametrically opposed: one wanted an immediate appeal of the reinstatement order, and the other did not.
156. *Digital Equipment*, 114 S. Ct. at 2002-03.
the same thoughtful analysis that the Court undertook with respect to these other institutional interests.

For example, one of the underpinnings of the policy favoring settlement is that such agreements decrease the burden on courts. This allows courts to conserve their limited resources because the ever-increasing pressure on the courts is reduced when parties resolve their disputes through settlement rather than full litigation.\textsuperscript{157} This aspect of the policy favoring settlement is of great significance to the judicial system. If every case were litigated to the limit, the courts would collapse under the weight of their dockets. In a real sense, this aspect of the policy allows the courts to function smoothly and efficiently. Thus, when the Court discussed the related considerations of efficiency and orderly procedures in \textit{Digital Equipment} and \textit{Bonner Mall}, it should have carefully considered any effect that its rulings might have on this aspect of the policy favoring settlement.

More specifically, in \textit{Digital Equipment}, the Court carefully emphasized that strict enforcement of the final judgment rule promotes "efficient administration of justice in the federal courts."\textsuperscript{158} Efficient administration is undoubtedly an important institutional concern: the courts could not continue to function effectively without efficient procedures. In its analysis, however, the Court should have also considered whether greater overall efficiency might be produced by treating the settlement-based right to avoid trial as sufficiently important to warrant immediate appeal, thus allowing cases which had, in fact, been effectively settled to be removed from the judicial system before significant resources were invested in litigating a trial on the merits.

In \textit{Bonner Mall}, the Court stressed the benefits to "the orderly operation of the federal judicial system"\textsuperscript{159} that flow from requiring parties who seek relief from a judgment to take the primary route of appeal and certiorari. The Court, however, should also have considered whether allowing parties to obtain relief from a judgment through another route—agreed vacatur—would lead to more settlements, and thereby benefit the orderly operation of the judicial system by helping to reduce the crush of work in the federal courts.

Another significant justification for the policy favoring settlement is that settlement reduces the expense and risk of litigation for parties, and it also provides them with a speedier, and potentially more satis-

\textsuperscript{157} See supra note 116 and accompanying text.
\textsuperscript{158} Digital Equipment, 114 S. Ct. at 1996.
\textsuperscript{159} Bonner Mall, 115 S. Ct. at 392.
fying, resolution of their dispute. To the extent that parties may be more committed to a resolution that is achieved through negotiation rather than litigation, the pressure on the courts may be reduced because the parties may be in a better position to work out problems cooperatively, without resorting to further litigation. This aspect of the policy favoring settlement thus may also, to some degree, help the courts to function smoothly and efficiently.

This aspect of the policy is important to the courts as an institution for another reason as well: a primary function of the judicial system is to resolve disputes. When the courts facilitate settlement, they help parties resolve their disputes, and further, they help them do so in a way that is potentially less expensive, faster, and more satisfying. In essence, this aspect of the policy reflects a core purpose of the courts. The Supreme Court thus should have considered this important institutional interest in its analysis of the cases, and particularly in its analysis of the vacatur issue in *Bonner Mall*.

In *Bonner Mall*, the Court addressed the question of whether a court should grant the parties' request for vacatur of a judicial opinion when that request is contained in the parties' settlement agreement. In discussing that question, the Court emphasized both the importance to the judicial system of maintaining orderly procedures and the value of judicial precedent. Both of these are, indisputably, important institutional interests. Maintaining orderly operations and the integrity of judicial precedents enables the courts to fulfill their dispute-resolution function more effectively over time. Courts will be able to deal with future cases more efficiently if dependable, orderly procedures are in place, and they will be able to resolve future disputes more easily if the relevant rules have been clearly and comprehensively interpreted in previous cases. In addition, through authoritative statements of the law in judicial precedents, courts serve the public interest by enabling people to order their affairs in light of clearly defined legal rules. It was thus appropriate for the Court to consider these interests, but it should not have done so to the exclusion of interests relating to the policy favoring settlement. In other words, the Court also should have considered the value of helping parties achieve

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160. *See supra* notes 117-19 and accompanying text.
161. Even though it seems clear that the Supreme Court has endorsed a role for the courts that is broader than merely serving the litigants before them in resolving their particular disputes, *see supra* note 149 and accompanying text, helping to resolve disputes surely remains a primary function of the judicial system.
a resolution of their dispute through settlement in its analysis of the propriety of granting requests for vacatur.

The point is not that the policy favoring settlement must be the decisive consideration in any case involving a settlement agreement. Rather, the point is that the institutional interests that the policy promotes are significant and are deserving of more careful consideration than the Court gave them. In any given case, the interests which underlie the policy favoring settlement may not outweigh other institutional interests that point to a different resolution. But the interests which underlie the policy are sufficiently substantial to merit significant attention in any comprehensive and convincing legal analysis.

The Court's apparent indifference to the policy in these decisions may serve as a signal to the lower courts that the policy should be given significantly less weight in their decision-making.\(^{163}\) This may be particularly true in those difficult cases where conflicting arguments are made about the effects of a disputed practice on the policy favoring settlement, and the proper resolution of those opposing arguments is not immediately apparent. In these circumstances, the lower courts may now be tempted to avoid the rigors of undertaking a thorough analysis, and instead may decide the case on other grounds, thus essentially ignoring the possible effects of the disputed practice on the policy favoring settlement. The courts, however, should resist this temptation to gloss over the policy in their analysis of legal issues involving settlement agreements. For all the reasons stated above, the courts instead should give the policy—along with the substantial interests that underlie the policy—thorough consideration in their analysis of such issues.

As courts perform this more complete analysis of how their resolution of particular legal issues will affect the policy favoring settlement, they would be greatly aided by empirical research documenting the effects of various judicial practices on the incentives and disincentives for parties to enter into and abide by settlement agreements. The Supreme Court has indicated that it is willing to consider such data,\(^{164}\) and it has shown that the unavailability of such data can have

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163. A number of the circuit courts of appeals had relied heavily on the policy favoring the private settlement of disputes in making their decisions on the issues discussed in Part I. See supra note 146 (citing cases).

164. In two recent cases, the Supreme Court has attempted to consider empirical data on settlement-related issues. See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 n.11 (1993) (Stevens, J., dissenting) (noting that there was a "natural experiment" in the California courts of appeals with respect to the effect of vacatur on settlement rates, because one division of that court routinely refused vacatur, while most
important consequences for the resolution of settlement issues in cases where arguments are made about the potential relevance of the policy favoring settlement.165

The amassing of statistical data on how different judicial approaches may affect the policy favoring settlement is thus an important task for legal scholarship in this area. Several techniques exist for gathering and analyzing such information, including cross-jurisdictional comparisons where different approaches are followed, aided by the tools of statistical and regression analysis.166 Empirical data would supplement or even replace the necessarily speculative reasoning that courts currently employ. Data of this nature would therefore enhance the courts' ability to answer questions about the effect of particular practices on the policy favoring settlement, the particular objectives that would be advanced or retarded by such practices, and the likely magnitude and significance of such effects. This information, in turn, would better enable the courts to weigh the policy favoring settlement against other competing interests, and ultimately, to reach more certain and persuasive decisions on legal issues involving settlement agreements.

III. Analyzing Settlement Issues: Two Illustrations

Implicit in this discussion of the meaning and significance of the policy favoring settlement is an analytical approach that is quite different from the Supreme Court's treatment of the policy in "Kokkonen," other divisions granted it; comparison of the rates of settlement suggested that refusal of vacatur did not discourage settlement); United States v. Mezzanatto, 115 S. Ct. 797, 805 n.6 (1995) (chastising the defendant for failing to provide empirical support for his argument that allowing criminal defendants to waive their right to exclusion of statements made during plea discussions would undermine the policy favoring the disposition of criminal cases by compromise, and also noting that statistical data on the number of cases resolved through plea bargains contradicted the defendant's predictions).

165. See, e.g., Bonner Mall, 115 S. Ct. at 393 (observing that it was "quite impossible," based on the limited information available, to assess the likely effect of vacatur on the "frequency or systemic value of settlement" and thus disregarding this consideration in resolving the issue).

166. This is, in fact, exactly the kind of empirical data that Justice Stevens cited as persuasive evidence in his dissent in "Izumi." See Izumi, 510 U.S. 27, 40 n.11 (citing Barnett, supra note 148, at 1073). This example points up the need for more comprehensive data, however, for the study cited in this passage actually concerned the effect on settlement rates of the practice of stipulated reversals as well as simple vacatur orders. See Barnett, supra note 148, at 1073 & n.221. In addition, the size of that particular case sample was limited, and the author of the comparison acknowledged that "other things may not have been equal; many factors may affect an appellate court's settlement rate." Id. at 1073 n.221.
Digital Equipment, and Bonner Mall. Under this approach, courts would be expected to give careful and serious consideration to the policy favoring settlement in any analysis of issues involving settlement agreements. In order to illustrate this approach, two issues that the Court itself has recently identified, but has not yet had an opportunity to resolve, will be discussed and analyzed.

A. Reinstatement and Enforcement of Settlement Agreements Under Rule 60(b)(6)

In Kokkonen, the Supreme Court noted but did not address the question of whether a federal court may reopen a case that it had earlier dismissed, where the reopening is based on breach of the settlement agreement that prompted the dismissal.\textsuperscript{167} The circuit courts of appeals are divided on the issue,\textsuperscript{168} which turns on the proper application of Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b) permits a court to relieve a party from a final judgment, order, or proceeding in certain limited situations.\textsuperscript{169} Subsection six of the rule serves as a catchall provision, enabling the court to set aside a judgment for "any other reason justifying relief from the oper-

\textsuperscript{167} Kokkonen, 114 S. Ct. at 1675. It is worth noting that this question is primarily one for the federal courts, because it revolves around the scope of federal jurisdiction. If a similar issue were to arise in state court, its resolution would turn on the law and procedural rules of that particular state.

\textsuperscript{168} Compare Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991) (finding that repudiation of a settlement agreement justifies vacating the court's prior dismissal order), United States v. Baus, 834 F.2d 1114, 1124 (1st Cir. 1987) (same), Fairfax Countywide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299, 1303-04 (4th Cir.) (same), cert. denied, 439 U.S. 1047 (1978), and Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371 (6th Cir.) (same), cert. denied, 429 U.S. 862 (1976) with Sawka v. Healtheast, Inc., 989 F.2d 138, 140-41 (3rd Cir. 1993) (finding that breach of a settlement agreement "is no reason to set aside the judgment of dismissal").

\textsuperscript{169} Federal Rule of Civil Procedure 60(b) provides, in pertinent part:

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

The rule also specifies certain time requirements: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Id.
lation of the judgment. Relief under Rule 60(b)(6), however, is only available in extraordinary circumstances, where there is otherwise a substantial danger that injustice will occur. Most of the courts of appeals have held that breach of the settlement agreement that precipitated the dismissal of the case is sufficient ground for a district court to set aside the order of dismissal under Rule 60(b)(6). These courts thus allow the district courts to reopen a case for trial on the merits if one of the parties repudiates the settlement agreement that was the basis for dismissal.

The Third Circuit, however, has held that breach of a settlement agreement does not justify relief under Rule 60(b). The court reasoned that these circumstances—breach of the agreement that produced the dismissal—were not sufficiently extraordinary to justify


171. See Ackermann v. United States, 340 U.S. 193, 199-202 (1950); Klapprott v. United States, 335 U.S. 601, 613-14 (1949). There is some confusion about whether the "extraordinary circumstances" standard applies to all requests for relief under Rule 60(b)(6), or only those requests that would otherwise be time-barred under one of the specific subsections of Rule 60(b). A number of courts have held that the extraordinary circumstances standard always applies. See Lasky v. Continental Prods. Corp., 804 F.2d 250, 255-56 (3d Cir. 1986); Industrial Assoc., Inc. v. Goff Corp., 787 F.2d 268, 269 (7th Cir. 1986). Professors Wright, Miller, and Kane, however, contend:

If the reasons for seeking relief could have been considered in an earlier motion under another subsection of the rule, then the motion will be granted only when extraordinary circumstances are present. Otherwise, if the movant clearly demonstrates some "other reason" justifying relief outside of the earlier clauses in the rule, then the "extraordinary circumstances" test is not invoked.

172. See Keeling, 937 F.2d at 410; Aro, 531 F.2d at 1371; Fairfax Countywide, 571 F.2d at 1302-03. In addition, several courts of appeals have apparently assumed that a district court has the power to reopen a case under Rule 60(b)(6) based on breach of a settlement agreement. See, e.g., Joy Mfg. Co. v. National Mine Serv. Co., 810 F.2d 1127, 1128-29 (Fed. Cir. 1987); Adduono v. World Hockey Ass'n, 824 F.2d 617, 620 (8th Cir. 1987); Stipelcovich v. Sand Dollar Marine, Inc., 805 F.2d 599, 604-05 (5th Cir. 1986); McCall-Bey v. Franzen, 777 F.2d 1178, 1186-87, 1189 (7th Cir. 1985); Chief Freight Lines Co. v. Local Union No. 886, 514 F.2d 572, 576-77 (10th Cir. 1975).

173. The district court, however, is not required to reopen a case under Rule 60(b)(6) because the settlement agreement has been breached. See, e.g., Stipelcovich, 805 F.2d at 605 (affirming district court's refusal to reopen the case under 60(b)(6) because plaintiff had obtained a judgment for breach of contract); Harman v. Pauley, 678 F.2d 479, 481-82 (4th Cir. 1982) (affirming district court's refusal to reopen the case under 60(b)(6) because the plaintiff had already filed a separate suit for breach of contract).

relief, because the complaining party could simply file a separate action for breach of contract based on the settlement agreement itself.\textsuperscript{175}

The proper resolution of this issue turns only on the interpretation and application of the "extraordinary circumstances" standard. No serious obstacle of federal jurisdiction is posed, at least to the extent that the federal court is reopening the case to proceed on the merits of the original claim. That claim was, presumably, within the jurisdiction of the federal court when it was originally brought, and the same jurisdictional basis should supply the authority for renewed review of the claim.\textsuperscript{176} It thus seems that considerations of policy should be the primary determinants of whether, as a general matter, breach of a settlement agreement can constitute a sufficiently extraordinary circumstance to justify reinstating a case under Rule 60(b)(6).

As this issue involves settlement agreements, an important policy to be considered is the policy favoring settlement. It appears that a rule permitting reinstatement will advance that policy and the objectives that it serves. In most cases that are litigated in federal court, at least one of the parties has a strong preference for the federal forum.\textsuperscript{177} That party may be reluctant to jeopardize its ability to proceed in federal court by entering into a settlement agreement, which could relegate any further enforcement proceedings to a contract action brought in state court.\textsuperscript{178} This reluctance would be particularly

\textsuperscript{175} Id.

\textsuperscript{176} See McCall-Bey, 777 F.2d at 1186-87 (stating that the district judge "undoubtedly" has the power to restore a previously dismissed case to his docket under Rule 60(b), and further explaining that, when "the judge sets aside his earlier judgment of dismissal and restores the plaintiff's suit to the trial docket, and then proceeds to adjudicate the issues in that suit, he is adjudicating issues of federal law, as he has unquestioned authority to do"). In Kokkonen itself, the Supreme Court indirectly made this point in distinguishing reinstatement of a case under Rule 60(b)(6) from direct enforcement of the settlement agreement: "Enforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." 114 S. Ct. at 1675-76.

\textsuperscript{177} This is certainly true of most of the cases that are in federal court on grounds of diversity of citizenship or federal question jurisdiction, because at least one of the parties either opted to file in federal court instead of state court or to remove the case to federal court from state court. Indeed, the only exception to this general rule in either category of cases would be those cases where the federal courts have been granted exclusive jurisdiction.

\textsuperscript{178} Once the parties resolve their dispute by entering into a settlement agreement, the federal court will lose its basis for jurisdiction in two situations: where jurisdiction was originally based on the existence of a federal question; and where jurisdiction was originally based on diversity, and either the amount in controversy following the settlement is no longer sufficiently high or the parties are no longer completely diverse. See supra notes
strong where one party has doubts about whether the other party will make a sincere and successful effort to perform its obligations under the agreement. If, however, the federal courts treat breach of a settlement agreement as sufficient grounds for reopening a case under Rule 60(b)(6), then the risk of losing the federal forum will be greatly diminished and litigants will not be deterred from entering into settlements. By removing this deterrent, a rule that permits courts to reopen cases pursuant to Rule 60(b)(6) on the basis of breach of the parties' settlement agreement will further the policy favoring the private settlement of disputes.

In addition, such a rule will serve another institutional interest of the federal courts. If the courts were to employ the opposite rule—refusing to reinstate a case on grounds of breach of the settlement agreement—a party would be able to divest the federal court of jurisdiction simply by settling the case. This consequence might encourage a party to settle in bad faith, in an effort to force the case out of the federal forum and into a state court. The Supreme Court's holding in Kokkonen enhances a party's ability to achieve this result as it has cut off the other avenue of redress—direct enforcement of the settlement agreement by the federal court. Thus, a rule permitting the federal courts to reopen a case because one of the parties has breached a settlement agreement will serve the judiciary's institutional interest in maintaining the integrity of its jurisdiction because it will prevent litigants from defeating federal jurisdiction through the use of abusive settlement tactics.

7-8 and accompanying text. In cases where, even after a settlement agreement is entered, the parties meet the requirements for diversity jurisdiction, the court will, of course, have an independent basis for jurisdiction and would have the power to enforce any settlement agreement.

179. A number of the lower courts had expressed concern about such abusive settlement tactics in holding that federal courts have the inherent power to enforce a settlement agreement. See Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371 (6th Cir.), cert. denied, 429 U.S. 862 (1976); Hamilton v. School Comm. of Boston, 725 F. Supp. 641, 647 (D. Mass. 1989).

180. Kokkonen, 114 S. Ct. at 1677. Indeed, the Court emphasized that if a federal court fails to retain jurisdiction over a settlement contract, "enforcement of the settlement agreement is for state courts." Id.

181. In some circumstances, Rule 60(b)(3)—which allows a court to reopen a case on grounds of fraud—will be adequate to address this concern about litigants entering into settlement agreements in bad faith in order to divest the federal court of jurisdiction. Fraud, however, is notoriously difficult to prove. In addition, Rule 60(b) strictly limits the time in which a federal court may reopen a case based on fraud to one year after the order of dismissal was entered. Fed. R. Civ. P. 60(b) ("The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment,
Both of these institutional interests—the policy favoring settlement and the protection of the jurisdiction of the federal courts—weigh in favor of allowing the district court to reopen a case for trial on the merits if one of the parties has breached the settlement agreement which produced the dismissal. As there are no independent jurisdictional obstacles to such a ruling, the federal courts should hold that breach of a settlement agreement can serve as the basis for reopening a case under Rule 60(b)(6).\textsuperscript{182}

This view comports with the position of the majority of the circuit courts of appeals that had addressed the issue prior to the Supreme Court's decisions in \textit{Kokkonen}, \textit{Digital Equipment}, and \textit{Bonner Mall}.\textsuperscript{183} However, the courts of appeals had been much more troubled by a related issue which still remains in some doubt even after \textit{Kokkonen}—once a case is reopened under Rule 60(b), does the district court then have jurisdiction to enforce the terms of the original settlement agreement?\textsuperscript{184}

\textsuperscript{182}The courts should, of course, retain the discretion to find that, on the facts and circumstances of a particular case, breach of the settlement agreement does not justify reinstatement under Rule 60(b)(6). \textit{See}, e.g., Stipelcovich v. Sand Dollar Marine, Inc., 805 F.2d 599, 605 (5th Cir. 1986) (holding that reinstatement under Rule 60(b)(6) may not be appropriate if plaintiff has already pursued a separate action for breach of contract); Harman v. Pauley, 678 F.2d 479, 481-82 (4th Cir. 1982) (same). Thus, for example, if one party seeks reinstatement because the other party has committed some minor breach of the settlement agreement, a court might exercise its discretion to refuse to reopen the case. If, on the other hand, the party seeking reinstatement shows that the other party has repudiated the settlement agreement, then it would seem that, in most situations, a court should reopen the case.

Also, it should be noted that, under the Court's holding in \textit{Digital Equipment}, if a federal court does reinstate a case based on breach of the parties' settlement agreement, the party who opposes reinstatement will not be entitled to appeal the ruling immediately, but rather will have to wait until the trial has concluded. Digital Equip. Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992, 2004 (1994).

\textsuperscript{183} \textit{See supra} note 172 and accompanying text.

\textsuperscript{184}Compare Langley v. Jackson State Univ., 14 F.3d 1070, 1074 (5th Cir.) (holding that the court does not have jurisdiction to enforce a settlement agreement even after reopening the case under Rule 60(b)(6)), \textit{cert. denied}, 115 S. Ct. 61 (1994), McCall-Bey v. Franzen, 777 F.2d 1178, 1186-87 (7th Cir. 1985) (same) and Fairfax Countywide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299, 1303-05 (4th Cir.) (same), \textit{cert. denied}, 439 U.S. 1047 (1978) with Joy Mfg. Co. v. National Mine Serv. Co., 810 F.2d 1127, 1128-29 (Fed. Cir. 1987) (holding that the court has the power to enforce the settlement agreement after it has reopened the case under Rule 60(b)(6)) and Aro, 531 F.2d at 1371-72 (same). \textit{See generally} Darryl R. Marsch, \textit{Note, Postdismissal Enforcement of Settlement Agreements in Federal Court and the Problem of Subject Matter Jurisdiction}, 9 REV. LITTG. 249 (1990) (describing the caselaw); Alyson M. Weiss, \textit{Note, Federal Jurisdiction To Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6)}, 10 CARDOZO L. REV. 2137 (1989) (same).
Prior to the Supreme Court’s decision in *Kokkonen*, a number of the courts of appeals had held that a district court does have jurisdiction to enforce a settlement agreement, as long as it has reopened the case pursuant to Rule 60(b)(6). In reaching this conclusion, these courts had relied on the established principle that federal courts have the inherent power to enforce settlement agreements in cases pending before them. In addition, one circuit had maintained that jurisdiction to enforce the settlement agreement derived from the fact that the agreement grew out of the original federal litigation.\(^{187}\)

Other courts of appeals, however, had held that a district court does not have jurisdiction to enforce a settlement agreement even after it has reopened the case pursuant to Rule 60(b)(6). These courts had rejected any notion that a federal court has “derivative jurisdiction” or “inherent power” over a breach of contract claim merely because the contract served to settle a claim that was originally litigated in federal court.\(^{189}\) Moreover, they had refused to allow the reinstatement of a case under Rule 60(b)(6) to confer jurisdiction. The Seventh Circuit explained:

> If the judge sets aside his earlier judgment of dismissal and restores the plaintiff’s suit to the trial docket, and then proceeds to adjudicate the issues in that suit, he is adjudicating issues of federal law, as he has unquestioned authority to do. If instead he undertakes to adjudicate issues of contract law that he does not have statutory authority to adjudicate, because they are not issues of federal law or

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\(^{185}\) Hinsdale v. Farmers Nat’l Bank & Trust Co., 823 F.2d 993, 996 (6th Cir. 1987). *See also Aro*, 531 F.2d at 1371-72; *Joy Mfg.*, 810 F.2d at 1128-29 (adopting *Aro*’s reasoning, but not discussing whether the court must first reopen the case under Rule 60(b)(6) in order to enforce the settlement agreement).

\(^{186}\) *Aro*, 531 F.2d at 1371. It is widely agreed that federal courts have jurisdiction to enforce a settlement agreement while the litigation is pending before them. *See*, e.g., *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987); *Dankese v. Defense Logistics Agency*, 693 F.2d 13, 16 (1st Cir. 1982); *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2nd Cir. 1974); *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619, 621 (6th Cir. 1973); *Cia Anon Venezolana de Navegacion v. Harris*, 374 F.2d 33, 36 (5th Cir. 1967); *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C. Cir. 1969); *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721, 723 (7th Cir. 1962). *But see Londono v. City of Gainesville*, 768 F.2d 1223, 1227 (11th Cir. 1985) (suggesting that, once the parties settle without the settlement being incorporated into a consent decree, the district court must dismiss the case as moot and may not enforce the settlement agreement). *Londono* was expressly disapproved in *Kent v. Baker*, 815 F.2d 1395, 1399 (11th Cir. 1987).

\(^{187}\) *See Aro*, 531 F.2d at 1371.

\(^{188}\) *See Langley*, 14 F.3d at 1074; *Adduono*, 824 F.2d at 620; *McCall-Bey*, 777 F.2d at 1186-87; *Fairfax Countywide*, 571 F.2d at 1305-06.

\(^{189}\) *McCall-Bey*, 777 F.2d at 1187; *Fairfax Countywide*, 571 F.2d at 1304-05.
state-law issues cognizable under the diversity jurisdiction, he cannot use Rule 60(b) to fill the vacuum.190

On first impression, the Supreme Court's decision in Kokkonen would seem to resolve this issue. In Kokkonen, the Court held that a federal court does not have jurisdiction to enforce a settlement agreement after it has dismissed a case unless the court had retained jurisdiction over the settlement agreement in its dismissal order or otherwise has some independent basis for jurisdiction.191 In reaching this conclusion, the Court explicitly distinguished the issue of reopening the merits of the original case under Rule 60(b)(6), observing: "It must be emphasized that what respondent seeks in this case is enforcement of the settlement agreement, and not merely reopening of the dismissed suit by reason of breach of the agreement that was the basis for dismissal."192 The Court then reiterated the distinction: "Enforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction."193

The Court's insistence that enforcement of a settlement agreement "requires its own basis for jurisdiction" suggests that a district court also does not have jurisdiction to enforce a settlement agreement after the original case has been reopened under Rule 60(b)(6).194 However, the Court's broad language on the power of the federal courts to retain jurisdiction over settlement agreements casts doubt on this conclusion.195

In Kokkonen, the Supreme Court was careful to note that if a federal court retains jurisdiction over the parties' settlement agreement in the order of dismissal, the court will then have jurisdiction to enforce the agreement.196 In emphasizing the existence of this power to retain jurisdiction, the Supreme Court did not suggest any substan-

190. McCall-Bey, 777 F.2d at 1186-87.
191. Kokkonen, 114 S. Ct. at 1677. In Kokkonen, the party seeking enforcement of the settlement agreement had not sought to have the case reopened under Rule 60(b)(6). See Petitioner's Brief at 7 n.10, Kokkonen (No. 93-263); Respondent's Brief at 17, Kokkonen (No. 93-263).
192. Kokkonen, 114 S. Ct. at 1675.
193. Id. at 1675-76.
194. Id. at 1676.
195. See Krauth v. Executive Telecard, Ltd., No. 95 Civ. 0106, 1995 WL 272556, at *2-4 (S.D.N.Y. May 9, 1995) (explaining that the Supreme Court's holding in Kokkonen does not squarely address the issue whether a district court may reopen a case under Rule 60(b) and then proceed to enforce the parties' settlement agreement, but concluding that Kokkonen nonetheless seems to endorse an approach that requires the district court to have an independent basis of jurisdiction in this situation as well).
tive, policy-based limits on such power. Further, the Court did not question the long-standing principle that federal courts have the power to enforce settlement agreements in cases pending before them.

It is thus arguable that the Court would find jurisdiction to enforce a settlement agreement to exist even if the district court did not expressly retain jurisdiction in its order of dismissal, as long as the case had been reopened and was again pending before the federal court. Although use of a procedural device—reopening the case under Rule 60(b)(6)—to evade the Court's jurisdictional holding in Kokkonen seems formalistic, the logic of it follows from the Court's technical treatment of the jurisdictional requirement in that case. In Kokkonen, the Court made clear that a federal court can effectively retain jurisdiction to enforce a settlement agreement by so stating in its order of dismissal, and it has long been understood that a federal court can enforce a settlement agreement before it dismisses the case. Federal courts do, therefore, have the power to enforce settlement agreements in these circumstances, even where there would be no independent basis for jurisdiction over the settlement agreement itself. It would be plausible for the Court to extend this reasoning to conclude that even though a federal court cannot reach out and enforce a settlement agreement when it no longer has any connection to the case—having entirely and unconditionally dismissed it—a federal court may proceed to enforce a settlement agreement after the court has reestablished its connection to the case by reopening it pursuant to Rule 60(b)(6).

197. The only limit that the Court placed on this power was that, if the dismissal is pursuant to Rule 41(a)(1)(ii) (the terms of which do not authorize the district court to attach conditions to the dismissal), the parties must agree to any retention of jurisdiction. Id.; see also supra note 11 (describing Rule 41(a)) and notes 35-37 and accompanying text (discussing the impact of this limitation).

198. See supra note 186 (citing cases). See also In re Mal de Mer Fisheries, Inc., 884 F. Supp. 635, 637-38 (D. Mass. 1995) (holding that, under Kokkonen, a federal court has the inherent power to enforce a settlement agreement in a case pending before it, because such power is necessary to enable the court to vindicate its authority and manage its proceedings).

199. At least one circuit court of appeals had taken this position prior to the decision in Kokkonen. See Hinsdale v. Farmers Nat'l Bank & Trust Co., 823 F.2d 993, 996 (6th Cir. 1987).

One court has recently suggested that when a court reopens a case under Rule 60(b)(6), the court should be considered to have voided the settlement agreement. In re Hanks, 182 B.R. 930, 935 (Bankr. N.D. Ga. 1995) ("These [settlement] agreements become enforceable only upon the dismissal of the underlying federal case. In the case sub judice, an express condition to the effectiveness of the settlement between the Debtor and TMSI was the dismissal of the Debtor's Chapter 7 case. In order for the agreement to be en-
In *Kokkonen*, *Digital Equipment*, and *Bonner Mall*, the Court made it clear that in analyzing this type of issue, the courts can and should consider the policy-based, institutional interests that are implicated. From this perspective, however, the Court erred when it largely ignored the policy favoring settlement in those cases because, as discussed above, that policy also reflects substantial institutional interests of the courts. The policy favoring settlement should thus be given careful consideration, along with any other relevant institutional interests, in the analysis of whether federal courts should be permitted to enforce the parties' settlement agreement after reinstating the case pursuant to Rule 60(b)(6).

Permitting federal enforcement of settlement agreements would promote the policy favoring settlement. If a federal court were willing to reopen a case and then immediately enforce the parties' settlement agreement, settlement would become a more attractive alternative for parties. This is so because parties would expect that if they needed help with interpretation or enforcement of their settlement agreement, they could return directly to the federal court, rather than being forced to initiate a new lawsuit on the contract claims in a different court. Because parties would anticipate that enforcement of their rights under the terms of a settlement agreement would be efficient and effective, they might be more inclined to settle. To the extent that this greater inclination to settle would produce more settlement agreements (or settlement agreements earlier in the litigation process), the goals that underlie the policy favoring settlement—conservation of judicial resources, reduction of backlog, reduction of expense to parties, achievement of a more satisfactory resolution of the dispute—would be advanced.

Implicit in this account of the increased incentives for parties to settle, however, is a countervailing consideration that deserves mention. If it is easy for parties to return directly to the federal courts for enforceable, there can be no bankruptcy case. In cases where the court reopens to consider the merits of the underlying claim, this understanding would certainly be correct. But the issue here is different—whether the trial court has discretion to reopen the case simply in order to enforce the terms of the original settlement agreement, without proceeding on to consider the merits or setting the case for trial. The lower courts have assumed that such action would not void the settlement agreement. The analysis in the text thus addresses the various policy concerns that should guide the federal courts in resolving the issue whether a district court has jurisdiction to enforce a settlement agreement once the case is reopened under Rule 60(b).

200. See supra notes 116-19 and accompanying text.

201. See supra note 13 and accompanying text (discussing the reasons why parties might prefer to return to the federal court for enforcement of their settlement agreement).
interpretation and enforcement of their settlement agreements, they might be more inclined to seek help from the courts in solving any problems that arise, rather than working out the problems between themselves. This would, of course, add to the work of the courts, thereby disserving the goals of conserving judicial resources and reducing backlog. Thus, while it seems likely that a rule permitting the federal courts to reopen a case and then immediately enforce the parties' settlement agreement would have the overall effect of promoting settlement, this countervailing consideration would diminish the beneficial effects to some degree.

In evaluating the desirability of such a rule, it is also important to consider other institutional interests. In *Kokkonen* itself, the Supreme Court stressed that the federal courts should remain aware of and strictly abide by their jurisdictional limits. In doing so, the Court was, of course, reiterating the mandate of the Constitution. But the Court's easy rejection of the argument that the doctrine of ancillary jurisdiction could support federal enforcement of settlement agreements, and its insistence that if jurisdiction is not retained in the dismissal order, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction," suggest that the Court strictly construes the discretionary doctrines that enable it to extend its jurisdiction. In other words, the Court's opinion in *Kokkonen* indicates that it views the federal courts as having an institutional interest in maintaining fairly tight limits on the discretionary aspects of their jurisdiction so that they are available to address matters properly within the traditional federal domain. This interest would be impaired if jurisdiction were stretched beyond those limits with matters that have traditionally belonged to the state courts, such as contract claims. This view points in the direction of not

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203. *Id.* at 1677.

204. This view is also reflected in the Court's decisions on pendent jurisdiction. Under the doctrine of pendent jurisdiction, a federal court may exercise jurisdiction over state law claims when the federal claims are substantial and the federal and state claims "derive from a common nucleus of operative fact." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966). The Supreme Court has emphasized, however, that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 726. Cf. *Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970) (allowing federal courts to exercise their discretion in determining whether to dismiss pendent state claims after the federal claims are dismissed). Congress recently codified this principle in the "supplemental jurisdiction" statute, 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . [if] the district court has dismissed all claims over which it has original jurisdiction . . . ."). See generally 13B WRIGHT ET AL., supra note 21, § 3567.1, at 133-43 (discussing the application
allowing the federal courts to reopen cases in order to enforce settlement agreements (which would involve contract claims traditionally within the jurisdiction of the state courts).

The strength of this interest in maintaining strict limits on the discretionary aspects of the federal courts' jurisdiction, however, is left in some doubt given the Court's dicta in *Kokkonen*. In that case, the Court took pains to assure the federal courts that although they do not have jurisdiction to enforce settlement agreements in cases that they have unconditionally dismissed, they nonetheless have broad power to retain jurisdiction over settlement agreements in their orders of dismissal. While in some cases it seems clearly appropriate for a federal court to retain jurisdiction—typically by incorporating the terms of the parties' settlement agreement into its own order and thereby creating a consent decree—the Supreme Court offered no guidance on when courts should undertake to retain jurisdiction, noting only that the decision is within "the court's discretion."

By providing the federal courts with this virtually unlimited ability to exercise jurisdiction over settlement agreements, the Court undermined the institutional interest that it apparently sought to protect with its actual holding in the case. While the Court's actual jurisdictional holding in *Kokkonen* seems to be designed to limit the federal courts, and to keep them focused on matters traditionally within the federal domain, its dicta seems to give the federal courts wide latitude to sidestep this jurisdictional limit and wander into areas traditionally reserved for the state courts. In consequence, *Kokkonen*’s dicta raises questions about the strength of the Court's commitment to the interest in maintaining strict limits on the jurisdiction of the federal courts.

The issue of whether the federal courts should be permitted to enforce a settlement agreement after reopening a case under Rule 60(b)(6) thus implicates competing policy considerations. On one side, permitting such enforcement would likely promote settlement, and therefore would further the interests that underlie the policy favoring settlement. On the other side, however, permitting such enforcement would expand the federal courts' jurisdiction, and therefore

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and general effect of the rule that pendent state claims should be dismissed if the federal claims are dismissed before trial).

205. *Kokkonen*, 114 S. Ct. at 1677. This aspect of the Court's holding is discussed in more detail, supra, at notes 29-37 and accompanying text.

206. See generally Kramer, supra note 10, at 324-31 (discussing the nature and beneficial uses of consent decrees); Chayes, supra note 148, at 1288-1304 (discussing the need for greater judicial involvement, including the use of consent decrees, in "public law" cases).

207. *Kokkonen*, 114 S. Ct. at 1677. *See also supra* note 37 and accompanying text.
would undermine the interest in maintaining firm limits on jurisdiction. This conflict between institutional interests makes the resolution of this issue difficult, because it requires a balancing of the relative importance of competing interests. Empirical data on the effect of permitting or refusing federal enforcement on the rate of settlement (and on the cost to the courts of responding to enforcement requests) would greatly aid the analysis, as it would help in evaluating the weight that should be given to the interests that the policy favoring settlement serves in this particular context.\textsuperscript{208}

Although federal enforcement of settlement agreements would likely promote settlement to some degree, the costs to the courts of providing enforcement might tend to marginalize any beneficial effects that the court would enjoy from the potentially higher settlement rate. In this situation, the concern about maintaining strict limits on the jurisdiction of the increasingly burdened federal courts would seem to outweigh the benefits from the policy favoring settlement. This resolution represents a judgment about the importance of the competing interest in maintaining strict limits on jurisdiction. For the reasons discussed above, that judgment is complicated by the dicta in \textit{Kokkonen}. Because that dicta is inconsistent with the central thrust of the Court's holding, however, its reliability is dubious.\textsuperscript{209} Thus, although both competing interests are strong, unless empirical data indicate that a refusal to enforce settlement agreements would significantly affect the willingness of parties to enter into them, the federal courts should refuse to enforce settlement agreements even after reopening a case pursuant to Rule 60(b)(6).

\textbf{B. The Ability of Parties To Dissolve Coercive Contempt Fines Through Private Settlement Agreements}

A careful analysis of the policy favoring settlement is also useful in resolving another issue that has troubled both federal and state

\begin{footnotesize}
\textsuperscript{208} See \textit{supra} notes 164-66 and accompanying text (discussing the value of empirical data).
\textsuperscript{209} The federal courts should thus act with caution in retaining jurisdiction over settlement agreements, despite this dicta. For the same reasons, the federal courts should also exercise caution in enforcing settlement agreements in cases that are still pending before them. Although the federal courts have consistently asserted their inherent power to enforce settlement agreements in pending litigation, the institutional interest in limiting the extent of the federal courts' involvement in areas traditionally reserved for the state courts is also present in this context, and it should serve as a check on the willingness of the federal courts to enforce the terms of the parties' settlement agreement. This concern is, of course, alleviated if the court would otherwise have an independent basis for jurisdiction—such as diversity jurisdiction—over the settlement agreement.
\end{footnotesize}
courts. That issue is whether the courts should defer to the parties' request for vacatur of coercive contempt fines when the parties agree to vacate such fines as part of their private settlement agreement.

In order to understand this issue, some background in the law of contempt is helpful. Traditionally, the courts have divided contempts into two general categories: criminal contempt and civil contempt.210 The distinction between criminal and civil contempt turns not on the nature of the contemnor's conduct, but rather on the purpose of the sanction that the court imposes.211 If the sanction is remedial—for the benefit of the injured party—then the contempt is civil. If, on the other hand, the sanction is punitive—to vindicate the court's authority—then the contempt is criminal.212 While the courts have long adhered to this distinction, they have nonetheless consistently recognized that any contempt sanction will usually contain both punitive and remedial aspects:

It is true that either form of [contempt sanction] has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.213

Within the general criminal and civil categories, the courts have identified three specific types of contempts: criminal contempt, compensatory civil contempt, and coercive civil contempt. A contempt sanction is "criminal" if it imposes punishment for past conduct—usu-


211. See Bagwell, 114 S. Ct. at 2557; Hicks, 485 U.S. at 631-32; Gompers, 221 U.S. at 441. Traditionally, the courts had looked exclusively to the purpose and form of the sanction in order to determine whether the contempt was criminal or civil in nature, an inquiry that often posed difficulties. In Bagwell, the Supreme Court indicated that, in some circumstances, it is necessary for the courts to perform a more substantive review of the content and effect of the contempt sanctions in order to determine whether the contempt was criminal in nature. The determination that contempt sanctions are criminal, rather than civil, has the important consequence of entitling the contemnor to full protection under the criminal procedural provisions of the Constitution. 114 S. Ct. at 2562-63.

212. Hicks, 485 U.S. at 631; Gompers, 221 U.S. at 441.

213. Gompers, 221 U.S. at 443. See also Bagwell, 114 S. Ct. at 2557; Hicks, 485 U.S. 635-36.
ally imprisonment or a fine in a fixed amount. A contempt sanction is "compensatory civil" if it is designed to compensate the other party for losses sustained as a result of the contemnor's contumacious conduct. And a contempt sanction is "coercive civil" if it is a conditional penalty designed to coerce compliance with the court's order.

The third form of contempt—coercive civil contempt—is considered to be civil in nature even though the contemnor may be imprisoned or fined, and any fines assessed are typically payable to the court rather than the opposing party. This characterization has prevailed because the penalty is specified in advance and is conditional, so that the contemnor can avoid the penalty (whether imprisonment or a fine) simply by complying with the court's order. In addition, the sanction is viewed as remedial because its purpose is to compel the contemnor to comply with the requirements of the court's order.

Sanctions imposed pursuant to a coercive contempt order can be significant, amounting in some cases to millions of dollars. In the face of such fines, the parties in a number of cases have sought to diminish or eliminate the fines through provisions in their settlement agreements. The question has thus arisen as to whether the courts should honor provisions in private settlement agreements calling for vacatur of fines imposed pursuant to a coercive contempt order.

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214. See Hicks, 485 U.S. at 632-33.
215. See id.
217. See Hicks, 485 U.S. at 632-33.
218. Id.
219. In the case that gave rise to the Supreme Court's recent decision in Bagwell, for instance, the trial court levied over $64,000,000 in fines against the labor union pursuant to a coercive contempt order. 114 S. Ct. at 2555-56. For a fuller discussion of Bagwell see, infra, notes 234-254 and accompanying text.
221. In Gompers, the Supreme Court made clear that parties may settle away compensatory civil contempt fines, but may not affect criminal contempt sanctions. Upon learning that the parties had settled the underlying litigation, the Court stated:

When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled—of course without prejudice to the power and right of the court to punish for contempt by proper proceedings . . . . If this had been a separate and independent proceeding at law for criminal contempt, to
A request for vacatur of coercive contempt fines gives rise to the same two issues that were raised by a request for vacatur of a lower court's opinion. The first issue is whether the court is required to vacate the fines on the ground that settlement of the action mooted the case. The second issue is whether, as a matter of policy, the court should vacate the fines in order to facilitate the parties' settlement.

With respect to mootness, most of the courts that have addressed the issue have concluded that settlement of the underlying litigation does not moot the coercive contempt fines imposed prior to the settlement. In reaching that conclusion, these courts have emphasized the negative impact that a finding of mootness would have on the court's authority:

[T]he court's adoption of the [defendant's] mootness argument would absolutely undermine the efficacy of civil contempt sanctions. If the [defendant's] argument governed, any organization facing coercive contempt fines would know that it only had to postpone actual collection of the fines until the settlement of the underlying dispute to avoid payment of the fines altogether. No decision of this court will allow such unanswered contempt toward the rule of law.223

vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

But, as we have shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant . . . . [W]hen the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part.

221 U.S. 418, 451-52 (1911). See also United States v. United Mine Workers of Am., 330 U.S. 258, 294 (1947) (stating that "[v]iolations of an order are punishable as criminal contempt even though the order is set aside on appeal or though the basic action has become moot" (citation omitted)).

222. See Bagwell, 423 S.E.2d at 358; Clark, 752 F. Supp. at 1301; Hawaii Pub. Employment Relations Bd., 667 P.2d at 797. See also Work Wear, 602 F.2d at 114-16 (assuming that settlement of the litigation did not moot the defendant's liability for coercive contempt fines).

In the Bagwell case, the Virginia Court of Appeals had reached the opposite conclusion, holding that the trial court should have vacated the fines as moot. The court reasoned that, when the litigation was settled, the coercive civil fines, which were imposed for the benefit of the plaintiff companies, were also settled. With respect to the need to vindicate the court's authority, the court of appeals opined that a court could achieve such vindication through criminal contempt proceedings against the defendant. See Clinchfield Coal, 402 S.E.2d at 905. The court of appeals' ruling was, of course, reversed on appeal by the Virginia Supreme Court. Bagwell, 423 S.E.2d at 358.

223. Clark, 752 F. Supp. at 1301. See also Bagwell, 423 S.E.2d at 358 (agreeing with Clark); Hawaii Pub. Employment Relations Bd., 667 P.2d at 797 (arguing that mootness of the fine would defeat the coercive function of civil contempt sanctions).
It is surely correct that the settlement of the underlying litigation does not moot the coercive contempt sanctions incurred prior to the settlement. As the Supreme Court stressed in *Bonner Mall*, even after the merits of a case have become moot, courts have the authority “to enter orders necessary and appropriate to the final disposition of a suit . . . .” Coercive contempt sanctions, while remedial in the sense that they are designed to coerce compliance, are neither part of the merits of the underlying litigation nor compensation to the plaintiff in the case. As a result, the court’s ability to enforce the coercive sanctions should survive the parties’ settlement of the litigation.

On the issue of whether a court should, as a matter of policy, vacate coercive contempt fines at the parties’ request, the courts have also emphasized the need to vindicate their authority. Both federal and state courts have thus generally refused to exercise their discretion to vacate coercive fines, citing the need to maintain “the dignity of the law and public respect for the judiciary . . . .” In refusing to


225. This issue—whether preexisting coercive contempt sanctions are rendered moot by the settlement of the underlying litigation—should be distinguished from the issue whether a court may continue to subject the defendant to further coercive sanctions when it is no longer necessary or possible for the defendant to comply with the court’s order, because the main case has been terminated through settlement or otherwise. With respect to the latter issue, the courts have uniformly held that the coercive contempt sanctions abate when the proceedings out of which the court’s order arose are terminated. *See*, e.g., *Shillitani v. United States*, 384 U.S. 364, 371-72 (1966); *Backo v. Local 281, United Bhd. of Carpenters and Joiners of Am.*, 438 F.2d 176, 182 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971); *De Parcq v. United States Dist. Court for S.D. of Iowa*, 235 F.2d 692, 700 (8th Cir. 1956); *Harris v. Texas & Pacific Ry.*, 196 F.2d 88, 90 (7th Cir. 1952); *United States v. International Union, United Mine Workers of Am.*, 190 F.2d 865, 873-74 (D.C. Cir. 1951).

226. *Bagwell*, 423 S.E.2d at 358. *See also Clark*, 752 F. Supp. at 1301 (noting that failure to enforce the fines would allow “contempt toward the rule of law”); *In re Rogers Oil Co.*, 17 B.R. 319, 321 (Bankr. W.D. Ark. 1982) (“To empower the officers of the estate to compromise the fines would mean that the judicial power might always be upset or overturned by nonjudicial officers charged with administration of the estate.”); *Work Wear*, 602 F.2d at 116 & n.12 (noting that the trial court had refused to reduce the coercive fines on the ground that doing so “would denigrate the authority of the Court and sanction mere lip service to its Orders.”). *Cf. In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302-03 (7th Cir. 1988) (refusing to vacate a lower court’s judgment finding the defendant in contempt, and emphasizing that there is “a special interest when the adjudication in question holds one of the parties in contempt of court. Such an adjudication may vindicate not only an entitlement of a party—as the one in this case did—but also the authority of the court.”).

Several courts, however, have indicated that, in some instances, it is appropriate for courts to exercise their discretion to reduce or vacate coercive contempt fines. *See*, e.g., *Work Wear*, 602 F.2d at 116 (assuming that courts have discretion to reduce coercive fines); *League of Voluntary Hosps. and Homes of N.Y. v. Local 1199*, Drug and Hosp. Union, 490 F.2d 1398, 1405 (Temp. Emer. Ct. App. 1973) (holding that a court has discretion to consider remittitur of coercive fines), *vacated in part*, 1974 WL 1070 (D.C.N.Y., Apr. 16, 1974).
vacate the fines, however, these courts have focused very narrowly on their own institutional interest in maintaining the integrity of their orders, apparently giving no consideration to the competing interest in facilitating the private settlement of disputes.

This issue does, however, directly implicate the policy favoring the private settlement of disputes. A rule that allows parties to reduce or eliminate coercive contempt sanctions in their settlement agreements will give both plaintiffs and defendants greater incentive to settle. A defendant-contemnor will obviously be more inclined to settle because through settlement that party will be able to achieve not only resolution of the underlying claim in the case, but also relief from oppressive contempt sanctions.\(^2\) Settlement will also be more attractive to the plaintiff because the plaintiff will be able to use reduction or elimination of the contempt fines to gain greater leverage in settlement negotiations.\(^3\)

Such a rule, however, might have the effect of delaying settlement and encouraging defendants to flout court orders in some cases. This consequence might occur because defendants would know that they could ultimately seek to negotiate their way out of any coercive contempt sanctions. This would erode some of the benefits of lightening the court’s case load that settlement generally brings about.

A rule that allows parties to vacate coercive contempt sanctions in their settlement agreements thus would provide some positive incentives to settle, but it might also have a negative delaying effect on settlement. In *Bonner Mall*, the Supreme Court was presented with a similar dilemma: a rule that allows parties to vacate a judicial decision in their settlement agreement would likely facilitate settlement, but such a rule might deter parties from settling at an earlier stage in the litigation when the savings to the judicial system are greatest. In the face of these opposing factors, the Supreme Court simply dropped the policy favoring settlement out of its analysis, stating: “We find it quite impossible to assess the effect of our holding, either way, upon the frequency or systemic value of settlement.”\(^4\)

Although it may be tempting for the lower courts to take this same approach to the issue of whether parties should have the power

\(^{227}\) In *Bagwell*, for instance, the parties’ settlement agreement provided for the vacatur of $64 million in coercive contempt fines. 114 S. Ct. at 2556.

\(^{228}\) This point has been noted in the context of vacatur of judicial opinions. See Fisch, *Rewriting History*, supra note 74, at 640-41; Resnik, *Role of Adjudication*, supra note 77, at 1490-91.

\(^{229}\) *Bonner Mall*, 115 S. Ct. at 393.
to vacate coercive contempt sanctions, they should make a concerted effort to examine the potential effect on the policy favoring settlement. Empirical research would greatly facilitate this effort, but even absent empirical findings, it is possible to look at general tendencies to determine the probable effect that allowing vacatur would have on the policy.

In making that determination, the key question is whether a rule allowing parties to vacate coercive contempt fines in their settlement agreements would delay settlement and encourage defendants to disobey court orders, thereby nullifying the positive effect on the incentives for settlement that such a rule would provide. The concerns about delay and disobedience, however, are somewhat mitigated by several considerations. First, such conduct would put defendants at a disadvantage in negotiation by increasing the other party's bargaining leverage; indeed, the other party's leverage would steadily increase as the coercive sanctions mounted. Further, delay and disobedience would continue to carry risk for defendants, because they would have no guarantee of successfully eliminating the coercive sanctions through any settlement negotiations. Moreover, it is possible that, even if any coercive contempt sanctions were vacated pursuant to the parties' settlement agreement, the court could still punish the defendant-contemnor for criminal contempt. All of these factors should discourage delay. In addition, the expectation that they could settle away the coercive contempt sanctions might push parties to the bargaining table even sooner, in time to use the bargaining chip of the contempt sanctions before it is too late—that is, before the defendant has already served the prison sentence or paid the fine that the court imposed. In light of these various considerations, it is likely that a rule allowing parties to reduce or eliminate coercive contempt sanctions would not significantly encourage delay and disobedience and thus would, overall, tend to promote settlement.

230. See supra notes 164-66 and accompanying text.
231. See Yates v. United States, 355 U.S. 66, 74 (1957) ("The civil and criminal [contempt] sentences served distinct purposes, the one coercive, the other punitive and deterrent; that the same act may give rise to these distinct sanctions presents no double jeopardy problem."); International Union, United Mine Workers of Am. v. Clinchfield Coal Co., 402 S.E.2d 899, 905 (Va. Ct. App. 1991) (holding that, when parties settle, coercive contempt sanctions must be vacated as moot, but noting that vindication of the court's authority "remains available by criminal contempt proceedings"), rev'd sub nom. Bagwell v. International Union, United Mine Workers of Am., 423 S.E.2d 349 (Va. 1992), rev'd on other grounds, 114 S. Ct. 2552 (1994).
Such a rule, however, would run up against other important institutional interests of the courts. Most significantly, giving the parties discretion to dissolve the coercive contempt sanctions that the court had imposed would jeopardize the integrity of the court's orders. If the threat of sanctions that backs a court order can be disposed of at the will of the parties, then the order itself may lose much of its force. This could have ramifications for the judiciary as an institution on two levels. In cases involving injunctions, it could cause defendants to defy the orders of the court more readily, despite the disincentives described above. And, on a more general level, it could diminish respect for the courts, thereby undermining their authority not only with respect to coercive contempt sanctions, but across the broad run of cases. Both of these ramifications would undermine the courts' ability to resolve future cases effectively and, more broadly, to serve the public as an authoritative and respected protector of societal values and the rule of law.

These institutional concerns are of unusual importance, for they go to the very heart of the judiciary's ability to function effectively. Concerns about the judiciary's ability to function effectively were integral to the Supreme Court's decisions in *Kokkonen*, *Digital Equipment*, and *Bonner Mall*,232 and because of the strength and significance of the particular concerns in this context, they should be held to outweigh the positive effect that vacatur of coercive contempt sanctions would have on the policy favoring settlement and the objectives that it serves. In order to safeguard their institutional interest in vindicating their own authority, therefore, courts should refuse to defer to settlement-based requests for vacatur of coercive contempt sanctions.233

232. More specifically, in *Kokkonen*, the Court was concerned about maintaining strict limits on the discretionary aspects of the jurisdiction of the federal courts in order to preserve their ability to address issues properly within the federal domain. *Kokkonen*, 114 S. Ct. at 1676-77. In *Digital Equipment*, the Court was concerned about safeguarding for the courts the benefits of efficiency that result from application of the final judgment rule. Digital Equip. v. Desktop Direct, Inc., 114 S. Ct. 1992, 1996, 2002 (1994). In *Bonner Mall*, the Court was concerned about the value to the courts of maintaining orderly procedures and preserving judicial precedents. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392-93 (1994).

233. As discussed above, both federal and state courts have reached this same result in cases that have presented the issue. *See supra* note 226 and accompanying text. Also, it is worth noting that, in the wake of *Bonner Mall*, at least two courts have held that a district court need not defer to the parties' request for vacatur of sanction orders, even when that request is made pursuant to a settlement agreement. Keller v. Mobil Corp., 55 F.3d 94, 99 (2d Cir. 1995) ("[T]here is no question that despite the parties' agreement to ask for the withdrawal of the sanction order as a condition to settlement, the district court had the
Although this resolution is consistent with the holdings of most of the courts that have addressed the issue, it is greatly complicated by language in Justice Ruth Bader Ginsburg's concurring opinion in *International Union, United Mine Workers of America v. Bagwell*; a case that was also decided in 1994. In *Bagwell*, the trial court had entered an injunction that prohibited the defendant labor union from engaging in various obstructionist activities at the plaintiff companies. After numerous violations of the injunction, the trial court announced a coercive sanction: it would fine the labor union $100,000 for each future violent breach of the injunction and $20,000 for each future nonviolent breach of the injunction. Over the next several months, the court levied more than $64,000,000 in fines against the labor union pursuant to its coercive order, of which approximately $52,000,000 was payable to the Commonwealth of Virginia and the affected counties. While the case was on appeal, the labor union and the companies entered into a settlement agreement that not only settled the labor dispute, but also called for the parties to make a joint motion for vacatur of the contempt fines.

After the trial court refused to vacate the $52,000,000 in contempt fines payable to the Commonwealth and the counties, the Virginia Court of Appeals ordered it to do so. On appeal, however, the Virginia Supreme Court reversed. It refused to allow the parties to eliminate the contempt fines through their settlement agreement, emphasizing that courts must maintain the power to enforce their contempt order "if the dignity of the law and public respect for the judiciary..."

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235. Id. at 2555.
236. Id.
237. The court treated $12,000,000 of the fines as payable to the companies, presumably as compensation. See id. at 2556.
238. Id.
239. *International Union, United Mine Workers of Am. v. Clinchfield Coal Co.*, 402 S.E.2d 899, 905 (Va. Ct. App. 1991), rev'd sub nom. *Bagwell v. International Union, United Mine Workers of Am.*, 423 S.E.2d 349 (Va. 1992), rev'd on other grounds, 114 S. Ct. 2552 (1994). The Court of Appeals stated: "civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines." Id.
ary are to be maintained.\textsuperscript{240} The Virginia Supreme Court also rejected the union’s argument that the contempt fines were in fact criminal and could not be imposed constitutionally without the requisite procedural protections.\textsuperscript{241}

The United States Supreme Court granted certiorari to consider this latter issue—whether the contempt fines that the trial court had assessed were criminal in nature, even though the fines were imposed in the traditional coercive civil form.\textsuperscript{242} Ultimately, the Court unanimously held that the contempt fines were criminal and could only be imposed if the defendant received the procedural protections, such as a jury trial, that the Constitution mandates.\textsuperscript{243}

Although the majority opinion in \textit{Bagwell} mentioned the vacatur issue only in describing the procedural history of the case,\textsuperscript{244} Justice Ginsburg, joined by Chief Justice Rehnquist, thought that the Virginia Supreme Court’s resolution of that issue was of considerable importance in determining whether the contempt sanctions were criminal or civil. In her concurring opinion, Justice Ginsburg argued that “the Virginia courts’ refusal to vacate the fines, despite the parties’ settlement and joint motion . . . is characteristic of criminal, not civil proceedings.”\textsuperscript{245} Justice Ginsburg was persuaded that the Virginia

\textsuperscript{240} Bagwell v. International Union, United Mine Workers’ of Am., 423 S.E.2d 349, 358 (Va. 1992), rev’d on other grounds, 114 S. Ct. 2552 (1994). Both the Virginia Supreme Court and the Virginia Court of Appeals treated this issue as one of state law. \textit{Id.}; Clinchfield Coal, 402 S.E.2d at 904.

\textsuperscript{241} Bagwell, 423 S.E.2d at 356-58.


\textsuperscript{243} Bagwell, 114 S. Ct. at 2561-63. In explaining why the fines were criminal, the Court cited a variety of factors:

The fines are not coercive day fines, or even suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed . . . .

. . . The union’s sanctionable conduct did not occur in the court’s presence or otherwise implicate the court’s ability to maintain order and adjudicate the proceedings before it. Nor did the union’s contumacy involve simple, affirmative acts, such as the paradigmatic civil contempts examined in \textit{Gompers}. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners’ compliance with an entire code of conduct that the court itself had imposed. The union’s contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over $52,000,000. Under such circumstances, disinterested factfinding and even-handed adjudication were essential, and petitioners were entitled to a criminal jury trial.

\textit{Id.} at 2562.

\textsuperscript{244} \textit{Id.} at 2556.

\textsuperscript{245} \textit{Id.} at 2567 (Ginsburg, J., concurring).
Supreme Court's rationale for collecting the fines—that courts "must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained"—reflected purposes characteristic of criminal contempt. Further, she found it "implausible" that the contempt sanction was for the benefit of the civil complainant, as the complainant had repudiated the fines; indeed, the Commonwealth was pursuing "the fines on its own account, not as the agent of a private party, and without tying the exactions exclusively to a claim for compensation." Justice Ginsburg thus concluded: "If, as the trial court declared, the proceedings were indeed civil from the outset, then the court should have granted the parties' motions to vacate the fines."

Under Justice Ginsburg's approach, a court's refusal to grant the parties' motion for vacatur of a sanction imposed in the traditional coercive form would necessarily make that sanction criminal in nature. This approach to distinguishing criminal from civil contempts has potentially dramatic ramifications for contempt law. As discussed above, both federal and state courts have held, and will likely continue to hold, that courts should not grant parties' settlement-based requests for vacatur of coercive contempt sanctions. As these holdings harden into a general rule, courts will universally refuse to grant the parties' motion for vacatur of coercive contempt sanctions. Under the logic of Justice Ginsburg's approach, this would mean that all such coercive contempt sanctions are criminal in nature. This approach would thus effectively relocate coercive contempt from the civil category, where it has traditionally been lodged, into the criminal category.

Justice Ginsburg would apparently avoid this result by resolving the vacatur issue differently. In her concurrence, she clearly indicated that, in her view, courts should grant parties' requests for vacatur of civil contempt fines. This approach, obviously, would allow parties to reduce or eliminate coercive contempt sanctions in their settlement agreements. But the basis for Justice Ginsburg's position is unclear: she provided no explanation, for instance, of why courts are obliged to honor the parties' request for vacatur of contempt fines in a civil set-

246. Id. (quoting Bagwell, 423 S.E.2d at 358).
247. Id.
248. Id.
249. Justice Ginsburg stated: "If, as the trial court declared, the proceedings were indeed civil from the outset, then the court should have granted the parties' motions to vacate the fines." Id. at 2567.
ting, when they are not obliged to honor the parties’ request for vaca-
tur of a judicial opinion in a civil case.250

Justice Ginsburg’s statements appear to have resulted from a nar-
row focus on the traditional distinction between the purposes of crim-
nal and civil contempt. She emphasized this distinction, relying on the
Courts articulation of it during the early part of the century in the
Gompers case: “The civil contempt sanction, Gompers instructs, is
designed ‘to coerce the defendant to do the thing required by the or-
der for the benefit of the complainant.’ . . . . The criminal contempt
sanction, by contrast is ‘punitive, [imposed] to vindicate the authority
of the court.’”251 Using these classifications, Justice Ginsburg rea-
soned that once the private party-complainant no longer wishes to
benefit from the collection of coercive fines, the court’s enforcement
of those fines cannot be said to benefit the complainant, and thus
would not be directed toward the traditional purpose of civil con-
tempt.252 Further, Justice Ginsburg reasoned that the Virginia court’s
emphasis on maintaining respect for the courts smacked of the tradi-
tional purpose of criminal contempt.253

A sound argument can be made, however, that the court’s en-
forcement of the coercive sanction does benefit the private complain-
ant, or at least private complainants in general. This benefit results
because the image of an authoritative court and the expectation of
certainty in enforcement will make coercive orders more forceful,
which in turn will give such orders greater coercive power. Justice
Ginsburg would likely contend that this more generous view of the
benefits of the contempt sanction blurs the distinction between the
traditional purposes of criminal and civil contempt. This blurring oc-
curs because the benefit to the complainant that arguably justifies
treating the contempt as civil follows from the court’s vindication of
its authority. Vindication of the court’s authority, however, is the
traditional purpose of criminal contempt. Thus, the benefit to the
complainant (or complainants in general) is achieved through the very
thing—vindication of the court’s authority—that serves as the core
purpose of criminal contempt.

250. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392-93
(1994). Justice Ginsburg, of course, joined the Court’s unanimous opinion in Bonner Mall.
Id. at 388.

251. Bagwell, 114 S. Ct. at 2566 (Ginsburg, J., concurring) (quoting Gompers v. Bucks
Stove & Range Co., 221 U.S. 418, 441-42 (1911)).

252. Id. at 2567.

253. Id.
While the argument that the court's enforcement of the coercive sanction is of sufficient benefit to private complainants to justify treating the sanction as civil does tend to muddy the traditional distinction, this consequence is not decisive. Indeed, the Court has consistently recognized and accepted that there is significant overlap between the purposes and effects of criminal and civil contempt sanctions.\(^{254}\) Thus, despite the indications to the contrary in Justice Ginsburg's *Bagwell* concurrence, the lower courts should continue to refuse to permit parties to reduce or eliminate coercive contempt sanctions in their settlement agreements, and they may do so without any significant danger that such a refusal will convert a traditionally civil contempt into a criminal contempt.

**Conclusion**

The Supreme Court's three recent settlement decisions—*Kokkonen*, *Digital Equipment*, and *Bonner Mall*—offer rare insights into the Court's views about settlement agreements. These cases suggest that the Court has, perhaps inadvertently, strayed from its long-standing commitment to the public policy favoring the private settlement of disputes. Indeed, in each of the three cases, the Court's concern about protecting other institutional interests virtually eclipsed any concern about the policy favoring settlement.

On reconsideration of the policy, however, it seems clear that the goals that form its foundation are essentially institutional in nature and, moreover, are of substantial importance to the judicial system. Despite the contrary indications in this recent trilogy of Supreme Court cases, therefore, courts should give careful and serious consideration to the policy favoring settlement in deciding cases involving settlement issues. In attempting to illustrate how courts should incorporate the policy favoring settlement in their analysis, this Article has considered two such issues that are currently troubling the lower courts. With respect to the first issue—whether a breach of the parties' settlement agreement can serve as the basis for reopening a case under Rule 60(b)(6)—the Article concluded that the policy favoring settlement, in conjunction with the interest in protecting the jurisdiction of the federal courts, justifies permitting the federal courts to reopen a case for consideration of the merits of the original claim, but it

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254. Even in *Gompers*, where it articulated the distinction, the Court acknowledged that any contempt sanction will contain remedial and punitive aspects. 221 U.S. at 443. See also supra note 213 and accompanying text (discussing the incidental effects of a contempt sanction).
does not justify permitting the courts to reopen a case simply to enforce the settlement agreement. In regard to the second issue—whether a court should defer to the parties' settlement-based request for vacatur of coercive contempt sanctions—the Article concluded that, although permitting vacatur would advance the underlying objectives of the policy favoring settlement, courts should nevertheless deny vacatur because of the strength of the countervailing interest in protecting the integrity of court orders. In discussing the issues, the Article has suggested an approach to resolving settlement issues that gives the policy substantial but not decisive weight in recognition of the important purposes which the policy serves.