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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: MATT T. KOKKONEN, Petitioner v. GUARDIAN LIFE
INSURANCE COMPANY OF AMERICA, ET AL.

CASE NO: No. 93-263

PLACE: Washington, D.C.

DATE: Tuesday, March 1, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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MATT T. KOKKONEN, :

Petitioner :

V. : No. 93-263

GUARDIAN LIFE INSURANCE :

COMPANY OF AMERICA, ET AL. :

- - - - -X

Washington, D.C.

Tuesday, March 1, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES :

MICHAEL J. JENCKS, ESQ., San Luis Obispo, California; on
behalf of the Petitioner.

FRANK C. MORRIS, JR., ESQ., Washington, D.C.; on behalf
of the Respondents.

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1 P R O C E E D I N G S

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 93-263, Matt. T. Kokkonen v. the Guardian Life
5 Insurance Company of America.

6 Mr. Jencks.

7 ORAL ARGUMENT OF MICHAEL J. JENCKS

8 ON BEHALF OF THE PETITIONER

9 MR. JENCKS: Mr. Chief Justice, and may it
10 please the Court:

11 This case raises the issue of the scope of a
12 Federal court's power to enforce a settlement agreement
13 reached in a case before it. Specifically, the question
14 is whether the district court properly invoked its
15 inherent power in enforcing the settlement agreement in
16 this case where the action was no longer pending, having
17 been dismissed months previous, where the action was not
18 incorporated or made a part of any court order or
19 otherwise given judicial --

20 QUESTION: You say the action wasn't
21 incorporated. What you mean is the agreement, don't you?

22 MR. JENCKS: Yeah. Excuse me. Thank you,
23 Mr. --

24 QUESTION: And it was not a written agreement?

25 MR. JENCKS: That's correct. This was an -- let

1 me turn to the facts, because I think they're important in
2 this case. This originally was a case filed in State
3 court. It was removed on diversity grounds on account of
4 the respondent's New York citizenship; raised only State
5 law claims.

6 3 days into the trial of this matter, the
7 parties reached a settlement which, at the insistence of
8 the respondent, was not converted to a formal settlement
9 agreement. Approximately 5 weeks later the case was
10 dismissed unconditionally under 41(a)(1), and the parties
11 went their separate ways, only 4 or 5 months after that to
12 come to a major disagreement over the terms of the
13 settlement and who was breaching what terms. The
14 respondent sought its remedy back before the Federal
15 court, and the petitioner sought his remedy before the
16 State court.

17 But, you're correct, the -- Mr. Chief Justice,
18 there was no written settlement agreement. This was an
19 oral agreement and never incorporated into an order, never
20 given judicial sanction to be made an order of the court.

21 QUESTION: Was it dictated into the record some
22 way?

23 MR. JENCKS: It was summarized by one of the
24 counsel in chambers in front of the district court judge,
25 who had taken, as many judges do, an active role in

1 encouraging the settlement. But it was never -- except
2 for that recitation, the summarization in chambers, never
3 made a part of the record or otherwise incorporated into
4 an order of the court.

5 We have proposed, as have the 10 States who
6 filed an amicus brief, a rule of practice, as it were, a
7 line where we suggest the constitutional concerns of the
8 limited jurisdiction of Federal courts are met, and that
9 also serves an important function as a rule of practice.

10 QUESTION: Well, do you argue that application
11 of the Federal rules themselves means if you just follow
12 the rules, that there is no right to come in later for
13 enforcement?

14 MR. JENCKS: Yes, Justice O'Connor. I don't
15 think the Federal rules confer jurisdiction in this case,
16 with the single exception -- and it really doesn't confer
17 jurisdiction, but Rule 60 would allow, under the proper
18 circumstances and a showing --

19 QUESTION: But that wasn't resorted to here.

20 MR. JENCKS: It was not resorted to here.

21 QUESTION: So do you take the position that if
22 you just follow the rules, the court had no authority to
23 enforce this judgment?

24 MR. JENCKS: Yes.

25 QUESTION: But on your --

1 QUESTION: Then if that were the case, we
2 wouldn't reach any constitutional question.

3 MR. JENCKS: The only -- the constitutional
4 question arises from the district court deciding to
5 exercise its inherent jurisdiction to enforce this
6 settlement.

7 QUESTION: Well, but we can solve it by just
8 saying the rules don't allow it.

9 MR. JENCKS: That's correct.

10 QUESTION: Well, rules, strictly speaking, I
11 suppose, can't confer jurisdiction. It's statutes that
12 confer jurisdiction. A rule could implement a statute.
13 Then what you're saying here, I suppose, is that there's
14 no independent basis for Federal jurisdiction and the
15 judicial code.

16 MR. JENCKS: Exactly, Mr. Chief Justice.

17 QUESTION: But are you not also saying that
18 there is no juris -- there would be no jurisdictional
19 problem if a Rule 60 motion had been filed here and the
20 other side had been -- had asked to be relieved from the
21 burden of the judgment?

22 MR. JENCKS: If either party contesting the
23 terms had made a motion that was granted, under the
24 standards of Rule 60 the dismissal could have been vacated
25 and the case could have been restored to the docket.

1 QUESTION: All right, now if the case had been
2 restored to the docket, would you then take the position
3 that the court could not consider your settlement and that
4 the only thing the court could do would be to litigate the
5 case?

6 MR. JENCKS: Yes.

7 QUESTION: And that being on a jurisdictional
8 basis or on the text of the rules?

9 MR. JENCKS: Both on the text of the rules, but
10 also on a practical basis. In most settlements reached,
11 the dismissal of the action is obviously one of the major
12 elements of consideration. If you were unfolding the
13 settlement for some fraud in its procurement or other
14 reason and can convince a court that to let it stand and
15 not vacate it would perpetrate some extreme hardship or
16 great injustice, to fall under Rule 60.

17 And I want to -- Rule 60 I don't believe is available
18 for every breach of a settlement agreement that may occur.
19 I think it -- its history, its usage, its application, we
20 can assume it to be a much more of a reserved --

21 QUESTION: Well, would it be available here?

22 MR. JENCKS: I don't believe so under the facts,
23 even, that the district court found of the breach, of the
24 alleged breach of the settlement agreement. Had they made
25 the motion --

1 QUESTION: What more would you have needed? Are
2 there any set of facts that you can imagine in which Rule
3 60 could have been invoked here properly?

4 MR. JENCKS: Certainly, I think there could be
5 cases where either there was a clear fraud in the
6 procurement of the settlement, or perhaps a changed
7 circumstance. For example, something that has happened in
8 this case was a change in State law that makes one of the
9 terms of the settlement --

10 QUESTION: But mere breach of settlement would
11 never be sufficient under Rule 60?

12 MR. JENCKS: I don't think -- I guess the
13 circumstance of the parties could be such, that would be
14 the only way to avoid great hardship. But I think,
15 generally, simple breach of a settlement agreement would
16 not qualify for a Rule 60 setaside.

17 QUESTION: Mr. Jencks, I'm not sure I understand
18 how you say the constitutional question can be avoided.
19 It seems to me if neither the rules nor the statute
20 provide for this kind of jurisdiction, the argument is
21 still going to be made, and is made by your adversary
22 here, that it doesn't have to be in the statute or in the
23 rules; that the court has it by virtue of the
24 Constitution, automatically; there is an inherent
25 authority under the Constitution. Isn't that question in

1 this case, no matter what we say about the rule --

2 MR. JENCKS: The question of the scope of
3 inherent jurisdiction here is this case, because I think
4 we are prepared to concede that there is such a thing as
5 inherent jurisdiction, and in some situations it may apply
6 to the enforcement of settlement agreements. In fact,
7 that is exactly --

8 QUESTION: So --

9 MR. JENCKS: -- Why we've adopted and suggested
10 to the Court the rule of practice. Because if you take a
11 settlement agreement and incorporate it into an order, you
12 give it judicial sanction, you can access one of the
13 bedrock principles of inherent jurisdiction where the
14 exercise of the inherent power is indispensable, is
15 essential to the performance of the power formally
16 granted.

17 QUESTION: But we have to consider that
18 question, don't we, whether the inherent power under the
19 Constitution covers this?

20 MR. JENCKS: Absolutely, Your Honor, and I
21 apologize if I indicated we didn't.

22 QUESTION: What is that inherent power again?
23 Inherent power to do what, judge's inherent, what are we
24 talking about?

25 MR. JENCKS: In this case, in the way we would

1 view a proper scope of inherent jurisdiction, it would be
2 the power to vindicate and enforce the court's own orders.

3 QUESTION: Well, the only order that's
4 outstanding here is an order dismissing the case.

5 MR. JENCKS: That's right.

6 QUESTION: That's all -- that's the only order
7 we have.

8 MR. JENCKS: That's right, and that's why we
9 believe --

10 QUESTION: So the inherent power to enforce an
11 order of dismissal is what we're talking about.

12 MR. JENCKS: I think -- excuse me, Justice
13 Stevens. I think the court has the power to vacate, upon
14 a proper application under Rule 60, the order of
15 dismissal.

16 QUESTION: Yeah, but I think you just -- you
17 suggested earlier we're not talking about vacating a
18 judgment and going forward with the preceding lawsuit.
19 They are rather seeking to enforce a separate agreement
20 that resulted in dismissal of the lawsuit, and they're
21 suing for enforcement of that agreement. That's quite a
22 different lawsuit.

23 MR. JENCKS: That's correct.

24 QUESTION: And I'm still -- I still don't quite
25 understand the concept of inherent jurisdiction to enforce

1 the court's order to dismiss.

2 MR. JENCKS: Maybe you misunderstood --

3 QUESTION: I know you're not -- that's not --
4 you're arguing the other side. I'm not quite sure of the
5 scope of your concession, I guess that's what I'm saying.

6 MR. JENCKS: No, Justice Stevens, I apologize.
7 Let me -- the issue -- I was talking about our proposed
8 rule that tried to access a well established principle for
9 the exercise of inherent jurisdiction that would anchor
10 this enforcement mechanism constitutionally and in a way
11 that's supported by existing authority.

12 It's really in some ways the counterpart to this
13 Court's addressing the discipline or sanctions side in
14 Chambers, in the Chambers decision, where the need to
15 access or discharge a disciplinary function is essential
16 or viewed as essential to the court's maintenance of the
17 order of its proceedings and the conduct of its business.
18 I think much the same thing can be said about the inherent
19 power necessary to enforce and vindicate orders that have
20 been given judicial sanction by the court.

21 QUESTION: Well, suppose in this case there had
22 been a motion to reopen the judgment under Rule 60, and
23 the court then had said there are problems with this
24 settlement agreement and so I am now going to enter a new
25 judgment which incorporates the settlement agreement and

1 I'm going to enforce the settlement agreement if I have
2 to, would that have been an appropriate method of
3 proceeding and could the judge then have enforced the
4 settlement agreement?

5 MR. JENCKS: I don't believe so, Justice
6 Kennedy. The -- as I understand --

7 QUESTION: Why, if he could have done that in
8 the first instance?

9 MR. JENCKS: I think that the remedy provided by
10 Rule 60 to unwind an order or set aside an order or
11 judgment of the court is premised on restoring the parties
12 to the position they were before they gave up, in this
13 case the dismissals that they reached in connection with
14 the settlement. Different issues, it would go back on the
15 calendar, in our position, and should be tried and
16 resolved. The issues are different --

17 QUESTION: Well, I just want to make -- get one
18 thing clear. Do you concede or do you not that if the
19 judge had said when he heard the settlement agreement: I
20 am very interested in making sure that this settlement
21 agreement is honored. I therefore put the settlement
22 agreement into the judgment; I make it a part of the
23 judgement. Could he have done that and could he have
24 enforced it under those premises?

25 MR. JENCKS: He could have incorporated with the

1 parties' consent. This was still a voluntary private
2 settlement agreement. I think had they agreed that they
3 wanted to retain Federal court oversight and jurisdiction
4 over the enforcement of this settlement, that would have
5 been exactly the course to take. And what we're
6 suggesting should be the rule where the parties decide to
7 use the district court's continued jurisdiction as a means
8 of enforcement, they also could --

9 QUESTION: Well, if we're talking about the
10 constitutional limitations on jurisdiction, why does that
11 depend on the consent of both parties?

12 MR. JENCKS: As I understand -- I believe I
13 understood you to ask if -- could the court simply on its
14 own, sua sponte, take the parties' agreement, regardless
15 of their consent, and incorporate it in the judgment of
16 the court.

17 QUESTION: Well, suppose he said I'm not going
18 to dismiss this suit unless it's incorporated in the
19 judgment? Otherwise, I'm going to --

20 MR. JENCKS: Fine. I mean, it seems to me that
21 puts it directly to the parties to decide, in their
22 negotiation, whether that's the way they wanted to go, or
23 whether they wanted to proceed with the trial and have a
24 judgment.

25 QUESTION: But, Mr. Jencks, doesn't that raise

1 still another question? Pursuant to such an understanding
2 with the judgment incorporated in -- I mean, with the
3 terms of the settlement agreement incorporated in the
4 judgment, it seems to me that the judgment could do one of
5 two things. One, it could say, as injunctions often do,
6 the court retains jurisdiction for the purposes of
7 enforcement. Or alternatively, it could just put it in
8 there, say nothing, and dismiss the case. Now, if the
9 case is dismissed with just the terms of the agreement
10 printed in the judgment, would the court have jurisdiction
11 or not?

12 MR. JENCKS: With a simple statement expressly
13 retaining jurisdiction?

14 QUESTION: No, without such a statement. If it
15 retains jurisdiction expressly, of course it's easily,
16 like any - and most decrees such a recital. But my
17 question is supposing there's no such recital in the
18 judgment, just a copy of what the parties agreed to, and
19 then a judgment saying the judgment is dismissed -- the
20 case is dismissed and the parties shall go hence without
21 day, you know. This is a dismissal with prejudice and
22 just a recital of the basis of the settlement.

23 MR. JENCKS: If the basis of the settlement was
24 recited in the judgment, I think there would be --

25 QUESTION: And the case is dismissed.

1 MR. JENCKS: And the case was --

2 QUESTION: And 4 months later one of the parties
3 comes in and says they're not abiding by the settlement,
4 what can the judge do? Does he have jurisdiction just
5 because he put some words in the judgment?

6 MR. JENCKS: IF the basis -- well, one of the
7 hopes is to trigger the existing rules and remedies. For
8 example, in Rule 65(d) there's requirements about the
9 precision and the detail --

10 QUESTION: Right.

11 MR. JENCKS: -- That must be given in an
12 injunctive order. And most of the terms of this
13 settlement would fall under that. They were essentially
14 injunctive; you shall not communicate or you shall return
15 files. The hope, or one of the notions by incorporating
16 it in some order, is to require or have the existing rules
17 apply regarding -- that have been well worked out,
18 including the specificity of the order.

19 QUESTION: I understand all that, and I
20 understand your difficulty in answering. Do you have a
21 position on the hypothetical I've given you as to whether
22 the court would have jurisdiction if the judgment recited
23 the terms of a settlement and then dismissed the case
24 without an express retention of jurisdiction for purposes
25 of interpreting or enforcing the decree?

1 MR. JENCKS: My position would be that the
2 existence of the judgment could confer jurisdiction.
3 There may be, depending on the detail, enforceability
4 problems in terms of the rest of it, but there would be
5 jurisdiction if the judgment was, in fact, entered and
6 given judicial sanction.

7 QUESTION: I'm having a similar difficulty, I
8 guess, and I'd like to go back to your answer to Justice
9 Kennedy's questions, which I don't think I understood.
10 Is -- I think you said that if we assume the moment after
11 the Rule 60 motion is granted, the prior judgment, silent
12 as to any settlement and so on, silent with respect, in
13 fact, to anything except the dismissal, has been vacated.
14 I think you said that if the parties then said, in effect,
15 "Look, Judge, we're having trouble sort of administering
16 our settlement and we would like to put that on the record
17 and make that a part of the judgment," there would be no
18 jurisdictional problem in your view. Is that right?

19 MR. JENCKS: If the court --

20 QUESTION: It's done by consent, in other words.

21 MR. JENCKS: If the court -- I don't think
22 parties can privately necessarily contract for
23 jurisdiction, but upon judicial scrutiny and his entry,
24 that could -- would be done.

25 QUESTION: But there would be no jurisdictional

1 problem in doing that.

2 MR. JENCKS: I don't believe there would be a
3 jurisdictional problem.

4 QUESTION: Okay. Why then is there a
5 jurisdictional problem when they don't consent to that and
6 one party simply says we had a settlement; I want to prove
7 to you what the settlement was; I want you then to embody
8 that settlement in a judgment or at least enforce it now?
9 As you said, they can't confer subject-matter jurisdiction
10 by agreement. Why do they have jurisdiction in the first
11 case and not in the second case? Why does the court have
12 jurisdiction in the first case and not in the second case?

13 MR. JENCKS: The jurisdiction, as I understand
14 your hypothetical, Justice Souter, to enforce the
15 settlement agreement after vacating the dismissal under a
16 Rule 60 motion, I believe runs into the difficulty that
17 the breach of a settlement agreement, the breach of a
18 private contract, is going to be fundamentally different.
19 Different proof, different tests --

20 QUESTION: No, but if I may interrupt you, in
21 each case what you've got is what you describe here, at
22 this point, as a private contract. In each of the
23 alternatives the parties have not previously brought it
24 before the court and had it embodied in any order of the
25 court. In the one case they, in effect, are saying we'll

1 find it easier to live with this if you make it part of
2 your judgment. In the other case one of the parties says,
3 no, I deny that we had a settlement agreement of the sort
4 that is claimed here.

5 In the one case the parties in effect consent to
6 its embodiment in an order. In the second case one of the
7 party refuses, one of the parties refuses, and therefore
8 if it's going to be embodied in the order or, indeed, if
9 it's going to be enforced by the court, it's going to have
10 to be proven. In each case what you've got at that moment
11 is what you describe as a private contract. Why does the
12 court have jurisdiction, in your view, to accede to the
13 parties' request in the first case and not have
14 subject-matter jurisdiction in the second case? Doesn't
15 it either have it in both or in neither?

16 MR. JENCKS: I don't believe so. I -- the
17 choice of the parties in that situation would be either to
18 go back to the drawing board, vacate the dismissal on
19 60(b), or follow their remedies for breach of the
20 contract.

21 QUESTION: You're saying in effect it would be a
22 new settlement agreement. What you're saying is the 60(b)
23 can reopen the proceeding. Then if there is to be
24 restoration of the original settlement agreement, it's
25 because the parties again say to the judge we have -- this

1 agreement was opened but now we wish to present the very
2 same agreement and come to the same place again. It
3 wouldn't be an -- vacating the judgment under 60(b) and
4 then having the settlement agreement in place, is that the
5 distinction?

6 MR. JENCKS: I believe that's correct.

7 QUESTION: Is that an issue --

8 QUESTION: Well, Mr. Jencks, you've been asked
9 several questions where it's been assumed that there is a
10 proper motion to vacate under 60(b), but I think you said
11 earlier that in this case you didn't think there was any
12 basis on which 60(b) could be used. What would have been
13 the basis, on the facts of this case, for a motion of Rule
14 30 -- Rule 60(b) motion? I take it you don't think one
15 should have been granted.

16 MR. JENCKS: Not as I understand the evidence
17 that was presented on the motion to enforce, though the
18 motion to enforce would have different -- a different
19 showing. It's a different test.

20 QUESTION: Well, a motion to enforce wouldn't be
21 brought under Rule 60(b).

22 MR. JENCKS: No. I know. I'm only saying in
23 terms of the respondent's position about what they view
24 as -- they chose not to file a Rule 60(b) motion.

25 QUESTION: Right. But there have been a number

1 of hypothetical questions put to you.

2 MR. JENCKS: Well, let me -- let me give you the
3 best example. There was a change in the Insurance Code of
4 the State of California. It actually made a misdemeanor
5 not to disclose certain information that you -- as an
6 insurance agent, you receive from a client. That
7 communication is prohibited as a term of the settlement
8 here. You have a change in the law that affects the --
9 one of the important terms of the settlement.

10 QUESTION: That's peculiar to this case. What
11 of the general circumstance of a settlement agreement not
12 itself incorporated in the record, breached several months
13 later, the court simply orders a dismissal; is there any
14 basis for a Rule 60(b) motion on the part of the party
15 that wishes to have the Federal court enforce the
16 settlement agreement?

17 MR. JENCKS: I don't believe that on a routine
18 breach situation there is. I think that the interest in
19 finality, of encouraging parties to reach a final
20 enforceable good settlement -- settlement alone isn't a
21 good enough goal; we need effective settlements that will
22 clear the court's dockets.

23 Here we had a situation where the parties by
24 choice never converted this agreement to writing, didn't
25 want it incorporated in any order of the court. They have

1 their remedies, either to come in on 60(b) or to enforce
2 privately.

3 QUESTION: What you're saying is that there's no
4 evidence of fraud, mistake, or the sort of other things
5 that 60(b) is used for.

6 MR. JENCKS: Or the degree of injustice or
7 hardship that it conventionally is reserved for either, I
8 think, in the case law. It's not an automatic -- I don't
9 read it and I don't believe it's been interpreted as an
10 automatic escape valve whenever you get a few months down
11 the road and things aren't perfect. The idea is to
12 encourage parties --

13 QUESTION: How about any other 60(b)(6), the
14 catchall, and the judge saying well, it sounds like a
15 pretty good 60(b) motion to me; I was listening to these
16 two people debate what their settlement was going to be,
17 and they made certain representations, and one of them is
18 trying to get out of it. So I think that fits the
19 60(b)(6) catchall. It justifies relief to tell me one
20 thing and the go do another thing.

21 MR. JENCKS: It -- in terms of a private
22 agreement, you could have a conclusion under 60(b)(6) that
23 it should be set aside. But in addition to that, I think
24 you need to show -- for one reason or another, the parties
25 here chose not to bring that motion. They chose to

1 enforce -- the respondent tried, by a motion, to enforce
2 before the district court judge; the petitioner chose to
3 enforce, in State court, the agreement.

4 But I think conceivably you could have a
5 60(b)(6) motion that would offer relief on some kinds of
6 breach cases. I just don't think that on an -- absent
7 some fraud and absent some hardship, it is often going to
8 make the cut.

9 QUESTION: But if I hear your position, on such
10 a motion --

11 QUESTION: Let me just test --

12 QUESTION: -- the relief to be granted would be
13 to reinstate the lawsuit and go forward with that rather
14 than enforcing the settlement agreement.

15 MR. JENCKS: That's correct, Justice Stevens.

16 QUESTION: Yeah.

17 QUESTION: Let me just test out one more
18 proposition with you, because there are two undercurrents
19 to your argument. You seem to resist the idea that the
20 judge of his own motion could incorporate a settlement
21 agreement. Suppose the jury is sent home for the
22 afternoon midtrial because the parties think they can
23 settle, and they do and they tell the judge they have a
24 settlement, everyone agrees. They judge said, fine, we'll
25 bring the jury back tomorrow morning and we'll make an

1 appropriate order to dismiss this suit.

2 The next morning the parties -- one of the
3 parties said, "I've changed my mind, I'm not going to
4 settle." The judge said, "Don't do that to me. You've
5 made an agreement, you've got to stick by it, I'm
6 incorporating that settlement in -- and that contract of
7 settlement in the judgment whether you like it or not."
8 Can the judge do that?

9 MR. JENCKS: I don't believe so. The only
10 justification for that would be if it was viewed in terms
11 of the statements to the court. I would access -- the
12 only way that could happen would be, in effect, as a form
13 of sanction. If representations were made to the court,
14 the court was misled, act in reliance on it, it seems to
15 me you may -- might be able to justify, then, imposing the
16 agreement on the parties.

17 The -- one of the keys here is to try to
18 encourage the private settlement mechanism that generally
19 is working, and many cases are settling. I think it's one
20 of the things where instead of having a -- sort of a
21 roving jurisdiction to mop up the loose ends and the odd
22 bits, it is a case where maybe form is substance.

23 That is it's important to let the private
24 process do its best, to give incentives; in effect to
25 address dispute resolution, liquidated damages, other

1 mechanisms to enforce their own contract, and as one of
2 those options to decide whether, by converting it to a
3 court order, to avail themselves of the assistance of the
4 Federal court. I think we do that by drawing a bright
5 line that indicates what side of the line settling parties
6 will fall. They will know when they reach their agreement
7 if they will fall on the side of continued Federal
8 jurisdiction or not.

9 If I may --

10 QUESTION: Just to make sure I understand, your
11 answer to Justice Kennedy is based on subject-matter
12 jurisdictional grounds.

13 MR. JENCKS: Yes.

14 QUESTION: Yeah.

15 MR. JENCKS: Mr. Chief Justice, if I may, I'd
16 like to reserve the balance of my time.

17 QUESTION: Very well, Mr. Jencks.

18 Mr. Morris, we'll hear from you.

19 ORAL ARGUMENT OF FRANK C. MORRIS, JR.

20 ON BEHALF OF THE RESPONDENT

21 MR. MORRIS: Mr. Chief Justice, and may it
22 please the Court:

23 We would submit that the rule that petitioner
24 seeks in this case is a rule that after 3 days of trial,
25 and with the apparent view that they were going to face an

1 imminent loss in that trial, they initiate settlement
2 discussions; the district court judge becomes incredibly
3 involved in those discussions, in the clarification and
4 the refinement of that settlement agreement; upon
5 agreement to a settlement at the initiation of petitioner,
6 within days of the settlement agreement the petitioner
7 breaches that agreement. Petitioner's rule here would
8 leave the Federal court and the Federal court processes
9 powerless to deal with that situation and powerless, as
10 well, to provide relief to the aggrieved party.

11 QUESTION: But the court could say I will not
12 dismiss unless you agree to embody this settlement
13 agreement in my order. He has that whip hand.

14 MR. MORRIS: Well --

15 QUESTION: And your adversary will acknowledge
16 that if that's done, there would be -- to enforce.

17 MR. MORRIS: That's true, Justice Scalia.
18 However, in this case the breach, though close in time,
19 was not before the court when the stipulation and order
20 for dismissal was signed by Judge Coyle.

21 QUESTION: But if the court wanted to retain
22 jurisdiction over such a breach, for -- a breach in the
23 future, it could have done just what Justice Scalia
24 suggests, incorporate the agreement and say we retain
25 jurisdiction. You wouldn't have any of this problem.

1 MR. MORRIS: Well, that may be right in another
2 case, Your Honor. But we would submit that what actually
3 happened in this case is, in fact, the constructive
4 equivalent of just that. You asked the question earlier
5 of whether this settlement agreement was written. It was
6 not written in a separate document, but it is contained in
7 writing in the transcript of the proceedings, every single
8 word of it, before the district court judge, in which the
9 agreement was not read by one party.

10 It was a negotiation process by both parties and
11 in which, I would also observe, the petitioner himself,
12 Mr. Kokkonen, was also involved in the colloquy on the
13 record with the judge. And, in fact, Judge Coyle
14 specifically explained several of the provisions to which
15 Mr. Kokkonen said, yes, that's a good statement, sir, I
16 agree.

17 QUESTION: I don't understand the petitioner to
18 be challenging the fact that there was an agreement, so --
19 or saying that what appears in the record was not the
20 agreement of the parties. I think what the petitioner is
21 challenging is the authority of the court to enforce the
22 agreement.

23 MR. MORRIS: Yes, that is correct. But we
24 believe that on the facts of this case -- on the facts of
25 this case, that there was, in effect, an embodiment of

1 what was going to be. What was agreed to by the parties
2 is the settlement agreement. We have the constructive
3 equivalent of the embodiment of the agreement in the
4 order --

5 QUESTION: Well, now, you say: "We have the
6 constructive equivalent of the embodiment of the agreement
7 in the order." I mean what does that mean when stripped
8 of the adjectives.

9 MR. MORRIS: When stripped of the too many
10 adjectives, Your Honor, I think what that means is this.
11 Judge Coyle on three separate occasions made it clear to
12 the parties that he envisioned if there had to be any
13 enforcement activity in this case, that it was coming back
14 to him, not to the State court. He said I want this
15 clear. I want everyone to understand the agreement. And,
16 indeed, on three other occasions, as reflected in the
17 transcript, he also indicated at various points he didn't
18 think there was an agreement.

19 And what you therefore have in this case is the
20 enormous involvement -- this is not a case of the parties
21 simply going back and forth saying, okay, Your Honor,
22 we've reached agreement; we're going to tender to you a
23 stipulation. Rather, the district court, part and parcel
24 of that settlement, helped frame it and made sure that
25 both he and the parties --

1 QUESTION: But he didn't put it in his order.

2 MR. MORRIS: He didn't --

3 QUESTION: He dismissed the case outright.

4 MR. MORRIS: That's -- that is correct.

5 QUESTION: Do you -- suppose your opponent is
6 correct that there was nothing here to reopen -- that
7 there was nothing here to enforce, because all there was
8 was a dismissal with prejudice, do you think you could go
9 back and say, well, alternately, please consider our case
10 under Rule 60(b)(6) and reopen the judgment because?
11 You're not alleging fraud; what would be the reason that
12 you could give if you were proceeding under 60(b)?

13 MR. MORRIS: Well, Your Honor, I think we would
14 have available to us not only 60(b)(6), but 60(b)(3).
15 Because if it's not fraud -- and it might be -- it
16 certainly, we would suggest, was a misrepresentation.
17 Because the record, I think, and what Judge Coyle found in
18 enforcement proceeding, that he had stubbornly and
19 unjustifiably refused to comply, and that he had blatantly
20 breached the agreement.

21 QUESTION: But that'll just get you the lawsuit.
22 You don't want the lawsuit, you want the settlement, I
23 understand.

24 MR. MORRIS: Well, Justice Scalia, I'm not
25 sure --

1 QUESTION: Do you want the lawsuit or the
2 settlement?

3 MR. MORRIS: Justice Scalia, I'm not sure it
4 gets us only the lawsuit, because I believe -- we would
5 submit that once the case is properly back before the
6 district court, the district court not only may reopen and
7 put the lawsuit back on the calendar. We believe that the
8 better view of the law is those cases which take the
9 position that if the case is properly back on the docket,
10 any order which could have been entered at a prior time is
11 then appropriate.

12 And the law -- among all the circuits, none have
13 disagreed with this proposition -- is in a case on the
14 docket, a court may enforce a settlement agreement that is
15 reached. And we believe that if this case when -- was
16 back before the court -- and we believe, in fact, that our
17 motion to enforce --

18 QUESTION: That's a little strange. You say you
19 can both rescind the agreement and sue for breach at the
20 same time. Because in order to reinstate the case you
21 have to set aside the settlement and say it's no longer
22 binding, and then you're going to say yes, but it's
23 binding but we want to enforce it. I don't -- I have some
24 difficulty with that.

25 MR. MORRIS: Well, Your Honor, I think what

1 we're saying is there's reason to bring the matter bring
2 and for the court to act, either under Rule 60 or under
3 its ancillary jurisdiction, to give effect --

4 QUESTION: But the only way it can bring the
5 matter back is to set aside the judgment and the
6 settlement. You can't have it both ways.

7 MR. MORRIS: Well, we believe there's ancillary
8 jurisdiction to enforce, Your Honor, so we would part with
9 you there.

10 QUESTION: May I ask you this question? I
11 understand your argument is that the transcript here is
12 just as clear as if they had written out a stipulation and
13 filed it in open court as part of the judgment, but
14 nevertheless dismissed the lawsuit and did not retain
15 jurisdiction. That's kind of -- you're saying that's the
16 equivalent of this case. How long, under your view of the
17 law, does the judge retain the power to enforce the
18 judgment?

19 MR. MORRIS: The short answer to that is --

20 QUESTION: To enforce the settlement agreement,
21 I mean.

22 MR. MORRIS: To enforce -- there would be no
23 express time. Ancillary jurisdiction we believe provides
24 the basis for enforcement in this case, and the ancillary
25 jurisdiction should be exercised in the sound discretion

1 of the district.

2 QUESTION: So he -- the time limit is just his
3 sound discretion.

4 MR. MORRIS: The district court judge's sound
5 discretion, informed by the facts of the case. And
6 whether they choose at all, whether he or she chooses at
7 all --

8 QUESTION: Well, I really want to be sure I
9 understand your position. Your position is it's whatever
10 the judgment -- whatever the judge thinks is equitable or
11 appropriate in the particular case.

12 MR. MORRIS: Perhaps tested by appeal, but, yes,
13 Your Honor.

14 QUESTION: Yeah.

15 QUESTION: Now, the court of appeals didn't rely
16 on ancillary jurisdiction in upholding the district
17 court's authority, did it?

18 MR. MORRIS: Well, I think what it -- it used
19 the phrase, I believe, the inherent power. The decisions
20 of the Ninth Circuit -- and there are three decisions of
21 the Ninth Circuit. I think if you read all three of those
22 decisions of the Ninth Circuit, in Wilkinson, in Dacanay,
23 and in our own case, that the concept here is that there
24 is inherent or ancillary power to enforce, in appropriate
25 circumstances, a settlement agreement.

1 QUESTION: And you would say both of those are
2 their -- one is the equivalent of the other, inherent
3 power or -- is the same as ancillary jurisdiction.

4 MR. MORRIS: Well, the -- I don't know that
5 there is an absolutely precise definition if you read many
6 cases, Mr. Chief Justice. And for purposes of how the
7 courts frequently categorize this, the answer I would say
8 is yes, although I understand there may be circumstances
9 where they are different. I don't think that difference
10 here, however, is material to whether or not Judge Coyle
11 had the authority to enforce his prior order.

12 I think there are many cases of this Court under
13 the ancillary jurisdiction principles, which is our
14 primary ground upon which we believe enforcement here in
15 appropriate, where the --

16 QUESTION: When you're using that term, are you
17 referring -- you're not referring to, like, Rule 13 or
18 Rule 14, or 13671 you're just saying ancillary
19 jurisdiction, inherent jurisdiction?

20 MR. MORRIS: Correct, Justice Ginsburg.

21 QUESTION: You have no statutory rules --

22 MR. MORRIS: Not in the narrow -- perhaps the
23 most frequently today encountered phrase -- use of the
24 phrase, ancillary jurisdiction, that is absolutely
25 correct.

1 QUESTION: Well, you say that Judge Coyle had
2 the authority to enforce his order. His only order was to
3 dismiss the case.

4 MR. MORRIS: Well, we believe that what he did
5 here, in effect, with the substantial proceedings in
6 chambers and his participation, that we had, in effect, a
7 much -- a broader order than the narrow stipulation which
8 is all that is on -- entered on the docket, the narrow
9 stipulation in his order dismissing the case.

10 But we would take the view that in this case --
11 and we believe this case, frankly, presents somewhat
12 unique facts, and that on these facts we were entitled to
13 have what Judge Coyle did and what the Ninth Circuit also
14 found appropriate. We would also observe that, of course,
15 when we brought the motion to enforce in this matter, we
16 were proceeding in a circuit that said that's all you need
17 to do.

18 QUESTION: Well, surely there's a parole evidence
19 rule of some sort with respect to orders in judgment. You
20 say that it isn't in writing, but somehow it hovers around
21 the written word. I don't know that we've ever said that
22 the -- particularly in dealing with a jurisdictional
23 matter, that you look not merely to what's written, but to
24 all the circumstances that kind of led up to it.

25 MR. MORRIS: Well, it would be our position

1 that, in fact, we essentially have the writing of the
2 agreement here. The writing is the reporter's transcript.
3 And contrary to the suggestion, both parties --

4 QUESTION: But nobody doubts -- no one is
5 claiming that there was no agreement here. I -- the
6 argument the other side makes is since there was no
7 reservation of jurisdiction, that it can't be enforced in
8 Federal court.

9 MR. MORRIS: Yes, Mr. Chief Justice, but our
10 view of that is on these facts there is ancillary
11 jurisdiction. That going back to the earliest years of
12 this country, the courts have, on selected occasions, used
13 ancillary jurisdiction to see to it that prior judgments
14 have not been misused, inequitably used.

15 QUESTION: Ancillary to what? I mean you can
16 have jurisdiction ancillary to a case that's before you,
17 but once this case has been dismissed without any
18 reservation of continuing jurisdiction, there's nothing to
19 be ancillary to.

20 MR. MORRIS: Well --

21 QUESTION: The court has -- no longer has a case
22 in front of it.

23 MR. MORRIS: Well, Justice Scalia, we would
24 respectfully suggest that there are a number of instances,
25 as cited in our brief, where this Court has said that if

1 there was once proper jurisdiction in the Federal courts,
2 there can be ancillary jurisdiction based on that original
3 prior Federal court jurisdiction.

4 QUESTION: For example, what case do you have in
5 mind?

6 MR. MORRIS: Well, the cases where -- they come
7 in a number of varieties. The cases where there were
8 judgments entered, the cases went off the books, and
9 where -- in one of the principal cases that we cite, the
10 Julian v. Central Trust -- the court, in aid of its prior
11 decree in a mortgage foreclosure situation and when there
12 was going to be a State court action that called into
13 question the transfer of the property in that case,
14 entered further orders.

15 We have cases in a variety of circumstances
16 where the courts --

17 QUESTION: The court has authority to enforce
18 its orders. But here there isn't anything other than a
19 bare dismissal with prejudice.

20 MR. MORRIS: Well, we have attorney's fees
21 cases, Justice Ginsburg, where the case is dismissed but
22 the court, after the dismissal, deals with the attorney's
23 fees. We have contempt cases where the case is dismissed
24 and the court deals with the contempt. We have those
25 circumstances where the courts quite clearly, after

1 dismissal, have had to address various issues.

2 QUESTION: Have you had -- I'm -- what is the
3 contempt case you have, where after a case is dismissed a
4 party is held in contempt for violating --

5 MR. MORRIS: Well, the action that would be the
6 basis occurred -- would have occurred, certainly, Justice
7 Stevens, during the live period of the case before the
8 court. But in many instances -- in some instances, at
9 least, the addressing of the contempt and whether
10 punishment is warranted and what punishment would be
11 warranted may be done after the dismissal of the
12 substantive case wherein the contempt was committed.

13 And so too with attorney's fees issues. The
14 substantive case may have gone away --

15 QUESTION: But are there any cases in which
16 action taken after the case is dismissed provides the
17 basis for contempt of court? I don't there are, are
18 there?

19 MR. MORRIS: In a contempt -- I am not aware of
20 any contempt cases --

21 QUESTION: Yeah, yeah.

22 MR. MORRIS: -- Where an action of a contempt
23 nature would be after the case was dismissed.

24 QUESTION: May I ask this question too? Would
25 it matter if the settlement agreement incorporated a term

1 that could not have been granted by an -- a provision the
2 court could not have ordered as relief in the case?

3 For example, say your client had settled and
4 said I'll move to San Francisco so I won't compete with
5 you any more, and then he doesn't move to San Francisco.
6 A judge could -- normally could not have ordered him to
7 move to San Francisco. He just -- Would that make any
8 difference? Does it have to be -- does the settlement
9 agreement have to be limited to matters that could have
10 been ordered in the case?

11 MR. MORRIS: Well, if -- it would probably -- I
12 believe the answer would probably be it would have to be
13 those matters which would be properly --

14 QUESTION: Proper relief in the case.

15 MR. MORRIS: Proper relief in the case.

16 QUESTION: And you would argue in this case
17 everything that was agreed to was something the judge
18 could have ordered?

19 MR. MORRIS: Yes, absolutely.

20 It's relatively simple. Really, there are only
21 a couple of provisions: that he would turn back over to
22 the Guardian various files that he had improperly
23 retained, and that he would not act as a representative in
24 seeking information on behalf of continuing clients of
25 his. Those were the only -- really the two essential

1 provisions. He was to pay the Guardian some money, and
2 that was -- those were the essential terms ultimately
3 agreed to after the intervention.

4 QUESTION: It would be too late now for a
5 60(b)(3) -- not for 60(b)(6), but you'd be too late,
6 wouldn't you, because you didn't move for that originally?

7 MR. MORRIS: It may be or it may not be. The
8 reason I say may not be, under the normal reading of the
9 rule we have a 1 -- we would have a 1-year period to seek
10 60(b)(3) relief. I do not know, however, for sure whether
11 because of the ensuing litigation and the California
12 doctrines of equitable tolling, whether there may be an
13 argument that the continuing litigation in this matter
14 provides a basis where the 1-year period would have been
15 considered to be tolled.

16 QUESTION: Or that you could treat your original
17 motion for enforcement as though it were a 60(b)(3)
18 motion.

19 MR. MORRIS: And we would suggest more than
20 that, Justice Ginsburg, that, in fact, our original motion
21 to enforce, appropriate under the Ninth Circuit law at the
22 time, did all that a 60(b)(3) motion could have done. It
23 put the petitioner on notice that he had to defend. It
24 told him what we believed the actions at issue were, and
25 it told him what we were seeking in the case.

1 QUESTION: Did you make any reference to Rule
2 60(b) in your motion?

3 MR. MORRIS: No, Your Honor, we did not.

4 QUESTION: Then it would be a rather strange
5 thing to treat it as a Rule 60(b) motion.

6 MR. MORRIS: Well, there are cases cited in our
7 brief and Professor Morris' treatise that say Rule 60 is
8 to be liberally construed, and there is some authority for
9 treating it liberally. And we would suggest that it would
10 not be so strange where every real function that 60(b) is
11 intended to serve was met by our action with the motion to
12 enforce, which was the motion under the law of the circuit
13 that was appropriate.

14 QUESTION: Well, 60(b) is addressed to the
15 discretion of the trial judge, is it not?

16 MR. MORRIS: Yes, Your Honor.

17 QUESTION: And a motion to enforce, I take it,
18 would not be. If you have a right to have a settlement
19 enforced, it isn't up to the trial judge to decide, well,
20 I don't think I will enforce this, or perhaps I will
21 enforce it.

22 MR. MORRIS: If we're proceeding under Rule 60,
23 that's -- I believe that would be correct. We are also
24 saying as an alternative ground here, that Judge Coyle,
25 under the rubric of ancillary or we've used the phrase

1 also inherent jurisdiction, had authority to enforce.
2 There the discretion is has the district court's
3 involvement in the case, has the utilization of the
4 Federal resources been such that it makes sense that the
5 court, though having jurisdiction, should choose whether
6 to entertain the enforcement or whether not to entertain
7 it.

8 And so in the ancillary area, it is our view
9 that the court, though having jurisdiction to enforce our
10 motion -- to entertain our motion, did not necessarily
11 have to. And we would, indeed, submit that in the greater
12 majority of cases district court judges are likely,
13 probably, not to. You can take the whole range of the
14 kinds of circumstances where a settlement may have
15 occurred, and you could say some of them will be right
16 after a demand letter and a draft complaint. The chances
17 of there being any reason why a district court would
18 entertain a motion to enforce in that circumstance is
19 virtually nil.

20 We could have a midpoint where the issue has
21 been joined in a case, where there's been Rule 16
22 conference held, where there's been some litigation in the
23 case, where probably a district court judge would conclude
24 no reason to get invested in the enforcement in that
25 matter.

1 QUESTION: Mr. Morris, can I give you an example
2 that's based on many years ago that I bumped into many
3 times in practice, and see if you -- have you comment. I
4 was involved in a lot of cases where equitable relief was
5 sought which were settled at one time; either Government
6 antitrust cases, private antitrust cases, other cases.
7 And routinely, those decrees contained a provision, the
8 court retains jurisdiction for the purpose of interpreting
9 and enforcing this decree. Are you telling me that in all
10 of those settlements that provision was really
11 unnecessary?

12 MR. MORRIS: No. In a consent decree you -- I
13 believe --

14 QUESTION: It, of course, is a classic
15 settlement.

16 MR. MORRIS: Well, it's -- a consent decree, I
17 think almost by virtue of its very nature, will have
18 exactly the provision that you have described. I am
19 suggesting to you that on the facts of this case, that we
20 do not believe that that kind of language on these
21 peculiar facts was warrant -- was necessary here.

22 QUESTION: But was it necessary in a Government
23 suit against a couple of newspapers, or something like
24 that? Why would they keep it in if it's so obvious that
25 this is --

1 MR. MORRIS: Well, it certainly is the safer
2 procedure and it eliminates the possible position we have
3 here.

4 QUESTION: Yeah.

5 MR. MORRIS: No question but what -- if that
6 language is there, we resolve the problem.

7 QUESTION: It's just I have to confess to you, a
8 lot of lawyers thought it was necessary.

9 MR. MORRIS: Oh, I agree.

10 QUESTION: And I was one of them.

11 MR. MORRIS: Well --

12 QUESTION: And you're telling me it wasn't,
13 really.

14 MR. MORRIS: Well, I think the better, prudent
15 practice would be to do so, and certainly in a consent
16 decree where there is probably a notion of a more vigilant
17 district court role in enforcing the terms of a consent
18 decree. In this particular circumstance, though, as I
19 say, I would suggest to you that the actions of the
20 district court here are highly unusual in the way that the
21 court became involved, in the way that the court expressly
22 said that it was important to the district court judge to
23 understand and to make sure that there was agreement.

24 QUESTION: When you found yourself in this
25 position, that the other side, in your judgment, had not

1 carried out the bargain, did you find other cases in the
2 district court and in the Ninth Circuit where, despite the
3 failure to reserve jurisdiction, parties were able to
4 enforce a settlement agreement that was not incorporated
5 in the judgment?

6 MR. MORRIS: Well, there are cases that we have
7 cited in our brief where dismissals have been set aside
8 and where settlement agreements that have been breached
9 were enforced by the district courts. This is not a
10 completely sui generis case in that sense. There is
11 certainly no precedent in this Court that addresses this
12 particular case and clearly states that there is ancillary
13 jurisdiction or constructive -- or constructively the
14 compliance with Rule 60 in this particular circumstance.
15 There's no precedent here.

16 QUESTION: Would you have had a cause of action
17 in State court as well, or do you think this was your
18 exclusive remedy?

19 MR. MORRIS: No, I do not believe it is our
20 exclusive remedy. I believe we could have gone -- that we
21 could have gone to State court, but that would have been a
22 stranger forum, whereas Judge Coyle had been so heavily
23 involved in seeing this agreement come together, in making
24 sure that he and the parties both understood it, and in
25 telling the parties that if there was an enforcement

1 action he anticipated it would be before him.

2 QUESTION: And the reason you would not have
3 access to the Federal court for this enforcement
4 proceeding, if it was a de novo proceeding, is you no
5 longer have diversity and a mounting controversy? What is
6 the lack?

7 MR. MORRIS: Well, we would not concede that we
8 no longer have diversity jurisdiction. We believe we
9 merit -- very well may. We're still citizens of different
10 States, as far as we know, and we have the value of the
11 files that were not returned to us and we can probably
12 assert a fraud claim. So I think we could probably --
13 with regard to the alleging \$50,000 in damages, I believe
14 that we could, in good faith, make that allegation in this
15 case. So I believe that we would have diversity
16 jurisdiction.

17 QUESTION: So when your adversary says you have
18 recourse to a State court for breach-of-contract suit, you
19 say that you could bring that as a diversity suit as well,
20 that you meet the requirements of diversity --

21 MR. MORRIS: I believe that is correct, Judge
22 Ginsburg. I believe that is correct. Obviously, we
23 haven't yet had the occasion to test that fully, but that
24 is my belief at this time.

25 QUESTION: Of course, the big difference, I

1 suppose, is if you can go back the way you want to go back
2 in -- and maybe you should be allowed to -- you're going
3 to get it decided very promptly. If you've got to start
4 all over with a new lawsuit, you may be 3 years before you
5 get a decision.

6 MR. MORRIS: That's precisely the point that we
7 make, and that's where we do think the important policies
8 around settlement come in here.

9 QUESTION: And you might not get Judge -- what
10 is it?

11 MR. MORRIS: Coyle.

12 QUESTION: Yeah. But with 60(b), you would get
13 him.

14 MR. MORRIS: I would assume that we could say
15 that this was a related -- yeah. I mean, well, first of
16 all, if it's 60(b), even if we went in as an
17 independent --

18 QUESTION: You're reopening the same judgment --

19 MR. MORRIS: Yes. Even if we went in as an
20 independent action, I think we could probably say that
21 this was a related case and seek to have it placed before
22 Judge Coyle. We may or may not succeed with that, but I
23 think it would certainly be a claim that we could make.

24 QUESTION: Of course, then he'd be a party with
25 access to evidentiary facts that are in dispute, and you

1 might have to recuse.

2 (Laughter.)

3 MR. MORRIS: Well, perhaps, perhaps, Justice
4 Kennedy. I mean, he made it clear at the hearing in this
5 case, though, that he was well aware of what the terms of
6 the settlement were, and that there had been a breach in
7 this case. I mean, that's evident on the record. I mean,
8 there could not have been a clearer indication from Judge
9 Coyle.

10 So what we suggest here is that under ancillary
11 jurisdiction in these circumstances, we had a basis for
12 enforcement. But that's our -- that is our initial
13 belief, and we believe it is a basis for why this court
14 has jurisdiction.

15 There was a question as to why this case was in
16 court? It was in court under 28 U.S.C. 1331. We had
17 diversity -- there was diversity jurisdiction. That's the
18 basis for why the case was there.

19 If, however, the Court believes that there has
20 to be an express statement reserving jurisdiction, we
21 believe that on the facts of this case, that there is
22 sufficient indication in what went on in chambers, in what
23 Judge Coyle said and what he did and the parties'
24 agreement to that. The parties agreed --

25 QUESTION: What -- if I may interrupt you, what

1 about the fact that he said I don't want to see you back
2 here?

3 MR. MORRIS: Well, that's an interesting --
4 that's a good question, Justice Souter, because when you
5 first read that you could easily draw the opposite
6 conclusion; go anyplace, but don't come back to my
7 courtroom. I think, however, if you read the entire
8 transcript of the proceeding before him wherein the
9 settlement was agreed to, that what he makes clear is that
10 he envisioned that any enforcement action would be before
11 him.

12 At Joint Appendix page 81 he said, I must find
13 out what you people agreed to. And later on Joint
14 Appendix 81 he said, my concern is you all understood what
15 you've agreed to, and for that reason he brought up one
16 practical matter -- I'm quoting -- he could see that
17 problem, and he didn't want to see that problem come back,
18 he wanted it resolved now.

19 And one of our younger colleagues, perhaps a bit
20 more brashly than we would have, at the end of this
21 process said to Judge Coyle, Judge, do you understand?
22 And the Judge's response, at page 86 of the Joint
23 Appendix, was, oh, I understand.

24 QUESTION: Then why didn't you ask him to amend
25 his judgment because it failed to embody what he had

1 intended? You're giving us the legislative history of the
2 judgment here. Why didn't you just put it in the
3 judgment?

4 (Laughter.)

5 MR. MORRIS: Well, in retrospect it clearly
6 would have been better had we done so -- in retrospect.
7 But we believe that it's still capable of being enforced
8 in this case.

9 QUESTION: But in any of your submissions to the
10 court did you claim that the judgment entered was, in
11 fact, mistaken in failing to embody the settlement --

12 MR. MORRIS: Absolutely not, Your Honor.

13 QUESTION: -- As a result of your
14 conversation -- the conversation on the record?

15 MR. MORRIS: No, Your Honor, we did not. We
16 didn't believe that there was a mistake. We didn't
17 anticipate that we would have the problem, but that
18 problem did, in very short order, emerge. On March 5th
19 the settlement was reached in chambers on the record.
20 In -- by April -- by early April -- we had the dismissal
21 order April 13th and we had breach in April, and we were
22 back with our motion to enforce -- there's no long lapse
23 of time here.

24 One of the suggestions that's made is, well, you
25 can have a long lapse of time. We were before Judge Coyle

1 again with a motion filed on May 21st, and we were in
2 hearing before him on June 29th, all these dates of 1992.
3 So from the date of the agreement, March 5th, until Judge
4 Coyle held our hearing, it was March 5th to June 29th.
5 That's the modest timeframe that's involved here.

6 There will be other cases where the timeframe is
7 grossly different and where the district court judge there
8 will rightly choose not to exercise his or her discretion,
9 but we don't believe that this is a case where that's a
10 problem.

11 QUESTION: I guess this means that a district
12 judge can't avoid getting himself entangled in the future
13 disputes of a settlement agreement, even if he wants to.
14 I mean it's sort of nice to know the district judge, if he
15 thinks it's a pretty simple settlement that he can police,
16 just put it in his judgment order. But you say even if he
17 doesn't, he is enmeshed in whatever the parties have
18 agreed to, and they can keep coming back and bothering him
19 about it and saying --

20 MR. MORRIS: That's not our contention, Justice
21 Scalia.

22 QUESTION: Why isn't it?

23 MR. MORRIS: In rare circumstances, the facts of
24 the district court's involvement will justify the district
25 court judge making the determination.

1 QUESTION: Well, he's involved -- whenever he's
2 involved in the settlement, which often happens.

3 QUESTION: No, your position is whenever the
4 settlement -- the terms of the settlement are disclosed in
5 court proceedings. That's your position, isn't it? It
6 doesn't matter whether the proceeding is in chambers or in
7 the judgment itself.

8 MR. MORRIS: Well, I think --

9 QUESTION: But the terms of the settlement
10 are -- have to be set forth in --

11 MR. MORRIS: I -- because we believe its
12 discretion -- I believe it's going to take more, frankly,
13 for the court to decide that it will exercise its
14 discretion than just that it heard the terms. Justice
15 Coyle has presided over the 3-day trial. The petitioner
16 comes in and says they want to talk settlement. Justice
17 Coyle then makes sure that he and the parties, through a
18 negotiation process, understand that. That is a
19 relatively unusual amount of activity.

20 QUESTION: This is discretionary jurisdiction?
21 The court doesn't have to exercise this --

22 MR. MORRIS: That is correct.

23 QUESTION: -- This ancillary jurisdiction. It's
24 just --

25 MR. MORRIS: Ancillary jurisdiction is

1 discretionary.

2 QUESTION: Just if it wants to.

3 MR. MORRIS: If it wants to. And we believe
4 this is a case where --

5 QUESTION: So this judge could have said, I've
6 presided over dozens and dozens of settlements, I don't
7 remember this one from any other, go away, and you would
8 have nothing to complain about.

9 MR. MORRIS: Nothing -- we would not complain,
10 Your Honor. We would not complain. And we believe, as I
11 suggested, that the greater majority of cases, the
12 district court judge is far more likely -- because they
13 will not have invested the Federal judicial resources so
14 deeply in the case, that they will say --

15 QUESTION: Did you say as a form of Federal
16 jurisdiction, that the judge can just decide I don't want
17 to take the case? Strange --

18 MR. MORRIS: Discretionary. Well, it's
19 discretionary, Your Honor.

20 QUESTION: Discretionary jurisdiction.

21 MR. MORRIS: It's ancillary jurisdiction, and if
22 one looks at the historical ancillary precedents, the
23 issue is whether or not the court believes that there is a
24 reason to step back in.

25 QUESTION: Except, maybe it's not ancillary --

1 yes, ancillary jurisdiction, some of it is discretionary,
2 but if you consider this inherent jurisdiction I think
3 it's a lot harder to run that argument.

4 QUESTION: Thank you, Mr. Morris.

5 Mr. Jencks, you have 2 minutes remaining.

6 REBUTTAL ARGUMENT OF MICHAEL R. JENCKS

7 ON BEHALF OF THE PETITIONER

8 MR. JENCKS: Thank you, Mr. Chief Justice.

9 Just a couple of points. I want to emphasize
10 again the point that came out in the questioning. The
11 respondent has remedies here. Statutes haven't run, for
12 example, to pursue a State action. There's an ongoing
13 State action to enforce the settlement agreement brought
14 by Mr. Kokkonen. The respondent is appearing and
15 participating in that case, and it's at issue.

16 There are remedies here. They made a series of
17 choices, for whatever business purposes, confidentiality
18 and the like, to not have this settlement reduced to
19 writing and not incorporated in an order of judgment of
20 the court. The dismissal was expressly with prejudice.
21 That was the stipulation of the parties. And I think here
22 they're -- they have other remedies to pursue. They may
23 have a 60(B) motion if they can meet some of the time
24 concerns that respondents' counsel discussed with Justice
25 Ginsburg.

1 They are not without a remedy. They are not
2 stranded here. And it's really a situation very much of
3 their own making and choice and tactics, and I don't see
4 that the district court --

5 QUESTION: From what -- from your point of view,
6 having made that concession, what is involved here other
7 than a misnomer? You go back -- you get rid of this
8 proceeding and you go back before Judge Coyle with a 60(b)
9 motion which you will either -- which you'll take some
10 position on, no doubt oppose it. What is this
11 accomplishing, then, other than to get the thing back
12 where it was with a different label on it?

13 MR. JENCKS: I think there's a difference
14 whether we choose -- whether either of the parties chooses
15 to go back on a 60(b) motion to reopen the previous
16 proceedings, or to enforce the settlement agreement.
17 Counsel -- the enforcement of the settlement agreement may
18 be able to be in Federal court. It's not directly --
19 there's a State brief here that reads -- makes it sound
20 like a turf battle. It's really not that, because some of
21 these cases will still default to Federal court.

22 QUESTION: You -- as I understand your argument,
23 you say that he can go on 60(b). But the consequence is
24 not to enforce the settlement agreement, it's just to --

25 QUESTION: -- Go back to reopen the old case.

1 QUESTION: Right, to reopen the case. So it is
2 a difference.

3 MR. JENCKS: Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jencks.

5 The case is submitted.

6 (Whereupon, at 12:01 p.m., the case in the
7 above-entitled matter was submitted.)
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MATT T. KOKKONEN, Petitioner v. GUARDIAN LIFE INSURANCE COMPANY
OF AMERICA, ET AL. CASE NO: 93-263

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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