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SETTLING THE CONFUSION: APPLYING FEDERAL COMMON LAW IN SETTLEMENT ENFORCEMENT PROCEEDINGS ARISING FROM FEDERAL CLAIMS

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ABSTRACT—Today, many federal court cases are resolved by means of a settlement agreement. When a dispute arises regarding the formation, interpretation, and enforcement of those settlement agreements, a federal judge must resolve whether state or federal law governs the enforcement proceeding. Given the current lack of clarity in this area, this Article advocates for uniform federal choice of law principles in settlement enforcement proceedings where a federal question is involved. The federal courts have an institutional interest in creating uniform rules to govern the behavior in the courts. Uniformity in settlement enforcement proceedings would be consistent with the independent and self-regulating nature of the courts. Additionally, there is a strong federal interest in promoting the settlement of federal lawsuits and enforcing valid settlements. There may also be some federal statute-specific policies that require the use of federal common law when the underlying claims in a settlement are based on that statute. Part I of the Article discusses relevant Supreme Court case law and illustrates the confusion amongst the circuits. Part II argues that the federal courts have an institutional interest in governing their own affairs sufficient to support the application of federal common law of settlements. Part II describes the identifiable federal policy in favor of settlements. The Article ultimately proposes that the development of a uniform federal common law on settlement enforcement would address the current situation.

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INTRODUCTION

Currently, slightly over one percent of civil cases in the federal courts go to trial.[1] While some cases are dismissed or disposed of at the motion to dismiss or summary judgment stage, a large number are resolved by means of a settlement agreement. From time to time, disputes arise between parties regarding the formation, interpretation, and enforcement of those settlement agreements.[2] These disputes can raise a variety of legal and factual issues that require a ruling by the courts. The first of these issues is whether the federal court has jurisdiction over the dispute.[3] Assuming the federal court

[1] JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 172 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (detailing that of the 309,361 civil cases in federal courts that were terminated during a twelve-month period ending in 2010, only 1.1% of them were terminated by trial); *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) ("The portion of federal civil cases resolved by trial fell . . . to 1.8 percent in 2002 . . . .").

[2] A Lexis search performed in January 2012 for opinions published by Illinois federal courts in 2011 addressing conflicts of the validity, enforcement, or effect of settlement agreements returned fifty-three results, thirty-eight of which were directly relevant to this Article. The search was performed in the "IL Federal District Courts" database, and the search terms were: "settlement /s enforce! and date geq(1/1/11) and date leq(12/31/11)."

[3] *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994) (explaining that a federal district court can retain jurisdiction over a settlement agreement by incorporating the terms of the settlement in the dismissal order or by expressly retaining jurisdiction to enforce the settlement in the dismissal order). But see *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002), where the

has jurisdiction, the next question a judge must resolve—and the focus of this Article—is whether state or federal law governs the settlement enforcement proceeding.[4] Despite being such a basic issue, the Supreme Court has not addressed it, the circuits are split on the answer, and the case law fails to employ any meaningful analytical framework. Given the pervasive nature of settlements in the federal courts, uniform federal choice of law principles in settlement enforcement proceedings would assist the parties and the federal courts when disputes arise.

This Article addresses the choice of law issue in settlement enforcement proceedings. A settlement enforcement proceeding can arise from a federal case in which the basis of federal jurisdiction was federal question jurisdiction, diversity of citizenship jurisdiction, or a combination of federal question claims and supplementary state law claims. This Article focuses on all cases brought on the basis of federal question jurisdiction, including those that have supplementary state law claims.[5] For such cases, there is a threshold issue of whether federal or state law governs a settlement enforcement proceeding.

Where the underlying claim is based on federal question jurisdiction, the current state of the law is unclear as to whether federal or state law controls a settlement enforcement proceeding. There are no statutes or Federal Rules of Civil Procedure that address this issue; it is a matter of federal choice of law. The circuits, however, are split as to the proper approach.[6] Additionally, the circuits provide very little analysis as to *why* they choose to apply either federal or state law.[7] Supreme Court doctrine on federal common law is conceptually difficult and most circuits generally

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Seventh Circuit held that a district court's statement retaining jurisdiction over a settlement agreement was irrelevant to whether it actually retained jurisdiction, a statement that was inconsistent with the holding in *Kokkonen*. *See* Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements:* Kokkonen *Revisited*, 1 FED. CTS. L. REV. 345, 357–58 (2006).

[4] This Article uses the term "settlement enforcement proceeding" as a catchall for any context where a party seeks to enforce a settlement agreement, be it via motion when the original action is still before the federal court or a separate enforcement action after the original suit has been dismissed. When the context in which the enforcement proceeding arises changes the analysis, it will be noted.

[5] The question of what law should apply in diversity cases is beyond the scope of this Article. In a case brought in federal court under diversity jurisdiction, the federal court is to apply state law. Thus, there is a stronger argument that the law of the state under which the case would otherwise be decided should govern any settlement disputes, as opposed to cases in which federal law would otherwise govern. This Article does not take a position on what law should apply to settlement enforcement disputes in diversity cases, but acknowledges that a different analysis would be required.

[6] *See, e.g.*, Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1221 (8th Cir. 2006) (applying state contract law to resolve a motion to enforce a settlement revolving around the issue of whether a valid settlement agreement existed); Pereira v. Sonia Holdings, Ltd. (*In re* Artha Mgmt., Inc.), 91 F.3d 326, 329 (2d Cir. 1996) (holding that federal contract law governs the enforcement proceeding, specifically the scope of an agent's authority to bind a party to a settlement).

[7] *See, e.g.*, Mich. Reg'l Council of Carpenters v. New Century Bancorp, Inc., 99 F. App'x 15, 21 (6th Cir. 2004) (stating, without explanation, that Michigan contract law governed the validity of a settlement agreement where the original complaint alleged a federal securities law violation).

avoid the issue. When the circuits do provide an analysis, they usually ignore the relevant Supreme Court precedent[8] and cite cases that are similarly deficient in reasoning.[9]

Settlements resolving federal question cases can involve any number of parties. As the number of parties increases, the possibility of disputes arising from the settlement process can also multiply. These settlements are reached in a variety of forums—in front of a judge, in private mediation, or in direct negotiations between the parties. Each path to settlement is common and may raise particular issues in enforcement disputes. It is not unusual for a federal question case pending in one state to involve out-of-state parties and be settled by a mediator in another jurisdiction. Across-the-board application of state law is problematic on a practical level because it can raise a host of choice of law questions, such as: (1) where the case is brought, (2) where the settlement is made, (3) how to handle settlements of international disputes and litigation between states, and (4) what to do if the federal government is a party. These choice of law issues simply complicate matters. With the increasing prevalence of settlement agreements as the means of resolving federal cases, it is time the circuits and, ultimately, the Supreme Court, reexamine this important issue to provide clarity and reason to the choice of law in settlement enforcement proceedings.

Although the Supreme Court has not addressed this particular subject, several cases provide a general framework for determining whether federal common law should apply to an issue. Modern Supreme Court doctrine is skeptical of federal common law as the source of rules of decision.[10] As a result, the Court restricts its application to a very limited number of contexts where uniquely federal interests are implicated or Congress otherwise authorizes the use of federal common law.[11] A precondition for the use of federal common law is that there must be a "significant conflict" between the use of a state law rule of decision and the federal policy or interest at stake.[12]

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[8] *See, e.g.*, Malave v. Carney Hosp., 170 F.3d 217, 220 (1st Cir. 1999) (holding that federal law controls settlement enforcement proceedings where the underlying claim is brought pursuant to a federal statute without citing to or analyzing the issues made relevant by Supreme Court cases related to federal common law, such as *Atherton v. FDIC*, 519 U.S. 213 (1997)).

[9] *See, e.g.*, United States v. McCall, 235 F.3d 1211, 1215 (10th Cir. 2000) (holding that New Mexico state law controls the enforceability of settlements, but citing *Carr v. Runyan*, 89 F.3d 327, 331 (7th Cir. 1996), which traces back to case law that actually applied federal law to a settlement enforcement dispute); *see also infra* note 163 (detailing the authorities implicated by *McCall*).

[10] *See* Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 453 (2004).

[11] *See generally id.* at 434–53 (discussing the state of modern Supreme Court federal common law doctrine).

[12] *See Atherton*, 519 U.S. at 218; O'Melveny & Myers v. FDIC, 512 U.S. 79, 87–88 (1994); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991).

Despite these general principles, there are a number of issues that remain unclear in application. Primary among these is the scope of the prerequisite "uniquely federal interest" sufficient to justify the creation of federal common law. The Supreme Court has at times emphasized the very limited nature of this category,[13] while expanding it at other times.[14] Also among the gray areas are the contours of the significant conflict analysis. In particular, when does a conflict between a federal interest or policy and the use of state law become sufficiently significant to justify the use of federal common law rather than state law as a rule of decision? And what factors should a court consider when conducting this conflict analysis?

Ultimately, federal common law should provide the rules of decision for settlement enforcement proceedings where the underlying claim is based on federal question jurisdiction. The federal courts have an institutional interest in creating uniform rules to govern behavior in the courts. Such uniformity would preserve the independence of the courts and conform to their self-regulating nature. Additionally, there is a separate, yet strong, federal interest in promoting the settlement of federal lawsuits and enforcing valid settlements that supports a federal common law of settlements.[15] Varying state law contract principles have the potential to undermine the settlement process. When such a rule creates a significant conflict with the federal policy of promoting settlements, the displacement of state contract law in favor of federal common law is justified and appropriate.[16] Lastly, there may be even more federal statute-specific policies that require the use of federal common law when the underlying claims in a settlement are based on that statute.

Of course, leaving this choice of law issue up to the federal courts is not the only way of handling the problem. The parties to a settlement could always include a clause in their agreement specifying the choice of law in the event a dispute should arise. Congress could also pass a statute resolving this issue for all federal question claims.[17] Additionally, the Rules Committee of the Judicial Conference of the United States could suggest to the Supreme Court one or more Federal Rules of Civil Procedure to govern the settlement process.[18] But assuming none of these actions are taken, resolving this problem remains in the hands of the federal courts.

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[13] *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981).

[14] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504–06 (1988).

[15] *See, e.g.*, GET, LLC v. City of Blackwell, 407 F. App'x 307, 318 (10th Cir. 2011) (noting a federal policy in favor of settlement in federal courts); Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1369 (Fed. Cir. 2001) (same).

[16] *See Atherton*, 519 U.S. at 218.

[17] An even less likely resolution of this issue would come if Congress specified in any given statute whether federal or state law should govern any settlements of claims brought under that statute.

[18] The issues of whether this action would be valid under the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006), and whether the Rules Committee would be likely to take such action are outside the scope of this Article, but would be an interesting topic for further discussion.

This choice of law problem is relevant for the day-to-day settlement of federal litigation. Part I will first discuss the relevant Supreme Court case law and then illustrate how the circuits have generally misunderstood the proper issues informing the choice of law analysis under these cases. Part II will first argue that the federal courts have an institutional interest in governing their own affairs sufficient to support the federal common law of settlements. Then, Part II will describe the other federal interests that support the use of federal common law in settlement enforcement proceedings on a more limited basis. The identifiable federal policy in favor of settlements of federal claims, as well as statute-specific policies, support the use of federal common law. Part II will explore various arguments as to why federal common law should control the enforcement of settlements of federal claims when these other interests and policies are implicated.

I. THE EXISTING ANALYTICAL FRAMEWORK

The Supreme Court has not addressed the choice of law issue in a settlement enforcement proceeding arising out of federal question claims. There are, however, several analogous Supreme Court decisions that provide a general framework for understanding when a court should consider creating federal common law. Additionally, the subject implicates complicated issues of federalism and federal policy, issues the circuits generally avoid discussing. As a result, the circuits are split on whether state or federal law should control. Ultimately, most circuits resolve the issue without much analysis, so it is difficult to synthesize the different positions. To many circuits, the question is settled despite the fact that the Supreme Court has significantly altered its approach to federal common law over the last thirty years. This Part will first examine the relevant Supreme Court case law. A discussion of the state of the circuit court case law follows.

A. The Presumption Against Federal Common Law

Ever since the Supreme Court's seminal opinion in *Erie Railroad v. Tompkins*, the federal courts have been on notice that "[t]here is no federal general common law."[19] The exceptions to this general rule under *Erie* are "in matters governed by the Federal Constitution or by Acts of Congress."[20] The Supreme Court's position on federal common law has varied since *Erie*. The Court has, in fact, created federal common law in areas outside of constitutional or statutory interpretation[21] and recognized certain areas

[19] 304 U.S. 64, 78 (1938).

[20] *Id.*

[21] *See generally Atherton*, 519 U.S. at 218 (describing the existence of "'federal common law' in the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision").

appropriate for federal common law.[22] It applied federal common law to the validity of releases under the Federal Employers' Liability Act (FELA),[23] only to restrict it thirty years later to two limited situations: where Congress has conferred power on the courts via statute to develop substantive law and where a federal rule is necessary to protect a uniquely federal interest.[24] The Court also elaborated on the analysis a court must engage in before displacing state law with federal common law.[25] More recently, the Supreme Court again restricted federal common law,[26] though the doctrine is far from clear.[27] This line of Supreme Court case law on federal common law, beginning with *Dice v. Akron, Canton & Youngstown Railroad*, illustrates how the presumption against federal common law has evolved.

In *Dice*, the Supreme Court considered whether federal or state law controls the question of whether a document signed by the plaintiff prior to filing his lawsuit was a valid release of his claims under FELA.[28] In concluding that federal law must determine the validity of releases under FELA, the Court noted that it was Congress who granted the right to sue and stated that "[s]tate laws are not controlling in determining what the incidents of this federal right [to recover against an employer for negligence] shall be."[29] The Court further reasoned that the federal rights protected by FELA could be easily defeated if individual states could determine the available defenses to claims brought under the statute.[30] Additionally, the Court considered the uniform application of the statute to be essential to effectuating its purposes and saw the use of federal law as the way to achieve such uniformity.[31] Releases play an important part in the administration of a federal act, the Court explained, so their validity must be determined according to uniform federal law.[32] The sweeping language and reasoning in *Dice* are characteristic of the period prior to the 1980s that

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[22] *See* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 905–14 (1996).

[23] Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952).

[24] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

[25] Boyle v. United Techs. Corp., 487 U.S. 500, 504–13 (1988).

[26] *See, e.g.*, *Atherton*, 519 U.S. at 220–21 (holding that no federal interest was at stake because the various state laws had not prevented the banking industry from thriving); O'Melveny & Myers v. FDIC, 512 U.S. 79, 88–89 (1994) (rejecting the argument that a uniform standard was needed where the issue would not govern the conduct of the United States and rejecting the argument that there was a federal interest in not allowing states to insulate attorneys from malpractice liability).

[27] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507–09 (2001) (holding that federal common law controls the claim preclusive effect in state courts of judgments in federal question cases in federal court, but not elaborating on principles of federal common law).

[28] *Dice*, 342 U.S. at 360–61.

[29] *Id.* at 361.

[30] *See id.*

[31] *See id.*

[32] *Id.* at 361–62.

was more hospitable to the idea of federal common law than the present era.[33]

Starting in 1981, the Court took a narrower view, emphasizing that the areas in which federal common law may be appropriately used are "few and restricted."[34] In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Supreme Court began the modern trend towards limiting the use of federal common law by identifying specific limited categories within which federal common law would be justified.[35] *Texas Industries* presented the Supreme Court with the question of whether a right to contribution was available to a defendant who had been found liable and was assessed damages under federal antitrust statutes.[36] Since the antitrust laws did not expressly establish such a right, the Court proceeded to consider whether there was such a right as a matter of federal common law.[37]

The Court started with the basic principle announced in *Erie* that there is "no federal general common law"[38] and added the qualification that there is a need for such law in "few and restricted" instances.[39] The Court described two essential categories where general federal common law is permitted: (1) where Congress has given the courts the power to develop substantive law via statute and (2) where "a federal rule of decision is 'necessary to protect uniquely federal interests.'"[40]

The first category was relatively simple in application. A court only need analyze whether Congress intended to confer the power to create any common law principles to fill in any gaps in the substantive law.[41] The Employee Retirement Income Security Act (ERISA) is an example of a statute where Congress explicitly intended that the federal courts would develop a federal common law of rights and obligations under ERISA-regulated plans.[42] Other statutes, such as the Labor Management Relations Act[43] and the Sherman Act,[44] have been read to imply congressional intent

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[33] *See* Lund, *supra* note 22, at 905–15.

[34] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

[35] *Id.* at 640.

[36] *Id.* at 632.

[37] *Id.* at 639–40.

[38] *Id.* at 640 (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

[39] *Id.* (quoting *Wheeldin*, 373 U.S. at 651).

[40] *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

[41] *See generally id.* at 642–44 (discussing those situations in which Congress has vested the federal courts with the power to create rules of law governing particular federal statutes).

[42] *See* Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (describing congressional reports reflecting this sentiment).

[43] 29 U.S.C. § 185 (2006).

[44] 15 U.S.C. § 1 (2006).

that federal courts develop federal common law to establish the governing principles of law in those areas.[45]

The second category, dealing with uniquely federal interests, requires more explanation. Areas that implicate these interests include "those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[46] Only these areas were appropriate for federal common law because in all of them either "the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control."[47]

The Court admitted that there was a federal interest in an issue regarding remedies under the antitrust laws in a general sense. This was because lawsuits brought under the Sherman Act "supplement[] federal enforcement and fulfill[] the objects of the statutory scheme."[48] Nevertheless, the Court ruled that this was not the sort of "uniquely federal interest" requiring a federal rule of decision.[49] Interestingly, the Court never cited or mentioned *Dice* or its broad language about federal law controlling the incidents of federal rights. In fact, the Supreme Court has never returned to *Dice* on an issue of federal common law in any subsequent case.

Despite the clear language of *Texas Industries*, later Supreme Court cases suggest that federal common law is not so limited. In *Boyle v. United Technologies Corp.*,[50] the plaintiff sued a helicopter manufacturer in federal court on the basis of diversity, alleging that a defective helicopter door design caused the death of a marine pilot.[51] At issue was whether military contractors to the government have a "military contractor defense," predicated on federal law, to state law design defect product liability claims.[52] The Court began by citing *Texas Industries* for the proposition that if there is a uniquely federal interest, courts can apply federal common law.[53] Even though the underlying suit was a private suit between private parties, the Court found that the impact of such suits on the federal government was sufficient to implicate "uniquely federal interests."[54] The Court found that it was appropriate for federal common law to displace

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[45] *See Tex. Indus.*, 451 U.S. at 642–43.

[46] *Id.* at 641 (footnotes omitted).

[47] *Id.*

[48] *Id.* at 642.

[49] *Id.*

[50] 487 U.S. 500 (1988).

[51] *Id.* at 502.

[52] *Id.* at 503.

[53] *Id.* at 504.

[54] *Id.* at 506–07.

state law by providing this "Government contractor" defense.[55] Allowing such suits against manufacturers who provide products to the government pursuant to procurement contracts would have the effect of raising the price the company charges the government or deterring companies from designing government products to the provided specifications.[56] In either case, the interests of the United States are directly affected.[57]

The Court then recognized that a second level of inquiry was necessary before displacing state law.[58] Federal common law would only control, despite the federal interest, where there was "a 'significant conflict' . . . between an identifiable 'federal policy or interest and the [operation] of state law' . . . or the application of state law would 'frustrate specific objectives' of federal legislation."[59] The federal interest at stake might justify using federal common law because of the need for national uniformity on a particular issue, or it might only justify the use of federal common law when specific rules of the states were actually in conflict with the federal interest.[60]

The Court found the relevant federal policy embodied in the Federal Tort Claims Act's discretionary function exception, whereby the federal government would not be liable for the conduct of employees that constituted the exercise of a discretionary function or duty.[61] This provision evidenced a federal interest in limiting the costs of tort suits against the government when those suits would amount to second-guessing government decisions.[62] Suing government contractors had the same effect as directly suing the government because the government would ultimately bear the cost through increased contract prices.[63] The Court concluded that any state law that imposes design defect liability on government contractors providing military equipment presents a significant conflict with this federal interest and must be displaced.[64] In so doing, the Court gave a more expansive interpretation of the type of uniquely federal interest necessary for the application of federal common law than *Texas Industries* did.

The Court again discussed the appropriate reach of federal common law in *Kamen v. Kemper Financial Services, Inc.*,[65] answering whether

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[55] *Id.* at 507.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* (alteration in original) (quoting, respectively, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966), and United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

[60] *Id.* at 507–08.

[61] *Id.* at 511.

[62] *See id.* at 511–12.

[63] *Id.*

[64] *Id.* at 512.

[65] 500 U.S. 90 (1991).

federal common law should govern a universal demand requirement for derivative suits brought under the Investment Corporations Act (ICA).[66] The Court found this question to be easy, holding that it was "clear that the contours of the demand requirement in a derivative action founded on the ICA are governed by *federal* law."[67] This was because the ICA is a federal statute and "any common law rule necessary to effectuate a private cause of action under that statute is necessarily federal in character."[68]

The Court then proceeded to a second tier of the analysis: whether state law should provide the content of the federal common law.[69] Under this rule, state law provides the content of federal law except where there is a need for national uniformity, other analogous statutory schemes embody policy choices readily applicable to the issue at hand, or the state law would frustrate the objectives of federal programs.[70] While this latter statement was consistent with prior case law, the *Kamen* Court continued on to announce that there is a "particularly strong" presumption that state law should be incorporated into federal common law "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards."[71] The Court identified corporation law as one such area.[72]

One parting note on *Kamen* is worth considering. Analyzing whether federal common law controlled the demand-requirement issue under the ICA, the Court stated that "any common law rule necessary to effectuate a private cause of action under [a federal statute] is necessarily federal in character."[73] The idea that federal common law provides any rule necessary to effectuate a federal cause of action could be read to give federal courts wide discretion to use federal common law whenever a rule of decision was tangentially related to a federal lawsuit.

Lower federal courts have generally not read this principle to be an invitation to create federal common law.[74] The Supreme Court has likewise

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[66] *Id.* at 92.

[67] *Id.* at 97.

[68] *Id.*

[69] *See id.* at 98.

[70] *See id.* The more attentive readers will notice that this formulation is slightly different than the *Boyle* rule. *Boyle* held that state law actually controls (rather than providing the content of federal law) except where there is a significant conflict with a federal interest. Boyle v. United Techs. Corp., 487 U.S. 500, 507–08 & n.3 (1988). Ultimately, the Court settled on the *Boyle* formulation, so to pay this slight change too much attention in the historical analysis would be both unnecessary and confusing.

[71] *Kamen*, 500 U.S. at 98.

[72] *Id.*

[73] *Id.* at 97 (citing Burks v. Lasker, 441 U.S. 471, 476–77 (1979); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942)).

[74] *See, e.g.*, Halebian v. Berv, 590 F.3d 195, 204 (2d Cir. 2009) (filling gaps in the Investment Company Act of 1940 with state substantive law); Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 290 (3d Cir. 1994) (stating that Supreme Court cases counsel against using federal common law to

not returned to this principle and has actually reverted to the *Boyle* "significant conflict" rule rather than the two-tiered analysis originally articulated in *United States v. Kimbell Foods, Inc.*[75] and more recently applied in *Burks v. Lasker* and *Kamen*.[76] Additionally, in its most recent cases, the Supreme Court has imposed rigorous limitations on and raised the hurdles to using federal common law.

The first case evincing this shift was *O'Melveny & Myers v. FDIC*.[77] At issue in *O'Melveny* was whether federal or state law provided the rule of decision in a malpractice suit brought by the FDIC—the receiver of a federally insured bank—against attorneys who advised the bank in a pair of real estate offerings.[78] The FDIC sued O'Melveny & Myers in federal district court, alleging professional negligence and breach of fiduciary duty.[79] The parties agreed that the FDIC asserted a cause of action created by California law.[80] The attorneys asserted a defense that knowledge of the conduct of the bank's controlling officers should be imputed to the bank and, therefore, to the receiver—the FDIC—so that the receiver would be estopped from pursuing the tort claims.[81] The specific rule of decision at issue was the imputation of knowledge of corporate officers to the corporation when those officers act against the corporation's interest.[82] The question was whether state or federal law would provide the rule.[83]

The Court began by stating that the argument that federal common law governed the issue was "plainly wrong" because there is no general federal common law.[84] But the Court's statement that state law generally "governs the imputation of knowledge to corporate victims of alleged negligence" was not the end of the analysis.[85] Federal common law could still displace

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adjudicate a motion to strike or open a judgment confessed against defendants); Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 458 (7th Cir. 1991) (incorporating state law as the rule of decision rather than creating federal common law).

[75] 440 U.S. 715, 718 (1979) ("To resolve this question, we must decide first whether federal or state law governs the controversies; and second, if federal law applies, whether this Court should fashion a uniform priority rule or incorporate state commercial law. We conclude that the source of law is federal, but that a national rule is unnecessary to protect the federal interests underlying the loan programs. Accordingly, we adopt state law as the appropriate federal rule for establishing the relative priority of these competing federal and private liens.").

[76] Although, as we will discuss, it is unclear after *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), whether the current standard is significant conflict or the two-tiered state law incorporation approach.

[77] 512 U.S. 79 (1994).

[78] *Id.* at 80–81.

[79] *Id.* at 82.

[80] *Id.* at 83.

[81] *Id.* at 82.

[82] *Id.* at 83.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 84–87.

California law in its application to the FDIC if there were a significant conflict between the use of state law and some federal policy or interest.[86] The Court returned to the *Boyle* terminology, considering whether "displacement of state rules" was justified in this case.[87]

The Court held that the respondent failed to present any significant conflict with an identifiable policy or interest.[88] The Court rejected claims that a uniform standard was needed, for the issue would not govern the primary conduct of the United States.[89] Likewise, the Court reasoned that to allow the avoidance of the uncertainty and additional legal research that results from variations among states' laws to qualify as an identifiable federal interest would open the door to far too many federal common law rules.[90]

Even more illuminating is the Court's firm rejection of the argument that federal law should control because it would disserve federal interests to allow California law to insulate attorneys from malpractice, with taxpayers ultimately bearing the costs.[91] The Court described this argument as representing a dangerous and "facile approach to federal-common-law-making," flawed because it was "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."[92] Asking judges to make the policy determinations that go into setting a standard for tort liability for malpractice is to ask them to perform the job that within the federal system "is more appropriate[] for those who write the laws."[93]

After *O'Melveny*, it is clear that an identifiable federal policy, preferably embodied in a federal statute as in *Boyle*,[94] is necessary to argue that a case is "extraordinary"[95] enough to warrant a federal common law rule of decision on a particular issue. One issue that remains unclear is exactly how to conduct the significant conflict analysis. The Court has found only once that the asserted federal policy was sufficient, so it rarely proceeds to the step of analyzing whether there is a conflict that rises to the level of significant.[96] Additionally, *O'Melveny* shifted away from using state law as the content of federal law, favoring the idea that state law controls and federal law merely displaces when there is a significant

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[86] *Id.*
[87] *Id.* at 87–88.
[88] *Id.* at 88.
[89] *Id.*
[90] *See id.*
[91] *Id.* at 89.
[92] *Id.*
[93] *Id.* (quoting Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 98 n.41 (1981)).
[94] Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988).
[95] *O'Melveny*, 512 U.S. at 89.
[96] *See Boyle*, 487 U.S. at 512.

conflict. *O'Melveny* thus reaffirmed the Court's continuing hostility to federal common law rules of decision.

In *Atherton v. FDIC*,[97] the Supreme Court adhered to the *O'Melveny* significant conflict standard. The issue in *Atherton* was whether the conduct of the officers and directors of a federally chartered, federally insured bank violated the standard of care they owed to the bank.[98] The threshold issue for the Court was whether federal common law determined the standard of care or whether the Court should look to state law standards.[99] The Court noted that the decision "to displace state law is primarily a decision for Congress."[100] The existence of federal statutes related to an area of law at issue does not imply congressional intent to create federal common law, "for 'Congress acts . . . against the background of the total *corpus juris* of the states . . . .'"[101]

The Court then applied the *O'Melveny* rule that state law applies absent a "significant conflict" between using state law and some federal policy or interest.[102] The Court next explored whether such a conflict existed in *Atherton*. Rejecting the argument that the need for nationwide uniformity is sufficient without further support, the Court noted that varying state approaches to corporate governance did not prevent the banking system from thriving.[103] The Court also found little merit to the argument that federal common law governs the standard of care simply because the banks are federally chartered, since banks have long been held subject to various state laws.[104] It is clear that a specific conflict or threat to federal interests or policies is required to justify the adoption of federal common law.[105]

Atherton thus clarified that in addition to analyzing whether there exists a clearly identifiable federal policy under *O'Melveny*, courts will also examine the state law conflict with that policy. The level to which this conflict must rise to justify the use of federal common law remains unclear, but *Atherton* implied that the courts should require more than just a theoretical inconsistency. Additionally, *Atherton* adopted the *O'Melveny* displacement-of-state-law framework, providing consistency to choice of

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[97] 519 U.S. 213 (1997).

[98] *See id.* at 215.

[99] *See id.* at 217–18.

[100] *Id.* at 218 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (internal quotation mark omitted)).

[101] *Id.* (alterations in original) (quoting HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)).

[102] *Id.*

[103] *See id.* at 219–21.

[104] *See id.* at 221–23. That the federal courts settle thousands of cases every year despite having to use disparate state laws does not necessarily mean that arguments for a uniform federal law of settlements should be similarly rejected. See *infra* note 215 and accompanying text for an explanation of this position.

[105] *See Atherton*, 519 U.S. at 223.

law doctrine. Since *Atherton*, the Supreme Court has not analyzed the issue of the proper scope of federal common law as directly and as generally as it did in that case.[106] The circuit courts of appeals currently treat *Atherton* and *O'Melveny* as the leading cases on the issue.[107]

Nevertheless, it bears mentioning that in *Semtek International Inc. v. Lockheed Martin Corp.*,[108] the Supreme Court found that federal common law controlled "whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits."[109] The facts and procedural history of *Semtek* are convoluted and, ultimately, not important to the federal common law analysis. After rejecting various arguments for alternative sources of a controlling rule of decision, the Court concluded that federal common law governs the preclusive effect of federal judgments.[110] The Court reached this decision by analyzing several pre-*Erie* cases that had used federal common law to determine the preclusive effect in state courts of judgments of federal courts on federal question cases.[111] Those cases, the Court reasoned, stood for the principle that the Supreme Court had the final say on how state courts treat federal judgments, which meant that federal common law must govern issues of claim preclusion.[112]

The Court then observed that the issue of the preclusive effect of federal diversity judgments was a "classic case" for adopting state law as the federal rule.[113] The Court rejected the idea that there needed to be a uniform federal rule, saying that the more persuasive argument for uniformity is having the same preclusive rule apply whether a state or federal court dismissed the case.[114] The Court clarified, however, that should state law be incompatible with federal interests, a federal rule would be justified.[115] This last part of the analysis harkens to the significant conflict test, though mere incompatibility is insufficient under that standard.

Outside of this reminder that federal common law remains limited to the extent state law can address the issue, *Semtek* is not particularly helpful as a federal common law decision. Its analysis, which has been accused of

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[106] *See, e.g.*, Rosenberg, *supra* note 10, at 434–53 (describing Supreme Court federal common law doctrine and ending with *Atherton*).

[107] *See, e.g.*, Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 10 (1st Cir. 2010) (analyzing a federal common law issue and citing *Atherton* and *O'Melveny*).

[108] 531 U.S. 497 (2001).

[109] *Id.* at 499.

[110] *Id.* at 508.

[111] *See id.* at 507.

[112] *See id.* at 507–08.

[113] *Id.* at 508.

[114] *Id.*

[115] *Id.* at 509.

having an "*ipse dixit* quality" about it,[116] did not apply any broader rules on when federal common law is justified, such as the significant conflict test. It did not cite other federal common law cases or announce a rule about federal common law in general.[117] As a result, the case does not assist lower courts in considering whether federal common law should govern settlement enforcement proceedings of federal question cases. Furthermore, by returning to the two-tiered approach last seen in *Kamen*, where the Court stated that federal common law controls but incorporates state law, the Court further muddled existing doctrine and made determining the proper framework more difficult.[118] In light of this confusion, it is not surprising that lower courts have taken *Atherton* and *O'Melveny* to be the leading cases on the issue of federal common law.

The line of cases beginning with *Texas Industries* and culminating in *Atherton* makes it clear that the Supreme Court is generally skeptical towards federal common law rules of decision in modern choice of law doctrine. Federal common law is permitted in very few and specific areas of law, such as admiralty, interstate and international disputes, and in cases involving the rights and obligations of the United States. If a particular dispute does not fall into one of these categories, a federal common law rule of decision will only be used if state law creates a significant conflict with a clearly identifiable federal policy. While this conflict analysis is the proper mode of determining choice of law in settlement enforcement proceedings, the circuit courts have generally failed to apply it in that context.

B. The Circuits Take Their Positions

As this Article's Introduction suggested, settlements and settlement-related disputes are not unusual. Thus, it should come as no surprise that the circuits have all taken a position on whether state or federal law controls a settlement enforcement proceeding where the underlying claim is based on federal question jurisdiction. As the last section explained, standards that govern a federal court's choice between federal common law and state law should operate to rein in federal common law. Somewhat surprisingly, however, only one decision from an appellate court has analyzed the issue

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[116] Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 612 (2006). As a result, even guidance from this case gleaned through factual analogy would be minimal.

[117] *See Semtek*, 531 U.S. at 507–09.

[118] Fortunately for our purposes, there is skepticism as to whether the "incompatibility" and "substantial conflict" tests ever lead to different outcomes. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 507 n.3 (1988). The problem is more of an issue on what terminology to use on the one hand, and what the choice of formulation suggests about the Court's view of the proper limits on federal common law. Because the case law at both the Supreme Court level and in the circuits provides much more analysis with many more examples when using the significant conflict test, that test is the one we will apply in our analysis.

under the proper Supreme Court precedent.[119] Others neglect to provide any analysis, misuse authority, or ignore the important issues while treating largely irrelevant ones as dispositive.[120] This section will explore the different positions taken in the case law and identify common analytical deficiencies.

The circuits fall into two camps on this choice of law issue, though each suffers from deficiencies in reasoning or use of precedent. The First, Third, Fourth, and Fifth Circuits have held that federal common law controls. The Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have all held that state law controls. Only the Second Circuit, in a single case, has conducted a proper analysis of how the governing Supreme Court cases might relate to settlement enforcement proceedings, although the court has since backed off its position. This section will start by examining this Second Circuit case and then proceed to explain the shortcomings in the analyses of the other circuit courts.

1. The Lone Example of a Proper Analysis.—The Second Circuit is the only circuit to properly analyze whether federal or state law would control a settlement enforcement proceeding where the underlying case was based on federal claims, albeit in dicta. In *Ciaramella v. Reader's Digest Association*, the Second Circuit recognized the applicability of the *Atherton* line of cases to the choice of law in a settlement enforcement proceeding.[121] In that case, the plaintiff sued his former employer alleging violations of the Americans with Disabilities Act (ADA) and ERISA.[122] Prior to discovery, the parties negotiated a settlement and the defendant prepared a draft agreement containing language that the settlement was not final until executed by all parties and their attorneys.[123] After the plaintiff authorized his original attorney to accept, the plaintiff's attorney suggested several revisions to the defendants.[124] The defendants accepted those changes and the plaintiff's attorney indicated to the defendants, "We have a deal."[125] Meanwhile, the plaintiff consulted with a second attorney about the settlement, determined that the settlement was not acceptable, and refused to sign the updated version.[126] The defendant then moved to enforce the settlement.[127]

The Second Circuit first found that it need not decide the choice of law issue because there was no material difference between the relevant state

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[119] *See* Ciaramella v. Reader's Digest Ass'n, 131 F.3d 320 (2d Cir. 1997).
[120] *See infra* Part I.B.2–3.
[121] 131 F.3d 320.
[122] *Id.* at 321.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

law and federal common law.[128] Under both New York state law and federal common law,[129] parties can settle a case orally even if a future written memorialization of the terms is contemplated.[130] But if the parties do not intend to be bound until there is a signed, written agreement, an oral agreement is not binding.[131] After discussing these principles, the court entertained the defendant's argument that the court ought to exercise its power to fashion a new federal common law rule that any time both parties' attorneys agreed on all material terms, an oral settlement would be binding.[132] The court rejected this argument, noting that *Atherton* required a significant conflict between the use of state law and federal policy before departing from state law as the rule of decision.[133] The court did not find a conflict between federal policy and the relevant rule.[134] The court noted that at least one of the statutes at issue expressed a preference for voluntary settlements of claims.[135] The state common law rule was that the oral agreement at issue was not binding because it was not in writing. The court found that this rule does not conflict with the federal interest in encouraging settlements, and actually promotes settlements and gives effect to the intent of the parties.[136] The defendant's proposed rule—that oral agreements should be binding—would deter parties from negotiating settlements in fear of being locked into an agreement they never wanted.[137]

Because the court did not have to choose between federal and state law, the choice of law issue in settlement enforcement disputes technically

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[128] *Id.* at 322.

[129] The cases the Second Circuit relied upon for its source of federal common law on this topic were *Taylor v. Gordon Flesch Co.*, 793 F.2d 858 (7th Cir. 1986) and *Board of Trustees v. Vic Construction Corp.*, 825 F. Supp. 463 (E.D.N.Y. 1993). *Ciaramella*, 131 F.3d at 322. The Seventh Circuit case involved a settlement of a Title VII claim and based its authority to create federal common law on a prior case, Lyles v. Commercial Lovelace Motor Freight, Inc., 684 F.2d 501, 504 (7th Cir. 1982), that relied on a Fifth Circuit case, Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981), whose reasoning is debunked at length below. *See Taylor*, 793 F.2d at 862; *infra* notes 138–42 and accompanying text. The district court case involved an ERISA settlement, and the court reasoned, based on a concurring opinion in an outdated Supreme Court case and a few subsequent (and poorly reasoned) circuit court cases, that federal common law could be created in that context. *Bd. of Trs.*, 825 F. Supp. at 464, 465 (citing D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471–72 (1942) (Jackson, J., concurring)). The Second Circuit was not, however, necessarily supporting the legitimacy of those prior courts acting to make federal common law pertaining to the settlement of federal claims, but merely referring to the existence of such federal common law. *See Ciaramella*, 131 F.3d at 322.

[130] *Ciaramella*, 131 F.3d at 322.

[131] *Id.*

[132] *Id.* at 322–23.

[133] *Id.* at 323.

[134] *See id.*

[135] *Id.*

[136] *Id.*

[137] *See id.*

remains open in the Second Circuit.[138] Nevertheless, the case is important because the court appeared to recognize that the *Atherton* line of Supreme Court cases governs the choice of law analysis. Prior cases in the Second Circuit had held that federal common law controlled settlement enforcement disputes where the underlying claim was based on federal law.[139] The Second Circuit's willingness to engage in the proper analysis was a good sign, one that its sister circuits have generally missed.

2. Circuits in Which Federal Law Controls.—A minority of circuits hold that federal common law controls settlement enforcement proceedings when the underlying claim is a federal question.[140] While this Article and strong arguments support this position, none of these circuits have conducted a truly thorough analysis. More specifically, none have applied the modern standard for the application of federal common law set forth in the *Atherton* line of cases. Under the modern standard, a court should assume that state law provides a rule of decision unless there is a significant conflict between an identifiable federal policy or interest and the use of state law.[141]

The First Circuit uses federal law in settlement enforcement proceedings where a federal cause of action is the underlying claim.[142] The court now treats the issue as settled, relying on its prior cases. The problem with this approach is that the Supreme Court's shift against federal common law has altered the legal landscape upon which it relies. The First Circuit's approach goes back to *Malave v. Carney Hospital*,[143] a case involving a settlement dispute arising out of federal employment discrimination claims. The court applied federal law to the settlement enforcement proceedings.[144] Providing no further reasoning, the court cited several pre-1990 cases that predate the *Atherton* line of cases that solidified the presumption against

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[138] *See* Kaczmarcysk v. Dutton, 414 F. App'x 354, 355 (2d Cir. 2011) (citing *Ciaramella*, 131 F.3d at 322) ("[T]he question of whether New York or federal common law determines whether parties have reached a settlement is an open question in our Circuit . . . .").

[139] *See, e.g.*, Pereira v. Sonia Holdings, Ltd. (*In re* Artha Mgmt., Inc.), 91 F.3d 326, 328, 329 (2d Cir. 1996) (applying federal law where the underlying case arose under the Bankruptcy Code); Fennell v. TLB Kent Co., 865 F.2d 498, 500, 501 (2d Cir. 1989) (applying federal law where the underlying case arose under 42 U.S.C. § 1981). These previous cases can be traced back to a line of cases from other circuits that were predicated on an understanding of the role of federal common law that had drastically changed by the time *Atherton* came down in 1997. These cases required reexamination after the modern trend against federal common law became clear.

[140] This includes the First, Third, Fourth, and Fifth Circuits, though it is not entirely clear that the Fourth Circuit still adheres to this view, as discussed below. *See infra* note 147.

[141] Atherton v. FDIC, 519 U.S. 213, 218 (1997).

[142] *See* Quint v. A.E. Staley Mfg. Co., 246 F.3d 11, 14 (1st Cir. 2001).

[143] 170 F.3d 217, 220 (1st Cir. 1999); *see also Quint*, 246 F.3d at 14 (applying federal law and citing *Malave* as its binding authority).

[144] *See Malave*, 170 F.3d at 219–20.

federal common law.[145] The cases cited by the First Circuit did not support the position that federal law controls all settlement enforcement proceedings where the underlying claim is federal in nature.[146]

The Third, Fifth, and, at times, the Fourth[147] Circuits take similar positions and support them with cases and reasoning inconsistent with modern Supreme Court doctrine. The Third Circuit's shortcomings stem from a case that relied on an inapposite Supreme Court decision to support the proposition that federal law controls settlement agreements where the

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[145] *See id.* at 220. Those four cases are Michaud v. Michaud, 932 F.2d 77 (1st Cir. 1991); Fennell v. TLB Kent Co., 865 F.2d 498 (2d Cir. 1989); Mid-S. Towing Co. v. Har-Win, Inc., 733 F.2d 386 (5th Cir. 1984) (a maritime law case); and Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112 (4th Cir. 1983).

[146] The *Fennell* case no longer appears to control in the Second Circuit, as that court has recognized the impact of the *Atherton* line of cases. *See* Ciaramella v. Reader's Digest Ass'n, 131 F.3d 320, 322–23 (2d Cir. 1997). As for the First Circuit case that the *Malave* court relied on, *Michaud*, it was brought under 42 U.S.C. § 1983. *See Michaud*, 932 F.2d at 78. Section 1983 is unique in that a second statute, 42 U.S.C. § 1988, explicitly requires that courts first look to federal law on all matters pertaining to § 1983 suits. *See* 42 U.S.C. § 1988(a) (2006). If federal law is deficient, a court should look to state law to fill in the gaps. *See id.* ("The jurisdiction . . . conferred on the district courts by the provisions of [this Title] for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall . . . govern . . . ."). While the *Michaud* case did not explain that this was the basis for using federal law with respect to that settlement, the case *Michaud* relied on, *Furtado v. Bishop*, did explain the role of § 1988 in the choice of law analysis where § 1983 claims are involved. 604 F.2d 80, 97 (1st Cir. 1979). Because of § 1988's command, federal common law should control settlement enforcement proceedings of § 1983 claims. Express statutory authority to create federal common law is one of the well-founded exceptions to the limitations placed on common law, *see* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981), but the First Circuit has failed to recognize this basis for distinguishing *Michaud*.

The other cases the *Malave* court cited are similarly inapplicable; one was a maritime law case. *See Mid-S. Towing Co.*, 733 F.2d at 389. Like express statutory exceptions, maritime law is another area where federal common law is permitted. *See Tex. Indus., Inc.*, 451 U.S. at 641. As for the Fourth Circuit case it cited, *Gamewell*, that case no longer appears to be controlling law in that circuit. *See, e.g.*, Moore v. Beaufort Cnty. N.C., 936 F.2d 159, 162 (4th Cir. 1991).

[147] *See Gamewell*, 715 F.2d at 114. The interesting part of the reasoning of this case was that the court stated it had the option to use federal common law for "open questions incident to the adjudication of federal statutory claims." *Id.* This position was eroded by subsequent Supreme Court cases and is inconsistent with contemporary doctrine. *See supra* notes 77–106 and accompanying text. Later cases in the Fourth Circuit generally avoid choosing between federal and state law in settlement enforcement proceedings and no longer cite *Gamewell*, stating instead that "the controlling factor must in either event be the intentions of the parties." Piver v. Pender Cnty. Bd. of Educ., 835 F.2d 1076, 1083 (4th Cir. 1987); *see Moore*, 936 F.2d at 162. *But see* Silicon Image, Inc. v. Genesis Microchip, Inc., 271 F. Supp. 2d 840, 848 (E.D. Va. 2003) (holding that federal law controls settlement enforcement proceeding where underlying claim is a patent infringement action and citing *Gamewell* as controlling authority).

underlying right to sue derives from a federal statute.[148] Similarly, the Fifth Circuit's leading case, *Fulgence v. J. Ray McDermott & Co.*,[149] is based on an outdated Supreme Court decision that is inconsistent with modern doctrine.[150] *Fulgence* came down in 1981, and its analysis is indicative of the more relaxed view of federal common law that prevailed at that time.[151] Nevertheless, the Fifth Circuit continues to rely on *Fulgence* and its progeny for the rule that federal law controls settlements of federal claims.[152]

Generally, circuit decisions holding that federal common law controls settlement enforcement proceedings where the underlying cause of action is

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[148] *See* Williams v. Metzler, 132 F.3d 937, 946 (3d Cir. 1997). *Williams v. Metzler* involved a settlement enforcement proceeding where the underlying claim was brought under the federal Energy Reorganization Act. *Id.* at 940. On the choice of law issue, the court held that the settlement agreement at issue involved a right to sue derived from a federal statute, and thus federal common law principles governed the construction of the contract. *Id.* at 946. For support, the court cited *Town of Newton v. Rumery*, which analyzed the validity of a criminal defendant's waiver of any § 1983 claims he might have in return for the prosecution dropping the criminal charges against him. 480 U.S. 386, 391–92 (1987). The defendant ultimately brought a § 1983 action and claimed that the waiver was invalid as against public policy; the city moved to dismiss on the basis of the prior settlement. *Id.* The Supreme Court stated that "[t]he agreement purported to waive a right to sue conferred by a federal statute. The question whether the policies underlying that statute may in some circumstances render that waiver unenforceable is a question of federal law." *Id.* at 392.

In reaching this conclusion, the Court did not cite any federal common law cases, nor has it been cited in subsequent federal common law Supreme Court cases like *O'Melveny* or *Atherton*, leading to the inexorable conclusion that it simply is not to be considered a federal common law case. Furthermore, there is a fundamental difference between the *Rumery* waiver scenario and typical settlement enforcement disputes: in the former the Court is asking whether such a resolution is allowed under the federal statute, while in the latter the Court is merely interpreting the terms or determining the existence of the agreement. Therefore, the Third Circuit's use of *Rumery* as authority for the use of federal law in all settlement enforcement proceedings is very tenuous.

[149] 662 F.2d 1207, 1208 n.1 (5th Cir. 1981) (recognizing the issue as being one of first impression).

[150] The court's analysis begins with the proposition that since it is dealing with a federal statutory scheme, Title VII, to be precise, that "the federal courts are competent to determine whether a settlement exists without resort to state law." *Id.* at 1209. The only opinion the court cites for this proposition is a concurring opinion from a 1942 Supreme Court case. *See id.* (citing D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471–72 (1942) (Jackson, J., concurring) (asserting a federal court's freedom to create federal common law when it is related to federal statutes or the Constitution)). The *D'Oench* case, however, predates and is inconsistent with the modern Supreme Court law. *See* Atherton v. FDIC, 519 U.S. 213, 218 (1997) ("Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules . . . .").

[151] For example, the *Fulgence* court argues that creation of a federal rule rather than use of a state rule is appropriate where "the rights of the litigants and the operative legal policies derive from a federal source." *See Fulgence*, 662 F.2d at 1209. This language is clearly more accepting of federal common law than the *Atherton* significant conflict analysis.

[152] *See* Macktal v. Sec'y of Labor, 923 F.2d 1150, 1157 n.32 (5th Cir. 1991) (citing *Fulgence*, 662 F.2d at 1209); Liger v. New Orleans Hornets NBA Ltd. P'ship, No. 05-01969, 2010 WL 3952006, at *2 (E.D. La. Aug. 3, 2010) (citing *Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 389 (5th Cir. 1984), as a case that relies on *Fulgence* for the proposition that "[w]here the substantive rights and liabilities of the parties derive from federal law, the enforceability or validity of a settlement agreement is determined by federal law").

federal in nature all suffer from analytical deficiencies. Their rules are artifacts of a bygone era where federal common law was more pervasive. Supreme Court precedent has changed its tone towards federal courts creating federal common law, and these circuits have not adjusted to this doctrinal shift. These circuits have not clarified whether the use of state law in these proceedings would present a significant conflict with a federal policy or interest, the modern threshold for the use of federal common law.

3. Circuits in Which State Law Controls.—Likewise, the majority of circuits that hold that state law applies to federal question settlement proceedings have failed to conduct an adequate conflict analysis.[153] These circuits do not adequately entertain the possible federal interests impacted by their decisions, instead narrowly focusing on the settlement as a contract between private parties.

Several such circuits have, at times, come close to considering the right issues in recognizing the modern shift against federal common law. The Eleventh Circuit in *Resnick v. Uccello Immobilien GMBH, Inc.* examined the enforceability of a settlement agreement that required a property owner to bring its building into compliance with the ADA within 30 days.[154] On the choice of law issue, the Eleventh Circuit held that state contract law applied.[155] The court, using the Supreme Court's rule from *Texas Industries*, maintained that it "disfavor[ed] federal common law" and would apply federal common law in "only rare instances concerning 'rights and obligation[s] of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.'"[156] The *Resnick* court failed to realize that *Texas Industries* was but the beginning of the line of cases explaining when and how federal common law applies. Post-*Atherton*, federal common law also can be created whenever there is a significant conflict between some federal policy or interest and the use of state law.[157] The *Resnick* court's failure to recognize that the use of federal common law was not quite as limited post-*Atherton* as compared to *Texas Industries* resulted in the application of a rule that was unduly restrictive of federal common law. There is at least an argument that the ADA embodies significant federal interests in ensuring the integrity of the rights of disabled persons, policies

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[153] These circuits include the Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits.

[154] 227 F.3d 1347, 1349 (11th Cir. 2000).

[155] *Id.* at 1350 (citing Schwartz v. Fla. Bd. of Regents, 807 F.2d 901, 905 (11th Cir. 1987) (holding that state law applied to the construction and enforceability of a settlement agreement arising under Title VII)). The court also issued a general rule that "[p]rinciples governing general contract law apply to interpret settlement agreements." *Id.*

[156] *Id.* at 1350 n.4 (quoting Kobatake v. E.I. DuPont de Nemours & Co., 162 F.3d 619, 624 n.3 (11th Cir. 1998)).

[157] *See* Atherton v. FDIC, 519 U.S. 213, 218 (1997) (citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

that could feasibly be undermined by the state law rules applied in that case. However, the *Resnick* rule precludes analysis of these issues.

The D.C. Circuit has similarly come close to the proper approach with its fairly thorough analysis in *Makins v. District of Columbia*.[158] This decision, like *Resnick*, contains solid analysis recognizing the limitations on federal common law. But it too erred by requiring explicit statutory rulemaking authority before a court can create federal common law.[159] This rulemaking authority is not required under present doctrine—federal courts can create federal common law rules of decision where there is a significant conflict with a federal policy or interest. Thus, the *Makins* court unduly restricted federal common law.

While these courts at least acknowledged Supreme Court precedent, other courts that have selected state law for settlement enforcement proceedings have ignored it entirely. One primary example is the Tenth Circuit in *United States v. McCall*.[160] In *McCall*, the court examined an alleged settlement agreement between the Farmers Home Administration (FmHA) and a farmer over the farmer's outstanding debt owed to FmHA.[161] After settlement negotiations, a dispute arose as to whether a final agreement had been reached.[162] On the choice of law issue, the Tenth Circuit held that state contract law controlled, merely citing a single case and providing no further analysis.[163]

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[158] 277 F.3d 544, 548 (D.C. Cir. 2002).

[159] At issue in *Makins* was "under what circumstances, if any," an attorney may bind his client to a settlement agreement stemming from a Title VII lawsuit without having actual authority from the client. *Id.* at 545. The plaintiff, a female employee of the District of Columbia, brought a lawsuit against her employer, alleging sex discrimination and retaliatory firing in violation of Title VII. *Id.* In a settlement conference with a magistrate judge, the parties' attorneys reached a settlement agreement. *Id.* The plaintiff was not physically present but was in contact with her attorney throughout the settlement conference via cell phone. *Id.* at 545–46. The plaintiff, however, upon being presented with the written settlement agreement by her lawyer, refused to sign the agreement and the defendant filed a motion to enforce the settlement. *Id.* at 546.

In holding that local law, rather than federal common law, applies to the determination of whether a settlement should be enforced, the court began by expressing doubt both that the federal courts had power to formulate law in this area and that there was a need for national uniformity on this issue. *Id.* at 547–48. The court then endorsed the principle that "neutral state laws that do not undermine federal interests should be applied unless some statute (or the Constitution) authorizes the federal court to create a rule of decision." *Id.* at 548 (quoting Morgan v. S. Bend Cmty. Sch. Corp., 797 F.2d 471, 475 (7th Cir. 1986)). Further, the court recognized the benefit to members of the bar of knowing that the law governing the settlements they negotiate will be the same whether they are in a state or federal court. *Id.* Noting the lack of a statute permitting lawmaking by the federal courts and the absence of the United States as a party, the court determined local law was appropriate. *Id.* at 548.

[160] 235 F.3d 1211 (10th Cir. 2000).

[161] *Id.* at 1213.

[162] *Id.* at 1213–14.

[163] *Id.* at 1215. That single case is a Seventh Circuit case and is part of a line of authority that actually traces back to a Fifth Circuit case, which itself cites a Tenth Circuit case that actually applies federal law to a settlement enforcement dispute. *See* Carr v. Runyan, 89 F.3d 327, 331 (7th Cir. 1996).

The Sixth Circuit's analysis likewise comes up short. In *Michigan Regional Council of Carpenters v. New Century Bancorp, Inc.*,[164] the Sixth Circuit considered the enforceability of a settlement agreement of alleged securities law violations brought by a stock purchaser against a corporation and its controlling shareholder.[165] The court, in holding that the settlement agreement was enforceable, applied Michigan state contract law.[166] The court neither cited to any authority nor gave any analysis as to *why* state law governed the enforcement of this settlement even though the underlying claims were for violations of federal securities laws.[167] Similarly, the Eighth[168] and Ninth[169] Circuits have yet to properly analyze the choice of law in this area. In what is potentially a good sign, however, the Ninth

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The Seventh Circuit case law ultimately leads back to a Fifth Circuit case, *Florida Education Ass'n v. Atkinson*, 481 F.2d 662 (5th Cir. 1973). That case also has no analysis, simply stating the rule and citing Third, Fifth, and Tenth Circuit cases. *See id.* at 663. Thus, the case law runs full circle back to a Tenth Circuit case where the United States was a party and the court actually applied federal law in construing the settlement agreements. *See* Homestake-Sapin Partners v. United States, 375 F.2d 507, 511 (10th Cir. 1967).

Questionable basis in law aside, the *McCall* rule is difficult to understand when considered in light of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). In *Texas Industries*, the Court specifically made it clear that one of the very limited areas where federal common law exists is where the rights and obligations of the United States are at stake. *Id.* at 641. A settlement of a lawsuit where the United States is a party would certainly seem to involve the rights and obligations of the United States. In fact, at least one circuit has recognized this connection. *See Makins*, 277 F.3d at 548.

[164] 99 F. App'x 15 (6th Cir. 2004).

[165] *Id.* at 16.

[166] *Id.* at 21 ("As a matter of Michigan contract law, which governs the validity of the settlement agreement in this case, attorneys are considered to have the apparent authority to settle lawsuits on behalf of their clients, and opposing parties have the right to rely upon the existence of such settlements when agreed to by attorneys.").

[167] *See id.*

[168] *See, e.g.*, Sheng v. Starkey Labs., Inc., 53 F.3d 192, 194 (8th Cir. 1995). In that case, a settlement dispute arose regarding claims under Title VII. *See id.* at 193. The Eighth Circuit did not even identify that there was an issue as to whether federal or state law controlled the enforcement proceeding. *See id.* at 194. It simply stated that "[s]ettlement agreements are governed by basic principles of contract law" and proceeded to apply Minnesota law. *Id.*

[169] *See, e.g.*, United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992). That case involved a settlement dispute where the underlying lawsuit was brought under the Lanham Act and California state unfair competition law. *See id.* at 855. The court concluded state law governed even when the underlying cause of action is federal. *Id.* at 856. The court provided no further analysis as to why this is the case, and as authority it cited two cases. *Id.* The first of these cases gave no analysis and only relied on a Seventh Circuit case that also gave no analysis of the issue. *See* Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989) (citing Air Line Stewards & Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc., 713 F.2d 319, 321 (7th Cir. 1983)). The second case predated the modern line of Supreme Court cases and therefore did not apply the federal common law standards set forth in those cases. *See* Commercial Paper Holders v. R. W. Hine (*In re* Beverly Hills Bancorp), 649 F.2d 1329, 1332–33 (9th Cir. 1981) (deciding state law applied to a settlement dispute stemming from a bankruptcy action and relying solely on the facts that the settlement was not a government contract, nor was it a consent decree, and that it was "a contract and must be construed under the laws of California").

Circuit may be distancing itself from its earlier flawed cases, having recently suggested that the choice of law question is an open one.[170]

The Seventh Circuit has also given a very clear ruling on the source of the rules for settlement enforcement suits where the underlying claim is a federal lawsuit. In *Lynch, Inc. v. SamataMason Inc.*,[171] which involved a claim for copyright infringement, the court stated that the issue was settled: state law controlled.[172] The court took the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Co.*[173] to imply that state law would govern all settlement enforcement proceedings brought to enforce the settlement of a federal suit.[174] In *Kokkonen*, a lawsuit before a federal district court on the basis of diversity of citizenship settled and was dismissed with prejudice.[175] Later, a dispute arose pertaining to the return of certain files under the settlement agreement, and one of the parties sought enforcement of the agreement.[176] The Supreme Court found that the district court lacked jurisdiction over the subsequent suit to enforce the settlement agreement where the district court overseeing the settlement did not expressly retain jurisdiction.[177] The *Lynch* court reasoned that if federal law controlled the enforcement of settlement agreements reached in federal court, "the suit would arise under federal law and thus be within the jurisdiction of the federal court" even if diversity were not present.[178] The Seventh Circuit reasoned that, because there was no jurisdiction in *Kokkonen*, federal law does not control such actions.[179]

The problem with this logic is that in *Kokkonen* all the claims were state law claims before the court as a matter of diversity of citizenship.[180] As discussed above, there are three jurisdictional bases under which a case can be before a federal court: federal question jurisdiction, diversity jurisdiction, or a combination of federal claims and supplemental state law claims. It could easily be argued that where there is an underlying federal

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[170] *See* Ellerd v. Cnty. of Los Angeles, 273 F. App'x 669, 670 (9th Cir. 2008) (declining to decide whether federal or state law governed a settlement dispute where the underlying claim was brought under the Fair Labor Standards Act because the result would be the same). *But see* Kirkland v. Legion Ins. Co., 343 F.3d 1135, 1140 (9th Cir. 2003) (holding that state law controls settlement enforcement proceedings for federal class actions and citing *Jeff D.*, 899 F.2d at 759).

[171] 279 F.3d 487 (7th Cir. 2002).

[172] *Id.* at 490.

[173] 511 U.S. 375 (1994).

[174] *Lynch*, 279 F.3d at 489.

[175] *Kokkonen*, 511 U.S. at 376–77.

[176] *Id.* at 377.

[177] *Id.* at 381–82.

[178] *Lynch*, 279 F.3d at 490.

[179] *Id.* Apparently, the diversity jurisdiction that existed for the underlying claim was not met in the settlement enforcement action, presumably because the controversy was over the return of certain files rather than monetary. 28 U.S.C. § 1332(a) (2006).

[180] *Kokkonen*, 511 U.S. at 376–77.

law claim that ultimately settles, this settlement is controlled by federal law. Since *Kokkonen* only dealt with state law claims, it is distinguishable from the enforcement of a settlement of federal question claims, or those cases like *Lynch* with both federal and state claims.[181]

The *Lynch* court necessarily assumed that settlements of federal question cases and diversity cases should be treated the same for choice of law purposes. It took a case regarding jurisdiction over the settlement of state law claims in diversity and found it to imply choice of law principles for federal question claims. Since the *Lynch* court did not engage in an analysis of the relevant considerations of whether federal common law would be appropriate for federal question claims and instead relied on *Kokkonen*, its reasoning is flawed. The use of state law in settlement enforcement actions where the underlying claim was a federal question claim is not a logical consequence of *Kokkonen*.

Regardless of whether a given circuit court of appeals has found federal or state law to control the enforcement of settlements of federal claims, the decisions across the circuits do not adequately analyze the question. Many courts that apply federal law do so on the basis of cases that were decided in an era of looser standards for federal common law. The courts that apply state law tend to do so based on arguments that limit federal common law too much and in doing so fail to sufficiently consider federal interests that might be affected by the settlement context. The most important thing is to highlight the need to revisit rules premised on an outdated understanding of the controlling law. The next Part will explore the proper contours of the choice of law analysis as it relates to settlement enforcement proceedings in federal question cases.

II. PROTECTING THE FEDERAL INTEREST IN SETTLEMENTS WITH FEDERAL COMMON LAW RULES

Despite the varied approaches and conclusions of the circuit courts in choosing either state or federal law to control settlement enforcement proceedings, the controlling Supreme Court law is fairly clear. A few basic propositions are apparent. State law provides the rule of decision unless the case falls into one of a number of enclaves where federal common law is permitted. There are a number of such areas that have already been delineated where federal common law should apply, including international and interstate disputes, admiralty cases, and cases where the Unites States is a party.[182] If the underlying suit arises in one of these areas, the settlement

[181] *Lynch*, 279 F.3d at 489.

[182] *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981). Of course, if the settlement itself is of a case that fits into one of these categories, federal common law should control. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law.").

enforcement should be governed by federal common law.[183] Otherwise, settlement of federal cases does not fall within these identified areas; however, federal common law may still apply provided there is a significant conflict with a federal policy or interest created by using state law.[184] Additionally, the asserted federal interest is much more likely to satisfy the requirement if it is clearly identifiable and tethered to a federal statute.[185]

This Part will first describe three federal interests associated with settlements of federal claims that are sufficient to meet the standards under *Atherton*. First, the federal courts have a broad institutional interest in overseeing their affairs, particularly with respect to such a pervasive element of modern civil litigation. Second, there is a federal policy in promoting and achieving the settlement of federal lawsuits. Third, there may be statute-specific federal policies and interests affected by settlements. This Part will discuss each interest in turn and will consider the possibility of significant conflicts that state law could present. These potential conflicts highlight the situations in which, even if a blanket application of federal common law is not adopted, federal courts should be prepared to invoke federal common law to protect the federal policy of promoting settlements.

A. The Institutional Interests of the Federal Courts in Autonomy and Overseeing Their Own Affairs

The most significant federal interest implicated by the rules of decision that federal courts use to adjudicate settlement enforcement proceedings is the federal courts' institutional interest in overseeing procedures used to manage their dockets. Settlement conferences take place in federal district courts every day. Consequently, disputes about the resulting settlement

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[183] Where the underlying federal suit was, in fact, brought under one of those categories, some courts have used federal common law to adjudicate a settlement enforcement proceeding. *See, e.g.*, Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515, 1519 (11th Cir. 1986) (applying federal common law to a settlement agreement negotiated by the EEOC); Borne v. A & P Boat Rentals No. 4, Inc., 780 F.2d 1254, 1256 (5th Cir. 1986) (applying federal common law to determine "the validity and enforceability of agreements settling the rights of a seaman"); Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1516 (11th Cir. 1985) (applying federal common law to interpret an executive order conciliation agreement). Confusingly, however, federal courts do not always use federal common law in this context. *See, e.g.*, United States v. McCall, 235 F.3d 1211, 1213–15 (10th Cir. 2000) (using state law to adjudicate a settlement enforcement dispute where the underlying case was one where the United States was a party); Dillow v. Ashland, Inc., No. 97-6108, 1999 WL 685941, at *1 (6th Cir. Aug. 24, 1999) (using state substantive law to determine the validity of a settlement agreement where the underlying claim was one based on admiralty law). Ultimately, this disagreement, along with its origins and contours, falls outside the focus of this Article. The arguments in favor of federal common law in settlement disputes involving federal claims also apply to these types of cases. With these cases, however, the use of federal common law is supported even more so by the fact that the underlying case is one where courts have already recognized the appropriateness of federal common law.

[184] *See* Atherton v. FDIC, 519 U.S. 213, 223 (1997).

[185] *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994).

agreements are common. Allowing state law (with its inherent variations) to dictate the rules applying to settlements of federal claims comes at a great cost to judicial economy. Uniform federal common law standards would be much more consistent with these federal interests, allowing the federal courts to efficiently run their dockets free from the interference of state law.

The federal courts set their own procedural rules for how business is done within the walls of the courts. From start to finish, there are federal rules that govern the entire litigation process. Examples of this broad power include the establishment of the Federal Rules of Civil Procedure and the other national rules of procedure and evidence,[186] local court rules applicable to the entire federal district court docket,[187] and standing orders promulgated by a particular judge.[188] Furthermore, the Supreme Court has recognized that the federal judiciary has "inherent power[s], governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[189] The federal courts thus have the autonomy to manage the federal claims that they adjudicate up until those cases purportedly settle, at which point federal judges are left to determine whether to apply federal or state law to the settlement disputes before them. The issues governed by the Federal Rules of Civil Procedure include pleading, service of process, motion practice, discovery, trial, judgment, and postjudgment proceedings. Despite the important role settlement plays in the litigation process, there are no rules governing settlement. If there ever were a fitting place for federal common law, the set of rules governing the settlement of federal claims is it.

Additionally, the federal courts determine the binding effect of the judgments they enter.[190] This was the lesson learned from the Supreme Court in *Semtek*. In *Semtek*, the Court held that federal common law would determine the preclusive effect of a judgment of a federal court sitting in diversity.[191] The only explanation the Court offered was that the Court had

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[186] Although Congress does retain veto power over these Rules, they are drafted by officers of the federal courts, approved by the Judicial Conference of the United States, and promulgated by the Supreme Court under the Rules Enabling Act. 28 U.S.C. §§ 333, 2071–2077 (2006).

[187] *See id.* § 2071; 35A C.J.S. *Federal Civil Procedure* § 23 (2003).

[188] *See, e.g.*, Standing Order Setting Settlement Conference, Magistrate Judge Morton Denlow (Sept. 1, 2010), *available at* http://www.ilnd.uscourts.gov/home/JUDGES/DENLOW/MDSCORD.pdf.

[189] Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962) (internal quotation marks omitted). Another example of this authority is that each court controls the admission of attorneys to practice before them and governs their conduct, despite the fact that attorneys are licensed by individual states. *See, e.g.*, LOCAL RULES OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS LR83.10, at 40–41 (2012), *available at* http://www.ilnd.uscourts.gov/home/LocalRules.aspx?rtab=localrule.

[190] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001).

[191] *See id.*

long held that federal law controlled the preclusive effect of federal court judgments in federal question cases.[192]

The combination of the federal judiciary's powers over both its internal procedures and the binding effect of its decisions and judgments implies a broad institutional interest of the federal judiciary in controlling its own affairs. Just as the federal courts control how litigants must plead, discover, motion, and try their cases, the federal courts should control what steps are necessary to create a binding settlement. Because settlements are crucial to the everyday affairs of federal courts and greatly impact their operation, the procedural rules governing how litigants reach settlements are of great importance to those courts. One would be hard-pressed to identify an area that is more central to the management of the federal judiciary's "own affairs" relating to the achievement of "the orderly and expeditious disposition of cases"[193] than the rules pertaining to settlements. Furthermore, just as federal common law determines the preclusive effect of federal judgments, federal common law should also have the final say in deciding the effect of settlements of federal claims that take place within the federal court system.[194] In other words, federal common law should be used in settlement enforcement proceedings arising out of cases brought under the court's federal question jurisdiction.[195]

The institutional interest of the federal courts in controlling their own affairs is supported by the Supreme Court's decision in *Dice v. Akron, Canton & Youngstown Railroad Co.*[196] In *Dice*, the Supreme Court held that federal common law controlled the validity of a waiver of claims under FELA.[197] But the language and reasoning of *Dice* was much broader than that particular statute. The primary concerns of the *Dice* Court were to protect the erosion of federal rights by the operation of state law and to

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[192] *See id.*

[193] *Link*, 370 U.S. at 630–31.

[194] It is worth noting that Federal Rule of Evidence 501 specifies that federal common law governs claims of evidentiary privilege in federal question cases, but that state law governs evidentiary privilege in diversity cases. FED. R. EVID. 501.

[195] The federal question settlement-dispute context is actually more amenable to federal common law than the issue in *Semtek*. In the settlement area, the substantive law of the underlying suit is federal, while in *Semtek* the underlying substantive law involved state law statutes of limitation. *See Semtek*, 531 U.S. at 499; Tidmarsh & Murray, *supra* note 116, at 613. The fact that *Semtek* involved claims brought under state law may even suggest that federal common law would be justified in settlement enforcement disputes where the underlying federal jurisdiction is based on diversity. In diversity cases, the underlying substantive law would be premised on state law, just like in *Semtek*. But in *Semtek*, this aspect did not prevent the Court from using federal common law to address the procedures in federal courts. Be it the effect of a dismissal or the effect of conduct with respect to settlement, both arguably involve procedural concerns. This argument, however, extends past the scope of this Article and is an area ripe for analysis elsewhere.

[196] 342 U.S. 359, 361 (1952); *see supra* notes 28–33 and accompanying text.

[197] 342 U.S. at 361.

effectuate the purposes of the statute.[198] Furthermore, the Court emphasized the importance of releases to the administration of FELA.[199] This latter point is related to the institutional interests of federal courts just discussed. The federal courts are called upon to determine the validity of these releases as part of their administration of cases brought under FELA.[200] The Court was pointing out that state law could not come into federal courts and disrupt the federal courts' administration of the claims before it.

This observation about the administrative aspect of waivers is analogous to the settlement enforcement proceeding context. For one thing, a settlement is functionally very similar to a waiver or release. In fact, settlements often include general releases of other related claims. They are both means of resolving litigation, one before the case is even brought and one after the initiation of the claim. But if waivers are important to the administration of a statute, then settlements are even more important given the prevalence of settlement as a means of resolving claims under a particular statute. Given all of the similarities between waivers and settlements, there is a compelling argument that the institutional interests of federal courts in controlling their dockets supports the use of federal common law not only with waivers, but also settlements.

Despite being the most analogous Supreme Court case to the settlement context and containing a broad allowance for federal common law when the incidents of federal rights are involved, *Dice* has had limited influence over the past fifty years. The Supreme Court has rarely cited the case; when it has, the case is cited for procedural issues specific to FELA that are not relevant to settlements.[201] Nevertheless, the case remains on the books with strong language in favor of federal common law should the Supreme Court someday face this choice of law issue.[202]

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[198] *See id.*

[199] *Id.*

[200] *Id.*

[201] *See, e.g.*, Hogue v. S. Ry. Co., 390 U.S. 516, 517 (1968) (per curiam) (holding that federal rather than state law controls the issue of whether under FELA a plaintiff must tender back consideration received for a release when alleging a mistake of act regarding that release in a lawsuit).

[202] Some of the more expansive statements from *Dice* clearly are no longer valid given the modern shift against federal common law. For one, *Dice* takes the position that because states could undermine the federal right to sue created by FELA, federal law controls the validity of waivers. *See Dice*, 342 U.S. at 361. But under the modern understanding of the role of federal common law, the abstract possibility that a federal policy or interest could be undermined by state rule is not enough. A specific state rule that presents a significant conflict is required before federal common law is justified. *See* Atherton v. FDIC, 519 U.S. 213, 223 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 88 (1994). Additionally, the *Dice* Court invoked the need for "uniform application throughout the country" as a justification for the use of federal common law, but did not actually analyze the issue. *See Dice*, 342 U.S. at 361. Under *Atherton* and *O'Melveny*, however, the need for uniformity has to be affirmatively established rather than assumed.

That being said, we have already seen that the settlement enforcement setting with the federal interests it implicates can meet these modern standards. Since *Dice* remains good law, should this issue

The Fourth Circuit has recognized the institutional interest of the federal courts in controlling settlements, though *Dice* has not been broadly extended to settlement enforcement proceedings. Specifically, the court in *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.* considered whether federal or state law would control the enforceability of a settlement agreement of patent infringement claims.[203] The court cited *Dice*[204] but declined to rely on it, instead resolving the choice of law issue on the premise that "federal procedural interests" in determining whether and when settlement has been achieved in federal litigation were sufficient to justify the creation of a federal rule on the issue.[205] While the Fourth Circuit has not relied on the *Gamewell* case in its recent settlement enforcement cases,[206] a return to respecting the institutional interests of federal courts would allow the courts the freedom to efficiently manage their affairs.

But it is not enough to say that there is a federal interest in the federal courts managing themselves. To justify the use of federal common law, there must be a significant conflict with that interest created by using state law.[207] With respect to the federal interest in federal court independence, however, the conflict is quite apparent. Requiring the use of state law in settlement enforcement proceedings creates a fundamental conflict because to do so would amount to a substantial interference with the federal courts' autonomy by requiring federal courts to apply the law of fifty different states. It would be a significant conflict with the nature of the federal court system.

Furthermore, mandating that the federal courts administer settlements pursuant to the vagaries and inconsistencies of the laws of different states creates unnecessary inefficiency. The inefficiencies extend not only to the judges tasked with presiding over a wide variety of settlements; individual litigants are also negatively affected. Settlements are an increasingly important aspect of the vindication of federal rights. Since so much of federal litigation revolves around the process of negotiating a settlement, the rules governing those settlements will shape how litigants interact with each other and how courts interact with the litigants. For these rules to vary from courthouse to courthouse, and even from case to case before a single

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ever reach the Supreme Court, the Court would have an existing opinion permitting federal common law in a situation highly analogous to settlement.

[203] 715 F.2d 112, 113–14 (4th Cir. 1983).

[204] *Id.* at 114. While the court cited *Dice*, it did not rely on *Dice* or determine whether *Dice* controlled; rather, the *Gamewell* court found a separate basis for using federal law.

[205] *Id.* at 115–16.

[206] *See* Moore v. Beaufort Cnty., N.C., 936 F.2d 159, 162 (4th Cir. 1991); Piver v. Pender Cnty. Bd. of Educ., 835 F.2d 1076, 1083 (4th Cir. 1987). *But see* Silicon Image, Inc. v. Genesis Microchip, Inc., 271 F. Supp. 2d 840, 848 (E.D. Va. 2003) (holding that federal law controlled a settlement enforcement proceeding where the underlying claim was a patent infringement action and citing *Gamewell* as controlling authority).

[207] *See Atherton*, 519 U.S. at 218–19.

judge,[208] leads to unnecessary confusion and inconsistency. The independent and self-regulating nature of the federal courts justifies the use of federal common law to avoid these ill effects. These problems go to the heart of the federal judiciary and thus the federal government. In fact, since this conflict with state law directly affects the basic operation of the courts, its significance is even more pronounced than the tort liability of federal contractors, a potential conflict with federal interests that the Supreme Court deemed significant enough to support the creation of federal common law.[209] The importance of the uniform rules is recognized in the Federal Rules of Civil Procedure, which establish uniform federal rules for pleadings, discovery, motions, and trial rather than looking to state law.[210]

In light of these basic conflicts with using state law, the most effective remedy would be to implement a uniform federal common law governing settlements. It is hard to imagine that a federal judge overseeing a federal lawsuit would have to engage in a choice of law analysis and then apply different (and inconsistent) state laws every time he or she was either assisting in the settling of cases or adjudicating a dispute regarding those settlements. Since the use of state law is antithetical to the federal interest that the federal courts have in controlling their own courtrooms and dockets, the only viable solution is for courts to use federal common law, for Congress to adopt a statute, or to add a section on settlement to the Federal Rules of Civil Procedure.[211]

It is important to note that this argument for uniform federal rules is not a general appeal to uniformity for uniformity's sake—"that most generic (and lightly invoked) of alleged federal interests."[212] Federal courts critically assess claims for the need of a uniform federal rule[213] and "reject generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect" the federal interest.[214] Here, the

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[208] A single federal judge with a diverse docket could easily have diversity cases in front of it governed by the law of different states where, applying state law to settlement enforcement proceedings, different rules would apply. *Compare* TEX. R. CIV. P. 11 ("Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."), *with* Lynch, Inc. v. SamataMason Inc., 279 F.3d 487, 490 (7th Cir. 2002) (explaining how "[t]he enforceability of oral settlements is . . . the general rule, not something peculiar to Illinois though it has been changed by statute or court rule in some states" (citations omitted)).

[209] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504–06 (1988).

[210] The only area in which the Federal Rules of Civil Procedure defer to state procedure is in the execution of judgments. FED. R. CIV. P. 69(a).

[211] The purpose of this Article is to propose several solutions to the problem currently confronting the federal courts. Whether an amendment to the Federal Rules of Civil Procedure would be possible under 28 U.S.C. § 2072(b) (2006), which states that "rules shall not abridge, enlarge or modify any substantive right," is beyond the scope of this Article.

[212] O'Melveny & Myers v. FDIC, 512 U.S. 79, 88 (1994).

[213] *See* Atherton v. FDIC, 519 U.S. 213, 219–20 (1997).

[214] United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979).

uniform rule serves the institutional interests of the federal courts; the interest at stake is the institutional interest in the autonomy of federal courts. Uniformity is simply the means to best protect this interest and should not be confused with the interest itself.

Nor can one make the argument that the federal courts have thrived despite having to use state law for disputes concerning the settlement of federal claims. This was the argument that the Supreme Court used to reject the claim of a significant conflict in *Atherton*: the banking system has thrived despite varying rules pertaining to corporate governance.[215] But in the settlement enforcement context, the conflict with the institutional interests of the federal courts is not simply a matter of efficiency. The federal courts are accorded independence in our government to handle their own procedures and dockets.[216] Thus, whether or not the federal courts are "thriving" (however one might assess such a concept) is irrelevant—the conflict exists without reference to the functioning of the courts. In *Atherton*, the Court used the success of the banking industry to defeat claims for the need for uniformity in laws governing the liability of bank officers.[217] But in the settlement context this argument is not simply for uniformity for uniformity's sake, as discussed in the preceding paragraph. To be sure, there is an efficiency facet to the institutional interests of the federal courts. It is hard to argue that the federal courts would not greatly benefit from simplification of the settlement process. Any person familiar with the federal court system, even on a superficial level, is aware of the crowded dockets that federal judges face. Giving judges a uniform federal common law of settlements to deal with the settlement of all federal law claims would help relieve the burden on the federal court system. That being said, it is the independence of the courts in overseeing their own affairs that is the primary basis for instituting federal common law, with the gains in efficiency being an ancillary (but significant) benefit.[218]

B. Protecting the Federal Interest in Encouraging Settlements on a Rule-by-Rule Basis

The second federal interest that supports the use of federal common law in settlement enforcement proceedings is the federal policy of promoting settlement of the cases before them. The Alternative Dispute Resolution statute embodies a very strong federal interest in the process of settlement and in the promotion of settlement as a means of resolving

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[215] *Atherton*, 519 U.S. at 220.

[216] *See* U.S. CONST. art. III (establishing that the judiciary is a separate and co-equal branch of government); *see also* §§ 2071–2077 (establishing the rulemaking authority of the Supreme Court). These statutes reflect that courts should control what happens before them, with some congressional oversight.

[217] *Atherton*, 519 U.S. at 220.

[218] *See, e.g.*, §§ 2071–2077.

litigation.[219] That statute requires that all federal district courts "devise and implement [their] own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in [their] district[s]."[220] Courts that had such programs in effect at the time the statute was enacted were to assess the effectiveness of the programs and improve them to be consistent with the statute.[221]

In addition, it is well recognized among the federal courts that there is a strong policy in favor of settlements.[222] Settlements are encouraged because of the benefits realized in both judicial economy through the clearing of increasingly crowded dockets and in the expense saved by litigants.[223] For this reason, a federal court can direct parties in civil litigation to attend a settlement conference[224] and sanction attorneys or parties for failure to obey such an order.[225] Furthermore, Federal Rule of Evidence 408, which holds that offers to settle and statements made during settlement negotiations are inadmissible in court, was created to promote the public policy in favor of resolving disputes.[226]

There are a number of significant conflicts with the federal interest in promoting settlements that potentially arise if state law is used in enforcing settlements. Unlike the institutional interest discussed above, however, the interest in promoting settlement cannot support uniform federal rules for every settlement issue that might arise in an enforcement proceeding. Instead, state law conflicts with the federal interest in settlements on a rule-by-rule basis. The next subsection will discuss a number of important areas where state variation on important contract principles arguably encumbers the settlement process in the federal courts.

1. Potential Conflicts Between State Contract Law and the Federal Policy of Promoting Settlement.—The well-recognized interest in

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[219] *See id.* §§ 651–658.

[220] *Id.* § 651(b).

[221] *Id.* § 651(c).

[222] *See, e.g.*, GET, LLC v. City of Blackwell, 407 F. App'x 307, 318 (10th Cir. 2011); Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1369 (Fed. Cir. 2001) (noting the "compelling public interest and policy in upholding and enforcing settlement agreements" and thereby "fostering judicial economy" (quoting Hemstreet v. Spiegel, Inc., 851 F.2d 348, 350 (Fed. Cir. 1988))); Wilcher v. City of Wilmington, 139 F.3d 366, 372 (3d Cir. 1998) ("As a general rule, we encourage attempts to settle disagreements outside the litigative context."); Stewart v. M.D.F., Inc., 83 F.3d 247, 252 (8th Cir. 1996).

[223] *See, e.g.*, *Stewart*, 83 F.3d at 252 ("The judicial policy favoring settlement rests on the opportunity to conserve judicial resources . . . ." (citation omitted)); Ahern v. Cent. Pac. Freight Lines, 846 F.2d 47, 48 (9th Cir. 1988) ("The Ninth Circuit is firmly 'committed to the rule that the law favors and encourages compromise settlements. [T]here is an overriding public interest in settling and quieting litigation.'" (alteration in original) (quoting United States v. McInnes, 556 F 2d 436, 441 (9th Cir. 1977)) (internal quotation marks omitted)).

[224] FED. R. CIV. P. 16(a)(5).

[225] *See, e.g.*, Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1334–35 (5th Cir. 1996).

[226] *See* FED. R. EVID. 408 advisory committee's notes.

promoting settlement of federal claims requires protection on a rule-by-rule basis. State contract law principles potentially restrict settlements and thus conflict with that policy. This necessitates that federal courts remain vigilant when asked to enforce settlement agreements, ensuring that whatever state laws they would apply to the settlements do not actually present such a conflict. Where they do, the court should apply a federal common law rule that aligns with the federal policy favoring settlements.

Several variations in state law and conflicts between state and federal contract law will readily affect settlement enforcement disputes. One example is the validity of oral settlements. Several states deny the validity of oral settlements,[227] while most states[228] and federal common law[229] hold that oral settlements are enforceable. It is hard to imagine an issue more basic to the process of settlement and the agreements resulting from that process than whether agreements must be in writing. The federal courts should determine which of these positions is most consistent with the federal policy of promoting settlements or a federal rule of civil procedure should be adopted to embrace one rule.

Authority to settle is another rule, central to settlements, on which jurisdictions differ. The states vary widely on issues of when an attorney has authority to settle and the scope of that authority, including: (1) creating a rebuttable presumption that an attorney has express authority to settle,[230]

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[227] *See, e.g.*, TEX. R. CIV. P. 11 ("Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."); Sullivan v. Sullivan, 671 So. 2d 315, 317–18 (La. 1996) (holding that under Louisiana law, in order for a settlement to be valid, it must be recited in open court or reduced to writing); Melucci v. Berthod, 687 A.2d 878, 879 (R.I. 1997) (per curiam) (same, under Rhode Island law).

[228] *See, e.g.*, Dillard v. Starcon Int'l, Inc., 483 F.3d 502, 507 (7th Cir. 2007) (Illinois law); Yuen v. Bank of China, 151 F. App'x 106, 107 (3d Cir. 2005) (New Jersey law); *see also* Lynch, Inc. v. SamataMason Inc., 279 F.3d 487, 490 (7th Cir. 2002) ("The enforceability of oral settlements is . . . the general rule, not something peculiar to Illinois, though it has been changed by statute or court rule in some states." (citations omitted)).

[229] *See* Quint v. A.E. Staley Mfg. Co., 246 F.3d 11, 14–15 (1st Cir. 2001).

[230] *See, e.g.*, Amin v. Merit Sys. Prot. Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991) (applying federal common law and concluding that "[a]n attorney retained for litigation purposes is presumed to possess express authority to enter into a settlement agreement on behalf of the client, and the client bears the burden of rebutting this presumption with affirmative proof that the attorney lacked settlement authority"); Villanueva v. CNA Ins. Cos., 868 F.2d 684, 686 (5th Cir. 1989) ("In Louisiana, attorneys are presumed to have authority to negotiate settlement agreements for their clients. Absent evidence that the client's consent was not clear and express, the agreement is binding." (citation omitted)); Clark v. City of Zebulon, 156 F.R.D. 684, 692 (N.D. Ga. 1993) ("It is clear that under Georgia law, an attorney has apparent authority to enter into settlement agreements on behalf of his client. Therefore, in the absence of knowledge of express restrictions on an attorney's authority, other settling parties may enforce settlement agreements made by an attorney as against his client." (citation omitted)).

(2) requiring express authority,[231] (3) requiring authority to settle to be conferred in writing,[232] (4) allowing a client to give his lawyer apparent authority through communication with opposing counsel,[233] and (5) requiring clear and convincing evidence of express, actual authority.[234]

Much like whether a party can make a binding oral settlement, knowing who has the authority to settle a case and the scope of that authority are fundamental issues to the law of settlements. On one extreme is the rule that attorneys are presumed to have the authority to settle a case.[235] On the opposite extreme is the Hawaii rule that requires express written consent before an attorney can settle a case.[236] A federal court could conclude that one of the rules that fall somewhere in between these two extremes does not rise to the level of a significant conflict with the federal policy in favor of settlement. However, the Hawaii rule and other more extreme rules may create a conflict that rises to that level. In the same way that courts use a uniform rule for pleading or discovery, the issues of authority to settle and whether settlement must be in writing are fundamental and require a uniform rule.

A third example of an issue that can arise in settlement enforcements is the standard of proof required to rescind an agreement based on fraud or mutual mistake. Illinois law, for example, requires clear and convincing evidence to rescind a settlement on the basis of fraud or mutual mistake.[237] Not all states, however, require that the evidence be clear and convincing in order to rescind.[238] A state rule that more readily justifies rescission of a settlement by reason of mutual mistake may conflict with the federal policy in favor of settlement of federal claims. While this scenario may arise less

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[231] *See, e.g.*, Jago v. Special Needs Home Health Care, 190 S.W.3d 352, 353 (Ky. Ct. App. 2006) ("The law is clear that express client authority must be had to enter into a settlement agreement, and apparent authority is insufficient.").

[232] *See* Cook v. Surety Life Ins., Co., 903 P.2d 708, 714 (Haw. Ct. App. 1995) ("[N]o practitioner shall have power to compromise, arbitrate, or settle such matters confided to the practitioner, unless upon special authority in writing from the practitioner's client." (emphasis omitted) (quoting HAW. REV. STAT. ANN. § 605-7 (LexisNexis 1985))).

[233] *See, e.g.*, Farris v. JC Penney Co., 176 F.3d 706, 712 (3d Cir. 1999) (applying Pennsylvania law and concluding that apparent authority can be created by a client's communication with opposing counsel).

[234] *See, e.g.*, Linardos v. Lilley, 590 So. 2d 1064, 1064 (Fla. Dist. Ct. App. 1991) (per curiam) (requiring a "clear and unequivocal grant of authority to appellant's attorney to settle this case" as a precondition to enforcing purported settlement (internal quotation mark omitted)).

[235] *See supra* text accompanying note 230.

[236] *See supra* text accompanying note 232.

[237] *See* Dunlap v. Chi. Osteopathic Hosp., No. 92-3813, 1995 WL 94876, at *1 (7th Cir. Mar. 7, 1995).

[238] *See, e.g.*, Farm Bureau Mut. Ins. Co. v. Buckallew, 685 N.W.2d 675, 681 (Mich. Ct. App. 2004) (applying Michigan contract law to a claim for rescission of a settlement agreement and analyzing the issue without reference to a clear and convincing standard, but citing cases that require "satisfactory evidence," such as *Jackson v. Fitzgerald*, 67 N.W.2d 471, 473 (Mich. 1954)).

frequently than the previous two, it shows how even small and generally unanticipated legal rules that settlements can implicate can negatively affect the federal policy in favor of settlement.

This discussion only examines cases where rules currently in place may conflict. But federal courts are not limited to picking between an existing state contract law and the federal common law of contracts as it currently exists. Provided a significant conflict exists,[239] and because federal policy is at stake, a federal court could create entirely new federal common law principles that are even more attentive to the federal interest, or a federal rule could be adopted which would eliminate potential inconsistencies among courts attempting to create the federal common law.

2. What Is a Significant Conflict?.—While settlement rules can clearly conflict with the federal policy of promoting settlements, it is less clear when a conflict between a federal policy or interest and the use of a state rule of decision reaches the level of significance necessary to justify the use of federal common law. Based on how courts have analyzed the issue, there is no hard and fast answer. The analysis is highly specific to the federal interest at stake and the way the challenged state rule affects that interest. In many cases, there simply is a conflict or there is not, and there is not a principle that can be generalized to future cases.[240] Nevertheless, a couple of principles can be gleaned from some of the cases addressing significant conflict claims. If the federal interest at stake is adequately protected through other legal rules, the court may find the displacement of state law unnecessary.[241] The court may also find a federal common law rule unnecessary where such a rule could not protect the federal interest any more than state law rules can.[242]

One example of a situation in which federal common law was not required to protect identifiable federal interests is seen in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, where a museum brought an action for a declaratory judgment that the defendant's claims to a piece of art in its collection were time-barred.[243] The defendant was claiming a right to the artwork because the Nazi German regime forced her family to sell it.[244] The significant conflict analysis revolved around the defendant's argument that the court should displace the state law statute of limitations that would bar the defendant's claims to the art with a federal common law laches

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[239] *See* Ciaramella v. Reader's Digest Ass'n, 131 F.3d 320, 322–23 (2d Cir. 1997).

[240] *See, e.g.*, Cincom Sys., Inc. v. Novelis Corp., 581 F.3d 431, 436 (6th Cir. 2009) (identifying a direct conflict between state and federal law regarding the authorization of the transfer of a copyright license, but not analyzing "significance" in a less direct conflict).

[241] *See* Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 10–11 (1st Cir. 2010).

[242] *See, e.g.*, Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC, 632 F.3d 1056, 1062–63 (9th Cir. 2011).

[243] 623 F.3d at 3.

[244] *Id.* at 2.

defense.[245] The defendant argued that there was a compelling federal interest in ensuring charitable organizations such as the Museum provide the public with the benefits for which their tax exemptions were granted.[246] The defendant argued that museums such as the plaintiff had failed to investigate the artwork they acquired and thus had undermined the basis for their tax exemption by facilitating commerce in stolen artwork.[247] As a result, the defendant argued, the federal courts are justified in using federal common law in lawsuits seeking to reclaim Nazi-confiscated artworks.

The First Circuit rejected the defendant's argument that there was a significant conflict with federal policies concerning tax exempt organizations that required the use of federal common law in that instance. The court reasoned that there were many other means through which tax-exempt organizations were made accountable to the public interest. For one, they are subject to state law, such as employment law and fiduciary duties, the latter of which would protect against accusations such as the ones the defendant made.[248] Additionally, an organization may lose its tax-exempt status should it shirk its duties and be subject to criminal and civil penalties for various other abuses.[249] The court concluded that "[t]he federal interest in ensuring that tax-exempt organizations 'demonstrably serve and be in harmony with the public interest' is adequately protected through these mechanisms and others."[250] As a result, no further federal common law rules were necessary to protect the federal interest in tax exempt organizations.[251] Thus, there was a recognized federal interest to protect, but the court determined that alternate protection was in place via state law and other mechanisms.

The argument that there is not a significant conflict because the federal interest at issue is adequately protected in other ways does not apply to the settlement enforcement context. There is no alternative scheme that protects the federal interest in encouraging settlements. The real threat against the settlement of cases comes not from the actions of individuals (putting aside obstinate litigants), but from rules and procedures that undermine settlement. Nothing other than contract rules related to settlement agreements are capable of upholding the federal interest in promoting settlements because these are the rules that determine whether there is a settlement. Nor can one say that state contract law will adequately provide an alternate protective scheme to the interest in settlements. For all of the contract rules on which the states vary, one rule must, as a matter of federal

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[245] *Id.* at 6.
[246] *Id.* at 10.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 11.
[250] *Id.* (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983)).
[251] *Id.*

policy, best support the settlement of federal claims. For example, regarding the validity of oral settlements, federal courts should embrace the rule that they find to be protective of the interest in settling federal claims. Leaving state law to determine the validity of settlements of federal claims simply leaves the law in its current problematic state. Therefore, the alternate protection basis of *Museum of Fine Arts, Boston*, which meant that federal common law was not required to protect the particular federal interest, is inapplicable to the significant conflict analysis in the settlement context.

In settlement enforcement proceedings, there may well be certain contract principles that will not have an impact on the federal interest in promoting settlements one way or the other. In such circumstances, the use of federal common law as the rule of decision would not be justified. An example of this would be where a court was asked to interpret a specific term in the settlement agreement. Regardless of what the court takes that term to mean, it will not cause there to be more or fewer settlements. For example, courts vary on how they interpret provisions for the payment of costs when they are included in settlement agreements.[252] But regardless of how a settlement dispute about such a term would be resolved by a court, it would not promote or hinder the federal policy in favor of settlements. On the other hand, the issues discussed above, particularly in the area of contract formation, such as the authority to settle and the validity of oral settlement, certainly will have the possibility of hindering the federal policy in favor of settlements. Therefore, rules pertaining to these issues are capable of creating a significant conflict with that policy and are ripe for federal common law rules.

C. Federal Common Law Control of Settlements on a Statute-by-Statute Analysis

Even if the arguments for across-the-board use of federal law failed,[253] there would still be arguments to be made for each individual federal statute based on the policies and interests implicated by that specific statute. This was the approach taken by the Second Circuit in *Ciaramella*.[254] When the defendant–appellee urged the court to fashion a federal common law rule finding a binding oral settlement whenever the parties' attorneys agreed on all material terms, the court's significant conflict analysis focused on the specific underlying statutes.[255] The court did not address any broader federal interest in settlements of federal claims in general, whether premised on uniformity or simply the policy of encouraging settlements. The court looked at both the ADA and ERISA, finding in the ADA an explicit policy

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[252] *See generally* Wade R. Habeeb, *Construction of Provision, in Compromise and Settlement Agreement, for Payment of Costs as Part of Settlement*, 71 A.L.R.3d 909 (1976).

[253] *See supra* Part II.A.

[254] Ciaramella v. Reader's Digest Ass'n, 131 F.3d 320, 323 (2d Cir. 1997).

[255] *See id.* at 322–23.

in favor of voluntary settlement.[256] The defendant–appellee's argument failed where the state law and existing federal common law rule[257] did not actually conflict with this federal policy.[258]

As *Ciaramella* demonstrates, the analysis under this statute-by-statute approach would vary depending on the specific source of the federal lawsuit. Arguments would be based on the specific language and legislative histories of the individual statute at stake in that case and would therefore be hard to anticipate. One form this argument might take mirrors that in *Ciaramella*, that the specific statute—the ADA in that case—encourages voluntary settlements.[259] Another federal statute with an identifiable policy in favor of settlement is Title VII.[260]

There may also be other statute-specific policies that would be threatened by the use of state law to interpret settlement agreements. For any given federal statute, there could potentially be some unique policy or interest advanced by that particular statute that requires that federal law control all settlements under that statute. To hold otherwise would expose those policies and interests to possible erosion by the states.[261] Such a rationale has been recognized by at least one court as possibly applying to any federal remedial statute created to rectify historical inequalities in bargaining power, such as racial minorities under § 1983 or employees subject to discrimination under Title VII.[262] If federal common law found valid settlements in situations where state contract law would not (in the context of oral settlement agreements, for example), such a conflict could result in a party being adversely affected by the use of state law in settlement of federal question claims. A federal court would be justified in creating a federal common law rule to supplant any state law rule that served to upset the protections or remedies envisioned by a federal statute.

Even if the Supreme Court were to conclude that the institutional interests of the federal courts do not justify the blanket use of federal

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[256] *Id.* at 323.

[257] The court declined to choose which one controlled in that case because there was no material difference between the two rules. *Id.*

[258] *Id.*

[259] *Id.*

[260] *See* Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981) (9–0 decision) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.").

[261] *See* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952). As discussed *supra* notes 28–33 and accompanying text, *Dice* held that federal rights protected by FELA could be eroded if states were allowed to determine available defenses and also noted the importance of uniform application of a federal statute. *Dice*, 342 U.S. at 361–62.

[262] *See* Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112, 114–15 (4th Cir. 1983). The *Gamewell* court implicitly equates presuit waivers of federal claims with settlements of federal claims in its analysis. The Supreme Court case it bases its argument on is *Dice*, 342 U.S. at 361. *See supra* notes 28–33 and accompanying text.

common law in settlement enforcement disputes where the underlying claim arose under federal law, federal interests demand consideration in settlement agreements. There may be statute-specific policies that require applying federal common law. A federal court must weigh these interests, and the various threats to them presented by state law, when deciding whether a federal common law rule is necessary.

CONCLUSION

Under current Supreme Court doctrine, federal common law should only displace state law where there is a significant conflict between the use of state law and a federal policy or interest. The federal courts have a clearly identifiable institutional interest in managing their own procedures and dockets. This interest can be deduced from the federal courts' broad powers to set the procedures governing all aspects of litigation as it unfolds both within and outside the courtroom. Supreme Court precedent permitting the use of federal common law on issues related to in-court procedures further supports this federal interest. Any time a settlement stemming from a federal claim is before a federal judge, that judge should not have to parse through different legal rules or choice of law principles. A uniform federal common law of settlements in this situation should be adopted.

Additionally, there is a clearly identifiable federal interest in promoting settlements widely recognized by the federal courts and embodied by the federal Alternative Dispute Resolution statute. The undeniable federal policy in favor of settlement demands that federal courts conduct a case-by-case inquiry each time a settlement enforcement dispute is before them to ensure that the state rule at issue does not significantly conflict with that federal policy. This issue will likely have a significant conflict, particularly in the areas of oral settlements and authority to settle. Federal courts should not permit state contract rules that place restrictions on settlements to undermine the interest in the resolution of federal claims. Additionally, there may be statute-specific federal interests that require the use of federal law in settlements of claims brought under those statutes.

Recognition by federal courts of the various federal interests at stake in settlement enforcement proceedings will lead to much needed stability in this ever-important area of law. Given the prevalence of settlements in our civil litigation system, the rules that govern the disputes that inevitably arise from the settlement process are of paramount importance. Federal courts confronted with settlement enforcement disputes should apply federal common law. An efficient and direct route to the necessary uniformity would be to amend the Federal Rules of Civil Procedure to add a section on settlement, though the Article acknowledges potential challenges for this possibility.[263] In the meantime, practitioners can minimize confusion by

[263] *See supra* note 18.

including choice of law provisions in their settlement agreements. It is time that federal courts realize that the choice of law decisions that they presently rely on do not accurately reflect current Supreme Court doctrine. Once they pass this hurdle, they can ensure that the federal interests impacted by settlements of federal claims are adequately protected by adopting and implementing a federal common law of settlements for all federal question cases.