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Erasing The Law: The Implications Of Settlements Conditioned Upon Vacatur Or Reversal Of Judgments

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ERASING THE LAW: THE IMPLICATIONS OF SETTLEMENTS CONDITIONED UPON VACATUR OR REVERSAL OF JUDGMENTS

I. INTRODUCTION

Settlements conditioned upon vacatur of the initial trial court judgment and occurring while a case is pending appeal have become more prevalent in recent years.[1] The United States courts of appeals have developed three different standards to apply in deciding whether to grant such motions for vacatur.[2] Furthermore, the Supreme Court of the United States recently granted certiorari to a case in which the Court will address partially whether the federal courts of appeals should vacate district court judgments when parties enter into postjudgment settlements.[3] The controversy over the correct

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1. *See* National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 769 (9th Cir. 1989) (holding that insurer was not entitled to vacatur of judgment pursuant to settlement because of presence of third party interests and potential preclusive effect of judgment); *In re* Memorial Hosp., Inc., 862 F.2d 1299, 1300 (7th Cir. 1988) (stating that court will deny joint motions for vacatur after litigants have settled their dispute while appeal is pending); Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (holding that district court abused its discretion in denying parties' joint motion to vacate trial judgment); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 632-38 (1991) (discussing effects on settlement process of standard that allows posttrial vacatur of judgments at will of litigants); Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REVIEW 233, 235 (1989) (asserting that courts should employ presumption that allows parties to include vacatur as condition of settlement of cases pending appeal); Stuart N. Rappaport, Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731, 732 (1987) (arguing that courts should not grant preclusive effect to judgments vacated pursuant to settlement agreement); William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860, 874-78 (1987) (arguing that courts should prohibit vacatur when vacatur is condition of settlement in cases giving rise to possibility of defensive issue preclusion, but that vacatur should be at courts' discretion in cases that could form basis for offensive preclusion).

2. *See National Union Fire Ins. Co.*, 891 F.2d at 765-69 (holding district court should undertake separate determination for each motion for vacatur pursuant to postjudgment settlement weighing values of finality of judgment and right to relitigation of unreviewed issues); *Memorial Hosp.*, 862 F.2d at 1300 (stating that Ninth Circuit will always deny joint motions for vacatur after litigants have settled their dispute while appeal is pending); *Nestle Co.*, 756 F.2d at 283-84 (stating that Second Circuit will routinely grant joint motions for vacatur); *see also infra* notes 20-61 and accompanying text (discussing federal circuit cases and presenting three different standards).

3. 61 U.S.L.W. 3557 (U.S. Feb. 23, 1993); *see* U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728, 731 (Fed. Cir. 1992) (holding that vacatur of trial judgment is appropriate when postjudgment settlement moots action pending appeal, and rejecting argument that judgment's issue preclusive use should prevent vacatur), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993); *infra* notes 62-84 and accompanying text (discussing *Izumi* case); *infra* notes 181-88 and accompanying text (explaining that *Izumi* only presents issue of whether courts should grant motions for vacatur of judgments pursuant to postjudgment settlement when trial judgment has issue preclusive effects).

standard to apply largely results from tension concerning the proper role of the judiciary—deciding individual cases or making law.[4] In attempting to deal with this issue, none of the federal courts has recognized all of the factors that courts should consider when faced with settlements conditioned upon vacatur of trial judgments.[5] These considerations include the precedential value of judgments, the issue preclusive effect of judgments, and the litigants' motives for making vacatur of trial judgments a condition to settlement.[6]

Parties seek vacatur of judgments as a condition to settlements for several reasons: to manipulate precedent in specific substantive areas of the law, to avoid the issue preclusive effect of a judgment, and to minimize adverse publicity from a trial.[7] As evidence mounts that parties are using settlements conditioned upon vacatur to shape precedent, litigants' attempts to vacate judgments while an appeal is pending become more disturbing.[8] One area in which this problem predominates is insurance litigation. Commentators express suspicions that insurance companies use motions for vacatur to prevent decisions adverse to their interests from influencing the substantive law that governs the coverage of insurance policies.[9] Adding to these concerns is a recent Supreme Court of California decision that gave litigants, absent a showing of extraordinary circumstances, the right to have judgments reversed, rather than merely vacated, pursuant to a postjudgment settlement agreement.[10]

In light of these developments, the legal profession should examine the full ramifications of granting motions for vacatur or reversal as a condition to settlement. A resolution of this issue requires a review of the three

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4. *See infra* notes 199-269 and accompanying text (discussing arguments for allowing vacatur at will of litigants and arguments asserting that cases have value to public).

5. *See* discussion *infra* part II (discussing standards that federal courts of appeals have applied to motions for vacatur pursuant to postjudgement settlement).

6. *See infra* notes 286-95 and accompanying text (discussing factors courts should consider when determining whether to grant motion for vacatur or reversal when granting of such motion is condition of litigants' settlement).

7. *See* discussion *infra* part IV (discussing three primary motivations for making vacatur or reversal condition to settlement of claim pending appellate review).

8. *See infra* notes 124-56 and accompanying text (discussing recent evidence of attempts to manipulate precedent through motions for vacatur of judgments).

9. *See* Stacy Gordon, *Vanishing Precedents: Policyholders Can Get Better Deal—If Rulings are Erased*, BUS. INS., June 15, 1992, at 1 (discussing growing prevalence of courts' expunging insurance coverage decisions pursuant to settlements between insurers and policyholders); Roger Parloff, *Rigging the Common Law*, AM. LAW., Mar. 1992, at 74 (discussing instances in which institutional insurance litigants have used various procedural mechanisms, including vacatur, to manipulate development of law concerning legal interpretation of insurance policies).

10. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 120 (Cal. 1992) (holding that, when reversal is condition of settlement agreement, appellate courts should grant joint motions for reversal of trial court judgments under all but extreme circumstances); *infra* notes 85-122 and accompanying text (discussing *Neary* decision).

standards that the federal courts developed to handle such motions for vacatur,[11] of the case the Supreme Court of the United States recently granted certiorari to review,[12] and of the Supreme Court of California's solution to the problem of settlements conditioned upon the granting of a motion for reversal.[13] Also necessary is a discussion of the motivations of parties seeking to vacate or reverse judgments,[14] an analysis of the policies that support granting motions for vacatur at the will of the litigants,[15] and a study of the public effect and public value of judgments.[16]

This analysis suggests that granting motions to vacate or reverse lower court decisions as a condition to settlement should remain within the discretion of the court considering the motion.[17] Courts should decide this question upon the particular circumstances of each case.[18] Furthermore, in making this determination, a court should consider the precedential value of a judgment, the potential preclusive effect of a judgment, and the litigants' motives for seeking vacatur or reversal.[19]

II. THE FEDERAL COURTS

Decisions by the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits present three different methods of handling postjudgment settlements conditioned upon vacatur. In *Nestle Co. v. Chester's Market Inc.*,[20] the United States Court of Appeals for the Second Circuit held that the district court abused its discretion in denying the parties' joint motion to vacate the district court's earlier judgment when the parties had conditioned their settlement agreement upon the granting of such a motion.[21] Nestle had filed a trademark infringement suit against

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11. *See* discussion *infra* part II (discussing different standards that federal courts of appeals have applied to motions for vacatur pursuant to postjudgment settlement).

12. *See infra* notes 62-84 and accompanying text (discussing *Izumi* case).

13. *See* discussion *infra* part III (discussing recent Supreme Court of California decision giving litigants right to have trial court judgments reversed absent showing of extreme circumstances).

14. *See* discussion *infra* part IV (discussing three primary motivations for making vacatur or reversal condition of settlement of claim pending appellate review).

15. *See* discussion *infra* part V (presenting four major arguments for allowing vacatur or reversal of judgments at will of litigants when granting of such motions is condition of settlement).

16. *See* discussion *infra* part VI (arguing that judgments can have important impact on general public and can provide significant public benefits).

17. *See* discussion *infra* part VII (describing proper standard to apply to postjudgment settlements conditioned upon vacatur or reversal of lower court judgments).

18. *See infra* notes 270-82 and accompanying text (explaining why absolute standards cannot take into account all relevant considerations when court is determining whether to grant motion for vacatur or reversal of judgment as condition to settlement).

19. *See infra* notes 286-95 and accompanying text (describing factors court should examine when faced with settlement conditioned upon vacatur or reversal of judgment).

20. 756 F.2d 280 (2d Cir. 1985).

21. Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985).

Chester's Market and Saccone's Toll House for use of the name "Toll House."[22] The district court granted a partial summary judgment to Saccone, finding the name generic and not suitable as a trademark.[23] Nestle appealed, but while the appeal was pending, the parties reached a settlement conditioned on vacatur of the district court judgment.[24] The Second Circuit remanded the case to the district court for consideration of the parties' motion for vacatur.[25]

On remand, the district court found that vacatur of the prior judgment was a matter within the court's discretion.[26] The district court reasoned that the interest in finality of judgments and the public interest in having courts adjudicate disputes over trademark validity outweighed the parties' interest in settlement.[27] The Second Circuit reversed the district court.[28] The appellate court found that the parties' interest in settlement, including not bearing the costs and risks of further litigation, outweighed the public interest in finality of judgments and adjudication of trademark disputes.[29]

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22. *Id.* at 281.

23. *Id.*

24. *Id.*

25. *Id.* Parties attempting to obtain vacatur generally make a motion to the court pursuant to Federal Rule of Civil Procedure 60(b), and courts have commonly construed Rule 60(b) as granting courts the authority to vacate judgments. *Id.*; *see* National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 765 (9th Cir. 1989) (stating that Rule 60(b) gives appellate courts wide discretion to vacate judgment when such action is just under circumstances presented); First Nat'l Bank v. Hirsch, 535 F.2d 343, 344-46 (6th Cir. 1976) (holding that party attempting to move pursuant to Rule 60(b) to vacate judgment of district court after notice of appeal should first file motion in district court and not with appellate court). Rule 60(b) provides:

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

FED. R. CIV. P. 60(b). The Supreme Court has interpreted Rule 60(b)(6) as vesting power in the courts adequate to enable them to vacate judgments whenever appropriate to accomplish justice. Klapprott v. United States, 335 U.S. 601, 614 (1949). Parties also have attempted to use Rule 59(e) to achieve vacatur. *See* Wisconsin Truck Ctr., Inc. v. Volvo White Truck Corp., 692 F. Supp. 1010, 1011 (W.D. Wis. 1988) (denying motion for vacatur pursuant to Rule 59(e) on substantive law grounds).

26. Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 281 (2d Cir. 1985).

27. *Id.*

28. *Id.* at 284.

29. *Id.* at 282-84. The Federal Circuit also has adopted the *Nestle* rationale. *See* Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277, 280 (Fed. Cir. 1987) (holding that when parties to case pending appeal enter into settlement agreement, appellate court should dismiss action and vacate lower court judgment).

The Second Circuit reasoned that the intent behind policies favoring finality of judgments is to conserve judicial resources and that the district court's reliance on this finality principle to deny the motion for vacatur was nonsensical because such action would lead to more rather than less litigation.[30] Furthermore, the Second Circuit emphasized that denial of the motion in order to protect other unknown users of the trademark "Toll House" would cause the parties unfairly to bear the costs of further litigation when they wished to end their dispute.[31] The Second Circuit's ruling appears to require vacatur of district court judgments whenever granting a motion for vacatur is a condition to settlement, which essentially causes courts to vacate judgments at the will of the litigants.[32]

By contrast, in *In re Memorial Hospital, Inc.*,[33] the United States Court of Appeals for the Seventh Circuit declared that it will always deny joint motions to vacate a judgment or opinion of the district court pursuant to a postjudgment settlement, reasoning that a judicial opinion is a public act of government that parties cannot erase through a private agreement.[34] The underlying dispute involved a suit by Memorial Hospital asserting that the reduction of Medicare payments by the federal government's fiscal intermediary violated the "automatic stay" under federal bankruptcy law.[35] Memorial Hospital recently had filed a bankruptcy petition.[36] The bankruptcy court held the intermediary in contempt of court and ordered the intermediary to restore the funds it had withheld from Memorial Hospital.[37] The district court affirmed this decision.[38] The intermediary and the Department of Human Services appealed to the Seventh Circuit.[39]

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30. *Nestle*, 756 F.2d at 282.

31. *Id.* at 284.

32. *See* Fisch, *supra* note 1, at 610 (asserting that strict reading of *Nestle* suggests that Second Circuit believes courts should grant litigants' motions for vacatur as matter of right when litigants settle case conditional upon vacatur of earlier judgment); Klingeman, *supra* note 1, at 241 n.55 (stating Second Circuit in *Nestle* implicitly held that vacatur is available to parties as matter of right); *see also* Long Island Lighting Co. v. Cuomo, 888 F.2d 230, 234 (2d. Cir. 1989) (stating that *Nestle* presents principle that exception to practice of vacating lower court judgment because of deliberate action of losing party does not apply to situations in which both parties agree to settlement and vacatur of judgment).

33. 862 F.2d 1299 (7th Cir. 1988).

34. *In re* Memorial Hosp., Inc., 862 F.2d 1299, 1300 (7th Cir. 1988). Both the District of Columbia Circuit and the Third Circuit recently have adopted this rationale. *See In re* United States, 927 F.2d 626, 628 (D.C. Cir. 1991) (stating that court will deny motions for vacatur pursuant to postjudgment settlement); Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 129 (3d Cir. 1991) (stating that courts should deny motions for vacatur pursuant to postjudgment settlement).

35. *Memorial Hosp.*, 862 F.2d at 1301; *see* 11 U.S.C. § 362(a)(3),(6) (1988) (stating that debtor's filing of bankruptcy petition operates as stay against creditors acting to obtain possession of debtor's property or acting to collect claims arising against debtor before filing of bankruptcy petition).

36. *Memorial Hosp.*, 862 F.2d at 1301.

37. *Id.*

38. *In re* Memorial Hosp., Inc., 82 B.R. 478, 479 (Bankr. W.D. Wis. 1988).

39. *In re* Memorial Hosp., Inc., 862 F.2d 1299, 1301 (7th Cir. 1988).

However, before the appellate court could render a decision, the parties entered into a settlement agreement that called for both parties to join in a motion to vacate the district court opinion.[40] In denying the joint motion, the Seventh Circuit reasoned that the precedent created through the resolution of a dispute has social value produced at a cost to the public and is not the parties' private property.[41] The appellate court also stated that granting such motions squanders time the courts already have invested.[42] Moreover, the Seventh Circuit explained that litigants possess a general interest in having an orderly judicial system that records and preserves judges' solutions to legal disputes for later use.[43] Therefore, slightly higher costs in present suits reduce the costs and trouble that judges and litigants encounter in future cases.[44]

Alternatively, the United States Court of Appeals for the Ninth Circuit has developed a method of reviewing joint motions for vacatur of lower court opinions pursuant to settlement that strikes a balance between the contrasting standards of the Second and Seventh Circuits. In *National Union Fire Insurance Co. v. Seafirst Corp.*,[45] the Ninth Circuit held that the equities in each particular situation should determine whether a court should grant the parties' motion for vacatur.[46] National Union had issued liability insurance to Seafirst, but later, after Seafirst filed a claim, brought suit seeking to have the contract rescinded.[47] National Union asserted that Seafirst originally procured the insurance policy through fraud.[48] National Union also brought separate actions against Seafirst's insurance broker, attorney, and accountant.[49] Seafirst counterclaimed for breach of contract.[50]

The district court bifurcated the case for trial.[51] The first phase would determine the validity of National Union's fraud claims, and if the jury found no fraud, the second phase would deal with Seafirst's noncoverage claim.[52] After the trial court entered judgment on a jury verdict that Seafirst had not obtained the insurance policy through fraud, National Union and Seafirst entered into a settlement agreement.[53] The agreement provided that both parties forego litigating the second phase of the trial and that Seafirst join National Union in a motion to vacate the trial court judgement.[54]

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40. *Id.*
41. *Id.* at 1302.
42. *Id.*
43. *Id.* at 1303.
44. *Id.*
45. 891 F.2d 762 (9th Cir. 1989).
46. National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 764 (9th Cir. 1989).
47. *Id.* at 763.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 764.
54. *Id.*

Additionally, Seafirst expressly agreed that National Union could continue to pursue Seafirst's insurance broker, attorney, and accountant for damages for their involvement in the procurement of the insurance policy.[55]

The district court denied the motion for vacatur, and the Ninth Circuit affirmed.[56] The appeals court held that the lower court should determine whether to grant such motions by weighing the competing values of finality of judgments and the litigants' right to relitigation of unreviewed issues.[57] The Ninth Circuit relied on an earlier decision in which it had stated that making vacatur automatic upon the parties entering into a postjudgment settlement would damage the principle of judicial finality and would undermine the parties' incentives to settle disputes before trial by decreasing the risks of taking a controversy to trial.[58] The appellate court also criticized the Seventh Circuit's rule of always denying motions for vacatur as too inflexible and as making the costs of postjudgment settlement too high.[59] Consequently, the Ninth Circuit stated that the district court should examine the equities and hardships in each particular case to determine whether the court should grant the parties' motion.[60] Applying this rule to the facts of *National Union*, the Ninth Circuit reasoned that the trial court correctly denied the motion for vacatur because of the presence of third party interests and the possibility that the judgment would have a preclusive effect on later litigation.[61]

The Supreme Court of the United States may resolve partially this split between the federal circuits in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*.[62] The Supreme Court recently granted certiorari to decide *Izumi*,[63] which presents the question of whether the United States courts of appeals should vacate final judgments having issue preclusive effects at parties' request when the litigants settle cases pending appeal.[64] In *Izumi* the Court of Appeals for the Federal Circuit granted the parties' joint motion for vacatur of the trial judgment after the parties had entered

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55. *Id.*

56. *Id.*

57. *Id.* at 765 (quoting Ringsby Truck Lines v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982)).

58. *Id.* at 767 (quoting *Ringsby*, 686 F.2d at 721).

59. *Id.* at 769.

60. *Id.*

61. *Id.*

62. 971 F.2d 728 (Fed. Cir. 1992), *cert. granted* 113 S. Ct. 1249 (1993).

63. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993).

64. *See* 61 U.S.L.W. 3557 (Feb. 23, 1993) (stating that *Izumi* presents Supreme Court with issue of whether federal courts of appeals should routinely vacate district court judgments at parties' request upon postjudgment settlement); *see also* U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728, 731 (Fed. Cir. 1992) (holding that vacatur of trial judgment is appropriate when postjudgment settlement moots action pending appeal, and rejecting argument that judgment's issue preclusive use should prevent vacatur), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993).

into a postjudgment settlement.[65] The Federal Circuit stated that the parties were entitled to rely on its prior precedent,[66] which endorsed the Second Circuit's practice of routinely granting parties' motions for vacatur upon settlement of cases pending appeal.[67]

In *Izumi* U.S. Philips Corporation, North American Philips Corporation, and N.V. Philips Gloeilampenfabrieken (Philips) brought patent infringement and unfair competition claims against Windmere Corporation (Windmere) and Izumi Seimitsu Kogyo Kabushiki Kaisha (Izumi) in the United States District Court for the Southern District of Florida.[68] Only Philips and Izumi manufacture rotary electric razors for sale in the United States.[69] N.V. Philips sells razors through its subsidiary North American Philips while Izumi sells razors to Windmere and Sears Roebuck & Company (Sears) for resale in the United States.[70] Philips argued that Windmere's Ronson rotary razors violated Philips' patents on Norelco rotaries and that Windmere created confusion among consumers by marketing its Ronson razor as if it were nearly identical to the Norelco razor.[71] Windmere filed counterclaims asserting that Philips had attempted to monopolize the electric rotary shaver market in violation of the Sherman Act.[72]

After a jury trial, a remand, and another trial, the Florida district court entered judgments for Philips pursuant to the patent claims and for Windmere under the unfair competition count and antitrust counterclaim.[73] Izumi was a party to the patent infringement judgment, but did not file an

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65. *U.S. Philips*, 971 F.2d at 731.

66. *Id.*

67. *See* Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277, 280 (Fed. Cir. 1987) (holding that when parties to case pending appeal enter into settlement agreement, appellate court should dismiss action and vacate lower court judgment).

68. *U.S. Philips*, 971 F.2d at 729.

69. U.S. Philips Corp. v. Sears Roebuck & Co., No. 85-C5366, 1987 WL 26123, at *1 (N.D. Ill. Dec. 2, 1987).

70. *Id.* Philips sells its razors in the United States under the trade name "Norelco." *Id.* Windmere sells Izumi's razors under the "Ronson" trade name, and Sears sells the razors under its own name. *Id.*

71. U.S. Philips Corp. v. Windmere Corp., No. 84-2508CIV, 1991 WL 338258, at *1 (S.D. Fla. Sept. 3, 1991).

72. *U.S. Philips*, 1991 WL 338258, at *1.

73. U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728, 729 (Fed. Cir. 1992), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993). Windmere did not appeal the judgment on the patent infringement claim after the initial trial, and the district court entered final judgment on that count in 1986. *Id.* However, the Federal Circuit found that the district court had improperly directed a verdict against Windmere on the antitrust counterclaim in the first trial and remanded the case to the district court. *Id.* In the second trial, a jury found in favor of Windmere on both the unfair competition claim and antitrust counterclaims. *Id.* The court awarded Windmere $86,644,257 in trebled damages on its antitrust counterclaim. Petition for Writ of Certiorari at 3, U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728 (Fed. Cir. 1992), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993) (No. 92-1123).

appearance in the trial of the other issues.[74] Philips appealed the unfair competition and antitrust judgments to the Federal Circuit.[75] While this appeal was pending, Philips and Windmere entered into a settlement agreement that called for both parties to join in a motion for vacatur of the trial judgment.[76] Izumi opposed the parties' motion for vacatur asserting that the Federal Circuit should preserve the trial judgment because an Illinois district court had used the judgment for issue preclusion purposes.[77] Months after Philips had filed its action against Windmere and Izumi in the Southern District of Florida, Philips instituted a similar suit against Sears and Izumi in the Northern District of Illinois.[78] The United States District Court for the Northern District of Illinois held that the judgment against Philips on its unfair competition claim in the Florida court precluded Philips from contesting the same issue in the Illinois court.[79]

The Federal Circuit rejected Izumi's argument that the court should not vacate the Florida judgment because of its issue preclusive effects, holding that Izumi did not have standing to oppose the parties' motion for vacatur.[80] The Federal Circuit stated that Izumi's substantial involvement and substantial interest in the suit did not provide standing to oppose the motion for vacatur.[81] The Federal Circuit then addressed the appropriateness of the parties' motion for vacatur and granted the joint motion.[82] The appellate court stated that a postjudgment settlement moots an action on appeal, making vacatur proper.[83] Although the Federal Circuit noted that some

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74. *U.S. Philips*, 971 F.2d at 730.

75. *Id.*

76. *Id.* at 730. Petitioner, Izumi, noted that settlement had not been expressly conditioned upon vacatur. Petition for Writ of Certiorari at 5.

77. *U.S. Philips*, 971 F.2d at 730.

78. *See* U.S. Philips Corp. v. Sears Roebuck & Co., No. 85-C5366, 1987 WL 26123, at *1 (N.D. Ill. Dec. 2, 1987) (stating that on June 6, 1985 Philips filed action against Sears and Izumi alleging that Sears infringed and Izumi induced infringement of patents relating to Philips's "Norelco" rotary razor).

79. U.S. Philips v. Sears Roebuck & Co., No. 85-C5366, 1992 WL 296361, at *1 (Oct. 14, 1992).

80. U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728, 731 (Fed. Cir. 1992), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993). The Federal Circuit found that Izumi was not a party to the appeal or to the trial of the unfair competition and antitrust claims. *Id.* at 730.

81. *See id.* (rejecting Izumi's argument that even as nonparty it has sufficient interest to oppose vacatur, and stating that financial or commercial interest in unfair competition claim does not confer standing).

82. *Id.* at 731.

83. *Id.* Noting that vacatur is the general rule in the Federal Circuit, the court stated that it was not holding that a court must always grant vacatur. *Id.* However, in rejecting Izumi's collateral estoppel argument in this case, where a court clearly had used the judgment in question to preclude a party from asserting the same issue in subsequent litigation, the Federal Circuit has demonstrated that few if any grounds will prevent the court from vacating a judgment following postjudgment settlement. *See* Petition for Writ of Certiorari at 5 n.4, U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728 (Fed. Cir. 1992), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993) (No.

circuits have declined to vacate judgments merely because the parties have settled their dispute, the court stated that Philips and Windmere were entitled to rely on prior Federal Circuit precedent that called for vacatur under the circumstances presented.[84]

III. NEARY V. REGENTS OF THE UNIVERSITY OF CALIFORNIA

A recent Supreme Court of California decision has added to the debate over settlements conditioned upon the vacatur of lower court judgments. However, the Supreme Court of California went a step further than any of the federal courts of appeals by granting the litigants' motion to have the trial judgment reversed rather than vacated. In *Neary v. Regents of University of California*[85] the Supreme Court of California held that the California Court of Appeals must grant the requests of parties to reverse a trial court judgment, absent a showing of extraordinary circumstances, if obtaining such an order is a condition to the parties' settlement agreement.[86] The plaintiff, George Neary, had obtained a $7,000,000 verdict at trial in a libel action against defendants, the Regents of the University of California and three veterinarians that the University employed.[87] The University had published the veterinarians' report stating that Neary caused the death of several of his cattle through incompetent management of his ranch.[88] Neary maintained that the allegations in the report were false and that pesticides sprayed by the government had poisoned his cattle.[89] The defendants appealed the trial court judgment in favor of Neary, and Neary cross-appealed.[90]

Nevertheless, the parties entered into a settlement agreement while the appeal was pending.[91] The agreement required that the defendants pay Neary $3,000,000 and for Neary to join the defendants in a motion to reverse the trial court judgment and dismiss the appeal.[92] Upon making this motion, the parties advised the court of appeals that the stipulated reversal was a condition precedent to their settlement.[93] The court of appeals held that the reversal of a judicial opinion is not proper simply because the parties have made such action a condition to their agreement.[94] On appeal, the Supreme

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92-1123) (stating that in view of Federal Circuit's refusal to entertain Izumi's opposition to vacatur, scenario where court would not automatically grant vacatur is difficult to imagine).

84. *U.S. Philips Corp.*, 971 F.2d at 731.

85. 834 P.2d 119 (Cal. 1992).

86. Neary v. Regents of Univ. of Cal., 834 P.2d 119, 120 (Cal. 1992).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 774 (Ct. App. 1991).

94. *Id.* at 775.

Court of California reversed the court of appeals' order denying the motion for stipulated reversal.[95]

The supreme court's holding governs motions for *reversal* of trial court judgments rather than vacatur of such judgments.[96] Unlike a vacatur, a reversal is an affirmative finding of fact and law.[97] Reversal means overturning a judgment by contrary decision or annulling it because of error.[98] Therefore, granting a motion for reversal connotes more than simply the setting aside of a lower court judgment by an appellate court. Rather, reversal indicates that the appellate court is overturning the judgment because something is specifically wrong in the lower court's legal reasoning or finding of facts.[99]

To justify its ruling that parties are entitled to reversal absent a showing of extraordinary circumstances, the Supreme Court of California used a somewhat different analysis than the Second Circuit employed in *Nestle*. The supreme court first stated that granting motions for reversal to facilitate postjudgment settlements promotes efficiency because a reversal saves both the court of appeals and the parties to the suit from the considerable expense of litigating the case on appeal.[100] Secondly, the supreme court implicitly

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95. Neary v. Regents of Univ. of Cal., 834 P.2d 119, 126 (Cal. 1992).

96. *Id.* at 120.

97. Gail D. Cox, *Innovation—Or Just Court Triage?*, 15 NAT'L L.J., Oct. 5, 1992, at 1, 11 (quoting Fordham University School of Law Professor Jill E. Fisch).

98. BLACK'S LAW DICTIONARY 1319 (6th ed. 1990) (citing Atlantic Coast Line R.R. v. St. Joe Paper Co., 216 F.2d 832, 833 (5th Cir. 1954)).

99. *See* Department of Water & Power v. Inyo Chem. Co., 100 P.2d 822, 826 (Cal. Dist. Ct. App.) (stating that to reverse means to change to contrary), *rev'd*, 108 P.2d 410 (Cal. 1940).

100. Neary v. Regents of Univ. of Cal., 834 P.2d 119, 121-22 (Cal. 1992). Commentators have perceived the *Neary* opinion as a reaction to the Supreme Court of California's excessive caseload and as further indication of the supreme court's preoccupation with clearing dockets as quickly as possible. *See* Cox, *supra* note 97, at 10-11 (discussing Supreme Court of California's increasing willingness to use unorthodox judicial techniques to remove cases from its docket).

The Supreme Court of California's utilization of a process termed decertification or depublication also evidences the supreme court's concern with its crowded docket. Through depublication, the Supreme Court of California can order the Reporter of Decisions not to publish specified court of appeals' decisions in the official reporters. *See* CALIF. RULES OF COURT 976(c)(2) (stating supreme court has power to depublish cases that appellate courts have decided meet requirements for publication); *see also* CAL. CONST. art. VI, § 14 (stating that legislature will provide for publication of decisions of supreme court and court of appeals). When the Supreme Court of California depublishes or decertifies opinions, they are still dispositive as to the matter in dispute, but the supreme court prohibits attorneys from citing to them in other legal proceedings. *See* Julie Hayward Biggs, Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. CAL. L. REV. 1181, 1186 (1977) (explaining process of decertification and implications of decertification). However, decertified opinions sometimes appear in reporters other than California's Official Reporter or on Lexis and Westlaw. One such decision is American Star Ins. Co. v. American Employer's Ins. Co., 210 Cal. Rptr. 836 (Ct. App. 1985). The published decision contains a note stating that the Supreme Court of California denied review and decertified the opinion on May 16, 1985, but the opinion is still available in West's

rejected the court of appeals' assertion that the role of the judiciary is to define the law and apply it in particular circumstances rather than to satisfy the parties appearing before it.[101] The supreme court stressed that the purpose of the judicial system is to resolve disputes between real people.[102] The court further stated that the "real value" of a judicial pronouncement and the paramount purpose of litigation is settling the dispute between the specific parties before the court.[103] If a court achieves that goal, even after judgment, a court has fulfilled the judicial system's essential function.[104] The supreme court further asserted that the court of appeals wrongly suggested that a trial court decision had value as guidance to other courts.[105] The court supported this conclusion by explaining that trial courts do not provide binding precedent.[106]

Nonetheless, the Supreme Court of California acknowledged the possibility of situations in which the public interest would weigh heavily against granting stipulated reversal.[107] However, the court set a very high standard for evaluating such a public interest, stating that to overcome the strong presumption in favor of granting reversal the interest must be specific, demonstrable, well established, and compelling.[108] By contrast, the court expressed that in most cases the public interest against reversal would be indirect and amorphous.[109]

In an adamant dissent, Justice Kennard argued that in settling specific disputes the judiciary interprets and enforces policies adopted by the legislative process.[110] Therefore, the ultimate purpose of a judgment is to administer the laws of the state of California and do justice.[111] Because a judgment embodies an official act of government, courts must reconcile a judgment's reversal with public interests in addition to the litigants' interests.[112] Justice Kennard asserted that before granting motions for stipulated

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California Reporter, on Lexis, and on Westlaw. The practice of depublication has spurred considerable debate. *See generally* Julie Hayward Biggs, *Censoring the Law in California: Decertification Revisited*, 30 HASTINGS L.J. 1577 (1979) (discussing problems in Supreme Court of California's application of depublication process and summarizing several decertified cases); Robert S. Gerstein, *"Law by Elimination:" Depublication in the California Supreme Court*, 67 JUDICATURE 293 (1984) (discussing history of depublication, arguments against depublication, and ultimate impact of depublication); Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984) (defending Supreme Court of California's use of depublication).

101. Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 777 (Ct. App. 1991).
102. Neary v. Regents of Univ. of Cal., 834 P.2d 119, 124 (Cal. 1992).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 125.
108. *Id.*
109. *Id.*
110. *Id.* at 127 (Kennard, J., dissenting).
111. *Id.* (Kennard, J., dissenting).
112. *Id.* (Kennard, J., dissenting).

reversal, appellate courts should examine the parties' reasons for seeking stipulated reversal and should determine whether the judgment has value for third parties or the public at large.[113] Unlike the majority, Justice Kennard felt the appropriate presumption should be against allowing stipulated reversal.[114]

Justice Kennard reasoned that public respect for the courts erodes when parties who lose at the trial level can, in effect, purchase the nullification of the adverse judgment at the appellate level.[115] Such action reinforces the notion that the quality of justice a litigant can expect is proportional to the financial means that the litigant possesses.[116] Justice Kennard also argued that if litigants can delete an adverse decision easily by making stipulated reversal a condition to postjudgment settlement, parties concerned about the collateral consequences of an adverse judgment will have less incentive to settle cases before trial.[117] Litigants may gamble on favorable judgments and if unsuccessful at trial, settle cases after judgment and move for reversal.[118] These litigants are no worse off than if they had avoided trial and final judgment by pretrial settlement.[119]

Furthermore, Justice Kennard's dissent recognized that some judgments have value for society at large, even though they have no particular value for an identifiable nonparty.[120] The justice pointed specifically to cases involving public officials and the propriety of their official actions.[121] In light of these considerations, Justice Kennard would have held that appellate courts should deny the request of parties to reverse a trial court judgment to facilitate settlement if a reasonable probability exists that such reversal will affect the interests of nonparties or the public adversely.[122]

IV. Incentives for Utilizing Settlements Conditioned upon Vacatur

Parties may seek vacatur or reversal of a trial court judgment as a condition to a settlement for any of three major reasons: manipulating precedent in specific substantive areas of the law, avoiding the collateral estoppel effects of an opinion, or minimizing adverse publicity from a trial.[123]

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113. *Id.* (Kennard, J., dissenting).
114. *Id.* (Kennard, J., dissenting).
115. *Id.* (Kennard, J., dissenting).
116. *Id.* at 127-28 (Kennard, J., dissenting).
117. *Id.* at 129 (Kennard, J., dissenting).
118. *Id.* at 129-30 (Kennard, J., dissenting).
119. *Id.* at 130 (Kennard, J., dissenting).
120. *Id.* (Kennard, J., dissenting).
121. *Id.* (Kennard, J., dissenting).
122. *Id.* at 132 (Kennard, J., dissenting).
123. *See infra* notes 124-98 and accompanying text (discussing motivations for parties to enter into settlements conditioned upon vacatur or reversal of lower court judgments).

A. Preventing the Establishment of Adverse Precedent

The most disturbing motive that litigants may have for making the vacatur or reversal of a judgment a condition to settlement is preventing the affirmance of decisions that could create precedent adverse to the litigants' interests.[124] Institutional litigants have the greatest incentive to apply vacatur in this manner, for they repeatedly appear in court to try matters controlled by the same substantive area of law.[125] A good example of this phenomenon occurs in the context of insurance litigation. Insurance companies are involved continually in litigation over their liability to policyholders.[126] Insurers have considerable incentive to avoid the establishment of adverse precedent concerning their policy provisions in any state or federal court because insurance contracts tend to be standardized throughout the United States.[127] This incentive also is great because much of the debate in insurance litigation concerns which party has the support of the greater weight of authority.[128] Therefore, litigants in insurance cases have a significant advantage if they can point to a recent decision as an indication that the weight of authority is shifting in their favor.[129]

The precedential value of a case that a court has vacated is minimal.[130] To vacate means to annul, to set aside, to cancel, or to rescind, indicating that a vacated judgment has no precedential force.[131] The United States Supreme Court has stated in dictum that the vacatur of a judgment, of necessity, deprives a court's opinion of any precedential effect.[132] Similarly,

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124. *See infra* notes 125-56 and accompanying text (asserting that manipulation of precedent is major motivation behind parties' making vacatur or reversal of judgment condition of settlement agreement).

125. *See infra* notes 126-29 and accompanying text (discussing incentives insurance companies possess to prevent formation of precedent adversely construing meaning of policy provisions).

126. *See* Parloff, *supra* note 9, at 74-79 (documenting legal battles between insurers and policyholders concerning coverage of insurance policies for various damages).

127. *See id.* at 74 (stating that since at least 1940, most insurers have commonly issued Comprehensive General Liability (CGL) insurance policies, which follow uniform format).

128. *See* Gordon, *supra* note 9, at 14 (stating that both attorneys who work for insurers and policyholders' attorneys constantly keep tally of number of judicial decisions in their favor and claim that these calculations indicate that substantive law favors their clients).

129. *See id.* (stating that institutional insurance litigants constantly assert that newest court decisions indicate that "weight of authority" is in their favor).

130. *See infra* notes 131-39 and accompanying text (discussing precedential value of vacated judgments).

131. BLACK'S LAW DICTIONARY 1548 (6th ed. 1990).

132. County of L.A. v. Davis, 440 U.S. 625, 634 n.6 (1978) (quoting O'Connor v. Donaldson, 422 U.S. 563, 577-78 n.12 (1975)); *see* A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329 n.11 (1961) (stating that vacated district court judgment did not establish precedent demanding adherence); United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950) (stating that courts commonly use vacatur to prevent judgments from having any legal consequences). *But see Davis*, 440 U.S. at 646 n.10 (Powell, J., dissenting) (stating that lower court's statements will have precedential weight until court decides contrary authority, even though vacatur prevents judgment from being "the law of the case").

the federal courts of appeals have stated that the vacatur of a judgment prevents the judgment from having stare decisis effect[133] and have implied, in some instances, that courts should not rely on vacated judgments even as persuasive authority.[134]

Conversely, some circuits have expressed the view that vacating a judgment does not diminish any of the judgment's precedential effect.[135] Those who support this assertion argue that if the lower court believed a live controversy existed when the court decided the case, the same circumstances that produced the opinion also produced all other decisions to which courts give precedential weight.[136] Other commentators have stated that a vacated judgment can act as persuasive authority, although it will not have any formal stare decisis effect.[137]

Although the persuasive force of a vacated judgment likely will remain as long as a court's opinion is available to read, a vacatur order clouds and diminishes the significance of a court's holding.[138] Subsequent litigants often find it difficult to determine if a court vacated a decision for a reason that goes to the validity of the judgment, such as reconsideration of the court's earlier legal reasoning.[139] Therefore, vacatur of a judgment may deter litigants in later cases from citing the judgment even as persuasive authority.

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133. *See* Martinez v. Winner, 800 F.2d 230, 231 (10th Cir. 1986) (stating that order to district court to vacate earlier district court judgment will remove stare decisis effect of vacated judgment); Weisburg v. Webster, 749 F.2d 864, 870 (D.C. Cir. 1984) (stating that courts cannot consider judgments vacated on mootness grounds as authoritative law of circuit); Marshall v. Whittaker Corp., 610 F.2d 1141, 1145 (3d. Cir. 1979) (stating that vacating district court judgment deprives prior district court order of precedential effect).

134. *See* Tyler v. Black, 865 F.2d 181, 183 (8th Cir. 1989) (stating that portion of prior appellate judgment that dealt with issue which became moot due to settlement does not have precedential value); Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985) (stating that earlier vacated judgment does not constitute judicial precedent, that vacated judgment is without force or effect, and that vacated judgment cannot have any bearing on later cases raising similar issues); Delta Air Lines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582, 585 (11th Cir. 1983) (stating that vacated district court ruling has no precedential value); Curtis v. Taylor, 648 F.2d 946, 947 (5th Cir. 1980) (stating that vacatur of district court judgment will prevent district court opinion from "spawning" any precedential consequences); Kuahulu v. Employers Ins., 557 F.2d 1334, 1337 (9th Cir. 1977) (stating that vacatur of orders of district court will erase any precedential effect of orders).

135. *See* United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) (stating that only purpose of vacating judgment on grounds of supervening mootness is to prevent decision from having res judicata or collateral estoppel effect in future cases and that district court judgment vacated under such circumstances has same precedential effect as unreviewed lower court decision).

136. 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.10 (1981).

137. *See* Klingeman, *supra* note 1, at 246-47 (asserting that vacatur does not wholly deprive judgment of precedential value).

138. *In re* Memorial Hosp., Inc., 862 F.2d 1299, 1302 (7th Cir. 1988).

139. *See* Fisch, *supra* note 1, at 630 (stating that court may vacate judgment because of fraud, mistake, newly discovered evidence, or second thoughts about legitimacy of legal rulings).

The defendant insurance company in *Bankers Trust Co. v. Hartford Accident & Indemnity Co.*[140] appears to have desired to prevent the establishment of precedent adverse to the defendant's interests. In *Bankers Trust* the United States District Court for the Southern District of New York held on summary judgment that defendant insurance company, Hartford Accident and Indemnity, was liable to its policyholder, Bankers Trust Company.[141] The district court held Hartford liable pursuant to a Comprehensive General Liability (CGL) policy for the cost of environmental cleanup operations on Bankers Trust's property, to the extent that such operations prevented damage to the property of third persons.[142] The parties subsequently entered into a settlement agreement providing that the defendant pay the policyholder $200,000 more than the trial court had awarded, with the understanding that the court would vacate its earlier judgment.[143]

However, the district court's order vacating the earlier judgment did not mention the parties' settlement as the reason for the order.[144] Rather, the district court stated that it was vacating its prior judgment so Hartford could submit supplemental affidavits to enable the court to redetermine Bankers Trust's motion for summary judgment.[145] A day later the court granted an order dismissing the case.[146] The court's order vacating the earlier judgment provides a significant obstacle to attorneys wishing to cite to the original judgment because opponents can contend that the court had second thoughts about its initial reasoning.[147]

The stakes are great in cases, such as *Bankers Trust*, which concern whether insurers are liable for the cost of environmental cleanup under CGL insurance policies.[148] However, most of these cases deal with the

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140. 518 F. Supp. 371 (S.D.N.Y.), *vacated*, 621 F. Supp. 685 (S.D.N.Y 1981).

141. Bankers Trust Co. v. Hartford Accident & Indem. Co., 518 F. Supp. 371, 372-73 (S.D.N.Y.), *vacated*, 621 F. Supp. 685 (S.D.N.Y. 1981).

142. *Id.* The environmental damage resulted from a leak in an oil tank located on Bankers Trust's property that polluted an adjacent river and the corresponding shoreline. *Id.* The insurance policy that Hartford had issued to Bankers Trust covered liability for damage to the property of third persons, but excluded liability for damage to the policyholder's property. *Id.* at 372. Hartford contended that Bankers Trust removed oil from the soil of its property to remedy damage to plaintiff's property and not to the property of third parties. *Id.* at 373. The district court reasoned that common sense called for the court to read the insurance policy to cover cleanup operations on the insured's property commenced to prevent damage to a third person's property. *Id.* at 374. A contrary construction only would motivate policyholders to allow pollution to continue, causing further damage to third parties—damage for which the insurer would bear ultimate liability. *Id.*

143. *See* Parloff, *supra* note 9, at 78 (describing details of settlement agreement between Hartford and Bankers Trust).

144. *Bankers Trust*, 621 F. Supp at 685.

145. *Id.*

146. Parloff, *supra* note 9, at 78.

147. *See id.* (stating that district court's vacatur order allows attorneys representing insurance companies to contend that district court had second thoughts about reasoning in initial *Bankers Trust* judgment).

148. *See* notes 149-56 and accompanying text (discussing significant ramifications of legal

question of who is liable for hazardous waste cleanup imposed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)—more commonly known as the Superfund legislation.[149] As companies increasingly face liability under CERCLA, they are attempting to recover the costs of cleanup from their insurers pursuant to CGL insurance policies.[150] Consequently, insurers and policyholders have engaged in extensive litigation over who is ultimately liable for such costs under these policies.[151]

Immense amounts of money are at stake in this legal battle because CGL policies exist widely throughout the United States.[152] The potential costs of cleaning up hazardous waste sites subject to CERCLA are enormous.[153] Environmental experts have estimated the average cost of cleanup for a site as $8.1 million.[154] Commentators have projected the total cost of cleaning up all potential hazardous waste disposal sites as being $100 billion.[155] Therefore, the incentive for actors engaged in CERCLA and related CGL policy litigation to manipulate precedent by vacatur of judgments is especially great.[156]

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battles over interpretation of coverage of insurance policies because of potential cleanup costs pursuant to Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)). Hartford's agreement to pay Bankers Trust over $2 million to settle their dispute exemplifies the enormous stakes present in cases concerning insurer liability for environmental cleanup under CGL policies. *See* Parloff, *supra* note 9, at 78 (discussing terms of *Bankers Trust* settlement agreement).

149. 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990). Courts have interpreted CERCLA as imposing retroactive, joint and several, strict liability on all potentially responsible parties for cleanup of hazardous waste cites. *See* Stephen Mountainspring, Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755, 757 (1989) (citing several federal district court opinions that support principle that potentially responsible parties are retroactively, jointly and severally, and strictly liable under CERCLA). CERCLA includes as potentially responsible parties for uncontrolled hazardous waste sites: anyone owning property or operating a facility where hazardous substances are located, anyone arranging for disposal or treatment of hazardous substances at the facility, and anyone generating hazardous waste. Nancy W. Moots, *Insurance Coverage for Superfund Claims: Are Response Costs Recoverable Damages?*, 41 S.C. L. REV. 871, 872 (1990) (citing CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988)).

150. Mountainspring, *supra* note 149, at 755.

151. *Id.* at 759. Insurers and policyholders generally have argued over the meaning of the term "damages" in CGL policies. *Id.* at 755, 759.

152. *See id.* at 758 (explaining that business insurers have issued CGL insurance policies since 1880).

153. *See infra* notes 154-55 and accompanying text (discussing potential costs of cleanup pursuant to CERCLA).

154. *See* Mountainspring, *supra* note 149, at 757-58 (illuminating cost estimates of Environmental Protection Agency).

155. *See id.* at 757 (discussing projections of Office of Technology Assessment).

156. *See supra* notes 152-55 and accompanying text (discussing large amount of money at stake in legal battle between insurers and policyholders over who is ultimately liable for hazardous waste cleanup pursuant to CERCLA).

B. Issue Preclusion

Another motive that parties may possess for making vacatur or reversal of a judgment a condition to settlement is avoiding issue preclusion. A final judgment can have several binding effects on the parties to a lawsuit, one of which is issue preclusion—also termed collateral estoppel.[157] Under the doctrine of issue preclusion, a final judgment in an earlier action precludes a party from relitigating matters or issues controverted in the first action.[158] A person claiming the benefit of issue preclusion must prove that the earlier lawsuit involved the actual litigation of the fact or point now in issue and that the court's judgment necessarily determined that fact or point.[159] Furthermore, if the party asserting issue preclusion was not a party to the earlier suit, the court must determine whether the party against whom preclusion is being sought had a fair opportunity to litigate the matter in the prior litigation.[160]

Traditionally, a party could not use issue preclusion or have issue preclusion used against it if the party was not a litigant in the original suit, or in privity with an actor in the prior action.[161] However, courts increasingly have relieved parties attempting to assert issue preclusion from this mutuality requirement.[162] Modern courts have allowed people to use issue preclusion both offensively[163] and defensively[164] even if the people were not parties to

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157. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 532 (2d ed. 1978) (identifying issue preclusion and claim preclusion as two binding effects of judgment); 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 0.441 (2d ed. 1992) (discussing general principles of issue preclusion); 18 WRIGHT ET AL., *supra* note 136, § 4402 (discussing general principles of res judicata and distinguishing between issue preclusion and claim preclusion). The other significant effect of a final judgment is claim preclusion. JAMES & HAZARD, *supra*, at 532. Claim preclusion also is referred to as merger and bar. *Id.* Claim preclusion involves a judgment's acting as an absolute bar to any subsequent action by the parties involved in the initial litigation and anyone in privity with them. *Id.* (quoting Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877)). In other words, when a court asserts claim preclusion, a judgment is final as to the claim that was the subject of the original litigation. *Id.* (quoting *Cromwell*, 94 U.S. at 352-53). This finality applies not only to every matter that the parties offered and the court received in argument over the claim, but also to every matter that the parties could have offered either to support or refute the original claim. *Id.* at 532-33 (quoting *Cromwell*, 94 U.S. at 352-53).

158. *See* JAMES & HAZARD, supra note 157, at 533 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877)) (stating that where second action between parties is upon different claim or demand, judgment in prior action operates as estoppel only to matters in issue and upon determination of which jury rendered verdict).

159. *See id.* at 563-64 (listing traditional requirements for application of issue preclusion).

160. *See id.* at 579-80 (discussing courts' increasing proclivity to allow parties to assert nonmutual collateral estoppel as long as party to earlier action had opportunity to fully litigate issue); *see also* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 328 (1971) (providing requirements for use of nonmutual defensive collateral estoppel).

161. *See* JAMES & HAZARD, *supra* note 157, at 578 (explaining courts' traditional application of mutuality requirement).

162. *See infra* notes 163-65 and accompanying text (discussing diminishment in court enforcement of requirement of mutuality against parties attempting to utilize issue preclusion).

163. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979) (holding that if

the original suit. Because courts now often ignore the mutuality requirement, parties engaged in litigation must consider not only the costs of losing the present suit, but also the possibility that losing the current case will decrease severely their chances to prevail in future cases dealing with the same circumstances.[165]

Additionally, the original parties to a suit cannot eliminate the preclusive effects of judgments by simply settling their disputes while their cases are pending appeal. Courts have applied issue preclusion to issues determined by prior trial court judgments even though the parties to the earlier suit resolved their litigation through postjudgment settlement.[166] The courts have required only that the trial court rendered the prior judgment after the parties had a fair and full opportunity to litigate and that the judgment was consistent with the parties' settlement.[167] In contrast, courts generally have held that vacated judgments have no preclusive effect.[168] Therefore, a desire to avoid the issue preclusive effects of judgments is a possible motive of parties moving courts for vacatur as a condition to postjudgment settlement.[169]

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party received "full and fair" opportunity to litigate issue in prior action and opposing party could not have joined earlier action, court's application of issue preclusion is proper).

164. *See Blonder-Tongue*, 402 U.S. at 322-30 (discussing historic development of courts' reluctance to enforce mutuality requirement of collateral estoppel); Bernhard v. Bank of Am., 122 P.2d 892, 895 (Cal. 1942) (holding that court would not preclude party from asserting collateral estoppel despite party's lack of privity or mutuality of estoppel).

165. *See* Fisch, *supra* note 1, at 635-36 (discussing how possible preclusive costs of judgment increase parties' incentives to settle disputes before trial).

166. *See* Hartley v. Mentor Corp., 869 F.2d 1469, 1472 (Fed. Cir. 1989) (stating that when court makes rulings after litigant has had full and fair opportunity litigate and rulings are consistent with parties' subsequent settlement agreement, courts have applied issue preclusion to issues raised in succeeding suits) (citing Employees Own Fed. Credit Union v. City of Defiance, 752 F.2d 243, 245 (6th Cir. 1985); Swift Chem. Co. v. Usamex Fertilizers, Inc., 646 F.2d 1121 (5th Cir. 1981); EEOC v. Jacksonville Shipyards, Inc., 696 F. Supp. 1438, 1442 (M.D. Fla. 1988); Donovan v. United States Postal Serv., 530 F. Supp. 894 (D.D.C. 1981)).

167. *Hartley*, 869 F.2d at 1472.

168. *See* Dodrill v. Ludt, 764 F.2d 442, 444 (6th Cir. 1985) (stating that general rule is that vacated judgment has no conclusive effect as collateral estoppel); Quarles v. Sager, 687 F.2d 344, 346 (11th Cir. 1982) (holding that judgment vacated because of mootness has no "res judicata" effect); Universal City Studios, Inc. v. Nintendo Co., 578 F. Supp. 911, 919 (S.D.N.Y. 1983) (stating that judgment vacated by court of appeals lacks collateral estoppel effect); *see also* MOORE, *supra* note 157, § 0.416(2) (stating that court's vacating, reversing, or setting aside of judgment deprives judgment of all conclusive effect as res judicata and collateral estoppel); Robert Barker, *Collateral Estoppel; Workers' Compensation*, N.Y.L.J., Apr. 23, 1990, at 3 (providing general discussion about whether vacated judgments should subsequently have preclusive effect). *But see* Bates v. Union Oil Co., 944 F.2d 647, 650 (9th Cir. 1991) (holding that judgment vacated pursuant to litigants' settlement agreement can still have preclusive effect if court did not balance values of finality of judgments with litigants' rights to relitigation when making vacatur determination); Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1192 (5th Cir. 1982) (holding that subsequently vacated judgment has preclusive effect), *vacated*, 460 U.S. 1007 (1983). The Fifth Circuit stated in a later opinion that *Chemetron* has no precedential force. Hughes v. Santa Fe Int'l Corp., 847 F.2d 239, 242 (5th Cir. 1988).

169. *See infra* notes 181-92 and accompanying text (asserting that litigants in *Izumi* and

Hartley v. Mentor Corp.[170] exemplifies the result some parties seek to prevent by making vacatur a condition to settlement of a suit. Before *Hartley* was litigated, a court had ruled on summary judgment in a patent infringement dispute between Hartley and Minnesota Mining and Manufacturing Company (3M) that Hartley's patent was invalid.[171] The parties later negotiated a settlement that provided for an entry of stipulated judgment dismissing Hartley's infringement claim against 3M.[172] Subsequently, Hartley brought an action against a third party, Mentor Corporation, for failing to pay royalties to Hartley pursuant to the patent that the court had found invalid in the earlier action.[173] Mentor had purchased certain assets of American Hospital Supply Corporation, including American Hospital Supply's rights to the patent under a licensing agreement with Hartley.[174] Mentor refused to pay royalties pursuant to this agreement because of the court's decision in Hartley's earlier suit against 3M.[175]

Mentor asserted issue preclusion against Hartley, arguing that the earlier judgment invalidating the patent precluded Hartley from seeking any royalties for the patent.[176] Hartley maintained that when a court enters a judgment pursuant to a stipulation of the parties, the judgment will give rise only to claim preclusion, not issue preclusion.[177] The Federal Circuit found that the earlier judgment precluded Hartley from relitigating the issue of the validity of the patent, not only against 3M but also against Mentor.[178] Therefore, Hartley's settlement agreement and stipulated dismissal did not vitiate the preclusive effect of the prior judgment.[179] The Federal Circuit stated that for Hartley to ensure that the earlier judgment would have no preclusive effects, Hartley needed to have the court vacate its earlier order.[180]

Similarly, the plaintiff in *Izumi*[181] is seeking to eliminate the preclusive effects of a trial judgment.[182] As noted earlier, Philips filed similar federal

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National Union wanted lower court judgments vacated to avoid future collateral estoppel effects).

170. 869 F.2d 1469 (Fed. Cir. 1989).

171. Hartley v. Mentor Corp., 869 F.2d 1469, 1471 (Fed. Cir. 1989).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1471-72.

178. *Id.* at 1473.

179. *Id.*

180. *Id.*

181. U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728 (Fed. Cir. 1992), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993); *see supra* notes 62-84 and accompanying text (discussing *Izumi* case).

182. The plaintiff in *Nestle* also wished to avoid the potential preclusive effects of judgments. *See* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 281-84 (2d Cir. 1985) (documenting Nestle's motivations for entering into postjudgment settlement that called for vacatur of trial judgment). In *Nestle* the Second Circuit stated that Nestle desired to continue to defend the Toll House trademark and feared that the existence of the earlier trial judgment

suits against Windmere and Izumi in Florida district court and against Sears and Izumi in Illinois district court pursuant to patent infringement and unfair competition claims.[183] The United States District Court for the Northern District of Illinois ruled that a judgment for Windmere on the unfair competition count of the Florida suit precluded Philips from contesting the same issue in Illinois district court.[184] Rejecting Izumi's argument that the preclusive use of the Florida judgment made vacatur of the district court judgment inappropriate, the Federal Circuit granted Philips' and Windmere's joint motion to vacate the district court judgment after the parties had entered into a postjudgment settlement.[185] Subsequently, Philips moved the Illinois district court to reinstate the unfair competition claim against Sears.[186] The district court granted the motion expressly because the Federal Circuit had vacated the judgment in the Florida suit that was the basis for the Illinois district court's earlier finding of issue preclusion.[187] Therefore, *Izumi* presents the United States Supreme Court with the limited issue of whether federal appellate courts should vacate district court judgments at parties' request pursuant to a postjudgment settlement when the judgment has preclusive value for third parties.[188] Thus, the Supreme Court most likely will not address the problem of parties' attempting to manipulate precedent through vacatur of trial judgments.

The parties in *National Union*[189] also wished to avoid the preclusive effects of a district court judgment. In *National Union* Seafirst and National Union settled their dispute after the court had entered judgment on a jury verdict that Seafirst had not obtained liability insurance through fraud.[190] The parties' agreement explicitly stated that National Union still could pursue Seafirst's insurance broker, attorney, and accountant for damages

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in the suit involving Saccone would operate as issue preclusion in future litigation. *Id.* at 281. Moreover, the Second Circuit explicitly admonished the district court for "[d]rumbeating about the need to protect other unknown users of the trademark Toll House" because a denial of the vacatur motion would cause the parties to expend significant amounts of money appealing the original judgment and might even produce a reversal. *Id.* at 284.

183. *See* U.S. Philips Corp. v. Windmere Corp., No. 84-2508CIV, 1991 WL 338258, at *1 (S.D. Fla. Sept. 3, 1991) (stating that in October 1984 Philips brought patent infringement and unfair competition claims against Windmere and Izumi); U.S. Philips Corp. v. Sears Roebuck & Co., No. 85-C5366, 1987 WL 26123, at *1 (N.D. Ill. Dec. 2, 1987) (stating that on June 6, 1985, Philips filed action against Sears and Izumi alleging that Sears infringed and Izumi induced infringement of patents relating to Philips' "Norelco" rotary razor); *supra* notes 62-84 and accompanying text (discussing *Izumi* case).

184. U.S. Philips v. Sears Roebuck & Co., No. 85-C5366, 1992 WL 296361, at *1 (Oct. 14, 1992).

185. *U.S. Philips*, 971 F.2d at 731.

186. *U.S. Philips*, 1992 WL 296361, at *1.

187. *Id.* at *4.

188. *See supra* notes 181-87 and accompanying text (discussing Philips' motive in seeking to have judgment of Florida district court vacated).

189. National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989); *see supra* notes 45-61 and accompanying text (discussing *National Union* decision).

190. *National Union*, 891 F.2d at 764.

for their involvement in the procurement of the insurance policy at issue.[191] National Union apparently wished to avoid the preclusive effect of the judgment in later litigation against these parties. However, the Ninth Circuit, in contrast to the Federal Circuit in *Izumi*, pointed to the possible preclusive effect of the judgment in litigation with third parties as providing a legitimate reason for the district court to deny the parties' request for vacatur of the judgment.[192]

C. *Ameliorating the Effects of Negative Publicity*

Another possible motivation of parties seeking vacatur or reversal of a judgment as a condition to settlement is the desire to reduce negative publicity created by litigation.[193] Trials may have significant nonmonetary costs, and one of the most significant of these costs is negative publicity.[194] Adverse publicity from a trial can be especially harmful to an institutional defendant.[195]

A desire to alleviate the effects of negative publicity may have motivated the defendants in *Neary* to make reversal of the trial court judgment a condition of settlement.[196] Since the Supreme Court of California rendered its decision, the defendants' counsel has stated that the three veterinarians felt the jury's verdict, finding the veterinarians to have libeled Neary, had damaged their reputation in the scientific community.[197] Furthermore, the

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191. *Id.*

192. *Id.* at 769.

193. *See infra* notes 194-98 and accompanying text (asserting that desire to relieve negative publicity is another major motivation for parties to seek vacatur of judgments).

194. Neary v. Regents of Univ. of Cal., 834 P.2d, 119, 122 (Cal. 1992).

195. *Id.*

196. *See infra* notes 197-98 and accompanying text (discussing possible motives of *Neary* defendants for moving to have trial court judgment vacated). The amelioration of adverse publicity also may have been the motivation behind the United States government's inclusion of vacatur as a condition to settlement in *Memorial Hospital*. *See supra* notes 33-44 and accompanying text (discussing facts and reasoning of *Memorial Hospital*). In *Memorial Hospital* a bankruptcy court held the federal government, litigating on behalf of a fiscal intermediary, in contempt of court for violating the automatic stay under bankruptcy law. *In re* Memorial Hosp., Inc., 862 F.2d 1299, 1301 (7th Cir. 1989). The Seventh Circuit suggested that the government attempted to "escape notice" of this contempt judgment by having the bankruptcy and district court opinions vacated. *Memorial Hosp.*, 862 F.2d at 1302; *see* Klingeman, *supra* note 1, at 243 (noting that Seventh Circuit suspected government was seeking vacatur because bankruptcy court had found government's intermediary to be in contempt of court). Furthermore, the effects of issue preclusion could not have been the concern of the federal government because a party cannot assert offensive nonmutual issue preclusion against the United States government. *Memorial Hosp.*, 862 F.2d at 1303 (citing United States v. Mendoza, 464 U.S. 154 (1984)). However, the possibility exists that the government was attempting to prevent the courts from establishing adverse precedent. The government had asserted on appeal to the district court that the bankruptcy court's finding that a court must grant relief from the automatic stay before the government can recover Medicare overpayments from a bankrupt institution would undermine the entire statutory scheme covering Medicare provider reimbursement. *In re* Memorial Hosp., Inc., 82 B.R. 478, 480 (Bankr. W.D. Wis. 1988).

197. Cox, *supra* note 97, at 11.

court of appeals indicated that the veterinarians' unwillingness to accept dismissal of the appeal arose from their belief that the trial judgment had harmed their professional standing so severely that they had difficulty functioning in the scientific community.[198]

V. Arguments for Allowing Vacatur or Reversal at Will

Four major arguments support allowing vacatur or reversal at the will of litigants to facilitate postjudgment settlement. Three arise from courts' viewing the judicial process in terms of the traditional model of litigation,[199] and the fourth involves the doctrine of mootness. Under the traditional model of litigation, a lawsuit is solely a vehicle for settling disputes of private parties concerning private rights.[200] Furthermore, litigation is a retrospective and self-contained undertaking.[201] In other words, proponents of this viewpoint believe that the facts of a lawsuit always concern a completed set of events and that the impact of a judgment is confined to the litigants,[202] except at the appellate level.[203] Under this view, only appellate courts clarify the law by elaborating on generally applicable legal rules.[204] Trial judges play a passive role, simply applying appellate decisions to resolve issues that the parties identify.[205]

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198. Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 775 (Ct. App. 1991). The defendants also had informed the court of appeals that they desired reversal because they did not want the judgment to act as a continual reminder of the emotional trauma they had suffered during the litigation. *Id.*

Additionally, the defendants did not appear to have any other implicit motive behind their desire for reversal. The three veterinarians probably did not anticipate having to defend another libel claim from a third party in the future. Therefore, they had little motive to erase the decision to avoid its utilization as precedent in substantive libel law. Moreover, the Supreme Court of California concluded that the case carried no potential collateral estoppel effects. Neary v. Regents of Univ. of Cal., 834 P.2d 119, 125 (Cal. 1992). Both Neary and the defendants agreed that the trial judgment did not affect any third party, and the supreme court found nothing in the record to indicate otherwise. *Id.*

199. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1282-88 (1976) (presenting characteristics of traditional model of litigation).

200. *Id.* at 1282; *see* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 283 (2d Cir. 1985) (stating that parties should remain free to settle on terms that require vacatur of judgment, entry of new consent judgment, or any other action as fits their needs); *Neary*, 834 P.2d at 124 (stating real value of judicial pronouncement is settling disputes that affect behavior of defendant toward plaintiff); Rappaport, *supra* note 1, at 753 (stating that courts' role is to resolve conflicts between "real" parties).

201. Chayes, *supra* note 199, at 1282-83. Chayes defines five factors in all that comprise the private model of litigation. *Id.* Besides the fact that litigation is retrospective and self-contained, the other three factors Chayes notes are that lawsuits are bipolar, that rights and remedies are interdependent, and that the litigation process is party-initiated and party-controlled. *Id.*

202. *Id.*

203. *See id.* at 1285 (stating that under traditional model of litigation, only at appellate level does judicial process reach beyond import of parties immediately before court).

204. *Id.*

205. *See id.* at 1286 (asserting that under traditional model of litigation, only role of trial judge is to decide issues litigants identified in accordance with rules appellate courts established).

The first argument for allowing vacatur or reversal of judgments at the will of the litigants to facilitate postjudgment settlement is judicial efficiency. Because of the large caseloads most courts face[206] and because private settlements conserve judicial resources, the judiciary always should encourage settlement both at the trial and appellate level.[207] The denial of a motion for vacatur or reversal when the granting of the motion is a condition to settlement expends judicial resources instead of conserving them.[208]

However, this analysis fails to consider that the potential preclusive effects of a trial judgment provide a large incentive for litigants to settle before trial.[209] This incentive is removed if litigants know that they can avoid these effects after a trial by conditioning a settlement upon the vacatur or reversal of the judgment.[210] Therefore, routinely granting motions for vacatur or reversal in many instances promotes expenditure of judicial resources, rather than conserving these resources.[211] Allowing vacatur or reversal at the will of the litigants also can result in a party repeatedly litigating the same claim against different parties.[212] Both of these factors indicate that routinely granting motions for vacatur or reversal can thwart the goal of conserving judicial resources.

The second argument is that trial judgments have no effect as precedent unless an appellate court affirms the lower court decision.[213] Nevertheless, lower court judgments do have precedential value, as evidenced by the large

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206. *See* Thomas D. Rowe, Jr., Background Paper, *American Law Institute, Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 830 (discussing complaints about cost, high volume, and delay in modern civil justice system).

207. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 121 (Cal. 1992) (stating that Supreme Court of California highly favors settlement and that benefits of settlement do not disappear after court enters judgment); Klingeman, *supra* note 1, at 236 (stating that court's refusal to vacate judgment may force parties to continue appeal and to increase litigation costs to themselves, courts, and public); Rappaport, *supra* note 1, at 752 (stating that allowing parties to settle after judgment avoids costs of adjudication of needless appeals).

208. *See* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 282 (2d Cir. 1985) (stating that denial of motion for vacatur, when granting of such motion is condition to settlement, leads to more rather than less litigation).

209. *See* Fisch, *supra* note 1, at 637 (stating that *Nestle* analysis fails to realize that routinely allowing vacatur operates to encourage speculative litigation because parties can avoid potential collateral costs of litigation).

210. *See id.* at 636-37 (stating that if litigant can reasonably anticipate that court will grant postjudgment motion for vacatur, party may choose to wait until after trial to settle because this decision will not be costly).

211. *See id.* at 637 (stating that vacatur operates to encourage speculative litigation rather than to encourage pretrial settlement because vacatur allows parties to avoid potentially unfavorable results of litigation).

212. *Cf. Nestle*, 756 F.2d at 281 (stating that Nestle moved for vacatur of trial judgment because it desired to continue to defend Toll House trademark and feared judgment would operate preclusively in subsequent litigation).

213. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 124 (Cal. 1992) (stating that court of appeals incorrectly suggested that trial court judgments provide guidance to other courts and litigants); Klingeman, *supra* note 1, at 246 (stating that settlement while claim is pending appeal precludes creation of precedent in form of appellate judgment).

number of federal district court opinions published every year.[214] A lower court judgment is the first step in the process of developing precedent.[215] The vacatur of a trial court judgment may inhibit the development of precedent in the area of substantive law that the court addresses in its opinion.[216]

The third argument for granting motions for vacatur and reversal at the will of the litigants is that granting these motions facilitates fair treatment of the litigants. This argument contends that the litigants are the people most affected by the judgment.[217] By denying the litigants' motion for vacatur or reversal, the court requires the parties to continue to bear the many burdens of litigation when they really wish to bring their dispute to an end.[218] These hardships include both the financial and psychological costs of litigation.[219] Parties often choose settlement for pragmatic reasons—settlement is the most reasonable and inexpensive solution to their dispute under the circumstances.[220] Moreover, the losing party often may wish to alleviate bad publicity from the trial through vacatur.[221] The argument of fairness to the litigants has validity, but it cannot necessitate granting motions for vacatur or reversal in every case because it ignores the significant public implications that court judgments may have.[222]

The fourth argument favoring granting motions for vacatur and reversal of judgments pursuant to postjudgment settlement is that once the parties settle their dispute the case is moot. Litigants have argued that this mootness requires the court to vacate the trial judgment automatically according to

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214. *See* Fisch, *supra* note 1, at 629 n.205 (stating that scholars contending that utility of published opinions is limited to decisions of appellate courts might reconsider if scholars were aware of large number of trial court opinions that are published annually).

215. *See infra* notes 253-57 and accompanying text (discussing importance of persuasive precedent in development of legal rules).

216. *See supra* notes 138-39 and accompanying text (explaining how vacatur of judgment may deter later litigants from utilizing vacated decision).

217. *Neary*, 834 P.2d at 123.

218. *See id.* (listing costs that parties incur through litigation process and asserting that because of these costs, simple fairness calls for courts to accommodate parties' wishes); Rappaport, *supra* note 1, at 751-52 (stating that court's denying parties ability to negate collateral estoppel effects of judgment through settlement causes winning party to remain unpaid and forces losing party to expend resources on appeal); Zeller, *supra* note 1, at 867 (expressing that settlement resolves uncertainties, restores amicable relations, and frees parties to concentrate on more productive activities).

219. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 123 (Cal. 1992) (asserting that compelling litigants to continue their appeal will subject them not only to further legal costs, but also continuing psychological burdens).

220. Kipp D. Snider, Note, *The Vacatur Remedy for Cases Becoming Moot Upon Appeal: In Search of a Workable Solution for the Federal Courts*, 60 GEO. WASH. L. REV. 1642, 1673 (1992).

221. *See supra* notes 193-98 and accompanying text (discussing alleviation of adverse publicity as motivation for seeking vacatur or reversal).

222. *See* discussion *infra* part VI (arguing that judgments can have significant impact on general public and can provide significant public benefits).

United States v. Munsingwear, Inc.[223] *Munsingwear* involved a government claim against a business for violating regulations that set maximum prices for the sale of specific commodities.[224] The government lost at trial, and while the case was pending appeal, the price of the commodity involved was decontrolled.[225] The Supreme Court stated that a court should reverse or vacate a civil case that becomes moot while an appeal is pending.[226]

Nevertheless, when parties have conditioned settlement upon vacatur of a lower court judgment, the federal courts consistently have held that the controversy is not moot.[227] The reasoning behind this view is that the parties' dispute is still alive if the court denies the litigants' motion.[228] However, some disagreement exists as to whether a court should vacate a judgment due to mootness when the parties settle their dispute first and later move the court to vacate or reverse the trial judgment.[229] The majority of courts, though, finding *Munsingwear* inapplicable when litigants moot a case through deliberate action, have held that the settlement of a dispute while an appeal is pending does not automatically entitle litigants to vacatur.[230]

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223. 340 U.S. 36 (1950).

224. United States v. Munsingwear, Inc., 340 U.S. 36, 37 (1950).

225. *Id.*

226. *Id.* at 39; *see also* Great Western Sugar Co. v. Nelson, 442 U.S. 92, 94 (1979) (stating that when appeal becomes moot due to completion of arbitration proceedings, correct procedure is to vacate both court of appeals and district court judgments). The Court in *Munsingwear* cited Duke Power Co. v. Greenwood Co., 299 U.S. 259 (1936), for the doctrine that the appellate court has the "duty" to reverse or vacate the judgment below when a case becomes moot pending a Supreme Court decision. *Munsingwear*, 340 U.S. at 39 (citing *Duke Power*, 299 U.S. at 267). In *Duke Power*, the district court had entered a decree permanently enjoining defendants from carrying out a contract. *Duke Power*, 299 U.S. at 261. The defendant later terminated the original contract and entered into a new contract, which eliminated the terms of the earlier contract that the district court had found objectionable, mooting the controversy. *Id.* at 262, 267.

227. *See* National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 766-67 (9th Cir. 1989) (stating that *Munsingwear* doctrine is inapplicable when mootness arises from deliberate actions of litigant); *In re* Memorial Hosp., Inc., 862 F.2d 1299, 1301 (7th Cir. 1988) (holding that *Munsingwear* does not apply when parties settle case conditionally upon vacatur of lower court judgment); Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 282 (2d Cir. 1985) (same).

228. *See Nestle*, 756 F.2d at 282 (stating that when parties make settlement conditional upon vacatur of district court judgment, vacatur does not result from case's mootness, but rather, mootness is consequence of vacatur).

229. *See* Snider, *supra* note 220, at 1673 (providing in-depth discussion of when courts should vacate judgments in cases which become moot pending appeal).

230. *See* Karcher v. May, 484 U.S. 72, 83 (1987) (stating that *Munsingwear* is inapplicable when appeal becomes moot because losing party declines to pursue appeal and not because of circumstances unattributable to parties); Riverhead Sav. Bank v. Nat'l Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990) (holding that *Munsingwear* does not apply when appellants moot action through their own actions); Fishman v. Estate of Wirtz, 807 F.2d 520, 585 (7th Cir. 1986) (stating that case does not become moot pursuant to *Munsingwear* when parties voluntarily abandon their rights to further review); Center for Science in Pub. Interest v. Regan, 727 F.2d 1161, 1165-66 (D.C. Cir. 1984) (stating that when party before court prevents review of district court judgment through deliberate action, court of appeals should not order district court to vacate its judgment); Ringsby Truck Lines v. Western Conference of Teamsters,

VI. The Public Value of Court Judgments

Courts that favor granting motions for vacatur or reversal to facilitate settlement under almost any circumstances fail to consider that judicial decisions serve important functions beyond the resolution of the litigants' immediate dispute.

A. The Public Effect of Judgments

First, these courts fail to recognize that judicial decisions often affect large groups of people not directly before the court.[231] In the past forty years, society has become increasingly bureaucratized, and now many transactions do not occur solely on a bilateral basis.[232] Congress has developed numerous social programs that affect the interests of significant numbers of people.[233] Congress also has created large agencies to run these programs.[234] Because of the broad discretion these bureaucratic agencies have in implementing statutory programs,[235] much litigation now concerns public challenges to the propriety of administrative action.[236] Judicial decisions construing tax, welfare, and housing legislation provide examples of such disputes.[237]

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686 F.2d 720, 722 (9th Cir. 1982) (holding that exception to *Munsingwear* applies when appellant caused dismissal of appeal by his own act); *see also* Clipper v. Takoma Park, 898 F.2d 18, 19 (4th Cir. 1989) (denying request that appellate court withdraw its opinion when parties settled dispute while court of appeals considered parties petition for rehearing); Armster v. United States Dist. Court, 806 F.2d 1347, 1354-56 (9th Cir. 1986) (refusing to vacate appellate judgment when case became moot after court of appeals rendered decision and reasoning that allowing vacatur under such circumstances would encourage manipulation of judicial process). *But see* Stewart v. Southern Ry., 315 U.S. 784 (1942) (vacating Supreme Court's judgement along with judgment of court of appeals when parties settled case while Court considered petition for rehearing); *Clipper*, 898 F.2d at 19-20 (Widener, J., dissenting) (arguing that court of appeals should have withdrawn opinion due to mootness when case settled while appellate court was considering petition for rehearing); Ruiz v. Estelle, 688 F.2d 266, 266-67 (5th Cir. 1982) (vacating portion of appellate opinion pertaining to issue settled by litigants before court of appeals issued decision), *cert. denied*, 460 U.S. 1042 (1983).

231. *See* Chayes, *supra* note 199, at 1281 (discussing public litigation model of judicial process).

232. *See id.* at 1291 (noting growing awareness that many important public and private interactions take place on bureaucratized basis).

233. *See* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 1, 9 (stating that recent congressional legislation affects broad array of diffuse interests).

234. *Cf. id.* at 60 (stating that central phenomena of modern administrative state is that bureaucratic agencies run institutions and programs that affect large numbers of people).

235. *See id.* (stating that bureaucratic decisionmakers exercise broadly delegated powers in running congressional programs).

236. *See id.* (recognizing that now parties extensively use judiciary to control actions of federal administrative agencies).

237. *See* Chayes, *supra* note 199, at 1294 (stating that suits involving statutory construction of tax, welfare, and housing legislation have impact on large numbers of people not before courts).

Suits that involve individuals' attempts to enforce statutory rights also provide examples of judicial determinations that can have a significant public effect. In the recent past, Congress has extended statutory protection to many rights that courts previously did not recognize, such as a person's right to nondiscriminatory treatment.[238] In resolving disputes involving such statutory rights, the courts consider broad questions of policy in addition to weighing the interests of the litigants.[239] For example, public policy issues are very important in lawsuits brought pursuant to Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of race.[240] In such litigation, a court must determine both how to redress the plaintiff's injuries and how to further Congress's goal of assuring equality of employment opportunities.[241] Therefore, the litigants are not the only people with an interest in the litigation, because the public also benefits generally from judgments that decrease discrimination in society.[242] The Supreme Court of the United States and the federal courts of appeals have recognized the important public ramifications of such statutory claims, as evidenced by holdings that the federal courts retain the ultimate authority to decide lawsuits brought pursuant to specific federal statutes.[243]

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238. Civil Rights Act of 1964, 42 U.S.C. §§ 1975a-1975d, 2000a to 2000h-6 (1988 & Supp. II 1990); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988 & Supp. II 1990); *see* Chayes, *supra* note 233, at 23 (stating that standing explosion of 1960s resulted from recognition of legal protection of new categories of interests, such as conservation, personal expression, and privacy).

239. *See* Chayes, *supra* note 199, at 1294-95 (stating that suits involving enforcement of statutory rights often consist of arguments over how courts should implement government policy). As suits involving the vindication of statutory policies become more common, the job of the courts begins to resemble legislation rather than just the resolution of private disputes. *Id.* at 1297. A problem draws the court's attention, and the court attempts to develop measures to cure the mischief for the future as well as the present. *Id.*

240. 42 U.S.C. §§ 1975a-1975d, 2000a to 2000h-6 (1988 & Supp. II 1990)).

241. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974) (stating that private litigants not only redress their own injury, but also vindicate congressional policy against discriminatory employment practices by bringing suits pursuant to Title VII of Civil Rights Act of 1964).

242. *See* Chayes, *supra* note 199, at 1295-96 (stating that when party brings lawsuit pursuant to congressional enactment, courts acknowledge that statute embodies affirmative objective that courts should foster, and in shaping relief, courts give due weight to interests of unrepresented parties).

243. *See* McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984) (holding that when plaintiff brings action pursuant to Civil Rights Act of 1871, federal court should not afford res judicata or collateral estoppel effect to award given in arbitration proceeding); *Alexander*, 415 U.S. at 59-60 (holding that federal court should consider *de novo* plaintiff's action brought pursuant to Civil Rights Act of 1964 when plaintiff earlier had submitted claim to final arbitration under nondiscrimination clause of collective bargaining agreement); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827-28 (2d Cir. 1968) (holding that claims brought pursuant to Sherman Anti-Trust Act are inappropriate for arbitration); *see also* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1657 (1991) (Stevens, J., dissenting) (stating that Court should not compel plaintiffs to submit claims pursuant to Age in Discrimination Act of 1967 to binding arbitration).

Similarly, tort litigation may have implications for parties not directly before the court. As mass products liability claims have become more common, courts and commentators have developed new theories of tort liability that, instead of simply aiming to compensate victims for their injuries, attempt to alter producer behavior by shifting the costs of accidents to the producers of goods.[244] As a result, courts sometimes issue judgments assessing punitive damages against product liability defendants—action specifically designed to alter conduct[245]—and are more willing to provide plaintiffs with injunctive relief.[246] Therefore, some judgments against companies that produce faulty products have ramifications for persons beyond the litigants.[247] Such judgments provide a message to similarly situated companies that, in theory, should cause them to produce safer products and save others from suffering similar injuries.

Today, many lawsuits involve claims challenging administrative action, attempting to enforce statutory rights, or seeking to hold companies liable for dangerous products. Accordingly, when considering whether to grant a motion to vacate or reverse a lower court judgment in order to facilitate postjudgment settlement, a court should not assume that only the litigants have an interest in the judgment. Courts should recognize that the judgment may have implications for parties not directly before the court.

B. The Development of Precedent

Viewing litigation simply as a means of resolving disputes between the litigants also ignores the other primary function of courts: producing legal rules that guide other courts in resolving future disputes.[248] In deciding cases, courts determine what the parties' exact legal obligations are under the specific circumstances of their dispute.[249] Courts create narrow legal rules that other courts can apply in similar situations.[250] However, no two

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244. *See* Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 671 (1988) (stating that path-breaking scholars and courts have propelled plaintiffs into new theories of liability to improve plaintiffs' chances of attaining compensation and to alter behavior of providers of goods and services).

245. *See id.* at 671-72 (stating that courts' increased willingness to assess punitive damages is explicit endorsement of relief designed to alter conduct); *cf.* BLACK'S LAW DICTIONARY 390 (6th ed. 1990) (defining punitive damages as damages that are above amount needed to compensate plaintiffs and that are intended to make examples of defendants).

246. *See* Marcus, *supra* note 244, at 672-73 (providing examples of courts that have found injunctive relief to be proper remedy in some tort cases).

247. *See id.* at 672 (stating that tort litigation often has substantial social importance in addition to "private" significance).

248. *See infra* notes 249-57 and accompanying text (discussing importance of courts' role of developing guiding precedent).

249. *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 249 (1976) (stating that in resolving dispute over meaning of statute, court defines specific requirements of statute in circumstances presented in case).

250. *See id.* at 249-50 (stating that court's resolution of legal dispute creates specific rule applicable to like circumstances, but rule court creates in single decision tends to be narrow because rule is limited to court's holding).

controversies are factually identical. In each case, courts must decide whether to apply, extend, or reformulate relevant legal doctrines.[251] Nevertheless, the accumulation of numerous judicial decisions can create general doctrines of law that courts may apply broadly in future cases and that in many ways have the same effect as explicit statutory rules.[252]

In addition, a court's judgment has significance beyond any binding precedent it may create. A court's opinion makes a contribution to legal thought in the substantive area that the case addresses. Courts often rely on persuasive precedent in their legal reasoning.[253] When deciding whether to extend a rule to a new set of circumstances, a court often will consider if courts in other jurisdictions have applied legal doctrine in a similar manner.[254] Furthermore, well-reasoned persuasive precedent may convince a court to create exceptions to binding precedent.[255] Because this discourse between courts is an important factor in the development of law,[256] even lower court judgments, though having little formal effect, may play a significant role in the process of developing precedent.[257]

C. The Economic Value of Precedent

Most courts that favor granting vacatur or reversal of judgments to facilitate settlements point to advantages of postjudgment settlement that relate to increasing efficiency, such as cost savings to the individual parties—benefits that are easily quantifiable.[258] However, judgments also can promote

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251. MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 36 (1988).

252. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 509 (3d ed. 1986) (stating that accumulation of precedents dealing with same question will often create rule of law virtually having force of explicit statutory rule); Landes & Posner, *supra* note 249, at 250 (stating that solidifying rule in long line of decisions enhances authority of legal rule).

253. *See* EISENBERG, *supra* note 251, at 97 (discussing studies finding that state supreme courts frequently cite to out-of-state cases and other secondary sources).

254. *See id.* at 98 (stating that court will employ legal rule established in professional literature when there is no local precedent that governs issue in question).

255. *See id.* (stating that courts will treat doctrines established in professional literature as law even if they lead to different results than local precedent suggests, as long as local precedent is not flatly contradictory).

256. *See id.* at 156 (stating that criticism and understanding of legal propositions expressed in professional discourse and doctrinal propositions established in professional literature instruct courts in determining law).

257. *See* Fisch, *supra* note 1, at 629 n.205 (stating that large number of district court decisions that are published in reporters displays significant role that federal district court decisions play in development of precedent).

258. *See supra* notes 206-08 and accompanying text (presenting argument that courts should routinely grant motions for vacatur or reversal made pursuant to postjudgment settlement to conserve judicial resources and save litigants from costs of appeal). One cannot as readily quantify the economic benefits that arise from a court's judgment. *See generally* Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817 (1989) (asserting that economic theory of Pareto efficiency is of little use in examining net benefit society derives from particular judgments or legal concepts); Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CAL. L. REV. 815 (1990)

efficiency. Assuming that lawsuits occur when parties are unable to agree on the likely outcome of litigation, more litigation will exist in uncertain areas of the law.[259] Therefore, the proliferation of judgments clarifying legal rules can decrease the amount of litigation that parties undertake, because these judgments generally add more certainty to the law.[260] If the law is more certain, attorneys are better able to assess the probable outcome of litigation, and potential litigants are more likely to settle their dispute without judicial intervention.[261] Furthermore, attorneys can better advise clients on how to avoid legal conflicts when planning transactions if the legal obligations of parties in certain situations are clear.[262] If the number of legal conflicts that occur in transactions is decreased, the total cost of engaging in transactions will be less.

(discussing failure of positive economic theory to realistically quantify social value of judicial decisions). Many legal economists attempt to measure the benefits of laws according to their effect upon wealth maximization or on people's welfare. *See id.* at 825-835 (analyzing legal economists' attempts to use theory of wealth maximization to empirically measure welfare effects of laws). The theory of wealth maximization allows the legal economist to measure the consequences of a legally significant event in three ways: (1) how much the victim would be willing to pay to avoid the consequences of the event, (2) how much the offender would have to be paid to abandon the activity, and (3) the market value of the damage to the victim. *Id.* at 825. But the wealth that a person possesses does not always directly reflect that individual's welfare. *See id.* at 828 (stating that people often make choices that lower their incomes but provide larger amount of nonmonetary satisfaction). Often a legal judgment decreases one person's welfare while increasing another person's welfare. *See id.* at 835 (stating that to determine if criminal law results in net increase in welfare one would have to compare loss of criminal to gain of potential victims). Particularly when a legal principle involves involuntary transactions such as divorce, theft, rape, pollution, libel, or fraud, economic analysis has difficulty explaining the law's welfare effects. *Id.* at 841. Moreover, utility is a concept that is difficult to measure empirically because it involves a person's subjective determination that the person is "well off." *Id.* at 831. An outside observer cannot easily measure a person's desires or preferences, especially in a manner that allows the observer to compare that individual's preferences with someone else's preferences. *Id.* at 836.

Similarly, the economic theory of Pareto efficiency considers a law to be efficient if it increases the welfare of at least one person without decreasing the welfare of anyone else. Cooter, *supra*, at 821-22. However, actual changes in law are almost never Pareto improvements. *Id.* at 831.

259. Landes & Posner, *supra* note 249, at 270; *see* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 26 (stating that uncertainty is likely to be greater in areas of law in which few rulings exist).

260. *See* POSNER, *supra* note 252, at 511 (stating that generation of precedent reduces legal uncertainty, which causes amount of litigation to fall); Landes & Posner, *supra* note 249, at 272 (stating that as stock of legal knowledge relating to statute builds, uncertainty falls and consequently amount of litigation concerning statute also decreases).

261. *See* Philip B. Heyman, *Considering the Costs and Benefits of Lawyering in Drafting Legislation or Establishing Precedents*, 36 VILL. L. REV. 191, 201 (1991) (stating that litigation arises when parties cannot agree on meaning of law as applied to specific factual situation and that, conversely, if parties to suit have similar views as to value of potential judgment they will probably settle before trial).

262. *See id.* at 210 (stating that in planning transactions clear legal rules can facilitate agreements between parties that adjust parties' expectations of each other under circumstances presented); EISENBERG, *supra* note 251, at 4 (stating that society has enormous need for legal rules that allow private individuals to plan activity).

Even a single trial judgment can promote efficiency if it has collateral estoppel effect. If a court decides that another court determined an issue in prior litigation, the court can preclude a party from subsequently arguing about the same issue.[263] By applying issue preclusion, the court resolves the legal issue quickly and avoids expense to the litigants and the courts.

Judgments also can promote efficiency by deterring immoral behavior. Adherence to some moral principles, such as honesty and trustworthiness, increases efficiency because acting in accordance with these principles reduces transaction costs.[264] The common law in many instances provides incentives for people to observe such moral principles.[265] For example, contract law promotes honest and trustworthy behavior by allowing parties to rescind contracts induced through fraud.[266] Similarly, contract law often requires parties to fulfill their promises, or subjects parties to liability for damages for breach of their promises.[267] Court judgments punishing parties who act immorally provide public statements that people will incur penalties for such behavior,[268] and can deter people from acting in ways that increase transaction costs.[269]

VII. THE PROPER STANDARD TO APPLY TO MOTIONS FOR VACATUR UPON SETTLEMENT

A standard that allows courts to grant motions for vacatur or reversal of lower court judgments as a matter of right to facilitate postjudgment settlement,[270] absent a showing of extraordinary circumstances,[271] does not

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263. *See supra* notes 157-65 and accompanying text (discussing doctrine of collateral estoppel).

264. POSNER, *supra* note 252, at 238-39.

265. *See infra* notes 266-69 and accompanying text (describing how judgments promote efficiency by deterring immoral behavior). Moral principles are the basis for much of the common law. *See* POSNER, *supra* note 252, at 238 (stating that correction of injustice and vindication of moral sense were fundamental principles of common law of England and United States).

266. *See* 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:20, at 49-50 (Richard A. Lord ed., 4th ed. 1990) (stating that promises induced by fraud form voidable contracts).

267. *See id.* § 1:1, at 2-5 (defining term "contract").

268. *Cf.* POSNER, *supra* note 252, at 242-43 (emphasizing need for law to be public to have deterrent effect).

269. *See id.* (stating that viewing law from economic perspective, law can be useful as system for altering incentives and regulating behavior).

270. *See* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 283 (2d Cir. 1985) (stating that Second Circuit routinely will grant motions for vacatur pursuant to postjudgment settlement agreements); *see also* U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728, 731 (Fed. Cir. 1992), *cert. granted sub nom.* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249 (1993) (granting joint motion for vacatur of district court judgment pursuant to postjudgment settlement despite judgment's use for preclusive purposes in another suit).

271. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 120 (Cal. 1992) (holding that when reversal is condition of settlement agreement, appellate courts should grant joint motions for reversal of trial court judgments under all but extreme circumstances).

give sufficient consideration to the value the public derives from judgments. This standard ignores the public effect of many judgments, allows litigants to disrupt the judicial system's development of precedent, and prevents judgments from promoting efficiency.[272] Applying such a deferential standard to motions for vacatur gives more weight to private litigants' wishes concerning the establishment of legal rules than to the views of judges. Giving litigants' views such influence is a problem when litigation has significant public effects and has important public policy ramifications, such as when a party is challenging the propriety of an administrative agency's actions or attempting to enforce a statutory right that furthers a congressional goal.[273] This standard allows the interests of private parties with significant financial resources to outweigh society's interest in justice and fairness.[274] Consequently, wealthy private parties can usurp control over the legal process, promoting the perception that the judicial system is illegitimate.[275]

Additionally, lower court decisions constitute the beginning of the process of creating precedent.[276] If courts allow litigants to vacate or reverse trial judgments virtually at will, this could stifle the development of precedent.[277] Consequently, courts would allow uncertainty to remain in specific substantive areas of the law, which would decrease efficiency.[278]

Conversely, a standard by which courts always deny motions for vacatur of trial court judgments made pursuant to settlement agreements is too inflexible and dismisses too swiftly the benefits of private settlement.[279] Although the benefits of settlement are not as great as the proponents of granting vacatur or reversal at the will of litigants assert,[280] courts should not

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272. *See* discussion *supra* part VI (arguing that judgments can have important public impact and can provide significant public benefits).

273. *See supra* notes 231-47 and accompanying text (asserting that judgments can have significant impact on public).

274. *Cf.* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (asserting that distribution of financial resources significantly affects bargaining process, and therefore settlement is at odds with any concept of justice that seeks to make parties' wealth irrelevant).

275. *See Neary*, 834 P.2d at 127-28 (Kennard, J., dissenting) (stating that court erodes public respect for judicial system when court decides that party who has litigated and lost at trial can, by paying sum of money sufficient to secure settlement conditioned upon reversal, purchase nullification of adverse judgment); Fisch, *supra* note 1, at 631 (stating that judicial system in which wealthy litigants can use litigation process as nonbinding gambling procedure is abhorrent).

276. *See supra* notes 253-57 and accompanying text (discussing contribution that lower court judgments make to development of precedent).

277. *See supra* notes 248-57 and accompanying text (discussing process courts engage in to develop guiding precedent).

278. *See supra* notes 259-69 and accompanying text (discussing how judgments can promote economic efficiency).

279. *See In re* Memorial Hosp., Inc., 862 F.2d 1299, 1300 (7th Cir. 1988) (announcing that Seventh Circuit will always deny parties' motions for vacatur of district court opinions or judgments).

280. *See supra* notes 209-12 and accompanying text (asserting that allowing vacatur or reversal at will of litigant may increase use of judicial resources).

discount absolutely the importance of clearing court dockets[281] and the financial and psychological burdens that litigants incur through an appeal.[282] Moreover, the outcome of litigation does not always have significant ramifications for the public, and not every judicial decision makes a meaningful contribution to legal thought.

Because neither an absolute standard that requires always granting motions for vacatur pursuant to settlement nor an absolute standard that routinely denies such motions adequately takes into account all of the relevant considerations, courts should apply a standard similar to that developed by the Ninth Circuit in *National Union*.[283] The Ninth Circuit has concluded that the equities in each situation should determine whether a court will grant a motion for vacatur pursuant to a postjudgment settlement.[284] However, the considerations should be broader than those the Ninth Circuit set forth, which are limited to the public interest in finality of judgments and the parties' rights to relitigation of unreviewed issues.[285]

When determining whether to grant a motion for vacatur pursuant to a settlement agreement, a court should first contemplate the precedential value of the trial court opinion. If the decision pertains to an unsettled area of substantive law, a court should deny the motion because such decisions contribute to the development of legal doctrines[286] and increase efficiency by clarifying people's legal obligations.[287] Secondly, a court should examine whether the judgment might have preclusive value to other parties.[288] If the dispute implicates parties besides the litigants, a court should not grant the motion.[289] Courts that vacate judgments impacting third parties who are not before the court may destroy any opportunity these unrepresented parties have to use the judgment for issue preclusion purposes in future litigation, and may cause other courts to expend judicial resources unnecessarily by

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281. *See supra* notes 206-08 and accompanying text (explaining argument that large court caseloads have created need for conservation of judicial resources).

282. *See supra* notes 217-21 and accompanying text (discussing argument that fairness compels courts to acquiesce to parties' wishes to facilitate settlement because parties incur substantial financial and psychological costs in litigation).

283. National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989).

284. *Id.* at 764; *see supra* notes 45-61 and accompanying text (discussing holding of *National Union*).

285. *Id.*

286. *See supra* notes 248-57 and accompanying text (explaining that courts serve important function by producing legal rules to guide courts in resolving future disputes).

287. *See supra* notes 259-63 and accompanying text (describing how court judgment can decrease amount of litigation by reducing amount of uncertainty in specific substantive areas of law).

288. National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 765 (9th Cir. 1989) (stating that district court should determine whether to grant motions for vacatur pursuant to postjudgment settlement by weighing competing values of finality of judgment and litigants' rights to relitigation of unreviewed issues).

289. *See id.* at 769 (stating that district court correctly denied motion for vacatur because presence of third party interests created possibility that judgment could have preclusive effect in later litigation).

forcing these courts to resolve issues that have already been determined.[290] Subsequent courts that can consider both sides' arguments concerning the propriety of applying issue preclusion and the specific circumstances under which a party is seeking such action should make the decision of whether to preclude a party from arguing about an issue raised in earlier litigation.[291]

Lastly, a court should try to determine the litigants' motives for seeking vacatur.[292] While examination of the first two factors will provide some insight into this inquiry, it is important for the court to undertake a separate analysis to determine the parties' motives. If a court's decision has little precedential value and does not implicate third parties, a court should further examine the circumstances surrounding the parties' motion for vacatur. If the parties possess legitimate reasons for moving the court to take such action, such as ameliorating bad publicity[293] or alleviating the psychological effects of litigation,[294] the court should grant the parties' motion. However, allowing a party to vacate trial court decisions when a party possesses a discernible motive to either shape precedent or avoid the preclusive effects of a decision casts considerable doubt on the legitimacy of the judicial system.[295] Granting a motion for vacatur under such circumstances amounts to an endorsement of manipulation of the legal process.

A court should consider these same factors when determining whether to grant a motion for reversal of a lower court judgment pursuant to a postjudgment settlement. However, a presumption should exist against granting a motion for reversal. This is essentially the approach California Supreme Court Justice Kennard advocates in her dissent to the *Neary* majority opinion.[296] The severe implications of reversing a judgment justify the application

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290. *See supra* note 168 and accompanying text (stating that vacatur of judgment generally deprives judgment of preclusive effect).

291. *Cf.* Bates v. Union Oil Co., 944 F.2d 647, 650 (9th Cir. 1991) (holding that judgment vacated pursuant to settlement agreement may still have preclusive effect in later litigation if vacating court in making determination whether to grant litigants' motion for vacatur failed to consider possibility that third parties could use judgment for collateral estoppel purposes); Hartley v. Mentor Corp., 869 F.2d 1469, 1473 (Fed. Cir. 1989) (stating that when parties dismiss their case pending appeal, district court in subsequent case in which party asserts collateral estoppel should make determination of collateral estoppel effect of judgment).

292. *See* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 127 (Cal. 1992) (Kennard, J., dissenting) (stating that when appellate court is contemplating settlement conditioned upon reversal of trial judgment, court should examine parties' reasons for seeking reversal of judgment).

293. *See supra* notes 193-98 and accompanying text (discussing amelioration of adverse publicity as possible motive behind parties' making vacatur of lower court judgment condition of settlement).

294. *See supra* note 219-20 and accompanying text (explaining that many litigants desire to settle cases pending appeal simply to end psychological hardships of litigation).

295. *See supra* notes 274-75 and accompanying text (asserting that courts erode public respect for judicial system when courts allow parties to purchase nullification of trial judgments by routinely granting motions for vacatur pursuant to postjudgment settlement agreements).

296. *Neary*, 834 P.2d at 127 (Kennard, J., dissenting).

of a more stringent standard than that applied to motions for vacatur.[297]

VIII. CONCLUSION

With the Supreme Court granting certiorari to consider a case that presents only one problem associated with vacating trial court judgments upon postjudgment settlements,[298] and with parties' increasing use of this device at both the federal and state level, the courts will continue to grapple with the issue of whether to grant or deny motions for vacatur when such action is a condition to postjudgment settlement agreements. A court's determination of whether or not to grant these motions has significant ramifications. Judgments have value for the public, but litigants also have legitimate interests in ending the hardships of litigation. The suggested standard allows courts to weigh all of the relevant considerations in each case and, more importantly, should produce just outcomes for both litigants and society.

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297. *See supra* notes 97-99 and accompanying text (discussing ramifications of reversal of lower court judgments).

298. *See supra* notes 181-88 and accompanying text (explaining that *Izumi* presents Supreme Court with limited issue of whether federal courts should grant parties' motions for vacatur of district court judgments when other courts have used trial judgment for issue preclusion purposes).