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Is Settlement Conditioned on Vacatur an Option - Should It Be

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COMMENT

IS SETTLEMENT CONDITIONED ON VACATUR AN OPTION? SHOULD IT BE?

I. INTRODUCTION

Currently, whether a court grants or denies a motion to vacate resulting from settlement depends more on the particular court in which the request is made, than on the facts of the case and the effect of vacatur. Courts not permitting vacatur have expressed the fear that parties sensing they are going to lose will "buy their way out of an unfavorable precedent often at the relatively cheap price asked by the single opponent they face in that appeal."[1] Other courts routinely grant requests for vacatur. Settlements conditioned on the court's granting vacatur, and thereby avoiding precedent or issue preclusion, can be expected to increase as the use of court-annexed mediation at the appellate level expands.[2]

Conflicting views of litigation as a predominately public concern, as opposed to a private concern, raise difficult issues for the mediator and the court in evaluating settlements. Pending an appeal, can the parties fashion a settlement under which the losing party offers the winning party something in return for a joint motion to vacate the lower court judgment? This type of settlement involves not only the parties, as in pre-trial settlement, but the court which must vacate the judgment. The vacatur can also affect third parties not involved in the litigation who may later want to use the judgment as precedent or for issue preclusion. In light of this, how should the mediator respond when the idea of a settlement

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1. Village Escrow v. National Union Fire Ins. Co., 248 Cal. Rptr. 687, 696 (Ct. App. 2d Cir. 1988) (denying dismissal requested as a part of settlement agreement after oral argument but before the judgment had been issued). *See also In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1303 (7th Cir. 1988); Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982).

2. The United States Court of Appeals for the Second Circuit started the Civil Appeals Management Program (CAMP) in 1974; the Sixth Circuit started a mediation program in 1981; the Ninth Circuit started its Innovation Project in 1983 to clarify issues on appeal; the D.C. Circuit has an experimental settlement program; and the Tenth Circuit is about to begin a conference program, the Tenth District Court of Appeals Pre-Hearing Conference Program, submitted to the Ohio Supreme Court Committee on Dispute Resolution, Public Hearing Nov. 9, 1989. Appellate level mediation or settlement programs are found in the state appellate courts of California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Maryland, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, and Washington. SIXTH CIRCUIT COURT OF APPEALS MARCH STATUS REPORT, April 5, 1990.

conditioned on vacatur arises? Should the parties' interests take priority over the public interests, and how should the court respond to such requests?

The reason that the parties request vacatur may vary and affect the appropriateness of vacatur. If the parties want to vacate a poorly reasoned or mistaken judgment in order to avoid the time and expense of an appeal, such a settlement would seem to be efficient and create few policy concerns. However, if the original judgment was sound and well-reasoned and the losing party is willing to pay the winning party to obtain a joint motion to vacate in order to avoid the preclusive effect of the judgment, then major policy concerns arise.

The courts have come to no consensus on the proper response to such requests, or even the appropriate procedural steps. Some courts routinely vacate at the request of the parties,[3] others deny such requests,[4] and others advocate a balancing approach at the district court level.[5] As a result of this uncertainty, mediators may be reluctant to suggest vacatur as an alternative in appellate level mediation. If vacatur is not appropriate, then this is not a problem; but if vacatur is a legitimate alternative, then the mediator is ignoring a valuable tool in his attempt to move the parties toward settlement.

This Comment will examine the procedures used to request vacatur, the effect of vacatur on a judgment, and the courts' response to these requests. This Comment will then look at the policy considerations and suggest that in deciding whether to vacate a judgment a balancing of the factors involved is the most appropriate treatment and suggest the factors to be considered by the court in this balancing. This Comment will also consider policy considerations for the mediator in appellate level mediation programs.

II. PROCEDURES FOR REQUESTING VACATUR

A. Requesting Vacatur

Parties who reach settlement and want vacatur of a judgment often make a rule 60(b) motion for relief from judgment. Federal Rule of Civil Procedure 60(b), which governs federal courts in granting relief from judgments or orders,[6] permits the court to grant relief in a variety of situations including mistake, neglect, newly discovered evidence, fraud, judgment is void, judgment has been satisfied, or "any other reason justifying relief from the operation of the judgment."[7] The language of the rule indicates that the court is to use its

3. Nestle Co., Inc. v. Chester's Mkt., Inc., 756 F.2d 280 (2nd Cir. 1985).
4. *See Memorial Hosp.*, 862 F.2d 1299.
5. *See Ringsby*, 686 F.2d 720.
6. FED. R. CIV. P. 60. Rule intended to cover the whole field, 1946 advisory committee notes.
7. FED. R. CIV. P. 60(b)(6).

discretion in granting or denying the motion "upon such terms as are just".[8] According to the traditional rule, when the motion to vacate is made pending appeal, the district court has been divested of jurisdiction and is without power to grant relief under rule 60(b).[9] The district court needs the permission of the appellate court to grant the motion.[10] An order denying relief under rule 60(b) is a final appealable order.[11]

The circuits vary in whether or not they allow the motion to vacate to be originally filed in the district court, require the case be remanded to the district court to hear the motion, or decide to hear the motion themselves. For example, the Second Circuit Court of Appeals remanded to the district court a rule 60(b) motion requesting vacatur, leaving open the right to appeal the district court's decision.[12] The Ninth Circuit has denied a request for vacatur and dismissed the appeal, indicating that the decision "between the competing values of finality of judgment and the right to relitigation of unreviewed disputes should be left to the district court."[13] In later cases, the Ninth Circuit remanded the case to the district court dismissing the appeal.[14] Both the Second and the Ninth Circuit courts in remanding indicated that on appeal the standard of review would be for an abuse of discretion.[15] The Sixth Circuit follows the procedure of *First National Bank of Salem, Ohio v. Hirsch*,[16] which requires that a 60(b) motion, after notice of appeal, be made to the district court and if the district court indicates that it is disposed to grant the motion, the appellate court should grant a motion to remand.[17] The Seventh Circuit has denied motions to vacate made directly to the appellate court, alternatively allowing dismissal of the appeal "as a matter of course."[18]

The courts also vary in how they characterize the motion to vacate, not all considering such a request as a rule 60(b) motion. The United States District

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8. *Id. See* Lohman v. General Am. Life Ins. Co., 478 F.2d 719, 724 (8th Cir. 1973), *cert. denied*, 414 U.S. 857 (1973); Justice Black's comment describing the discretion under 60(b)(6):

> In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in the court adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Klapprott v. United States, 335 U.S. 601, 614-15 (1849).

9. 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.30(2) at 331-32 (2d ed. 1987) [hereinafter J. MOORE].

10. *Id.*

11. *Id.* at 331 (¶ 60.30(1)).

12. *Nestle*, 756 F.2d at 281.

13. *Ringsby*, 686 F.2d at 722 (denying the request to vacate the lower court judgment).

14. Allard v. DeLorean, 884 F.2d 464, 467 (9th Cir. 1989) (after dismissing the appeal, the court remanded the case to the district court to decide whether to vacate the judgment below).

15. National Union Fire Ins. Co. v. Seafist Co., 891 F.2d at 765; *Nestle*, 756 F.2d at 282.

16. 535 F.2d 343 (6th Cir. 1976).

17. *Id.* at 346.

18. Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) (denying the motion without explanation); *Memorial Hosp.*, 862 F.2d at 1300 (denying the motion on the rationale that an opinion is a public act of government).

Court for the Western District of Virginia considered a joint motion to vacate a rule 59(e) motion to alter or amend judgment,[19] which the parties appealed to the Fourth Circuit after the district court denied the motion.[20]

Parties also rely on the Supreme Court's decision in *United States v. Munsingwear*[21] to request vacatur when the parties have settled pending an appeal.[22] In *Munsingwear*, the Court held that the appellate court should vacate a lower court judgment where the issue has become moot, at the request of the parties.[23] The case involved an issue which was rendered moot by an amendment to the law being challenged.[24] The Court was concerned over the lack of any review of the case in the Court of Appeals and the possibility of the judgment being used for res judicata.[25] The Court sought to protect parties from judgments "review of which was prevented by happenstance."[26]

The lack of a consistent response by the courts leaves parties and mediators uncertain as to how the court will allow the issue of vacatur to come before it, and once before the court, how it will use its discretion in deciding whether to grant or deny the request. The most common procedure is to consider the motion a rule 60(b) motion for relief from judgment which should be remanded to the district court, appealable to the appellate court under an abuse of discretion standard.[27] What the district court should consider in granting or denying the motion and therefore what constitutes an abuse of discretion is less clear.

B. The Issue of Mootness

1. Mootness Requires Vacatur

The mootness doctrine[28] often arises in discussions of whether to vacate a lower court judgment requested as a result of settlement. Based on the Supreme Court's decision in *Munsingwear*,[29] it is argued that, once a live controversy no

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19. Kennedy v. Block, 606 F. Supp. 1397 (W.D. Va. 1985).

20. Kennedy v. Block, 784 F.2d 1220 (4th Cir. 1986).

21. 340 U.S. 36 (1950).

22. *National Union*, 891 F. 2d at 765 ("We assume that it [National Union Fire] relies upon *United States v. Munsingwear* as the basis for its motion to vacate.").

23. United States v. Munsingwear, 340 U.S. 36 (1950).

24. *Id.*

25. *Id.* at 38-39.

26. *Id.* at 40.

27. *Cf. Nestle*, 756 F.2d 280; *First National Bank of Salem*, 535 F.2d 343.

28. This doctrine is used to describe the idea that court must vacate a decision when the issue has become moot and is unreviewable.

29. *Munsingwear*, 340 U.S. 36. The *Munsingwear* rule states that it is the duty of the appellate court to vacate a judgment if requested by the parties when the appeal is to be dismissed as moot. 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1984) § 3533.10 at 426 [hereinafter C. WRIGHT].

longer exists, the issue is moot and must be vacated at the request of the parties.[30] "It is the well settled doctrine that when a matter presented on appeal ceases to embody a case or controversy, it is 'the duty of the appellate court' to dismiss the appeal and vacate the judgment appealed from."[31]

The traditional rule relies on article III of the United States Constitution, which requires that federal courts hear only cases or controversies.[32] The courts recognize an exception for short-lived issues "capable of repetition, yet evading review."[33] The Fourth Circuit in *Kennedy v. Block*[34] found that the "claims now before us are moot as a result of settlement," and therefore vacated the lower district court order.[35] Similarly in *Aviation Enterprises, Inc. v. Orr*,[36] the court found there no longer existed a case or controversy due to the parties' settlement and vacated the district court order as a matter of duty.[37] Agreeing that "all of the issues involved in the appeal had been rendered moot in view of the earlier agreement between the parties settling the entire controversy,"[38] the United States Court of Customs and Patent Appeals found "that the appropriate action in such case is to vacate the judgment previously rendered."[39]

2. Settlement Does Not Result in Mootness

Not all courts agree that settlement renders an action moot. The Seventh Circuit has held that settlement does not render an action moot.[40] "[A] case does not become moot because the parties have voluntarily abandoned their right to further review."[41] The Ninth Circuit explained in *In re Memorial Hospital of Iowa County, Inc.*,[42] that in the court's view settlement was no different than a choice not to pursue one's right to appeal.[43] The court also indicated that in the case before it, involving a bankruptcy proceeding, any settlement had to be

30. *See Kennedy*, 784 F.2d 1220; Aviation Enters., Inc. v. Orr, 716 F.2d 1403 (D.C. Cir. 1983); Swingline, Inc. v. I.B. Kleinert Rubber Co., 399 F.2d 283 (C.C.P.A. 1968).

31. *Aviation Enters.*, 716 F.2d at 1407-08, relying on *Munsingwear*.

32. U.S. CONST. art. III, § 2.

33. *Kennedy*, 784 F.2d at 1222, *quoting* Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911).

34. *Id.* at 1220.

35. *Id.* at 1224.

36. 716 F.2d 1403 (D.C. Cir. 1983).

37. *Id.* at 1407-08.

38. *Swingline*, 399 F.2d at 284.

39. *Id.*

40. *Fishman*, 807 F.2d at 585 (giving no further explanation).

41. *Id.*; *Memorial Hosp.*, 862 F.2d at 1301.

42. 862 F.2d 1299.

43. *Id.* at 1301.

Some settlements are conditioned on the vacatur of the lower court judgment. The Second Circuit in *Nestle Co., Inc. v. Chester's Market, Inc.*[45] found that when the parties preserve their right to appeal should the judgment not be vacated, the case is not moot.[46] "[M]ootness would be the consequence of vacatur. We conclude, therefore, the action is not moot."[47] Commentators and other courts have agreed with this reasoning.[48]

3. Settlement Results in Mootness, But Does Not Require Vacatur

Rather than focusing on whether the case has become moot and therefore whether the court has any discretion in vacating the judgment, the Ninth Circuit has distinguished the mootness in the *Munsingwear* line of cases requiring vacatur, from mootness resulting from a voluntary settlement which does not require vacatur.[49] The Ninth Circuit in *Ringsby Trucking Line, Inc. v. Western Conference of Teamsters*[50] found "relevant the distinction between litigants who are responsible for rendering their cases moot and those who are not.[51] The court was concerned that "[i]f the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books."[52]

The Ninth Circuit found the rule in *Munsingwear* to be "equitable in nature," and not applicable to a voluntary decision not to pursue an appeal.[53] The court relied on the Supreme Court's more recent opinion in *Karcher v. May*,[54] indicating that mootness does not automatically require vacatur. In *Karcher* the Supreme Court refused to vacate a judgment rendered moot when the parties who appealed the judgment as officers of the legislature were not re-elected and the newly-elected parties chose not to pursue the appeal.[55] The Court explained its refusal to vacate the lower court judgment and distinguished the case from *Munsingwear*, stating "[t]his case did not become moot due to circumstances not attributable to any of the parties."[56]

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45. 756 F.2d 280.

46. *Id.* at 282.

47. *Id.*

48. *Memorial Hosp.*, 862 F.2d at 1301; Zeller, *Avoiding Issue Preclusion by Settlement Conditioned upon Vacatur of Entered Judgments*, 96 YALE L. J. 860, 876 (1987); Donovan & Yee, *Letting the Chips Fall: The Second Circuit's Decision on Toll House*, 52 BROOKLYN L. REV. 1029, 1031 (1986).

49. *National Union*, 891 F.2d 762; *Allard*, 884 F.2d 464; *Ringsby*, 686 F.2d 720.

50. 686 F.2d 720 (involving a challenge to the legality of a strike and an arbitration decision).

51. *Allard*, 884 F.2d at 467, relying on *Ringsby*, 686 F.2d 720.

52. *Ringsby*, 686 F.2d at 721.

53. *National Union*, 891 F.2d at 767.

54. 484 U.S. 72 (1987).

55. *Id.* at 83.

56. *Id.* at 82.

The decision whether or not to vacate has also been characterized as depending on whether the request to vacate was the result of bilateral or unilateral action of the party. The distinction first arose in *Cover v. Schwartz*,[57] where the controversy was rendered moot by the action of the plaintiff pending appeal. The court dismissed the appeal but refused to vacate the lower court order.[58] This was later distinguished from the *Munsingwear* line of cases requiring vacatur because the action causing mootness in *Cover* was the unilateral act of the party.[59] The refusal to vacate was also explained as protecting the defendant who had fairly won the protection of the courts, from being deprived of such protection by the unilateral action of the other party.[60] However, the Ninth Circuit in *National Union Fire Insurance Co. v. Seafist, Inc.*,[61] rejected the bilateral/unilateral distinction, stating that allowing vacatur only if the request was the result of bilateral action does not address the *Ringsby* concerns, including third party interests and finality of judgment.[62]

The Ninth Circuit, relying on *Karcher*[63], leaves open the possibility that even if the issue has become moot, the court is not required to vacate the judgment if the lack of review is due to the action of the parties, whether bilateral or unilateral action.[64] The Ninth Circuit indicates that the decision whether to vacate should be made by balancing the competing interests involved and that this balancing should be done by the district court.[65]

C. *Effect of Vacatur on Judgment*

1. Issue Preclusion

A judgment can be used by or against a party in a later action through issue preclusion,[66] which prevents relitigation of issues fairly and fully litigated in a previous case by a court of competent jurisdiction.[67] The requirement of mutuality in the defensive use of issue preclusion, when a defendant seeks to prevent a plaintiff from asserting a claim against the defendant which was previously litigated and lost against a different defendant,[68] was abandoned when the Supreme Court allowed a defendant not a party to the previous action to use

57. 133 F.2d 541 (2d Cir. 1943).
58. *Id.* at 547.
59. *Nestle*, 756 F.2d at 283.
60. *Id.*
61. 891 F.2d 762.
62. *Id.* at 767.
63. 484 U.S. 72.
64. *National Union*, 891 F.2d at 767.
65. *Id.* (reaffirming "the strength and merits of *Ringsby*").
66. Issue preclusion is also referred to as collateral estoppel.
67. Montana v. United States, 440 U.S. 147, 153 (1979), *quoted in* Harris Trust & Sav. v. John Hancock Mut. Life Ins., 722 F. Supp. 998, 1008 (S.D.N.Y. 1989).
68. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

issue preclusion against the plaintiff in the previous case.[69] The mutuality requirement in the offensive use of issue preclusion, when a plaintiff seeks to prevent a defendant from relitigating an issue which the defendant unsuccessfully litigated against another party,[70] was put on a similar level when the Court allowed issue preclusion to be used by a plaintiff not a party to the previous suit at the discretion of the trial court, taking into consideration a number of factors.[71] With the requirement of mutuality abandoned, the possible preclusive effect of a judgment has an increasingly important role in a party's strategy during settlement negotiations. The ability to use a judgment preclusively also gives a judgment importance to third parties not a party to the suit who may later litigate a similar issue.

Can final judgments which have been vacated as a result of settlement be used preclusively? Generally, vacated judgments cannot be used for the basis of issue preclusion.[72] It has been explained that judgments vacated for mootness pending appeal lose their preclusive effect since the losing party has been prevented from obtaining review, based on the decision in *Munsingwear*.[73] However, in settlement the party has not been denied the right of appellate review, but has chosen not to pursue that right. In cases where the parties condition their settlement on vacatur, the case is clearly not moot since the parties indicate that they will continue their appeal if the vacatur is denied.[74] Arguably preclusion should apply to vacated judgments when the party has not been denied the right to pursue its appeal, but voluntarily chosen not to pursue the appeal as part of a settlement agreement.

Nevertheless, courts and parties appear to assume that judgments vacated as a result of a settlement will not be given preclusive effect.[75] In *Nestle*,[76] the Second Circuit in explaining Nestle's desire to avoid issue preclusion made no indication that this would not be achieved by vacatur. The court stated, "Nestle insists on vacatur of the court's judgment as a condition of settlement so that the judgment will not automatically prevent it through the operation of collateral estoppel from enforcing the trademark in the future."[77] The *Nestle* court went on to explain its decision to vacate the judgment as honoring the importance of settlement over the finality of the district court judgment.[78] The Ninth Circuit in deciding not to allow vacatur in *Ringsby*,[79] indicated that vacatur as a result

69. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).
70. *Parklane*, 439 U.S. at 326 n.4.
71. *Id.*
72. J. MOORE, *supra* note 9, at ¶ 0.416[2].
73. C. WRIGHT, *supra* note 28, § 3533.10 at 425.
74. *Nestle*, 756 F.2d at 281.
75. "[U]ncertain status of any preclusive effect," *National Union*, 891 F.2d at 769.
76. 756 F.2d 280.
77. *Id.* at 281.
78. *Id.* at 283.
79. 686 F.2d 720.

of settlement would allow "any litigant dissatisfied with a trial court's findings . . . to have them wiped from the books."[80] The Seventh Circuit, in *In re Memorial Hospital*,[81] cited third parties and "preclusive benefits" as a rationale behind the court's refusal to vacate at the request of the parties after settlement, indicating that such benefits would be lost if the judgment were vacated.[82] Commentators have also expressed the opinion that judgments vacated as a result of settlement should not have preclusive effect.[83]

A federal district court faced a preclusion issue in *Harris Trust & Saving v. John Hancock Mutual Life Insurance*.[84] The plaintiff wanted to use against the defendant insurance company a prior judgment resulting from a contract similar to the one disputed in the instant case. The prior judgment had been vacated pursuant to settlement after the district court judgment was released. The court indicated that "under ordinary circumstances claim preclusion here would not be 'unfair', and the 'contemporary law of collateral estoppel [should] lead inescapably to the conclusion that [Hancock] is collaterally estopped from relitigating the question.'"[85] The court stated it was bound by the Second Circuit's opinion in *Nestle* which "suggests that litigants prepared to settle may contract with impunity over the preclusive effects of their dispute."[86] Therefore, the vacated judgment did not preclude relitigation of the same issue by John Hancock.[87]

2. Precedent

Judgments are also valuable to third parties for their use as precedent. District court opinions have persuasive force as precedent.[88] The effect of vacatur is unclear since the court has discretion in the effect given such precedent. However, as the Seventh Circuit states in *In re Memorial Hospital*, vacatur "clouds and diminishes the significance of the holding."[89] While precedent is a byproduct of litigation,[90] it is valuable in that it saves judges and litigants time in future cases.[91] There is also the possibility that judgments which would

80. *Id.* at 721.

81. 862 F.2d 1299.

82. *Id.* at 1302.

83. Zeller, *supra* note 48, arguing that the decision by the court whether to vacate should be based on the probability that the judgment would be used in the future for preclusion, and distinguishing between future offensive use and defensive use; Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731, 739 (arguing for denying preclusive effect as a way to promote another settlement option—settlement conditioned on vacatur).

84. 722 F. Supp. 998.

85. *Id.* at 1009, quoting *Parklane Hosiery*, 439 U.S. at 331.

86. *Id.* at 1011.

87. *Id.*

88. Alliance to End Repression v. City of Chicago, 820 F.2d 873, 875 (7th Cir. 1987).

89. *Memorial Hosp.*, 862 F.2d at 1302.

90. Hewitt v. Helms, 482 U.S. 755 (1987).

91. *Id.*

otherwise be published if not vacated prior to publication will not be published, making the judgment unavailable to most third parties. Non-litigants also use judgments to guide and shape behavior and make decisions.[92] The ability of judgments to be used by third parties through issue preclusion, as precedent, and for guidance, expands the effect of vacatur beyond the parties to the settlement.

III. COURTS' RESPONSES TO REQUESTS FOR VACATUR

The courts which have dealt with the issue of whether to vacate a judgment at the request of the parties as a part of a settlement agreement, have responded differently to the discretion allowed by rule 60(b). These differences rest largely on the importance the court places on the competing values of finality of judgment and judicial economy versus preference for settlement and party autonomy. This section will examine the different approaches the courts use in deciding whether to grant or deny vacatur requested as a result of settlement.

A. Preference for Settlement

In *Nestle Co., Inc. v. Chester's Market, Inc.*,[93] Nestle brought a suit against Saccon for trademark infringement. The district court granted Saccon partial summary judgment, holding that the term "toll house" was generic and could not be a trademark.[94] Nestle appealed and while the appeal was pending, the parties reached a settlement through the Second Circuit's settlement program with the assistance of staff counsel.[95] The case was remanded to the district court to consider the motion to vacate, after the appellate court indicated that this was the proper procedure, and the district court denied the motion.[96] The parties then moved the appellate court to vacate the judgment, which the court treated as an appeal from the denial of the motion to vacate. The Second Circuit reviewed the district court's denial under an abuse of discretion standard, pursuant to rule 60(b). The appellate court found that the lower court had abused its discretion by refusing to vacate and remanded the case with instructions to vacate the order and dismiss the complaint.[97]

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92. Brunet, *Measuring the Cost of Civil Justice*, 83 MICH. L. REV. 916, 933 (1985).

93. 571 F. Supp. 763.

94. *Id.* at 769.

95. *Nestle*, 756 F.2d at 281. The Second Circuit started a settlement program in 1974 called Civil Appeals Management Plan (CAMP). Under the program cases deemed likely to settle are scheduled for pre-argument conferences with staff counsel. The conferences are mandatory and seek to clarify the issues, clear up procedural problems, and discuss settlement. *Address by* Dominic King, Judicial Conference—Federal Circuit Settlement, 108 F.R.D. 494, 496 (1986) [hereinafter King].

96. Nestle Co., Inc. v. Chester's Mkt., Inc., 596 F. Supp. 1445 (D. Conn. 1984).

97. *Nestle*, 756 F.2d 280. It has been suggested that the Second Circuit's involvement in the settlement through its CAMP program influenced its decision to enforce the settlement. Zeller, *supra* note 48, at 861-62.

In refusing to vacate, the district court in *Nestle* cited the importance of finality of judgment and the public interest.[98] The Second Circuit believed that these goals were best served by vacating the district court judgment. Reasoning that the policies favoring finality of judgment are intended to conserve judicial and private resources, vacating the judgment would bring an end to the litigation and therefore save both private and public resources.[99] Since the settlement was conditioned on vacatur, if the judgment was not vacated Nestle intended to pursue its right to appeal,[100] leading to more litigation and more expense for both the parties and the court.

The Second Circuit also cited the strong preference for settlement, a preference which outweighs the interest in finality of judgment.[101] The court cited Supreme Court cases vacating judgments, such as *Munsingwear*, to illustrate that the interest in finality of judgment often yields to other concerns. The court also cited cases where vacatur was permitted in cases settled on appeal and commentators who support such a position.[102] Finally, the court saw no rationale for forcing parties who would prefer to settle to continue litigation because of future "hypothetical" defendants.[103]

The Second Circuit views litigation as a predominately private concern, placing emphasis on the parties' desire to end the dispute. The court is also more interested in the public benefit of ending litigation and conserving judicial resources, than any possible loss to the public from vacating the judgment.[104]

B. Refusing Vacatur Pending Appeal

The Seventh Circuit has indicated that it will always refuse motions to vacate a district court's judgment based on settlement. The court explained this position in *In re Memorial Hospital*.[105] It stated that, "[w]e always deny these motions to the extent they ask us to annul the district court's acts, on the ground that an opinion is a public act of the government, which may not be expunged by private agreement."[106] The court acknowledged the benefits of settlement, but indicated that if parties want to avoid issue preclusion they need to reach a settlement prior to the district court rendering a decision.[107] The court opined that when settlement goes beyond a compromise by the parties and involves judicial action,

98. *Nestle*, 596 F. Supp. 1445.

99. *Id.* at 1452-53.

100. *Id.* at 1446.

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

102. *Id.* at 283, *citing* C. WRIGHT, *supra* note 28, at § 3533.10 at 432; Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., 638 F.2d 7 (2d Cir. 1980); *Aviation Enters.*, 716 F.2d 1403.

103. *Nestle*, 756 F.2d at 284.

104. *See id.* at 282.

105. 862 F.2d 1299.

106. *Id.* at 1300.

107. *Id.* at 1302.

such as in a motion to vacate, more than the parties' interests become involved and the court must look beyond the desire of the parties. The court identified third party interests in the judgment for its preclusive and precedent value, and the court's interest in maintaining its authority, as other interests deserving consideration.[108] Seeing the act of vacating final judgments as eroding the authority of the court, Judge Easterbrook wrote:

> The interest of litigants in general, however, lie with the orderly operation of a system of justice, one in which the conclusions of litigation are recorded and thus preserved for the future, one in which slightly higher costs in today's case may reduce the trouble encountered by litigants and judges tomorrow.[109]

The court then went on to grant the motion to dismiss the appeal as a matter of course.[110]

The Seventh Circuit clearly falls on the side of viewing litigation as a public concern.[111] This is in line with the writing of Owen Fiss,[112] who is against settlement. He views litigation as a public process, paid for at public expense, to enforce and shape legal norms.[113] Since judgments are a public resource, private parties cannot make them disappear as a result of an agreement between themselves.[114]

C. Balancing Factors Involved in Vacatur

The Ninth Circuit has indicated that the competing interests of finality of judgment and the right to relitigate unreviewed disputes should be left to the district court.[115] The Ninth Circuit in *Ringsby*,[116] finding vacatur requested as a result of settlement distinguishable from a request for vacatur in the *Munsingwear* line of cases, denied the motion to vacate and dismissed the appeal as moot.[117] In denying the motion, the court indicated that the district court was the proper place to explore the competing interests, but cautioned that losing

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108. *Id.*

109. *Id.* at 1303.

110. *Id.*

111. *See generally id.*

112. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Citing imbalances of power, disparity of resources, settlements contrary to justice, and the structural reform and enforcement role of the judicial process, Fiss argues against settlement.

113. *Id.* at 1085.

114. *Id.*

115. *Ringsby*, 686 F.2d 720, 722, *quoted in Allard*, 884 F.2d at 467.

116. *Id.*

117. *Id.* at 723.

parties should not be able to erase judgments they dislike by paying the winning party to agree to a joint motion to vacate.[118]

The Ninth Circuit reiterated its position in *Allard v. DeLorean*.[119] In that case, the court dismissed an appeal as moot and remanded the case to the district court to decide the issue of vacatur.[120] The dispute was rendered moot by a settlement between Allard and DeLorean, entered in the Michigan bankruptcy court where DeLorean had filed for bankruptcy. In remanding, the Ninth Circuit instructed the district court to balance the competing interests of the parties, namely "the competing values of finality of judgment and right to relitigation of unreviewed disputes."[121]

The Ninth Circuit reviewed for an abuse of discretion of this balancing in *National Union Fire Ins. Co. v. Seafirst Corp.*[122] The district court had refused to vacate its decision in an insurance contract dispute after the parties requested vacatur as a result of settlement reached while the appeal was pending.[123] The parties appealed this denial. In its opinion, the Ninth Circuit responded to criticism of the *Ringsby* balancing process,[124] saying that vacatur is not required by *Munsingwear* as illustrated by the Supreme Court decision in *Karcher*.[125] The court acknowledged that refusal to vacate may increase the cost of settlement but stated that "[t]his cost is not so high that it should defeat (1) the public interest in maintaining judicial finality, and (2) the legitimate interest of others in potential nonmutual preclusion."[126] The court went on to affirm the district court's refusal of vacatur, given the third party interests.[127]

Although the Ninth Circuit clearly places the discretion with the district court,[128] it is less clear what factors the district court should consider. The *National Union* court notes the importance of settlement, finality of judgment, and third party interests, and indicates that the equities and hardships of each case must be considered.[129]

IV. POLICY CONSIDERATION

A court's decision in applying its discretion to grant or deny vacatur requested as a result of settlement is based largely on which interests the court

118. *Id.* at 721.
119. 884 F.2d 464.
120. *Id.* at 465.
121. *Id.* at 467, *citing Ringsby*, 686 F.2d. at 722.
122. 891 F.2d 762.
123. *Id.* at 764.
124. *Nestle*, 756 F.2d 280; C. WRIGHT, *supra* note 28, at § 3533.10 at 431-32.
125. *National Union*, 891 F.2d at 766, *citing Karcher*, 484 U.S. at 108. *See supra* notes 56-57 and accompanying text.
126. *National Union*, 891 F.2d at 768.
127. *Id.* at 769.
128. *Id.* at 767.
129. *Id.* at 768.

finds most compelling.[130] Courts granting vacatur cite party autonomy and a preference for settlement—private concerns.[131] Courts denying vacatur cite finality of judgment and third party interests—public concerns.[132] Underlying issues, such as whether a party is seeking vacatur to avoid preclusion versus seeking vacatur to save time and avoid appealing a bad decision, also deserve consideration.[133] This section will explore the various factors the court should consider in applying its discretion and the policy questions associated with these factors.

A. Factors Favoring Vacatur

Factors cited for vacating a lower court judgment at the request of the parties as a result of settlement are party autonomy, preference for settlement and conservation of private resources.[134]

1. Party Autonomy

The concern for party autonomy comes from the fact that litigation is party-initiated and party-controlled.[135] In recognition of party autonomy, the courts permit dismissal as of right even when they refuse to vacate.[136] If litigation is a purely private dispute resolution process, it would follow that a settlement agreed to by the parties deserves judicial respect.[137] If the parties agree to a settlement which includes a joint motion to vacate, then the winning party must believe it is as well compensated as it would be by the winning judgment. The parties presumably protect their own best interests in agreeing to settlement, which the court overrides when it denies vacatur as requested by the parties.

Accepting the fact that litigation involves third parties and the judicial system, there are strong arguments against forcing parties to choose between continuing an appeal which they would prefer to settle or letting a lower court judgment which they disagree with remain in force. Parties to a suit should not have to bear the cost and risk of further litigation because of concern for third parties.[138] To require such parties to continue litigation is favoring the court's disposition of the case over the parties and favoring non-parties over the present parties.[139] Continuing an appeal which the parties would rather settle also

130. Zeller, *supra* note 48, at 865.
131. *Id.* at 866.
132. *Id.* at 867-68.
133. *Id.* at 869.
134. *Id.* at 866.
135. Resknik, *Tiers*, 57 S. CAL. REV. 837, 845-49 (1984).
136. *Memorial Hosp.*, 862 F.2d at 1303; *Ringsby*, 686 F.2d at 723.
137. Zeller, *supra* note 48, at 866.
138. *Nestle*, 756 F.2d at 284.
139. Note, *supra* note 82, at 748.

forces the winning party to wait for payment pending the outcome of the appeal.[140]

2. Preference for Settlement

Preference for settlement is often cited as the basis for granting vacatur conditioned on settlement.[141] Settlement has many benefits for the parties, the courts and the public. Settlement resolves uncertainties, restores relations, limits court costs, saves time, frees the parties for more productive activities, and frees the courts for cases requiring more attention.[142] Settlement is highly favored because it conserves judicial resources and concludes litigation. The Second Circuit in *Nestle* cites commentators who argue that parties should be able to settle on conditions which meet their needs because of the important policies that are promoted by voluntary settlement.[143] "Parties should remain free to settle on terms that require vacation of the judgment, entry of a new consent decree, or such other action as fits their needs."[144]

Settlement is also favored because it can provide resolutions which are not available to the parties through litigation, such as compromise and other solutions not involving fault.[145] This can be particularly beneficial to parties who will have an ongoing relationship after the resolution of the dispute, whether they are members of a family or corporations with a beneficial business relationship. Settlement allows the parties to shape a solution which meets both their needs, and may also be less disruptive to third parties than litigation, such as in child custody cases.

The Federal Rules of Civil Procedure were amended in 1983 to specifically include settlement negotiations as a purpose of pretrial conferences set by the court.[146] The advisory notes explain the benefits of settlement, stating "settlement obviously eases crowded court dockets and results in savings to the litigants and the judicial system."[147] The Federal Rules of Evidence also address settlement in rule 408 which provides special protection to settlement

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140. *Id.* at 752.

141. *Cf.* Federal Data Corp. v. SMS Data Products Group, 819 F.2d 277, 299 (Fed. Cir. 1987), *Nestle*. 756 F.2d at 283.

142. Zeller, *supra* note 48, at 867; Kessler & Finklestein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U.L. REV. 577, 578 (1988).

143. *Nestle*, 756 F.2d at 283, citing C. WRIGHT, *supra* note 28, at § 3533.10 at 432.

144. *Nestle*, 756 F.2d at 283.

145. Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 509-11 (1985) (discussing settlement solutions which meet the needs of parties better than litigation).

146. Purpose of the conference may be "facilitating the settlement of the case", FED. R. CIV. P. 16(a)(5); parties may consider at the conference "the possibility of settlement," *id.* at 16(c)(7).

147. *Id.*, advisory committee's note, 1983 amendment.

negotiations. The advisory committee notes explain that the rule is consistent with "public policy favoring compromise and settlement of disputes."[148]

3. Conservation of Resources

Settlement conditioned on vacatur may promote conservation of private and public resources and reduce the time and expense of litigation. Not only do parties have the right to decide whether to bring a valid claim, they also decide whether to pursue their right to appeal. It is not unusual for cases to settle prior to being heard by the appellate court. A Judicial Center study indicates that only 50% of cases appealed are argued.[149] These decisions are not based purely on who has the correct legal position, but on the time and cost involved in litigation, the public perception of such litigation, the benefit to be expected from winning, and other factors.[150] When a party chooses to settle, she knows exactly what the outcome is, which is of value in itself. Parties are also able to devise flexible settlements which may go beyond the power of the court but are of benefit to both parties, possibly more beneficial than a judgment.

The parties' decision to seek vacatur as a part of settlement may be based on a belief that the lower court judgment was mistaken or based on multiple and uncertain grounds. The parties may believe the outcome would be different on appeal, but are willing to settle to save time and money. Such a settlement promotes the public interest in efficiency.[151] The first judgment may have been sound and well-reasoned, but the settlement offer made to the winning party, often money, is more valuable than winning the case. While the latter situation raises more concerns, it is still true that the parties have chosen the efficient outcome for themselves.

Settlement conditioned on vacatur may also advance more public concerns when it results in dismissing an appeal and bringing litigation to an end.[152] If the parties agree to forego their right to appeal based on a settlement conditioned on vacatur of the lower court order, then the court resources involved in a lengthy appeal are saved. The court has indicated that the interest in finality of judgment will sometimes yield to other concerns, such as when a decision has become unreviewable pending an appeal through "happenstance" and should be vacated.[153] The interest in finality of judgment may also yield to judicial economy and party autonomy concerns.

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148. FED. R. EVID. 408, advisory committee's note.

149. King, *supra* note 95, at 496.

150. N. ROGERS & R. SALEM, A STUDENT GUIDE TO MEDIATION & THE LAW 44-51 (1987).

151. Zeller, *supra* note 48, at 869.

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

153. *Id.*, *citing Ringsby*, 686 F.2d 720.

B. Factors Disfavoring Vacatur

As discussed below, factors cited by those opposed to vacatur requested as a result of settlement include the interest in finality of judgment, efficient allocation of resources, judicial economy, consistency, public respect for courts, and third party interests.

1. Finality of Judgment

Many of the concerns associated with vacatur are a part of the reasoning behind the interest in finality of judgment. "Both the judicial system and the public have a strong interest in the finality of judgments. The doctrines supporting judgment finality—including res judicata and collateral estoppel—prevent needless and endless relitigation of issues and claims."[154] Issue preclusion saves judicial resources and increases efficiency by allowing courts to rely on decisions already determined, avoiding relitigation of repetitive issues and allowing courts to concentrate on new issues.

Issue preclusion also promotes consistency which in turn leads to public respect for courts and legitimatizes the legal system.[155] The orderly process of justice relies on respect for the legal system and the judgments courts produce.[156] If a judgment is considered a bargaining tool, only raising the price of settlement for the losing party, then courts are not serving their purpose and the laws they seek to enforce are undermined. Presenting the public policy arguments against vacatur requested as a part of settlement, Zeller states in his article discussing vacatur:

> Settlement conditioned on vacatur . . . decreases public respect for the legal establishment by encouraging wealthy litigants to sue until reaching favorable outcomes, to conspire against interests of unrepresented future litigants, and to utilize public resources and then discard the results. . . . In so doing, settlement conditioned on vacatur allows the present parties to appropriate from unrepresented third parties a portion of the value of public adjudication.[157]

Zeller goes on to advocate that vacatur be prohibited when requested to free a plaintiff from the possible preclusive effect of a judgment. He argues that allowing vacatur in this situation would encourage plaintiffs to sue defendants one at a time and then buy off defendants when the outcome was not favorable.[158]

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154. *Nestle*, 596 F. Supp at 1451.
155. Zeller, *supra* note 48, at 867.
156. *Memorial Hosp.*, 862 F.2d at 1303.
157. Zeller, *supra* note 48, at 868.
158. *Id.* at 875.

The interest in finality of judgment can also promote judicial economy. The time a court spends analyzing the issues and preparing a judgment, as well as the parties' time preparing and arguing their case, is wasted when the decision is later vacated.

2. Third Party Interests

Judgments are used as precedent and for guidance, giving the public an interest in litigation. Since courts are public entities, these third party interests play a valid role in a court's decision whether to allow vacatur or not. Collateral estoppel not only conserves judicial resources, but also those of future litigants.[159] However, often the third parties who will be affected are only speculative and not easily identifiable. Should the courts be concerned with looking out for these unrepresented third parties, who receive no benefit from the settlement, but who could rely on the judgment in the future but for the vacatur? Requiring the court to consider third parties not presently before it is not a new role for the court. Courts consider outside interests in approving settlement of class actions under Federal Rules of Civil Procedure 23(e).[160]

A case not involving vacatur, but dismissal, relied on the interests of third parties and judicial economy to deny the parties' request. *Village Escrow, Inc. v. National Union Fire Insurance Co.*,[161] arose in the California State Court of Appeal and involved a breach of contract dispute. The parties reached a settlement after oral arguments but prior to the court's reaching a decision. The parties conditioned their settlement on the court's dismissing the appeal without issuing an opinion. The court, noting that it favored early settlement, refused the motion to dismiss. The California Rules of Court specifically give the court discretion whether to honor a settlement which depends on dismissal of an appeal.[162] The court indicated that the contract issue before it was an issue of first impression which, quoting respondent's counsel, "is of great interest to the insurance industry."[163] The court also noted the investment it had made in hearing the case, making it no longer an issue solely of interest to the parties. The court was concerned with the message such a settlement would send to the public and future litigants, since the offer to settle was accompanied by a "substantial sum of money" to the anticipated winning party. The court expressed concern that such cases would continue to be settled prior to reaching the appellate level, making an appellate level decision of particular importance.[164] For these reasons, the court denied the motion to dismiss and filed its opinion.

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159. *Memorial Hosp.*, 862 F.2d at 1302.

160. FED. R. CIV. P.; *see* Donovan & Yee, *supra* note 47, at 1033. For a further discussion of rule 16, see McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818 (1988).

161. 248 Cal. Rptr. 687.

162. *Id.* at 695, *citing* Ca. Rules of Ct. 19(b).

163. *Id.* at 693.

164. *Id.* at 696.

3. Courts as a Public Resource

Many of the concerns cited by those opposed to vacatur conditioned on settlement are based on a view of litigation as a public resource. Owen Fiss, in his articles opposing settlement, describes litigation through a "structural reform" model.[165] Under this model, litigation proceeds within the framework of the Constitution which embodies public values which are given concrete meaning within the context of government through court decisions.[166] The courts safeguard public values and enforce norms through the use of public resources directed by public officials. He cites *Brown v. Board of Education*[167] and the decision's effect as an example of structural reform achieved by litigation.[168] He argues that settlement should not be encouraged by the courts as it dilutes their guidance and enforcement roles.[169] Other commentators agree, stating that courts are financed with public money and that the "benefits of litigation are largely for society and, accordingly, are at least partially external to individual adjudication."[170]

If the courts do not encourage settlement, it follows that a court should not grant the parties' request to vacate a judgment as a condition of settlement. For example, if a wealthy employer can pay a winning plaintiff in a discrimination suit in return for a joint motion to vacate the judgment as a part of settlement, other employers engaged in similar activities will not be alerted that their activity is illegal. Future plaintiffs or possible plaintiffs will be deprived of the benefit of the judgment in the previous case. This could affect their decision to protest the firing or bring a suit. The vacatur would eliminate the societal benefit of the judgment produced by the public court system. Additionally, this same pattern could be repeated over and over again by employers, decreasing the likelihood of the issue ever reaching the appellate level.

Judge Easterbrook espoused this view of litigation as a public resource in *In re Memorial Hospital*.[171] He stated that an opinion is a public act of government which private parties can not have vacated as the result of a private agreement between them. Since vacatur involves a court action that effectively erases a public act which would otherwise be available to third parties, such an act requires close scrutiny by the court—scrutiny which includes consideration of future litigants and the public. Easterbrook expressed concern for the loss of

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165. Fiss, *supra* note 111, at 1087; Fiss, *The Social and Political Foundation of Adjudication*, 6 LAW HUM. BEHAV. 121 (1982).

166. Fiss, *supra* note 111, at 1087-89.

167. 347 U.S. 483 (1954).

168. Fiss, *supra* note 111, at 1089.

169. *Id.*

170. Brunet, *Questioning ADR Quality*, 62 TUL. L. REV. 1, 51 (1987); Brunet, *supra* note 88. *See also* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668 (1986) (expressing concern over the use of alternative dispute resolution in certain types of cases and without court oversight).

171. *Memorial Hosp.*, 862 F.2d at 1302.

precedent, created at public expense, and then used as a "bargaining chip in the process of settlement."[172]

C. Balancing the Factors

Based on the various factors involved and the types of situations in which the request for vacatur can arise, an all-or-nothing rule would not be appropriate. Valid public policy issues raised by those who view litigation as a public process and judgments as a public resource, fail to address the interests of the parties forced to litigate a dispute they would rather settle. Clearly there are cases when vacatur is the most efficient for all concerned, including the courts and the public. The decision whether to vacate and the strength of public policy concerns varies depending on the soundness of the judgment and the likelihood that a different result would be reached on appeal. Vacating a poorly reasoned or mistaken judgment poses few problems and in fact is probably more efficient than pursing an appeal which would result in a reversal of the lower court order. On the other hand, if the case is well-reasoned and involves an important public issue or one likely to continue to arise, then public resources are wasted by vacating the lower court order and not pursing the appeal. A close decision, later vacated as a result of a settlement fairly negotiated, will not raise the same policy concerns as a vacatur which appears to be the result of the losing party paying off the winning party.

This Comment, therefore, advocates the position followed by the Ninth Circuit in balancing the competing interests as they arise in a particular case. While this will give parties and mediators less certainty in knowing how a particular court will respond to a request, given the importance of the concerns at issue such a solution is best able to address the issues as they arise. As the mediator deals with individual cases, he will be able to use a similar analysis to the one suggested for district courts in deciding which cases would be appropriate for suggesting or encouraging settlement involving vacatur. As the factors to consider become more defined, parties and mediators will be better able to predict how the court will respond to a request for vacatur and structure their settlement accordingly.

The courts have looked at a variety of factors when deciding whether to grant or deny a motion to vacate at the request of the parties and commentators have suggested additional factors to consider. The Ninth Circuit has indicated that the district court should balance the competing interests of finality of judgment with the right to relitigate unreviewed disputes.[173] However, the court has not specified how to balance these interests except to say that third party interests are enough to justify a refusal to vacate.

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172. *Id.* at 1302.

173. *Allard*, 884 F.2d at 467, *quoting Ringsby*, 686 F.2d at 722.

Commentators discussing the *Nestle* decision have advocated a balancing test rather than the *Nestle* rule favoring settlement.[174] They cite three factors: (1) correct legal standard, (2) interest of the parties and those similarly situated (third parties), and (3) policy considerations.[175] The commentators note that no one factor is paramount but any one could be dispositive.[176] They go on to find that the *Nestle* court used faulty reasoning to find that vacatur was justified,[177] while never clearly explaining the scope of the other two factors.

Zeller, in his article, advocates using a discretionary standard when the parties seek vacatur to protect the defendant from future litigation because such vacatur does not promote unfairness (unfairness promoted by the use of vacatur to protect plaintiffs, which he argues should be prohibited).[178] Zeller believes that factors which would be considered if preclusion were at issue should be considered in deciding whether to vacate. These factors include inconsistency, ambivalent decision, alternative basis for holding, incentive to fully litigate, whether preclusive effect is allowed by substantive law, good faith, and the cost of relitigation.[179]

The factors used by the courts and commentators can be broken into four categories: (1) the interests of the parties in control of litigation and costs, (2) the interests of the courts in an orderly and efficient judicial system, (3) the interests of third parties affected by the vacatur, and (4) the interests of the general public arising from the judgment and the strength of the legal reasoning. The interests of the parties focus on private concerns, while the three other categories focus on more public concerns. These factors are often interrelated and may overlap depending on the particular facts of the case.

The parties' interests will, of course, favor vacating the judgment. The importance of permitting vacatur at the parties' request will involve an examination of the parties' situation, including their resources, whether litigation can resolve their dispute as appropriately as settlement, and whether they are likely to agree to a settlement on other terms if the vacatur is not permitted. The parties' interests will also involve the burden of continuing litigation, including time, expense and uncertainty if vacatur is denied. Less obvious party concerns which may be relevant include imbalance of resources and power which may force a party to agree to a settlement.

The court's interests focus on finality of judgment and respect for the judicial system. Judicial economy in terms of the court's time and expense involved in deciding the case originally and the likelihood the issue will arise again should

174. Donovan & Yee, *supra* note 47, at 1034.

175. *Id.*

176. *Id.* at 1034.

177. *Id.* at 1037.

178. Zeller, *supra* note 48, at 876. *See supra* notes 151-52 and accompanying text, advocating vacatur be prohibited when sought to protect the plaintiff.

179. *Id.* at 877.

also be considered. The court will be concerned with the orderly and efficient process of justice, which may depend on the presence of third party interests.

Third party interests involve the likelihood that parties not involved will rely on the judgment for preclusion, precedent, or how the decision will influence public behavior. Third parties also assess the likelihood that similar disputes will arise again, whether the issue is one of first impression, and the likelihood that other similar disputes will get to the court.[180] Certain types of cases raise important third party concerns, such as constitutional cases, cases enforcing government regulations,[181] and other cases of obvious public concern—such as those involving environmental pollution. Characterizing private disputes as ones which are likely to affect third parties is more difficult. What may appear as a purely private contract dispute may actually have wide implications if the contract at issue is used by a company across the country.[182] These third party interests would weigh against vacatur. Other third party interests favoring settlement may include the interests of children in a divorce proceeding or the interest of disabled adults in a dispute between group home operators and home owners.

The judgment and the strength of the legal reasoning will also influence the likelihood that future parties will rely on the judgment if not vacated, and whether vacatur is an efficient way to deal with the situation. Poorly reasoned decisions pose fewer problems for vacatur than well-reasoned judgments settling disputed issues of law. The more important the decision is to the legal community and the better reasoned the decision is should weigh against vacating. A poorly reasoned decision, or one unlikely to affect anyone beyond the parties to the suit, should weigh in favor of vacatur at the parties' request.

While often these types of questions are best answered in hindsight, the district court is best equipped to answer them as they arise because of its contact with the parties and its experience with cases before the court. The district court's decision regarding vacatur, based on the above factors, should be reversed only for an abuse of discretion. As these standards are used by the district courts and reviewed by the appellate courts they will become better defined.

While a case by case analysis will not make the mediator's job easy, the appellate level mediator, like the district court, will be able to analyze the individual factors to determine what type of cases are appropriate for suggesting vacatur as a part of settlement. Since the mediator will have a more informal relationship with the parties, she will have more knowledge of the underlying reasons for a party's interest in vacatur as well as the importance of the condition of vacatur to the parties. By having some guidelines for when vacatur will be granted, the mediator will be able to determine when it is appropriate to suggest, encourage or discourage requesting vacatur, rather than avoiding it in all cases.

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180. *National Union*, 248 Cal. Rptr. at 695-96 ("Furthermore, appellate review may continue to be thwarted by the settlement of the underlying dispute, as occurred here.").

181. Raising interests of third parties who may later want to rely on the case as well as third parties for whom the government regulations are intended to protect.

182. *See supra* notes 83-86 and accompanying text.

When the mediator or a party suggests vacatur as a part of settlement, the mediator will need to inform the parties that granting or denying such a motion lies in the discretion of the court.

The mediator's role to facilitate settlement can be enhanced if he has an additional alternative for helping the parties agree to a settlement in cases where one party is concerned with the lower court's judgment. The mediator will also be helped by court opinions analyzing requests for vacatur on a consistent basis in cases where the parties suggest vacatur and the mediator believes it would not be granted by the court. Being careful not to cross the line of giving legal advice, the mediator would want to caution the parties that the request may be denied. Particularly in cases where the parties are represented by counsel, having available court decisions analyzing requests for vacatur on consistent factors will help parties and mediators come to appropriate solutions acceptable to the court.

V. CONCLUSION

As the use of appellate level mediation and settlement programs expands, settlements requesting vacatur of lower court judgments can be expected to increase. These settlements can raise serious public policy concerns for the court and the mediator, depending on the importance of the public and private interests in the particular case. The courts' response to such motions range from vacating at the request of the parties to promote settlement,[183] to indicating a refusal to ever grant such motions because of the public nature of a judgment.[184] Whether the court grants or denies a motion to vacate resulting from settlement depends largely on the particular court in which the request is made.

Motions to vacate are properly considered by the district court, appealable to the appellate court as a matter of right under an abuse of discretion standard of review.[185] Vacatur may be an appropriate part of a settlement agreement in some cases and not acceptable in others. This Comment advocates that courts use a balancing approach to determine when to grant or deny such motions, taking into consideration the various interests affected by vacatur. The factors to be considered can be broken into four categories: (1) the interests of the parties in control of litigation and costs, (2) the interests of the courts in an orderly and efficient judicial system, (3) the interests of third parties affected by the vacatur, and (4) the interests of the general public arising from the judgment and the strength of the legal reasoning. Based on an examination of these factors, vacatur may be appropriate in some cases—particularly where settlement offers the parties a better solution than litigation or in cases unlikely to affect third parties; and not appropriate in other cases—involving judgments likely to be relied on by third parties because of the important legal principles developed in a well-reasoned decision or the nature of the case.

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183. *Ringsby*, 686 F.2d 720.

184. *Memorial Hosp.*, 862 F.2d. 1299.

185. See *supra* notes 6-26 and accompanying text.

Mediators can take into consideration the same factors in deciding what approaches to consider during mediation. As district courts apply this balancing, the importance of the various interests will become better defined and those involved in settlement negotiations will be better able to structure appropriate settlements. Consistency in the analysis used by courts will help mediators in appellate level mediation programs know whether to suggest, encourage or discourage settlement conditioned on vacatur depending on factors involved in individual cases.

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