Settlement Pending Appeal: An Argument for Vacatur

Henry E. Klingeman

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol58/iss2/4

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
SETTLEMENT PENDING APPEAL: AN ARGUMENT FOR VACATUR

INTRODUCTION

Parties to a federal civil suit may consent to dismiss the case pursuant to a settlement agreement.1 Because settlement is an option available until final judgment is entered, it may occur while an appeal is pending. When it does, the parties to the case often decide to condition settlement on vacatur of the lower court judgment.2 Vacatur has the effect of “voiding” a judgment.3 Parties to a settlement agreement seek vacatur for several reasons. For example, vacatur may allow parties to avoid the preclusive effect5 of the judgment in a future action6 or it may enable

---

1. The Federal Rules of Civil Procedure provide that “an action may be dismissed by the plaintiff without order of court . . . by filing a stipulation of dismissal signed by all parties who have appeared in the action.” Fed. R. Civ. P. 41(a)(1).

2. Settlement “offer[s] the court the not unattractive prospect of foregoing further proceedings in the case.” Nestle Co. v. Chester’s Mkt., 596 F. Supp. 1445, 1455 (D. Conn. 1984), rev’d, 756 F.2d 280 (2d Cir. 1985). Even while denying a motion to vacate, the Seventh Circuit acknowledged that “[i]t is hard to be against settlement.” In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988).

3. Vacatur is “a rule or order by which a proceeding is vacated.” Black’s Law Dictionary 1388 (5th ed. 1979). To vacate is “[t]o render an act void; as, to vacate an entry of record, or a judgment.” Id. The practical and legal effects of vacatur on a judgment are discussed infra notes 80-111 and accompanying text.

4. The first Justice Harlan wrote that issue preclusion meant that “a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies . . . .” Southern Pac. R.R. v. United States, 168 U.S. 1, 48 (1897).

This principle, also known as collateral estoppel, has more widespread application today than it did at the time of Southern Pacific, because of the demise of the “mutuality doctrine.” The mutuality doctrine limited the application of issue preclusion to the parties and “their privies.” Id. Today, third parties can apply issue preclusion against the
them to avoid the non-legal ramifications of an adverse judgment.\(^6\)

The decision to grant or to deny vacatur implicates private and public interests that sometimes conflict.\(^7\) In the interest of settling litigation, some federal circuits routinely grant motions to dismiss and vacate.\(^8\) Others, however, cite the value of the lower court judgment and refuse to grant vacatur.\(^9\)

This Note will discuss whether a federal appellate court should vacate the judgment of a lower court when the parties’ settlement pending appeal is conditioned upon vacatur. Part I of this Note examines the relationship between settlement and vacatur, as well as how mootness relates to vacatur. Part I also explores the public and private interests implicated by vacatur and the standard of review applied to a motion to vacate. Part II analyzes the conflicting public and private interests in the contexts of vacatur’s effect on settlement, precedent and issue preclusion.


\(^7\) Issue preclusion is one component of res judicata. The other component is claim preclusion. Id. at § 11.3.

\(^8\) See Nestle Co. v. Chester’s Mkt., 756 F.2d 280, 281 (2d Cir. 1985) ("[Plaintiff] understandably feared that the existence of the [lower court] judgment would operate as collateral estoppel in future litigation.").

\(^9\) See infra notes 37-48 and accompanying text.

\(^5\) See Nestle Co. v. Chester’s Mkt., 756 F.2d 280, 281 (2d Cir. 1985) ("[Plaintiff] understandably feared that the existence of the [lower court] judgment would operate as collateral estoppel in future litigation.").

\(^6\) See infra note 64 and accompanying text.

\(^7\) See infra notes 37-48 and accompanying text.

\(^8\) See, e.g., Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277 (Fed. Cir. 1987); Kennedy v. Block, 784 F.2d 1220 (4th Cir. 1986); Nestle, 756 F.2d 280; see also Blackwelder v. Safnauer, 866 F.2d 548, 551 (2nd Cir. 1989) (dictum) (favoring vacatur "in some circumstances" and citing Nestle); First Nat’l Bank v. Don Adams Mining Co., 844 F.2d 1445, 1446 (10th Cir. 1988) (panel vacates own prior judgment pursuant to settlement).

The Second Circuit has apparently overturned its own rule against vacatur, sub silento. Compare Nestle, 756 F.2d at 283 (favoring "honoring settlements over the finality of trial court judgments"); with Sampson v. RCA, 434 F.2d 315, 317 (2d Cir. 1970) ("A motion under [Fed. R. Civ. P.] 60(b) [to vacate] cannot be used to avoid the consequences of a party’s decision to settle the litigation or to forego an appeal from an adverse ruling.").

\(^9\) See, e.g., In re Memorial Hosp., 862 F.2d 1299 (7th Cir. 1988); Fishman v. Estate of Wirtz, 807 F.2d 520, 585 (7th Cir. 1986); Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982) (dictum). But see Hartley v. Mentor Corp., 869 F.2d 1469 (Fed. Cir. 1989); Gould v. Control Laser Corp., 866 F.2d 1391 (Fed. Cir. 1989). While both cases appear to overrule prior Federal Circuit precedents allowing vacatur, neither actually do.

The court in Hartley states:

[T]o be assured that the judgment here would have no collateral estoppel effect, [plaintiff] would have had to have the [lower] court vacate its order, which he failed to do; otherwise the collateral estoppel effect of the judgment is left for decision by the district court in which it is asserted.

869 F.2d at 1473. This statement of the rule allowing vacatur does not reject vacatur; rather it holds that the rule is inapplicable to Hartley because the parties therein did not seek vacatur.

Gould is distinguished because the consent agreement ending the suit had been entered prior to the appeal to the circuit court. See Gould, 866 F.2d at 1395. The case was already over when the motion to vacate was made. It did not become moot on appeal, it became moot before appeal. Thus, there was no case to settle. See id.
This Note concludes that appellate courts should presumptively grant vacatur to promote settlement, in light of the speculative and \textit{de minimis} nature of its attendant costs.

I. BACKGROUND

A. Settlement and Vacatur

Although the Federal Rules of Civil Procedure command a "just, speedy, and inexpensive determination of every action,"\(^{10}\) there is doubt that the goals of speed and economy are being accomplished.\(^{11}\) One reason is docket congestion. In 1943, fewer than 80,000 cases were filed in federal court.\(^{12}\) By 1987, the number had increased to approximately 240,000,\(^{13}\) a jump of 200 percent.\(^{14}\) Commentators have identified several causes for increased litigation, including the tendency of Americans to resolve disputes through litigation and the recognition of new substantive rights.\(^{15}\) The legal community has responded to docket congestion in at least two ways. Alternative dispute resolution ("ADR") devices, which attempt to facilitate an end to litigation, have been developed to keep out of court disputes that otherwise could be resolved only through litigation.\(^ {16}\) The parties are also encouraged to settle,\(^ {17}\) because settle-

---

11. See Miller, \textit{The Adversary System: Dinosaur or Phoenix}, 69 Minn. L. Rev. 1, 1 (1984) ("The inability of the American judicial system to adjudicate civil disputes economically and efficiently is one of the most pressing issues facing the courts today.").
14. During approximately the same period, the number of federal judges also rose 200 percent. See McLauchlan, supra note 12, at 74-75 (increase in circuit court judges) & 114-15 (increase in district court judges). However, based on thorough statistical analysis of the federal caseload, "it does not appear that additional judges have 'solved' the problems of increased filings." \textit{Id.} at 201-02.
15. See Lambros, \textit{The Future of Alternative Dispute Resolution}, 14 Pepperdine L. Rev. 801, 802 (1987) (increased litigation due to changes in social interaction and attitudes); Miller, supra note 11, at 3 (increased litigation due to "massive growth in the number of substantive rights recognized by American law, some unfortunate side effects of . . . our extremely permissive and forgiving procedural system, and the unique economics of the American legal system."). Professor Miller cites newly-created substantive rights in the areas of civil rights, political rights, environmental law, consumer law and physical safety law. See \textit{id.} at 5. For examples, see Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (recognizing implied right of action for violation of § 10(b) of the Securities and Exchange Act of 1934); Davis v. Passman, 442 U.S. 228 (1979) (recognizing private right of action for violation of fifth amendment due process provision); Cannon v. University of Chicago, 441 U.S. 677 (1979) (recognizing implied right of action for violation of § 901(a) of Title IX prohibition against gender discrimination at educational institutions receiving government assistance, 20 U.S.C. § 1681 (1972)); Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing private right of action for violation of fourth amendment prohibition against unreasonable search or seizure); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (recognizing implied right of action for violation of § 14(a) of the Securities and Exchange Act of 1934).
16. ADR devices include mediation, arbitration, summary jury trials, and mini-trials.
ment is a natural solution when parties to a dispute seek an alternative to final judgment.  

The Federal Rules\(^\text{19}\) and the judiciary\(^\text{20}\) strongly encourage settlement because it reduces docket congestion. Settlement is also usually the best reflection of the parties' true interests.  

When a settlement is reached, the parties decide, rather than a judge or jury, what is a fair and reasonable end to their dispute. Given these benefits of settlement, courts should have a compelling reason if they are to reject a reasonable settlement reached by litigants. Refusing to allow vacatur may discourage settlement by appellants who consider vacatur an important part of settlement.  

Refusal to vacate may force parties to continue an appeal, at cost to themselves, their adversaries, the overburdened appellate courts and, by extension, the public.\(^\text{23}\)  

B. Relationship Between Mootness and Vacatur

Mootness is often an issue in motions to vacate: parties argue that a settlement, by eliminating the most evident form of controversy, renders the case moot.\(^\text{24}\) Mootness obligates an appellate court to dismiss the

\(^{18}\) Settlement is defined as "an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other." Black's Law Dictionary 1231 (5th ed. 1979).

\(^{19}\) See Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States, Committee on the Operation of the Jury System, 103 F.R.D. 461, 465-67 (1984). The adoption of a panoply of ADR devices suggests that alternatives to litigation are essential to the operation of the judicial system for litigants who need the formal civil or criminal process. See Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 Tul. L. Rev. 1, 2-3 (1987) (citing commentators who recommend ADR as substitute for litigation in variety of commonly litigated areas).

\(^{20}\) Settlement is defined as "an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other." Black's Law Dictionary 1231 (5th ed. 1979).


\(^{19}\) Mootness is often an issue in motions to vacate: parties argue that a settlement, by eliminating the most evident form of controversy, renders the case moot.\(^\text{24}\) Mootness obligates an appellate court to dismiss the
action and to vacate the lower court judgment.\textsuperscript{25}

It is axiomatic that mootness deprives a federal court of subject matter jurisdiction, because the matter no longer involves a "case" or "controversy."\textsuperscript{26} For this reason, the Supreme Court held in \textit{United States v. Munsingwear}\textsuperscript{27} that when a case pending appeal becomes moot as a result of "happenstance"—an event beyond the parties' control—the appellate court must dismiss the appeal and vacate the lower court judgment.\textsuperscript{28} Vacatur is granted in these circumstances because the losing party in the court below has been denied an opportunity to litigate fully his claim; mootness prevents the party from seeking review.\textsuperscript{29}

Although \textit{Munsingwear} is a tempting invitation for parties seeking vacatur, courts supporting and opposing vacatur as an element of settlement have noted that the \textit{Munsingwear} rule is inapplicable to much litigation ended by voluntary settlement.\textsuperscript{30} \textit{Munsingwear} requires vacatur when mootness is a result of uncontrollable outside circumstances.\textsuperscript{31} Settlement agreements, in contrast, are the result of voluntary, consensual acts, not "happenstance."\textsuperscript{32}

\textit{Munsingwear} also may not apply to cases in which the parties seek

\begin{itemize}
  \item \textsuperscript{26} See U.S. Const. art. III § 2; see also Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-41 (1937) (discussing constitutional dimension of mootness).
  \item \textsuperscript{27} 340 U.S. 36 (1950).
  \item \textsuperscript{28} See id. at 39-40.
  \item \textsuperscript{29} See id. at 39.
  \item \textsuperscript{30} See, e.g., \textit{In re Memorial Hosp.}, 862 F.2d 1299, 1301 (7th Cir. 1988); Nestle Co. v. Chester's Mkt., 756 F.2d 280, 281-82 (2d Cir. 1985); Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721-22 (9th Cir. 1982).
  \item \textsuperscript{31} See United States v. Munsingwear, 340 U.S. 36, 39-40 (1950).
  \item \textsuperscript{32} The Court's analysis in \textit{Karcher v. May}, 484 U.S. 72 (1987), suggests that it would not automatically find an action moot because of settlement. See id. at 83. For an action to be considered moot for \textit{Munsingwear} purposes, the mootness must be the result of an occurrence "unattributable" to the parties. As the Court explained, "[t]his controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal. Accordingly, the \textit{Munsingwear} procedure is inapplicable to this case." \textit{Id.} Because settlement is a bargain between the parties to which neither is forced to agree, settlement cannot be said to be "unattributable" to them. See United States v. Garde, 848 F.2d 1307, 1310-11 (D.C. Cir. 1988) (per curiam) (refusing appellant's request for vacatur under \textit{Karcher} analysis).

In its criticism of vacatur, the \textit{Garde} opinion misstated the Second Circuit's holding in \textit{Nestle} by asserting that the \textit{Nestle} court "decided against vacatur." \textit{Garde}, 848 F.2d at 1310 n.6. But see \textit{Nestle}, 756 F.2d at 284 (granting vacatur).

Several decisions prior to \textit{Karcher} anticipated its analysis. See, e.g., Cover v. Schwartz, 133 F.2d 541, 546 (2d Cir. 1942) (unilateral action by appellant in absence of settlement and final judgment cannot be basis for vacatur), cert. denied, 319 U.S. 745 (1943); \textit{Ringsby}, 686 F.2d at 721 (citing \textit{Cover} as precedent to deny settlement conditioned upon vacatur). But see \textit{Nestle}, 756 F.2d at 283 n.4 (asserting \textit{Ringsby} "misread" \textit{Cover} by extending its analysis to settlements conditioned upon vacatur, rather than limiting it to one appellant's unilateral motion to vacate); Greenbaum, \textit{Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition}, 17 U.C. Davis L. Rev. 7, 36 n.134 (1983) (criticizing \textit{Ringsby} for failing to recognize the distinction in the text of \textit{Munsingwear}).

\end{itemize}
vacatur as a condition of settlement, because those cases are not necessarily moot.\textsuperscript{33} In fact, "[t]he presence of a live controversy is amply demonstrated by [a party's] insistence on a vacatur prior to settlement so as to preserve its right to pursue an appeal should the judgment remain in effect."\textsuperscript{34} Should vacatur be denied, the losing party may continue to litigate because the controversy remains, as it does following the breakdown of any settlement agreement. "The case is neither more nor less moot than it would be if the loser were satisfied with the judgment and complied without appealing."\textsuperscript{35} Therefore, because of \textit{Munsingwear}'s self-imposed restriction on the granting of vacatur, whether vacatur should be allowed pursuant to settlement must be considered outside that case's narrow analytical framework.\textsuperscript{36}

C. \textbf{Conflict Between Public and Private Interests}

Vacatur raises issues that have come to be characterized as conflicts between private interests, such as early termination of litigation, and public interests, such as preservation of the lower court judgment's inherent value.\textsuperscript{37} Whether public and private goals are actually in conflict

\begin{itemize}
\item \textsuperscript{33} See \textit{Memorial Hosp.}, 862 F.2d at 1301; Fishman v. Estate of Wirtz, 807 F.2d 520, 585 (7th Cir. 1986); \textit{Nestle}, 756 F.2d at 282. \textit{But see} Tosco Corp. v. Hodel, 826 F.2d 948, 948 (10th Cir. 1987) (case mooted by execution of settlement agreement); Kennedy v. Block, 784 F.2d 1220, 1225 (4th Cir. 1986) (parties' settlement moots action).
\item \textsuperscript{34} \textit{Nestle Co. v. Chester's Market}, 756 F.2d 280, 282 (2d Cir. 1985).
\item \textsuperscript{35} \textit{In re Memorial Hosp.}, 862 F.2d 1299, 1301 (7th Cir. 1988).
\item \textsuperscript{36} The issue presented when the parties' settlement is conditioned upon vacatur should be distinguished from those raised when parties settle without seeking vacatur. In the latter circumstance, if settlement makes the case moot, then vacatur is required under \textit{Munsingwear}, even when the parties expressly object to it. See, e.g., Kennedy v. Block, 784 F.2d 1220, 1222-25 (4th Cir. 1986).
\item \textit{Kennedy} involved settlement of a landlord-tenant action brought by a private tenant against the Secretary of the Department of Agriculture and a private landlord operating federally-subsidized housing. The court held that the parties' settlement mooted the action. \textit{Id.} at 1224. Despite the settlement, plaintiff insisted that the issue was "capable of repetition, yet evading review," thereby permitting exception to the mootness doctrine. \textit{Id.} at 1222; see also \textit{Southern Pac. Terminal Co. v. ICC}, 219 U.S. 498, 515 (1911) (exception to mootness doctrine). The court disagreed, finding that it was not "reasonably likely" that the issue would arise again and even if it did, "it will not be one that evades review." \textit{Kennedy}, 784 F.2d at 1224. Because the issue failed to satisfy the requirements for the "capable of repetition, yet evading review" standard, the court refused to allow an exception to the mootness doctrine and vacated pursuant to \textit{Munsingwear}. See \textit{id.} at 1225.
\item \textsuperscript{37} See \textit{Memorial Hosp.}, 862 F.2d at 1303 ("Judges must have at heart the interests of other litigants in future cases, and hold them equal in weight with the interests of today's [litigants]."); \textit{Nestle}, 756 F.2d at 282 ("Our inquiry, therefore, is limited to whether the district court abused its discretion in subordinating the parties' interests to what it considered to be the public interest in the finality of judgments." (citation omitted)); see also \textit{Note}, \textit{Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments}, 96 Yale L.J. 860, 866 (1987) ("[S]ettlement conditioned on vacatur ... draws private and public goals into confrontation.").
\item Characterizing vacatur as a contest between public and private interests has the effect of discouraging public-minded judges from granting vacatur. See \textit{Memorial Hosp.}, 862 F.2d at 1302. See generally G. Hellemans Brewing Co. v. Joseph Oat Corp., 871 F.2d
when parties seek vacatur, however, depends on how such goals, particularly public goals, are defined.38

Courts favoring vacatur emphasize the parties' private interests in ending the dispute39 and the public interest in judicial resources conserved by an early end to litigation.40 If the public interest is defined as conservation of judicial resources, vacatur should be allowed because it stimulates settlements that conserve judicial resources.41

Courts opposed to vacatur hold that the public interests in precedent42 and collateral estoppel43 outweigh the parties' private interest in ending the litigation.44

The public interest reflects both sets of values.45 Because the decision to grant or to deny vacatur requires a balancing of interests, one must analyze the relative values of the interests involved. The private parties' interests in support of vacatur are substantial and immediate—terminating a dispute, saving legal expenses and resuming more productive activity.46 In most cases, the public interests militating against vacatur, such

---

648, 664 (7th Cir. 1989) (Easterbrook, J., dissenting) (judges must adhere to "generally applicable norms," such as protecting public interests); NLRB v. Brooke Industries, 867 F.2d 434, 436 (7th Cir. 1989) (citing Memorial Hosp., 862 F.2d at 1302) (emphasizing judicial duty to consider public interests).

38. Compare Nestle Co. v. Chester's Mkt., 756 F.2d 280, 282 (2d Cir. 1985) (defining public interest as early termination of litigation) with In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988) (defining public interest as value of precedent).

39. See Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277, 279 (Fed. Cir. 1987) ("[A]ll of the parties to the [litigation] have agreed to settle their differences . . . . Like the court in Nestle, we see no reason to force the parties here to continue the litigation."); Nestle, 756 F.2d at 284 (parties "wish only to settle the present litigation").

40. See Federal Data Corp., 819 F.2d at 280 ("[T]o require the parties who have settled their differences to continue to litigate . . . . is unjust not only to the parties, but is wasteful of the resources of the judiciary.").

41. See infra notes 60-62 and accompanying text.

42. See In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988) ("[T]he judicial system ought not allow the social value of the precedent . . . . to be a bargaining chip in the process of settlement.").

43. See id. at 1303; Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982) ("[V]acatur] would undermine the risks inherent in taking any controversy to trial and, in cases such as this one, provide the dissatisfied party with an opportunity to relitigate the same issues.").

44. In Memorial Hospital, the court acknowledged the difficulty of balancing the interests.

The recipient of the settlement offer will see nothing but injustice if the court invokes some abstruse systemic interest as justification for balking. "Why am I to be held hostage to some interest that is no concern of mine?", the party is entitled to ask. Perhaps the judicial system has no answer that will satisfy such a party. . . . However[,] judges must have at heart the interests of other litigants in future cases, and hold them equal in weight with the interests of today's [litigants].

862 F.2d at 1303.

45. See id. at 1302 (settlement benefits litigants requiring judicial attention and precedent benefits litigants trying similar issues).

46. See In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988); Nestle Co. v. Chester's Market, 756 F.2d 280, 284 (2d Cir. 1985).
as precedent and collateral estoppel—both representing future preservation of judicial resources—are remote and speculative.\textsuperscript{47} Substantial, immediate and actual interests should be given more weight than remote and speculative ones.\textsuperscript{48}

D. \textit{Balancing Interests in Review of the Motion to Vacate}

As an element of the settlement agreement, parties often request vacatur in their motion to dismiss the action. Parties seeking vacatur are effectively seeking relief from the judgment of the lower court.\textsuperscript{49} The parties may move to dismiss and vacate before the district court that issued the judgment,\textsuperscript{50} pursuant to Federal Rule of Civil Procedure 60(b).\textsuperscript{51} Alternatively, they may move before the circuit court where the appeal is pending pursuant to Federal Rule of Appellate Procedure 42(b)\textsuperscript{52} to dismiss the case and vacate the lower court ruling.\textsuperscript{53}

\textsuperscript{47} See Nestle, 756 F.2d at 284.
\textsuperscript{48} See id.; see also Greenbaum, supra note 32, at 38:

[T]hese concerns may be outweighed by the desire to facilitate settlement of the ongoing litigation. Encouraging settlement may go farther in reducing the burden on the court system, a principal concern of the preclusion doctrines, than would preserving a judgment's preclusive effects for use in future cases which may never arise.

\textit{Id.}


\textsuperscript{50} See Nestle, 596 F. Supp. at 1447. In Nestle, the parties made the motion to vacate before the Court of Appeals for the Second Circuit. See Nestle Co. v. Chester's Mkt., 756 F.2d 280, 281 (2d Cir. 1985). Judge Newman remanded, holding that the district court should consider vacatur first, because the parties had the right of appeal. See id.

\textsuperscript{51} Rule 60(b) provides in pertinent part, "[a]n 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:

\begin{itemize}
  \item [(6)] any . . . reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).
\end{itemize}

Because no Federal Rule specifically mentions vacatur, courts have treated motions to vacate under a variety of rules. At least one court has treated the motion to vacate as a motion pursuant to Rule 59(e). See Kennedy v. Block, 784 F.2d 1220, 1222 (4th Cir. 1986). Because Rule 59(e) provides for a motion to "alter or amend" a judgment, not to expunge it, it does not have an effect on the issue of vacatur. See In re Memorial Hosp., 862 F.2d 1299, 1300 (7th Cir. 1988) (vacatur "expunge[s]" judgment).

\textsuperscript{52} Rule 42(b) provides in pertinent part that "[i]f the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed . . . the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court." Fed. R. App. P. 42(b).

A Rule 42(a) motion, made before the appellate court but providing for dismissal of the appeal in the district court, provides that "[i]f an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant." Fed. R. App. P. 42(a).

\textsuperscript{53} Because motions to vacate are made under federal rules governing dismissal, which are discretionary, both district courts and appellate courts hold that the decision to grant or to deny vacatur is a matter of judicial discretion. See In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988) ("[T]he judge . . . must ensure that the agreement is an
Although motions to vacate are made pursuant to discretionary federal rules, many courts either grant or deny vacatur as a matter of law, leading to contradictory results. To ensure consistency in resolving motions to vacate, to avoid conflicting results and to encourage settlement, there should be a presumption in favor of allowing these motions. A presumption, rather than a mandatory rule, gives the court the prerogative to deny the motion to vacate. Thus, the value of the lower court’s judgment would be preserved when the facts and circumstances of the case warrant, for example, in cases of first impression. In such cases, litigants would be prevented from having important judg-
ments capriciously "wiped from the books." 59

II. VACATUR'S EFFECT ON SETTLEMENT AND JUDGMENT

Vacatur helps to achieve the goal of settlement at a minimum cost with respect to the conflicting public and private interests in the contexts of vacatur's effect on settlement, precedent and issue preclusion. Concerns that the value of important judgments will be lost can be addressed by treating motions to vacate with a presumption that favors them but that allows courts to consider extraordinary circumstances when necessary.

A. Encouraging Settlement

There is overwhelming authority in favor of settlement. 60 It eases docket congestion and reflects a voluntary resolution of the dispute, rather than a coercive solution imposed by judgment. Encouraging settlement is a primary consideration for courts granting vacatur, 61 because common sense suggests that settlement is more likely to occur when there are more negotiating options open to parties. 62

---

59. Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982).
60. See supra note 18.
   It has been argued that resolving disputes by settlement rather than judicial decision provides additional benefits beyond the saving of judicial resources and those of the parties, including: (1) providing a higher quality of justice; (2) promoting the litigants' interests in autonomy; and (3) facilitating the restoration of working relationships among the parties.
Greenbaum, supra note 32, at 38 n.140 (citing Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1202 n.5 (5th Cir. 1982) (Reavley, J., dissenting), cert. denied, 460 U.S. 1013 (1983)).
   For different arguments which oppose a vigorous policy favoring settlement, see Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366, 388 (1986) (increasing amount of settlement may result in short-term cost reduction, but "in the long run the litigation rate may rise") and Fiss, Against Settlement, 93 Yale L.J. 1073, 1085 (1984) (settlement merely produces "peace," not "justice").
61. See Nestle Co. v. Chester's Mkt., 756 F.2d 280, 282 (2d Cir. 1985):
   For the same reasons that the case is not moot, the judgment here is subject to reversal on appeal. We are thus not faced with new litigation which seeks to avoid directly or indirectly an otherwise final judgment, such as a collateral attack or a claim that a judgment previously entered in litigation between the parties over the same subject matter is not preclusive. To the contrary, here we are faced with a settlement that will bring pending litigation to an end.
Id. at 282; see also Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277, 279 (Fed. Cir. 1987) (granting vacatur because "[i]t is long established that courts favor dispute resolution through voluntary settlements") (citing Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910)).
62. "[S]ettlement connotes a bargained agreement to end the litigation . . . . In this situation, perhaps the parties should be allowed to treat the continued viability of the judgment as a negotiable issue. Such an approach [favoring vacatur] would encourage settlement . . . ." Greenbaum, supra note 32, at 36-37 (citing 1B J. Moore, Moore's Federal Practice ¶ 0.444[1] (2d ed. 1983); 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4433 (1975 & Cum. Supp. 1980)).
Of course, the likelihood of settlement conditioned on vacatur depends on the attractiveness of vacatur to the parties. Vacatur is an especially attractive term of settlement, because it may help a party to reach a number of its more general goals in settling its case. Aside from depriving a judgment of preclusive effect, vacatur would "cloud[] and diminish[] the significance of the [judgment]" inside and outside of the litigation context, allowing a party to protect himself from the impact of an adverse judgment.

In the litigation context, a party might wish to vacate a judgment even when it would not be preclusive in the future. For example, the parties in In re Memorial Hospital who were denied vacatur were not motivated by issue preclusion. The United States, the losing party at the trial court level, is not subject to offensive nonmutual issue preclusion as a matter of law. It had been held in contempt by a federal bankruptcy court. When the parties reached a settlement pending appeal and sought vacatur, the Court of Appeals for the Seventh Circuit speculated that the defendant was seeking to "escape notice" of the contempt judgment against it through vacatur.

Outside a litigation, vacatur could be a useful public relations tool, a factor of growing importance in the law. Assume that P, a local resident, brings a tort action in nuisance against D, an out-of-state company that has allegedly dumped toxic waste on P's property. D loses the judgment and the judge issues a scathing recitation of the company's toxic dumping activity. As anxious as D is to reduce its legal bills and the judgment it owes P, D is also concerned about its relationship with the local community. As part of a generous settlement agreement, P agrees to vacatur. Subsequently, with the help of a public relations firm, D is able to characterize the vacated judgment as worthless. To a non-lawyer, vacatur might imply that the judgment itself was "wrong," due to judicial error or the emergence of some evidence supporting the loser. In the public's eyes, a vacated judgment may be a discredited judgment, thereby


Avoiding issue preclusion is not the only reason to seek vacatur. See In re Memorial Hosp., 862 F.2d 1299, 1302-03 (7th Cir. 1988) (suggesting alternative reasons for seeking vacatur). But see Note, supra note 37, at 860 ("Indeed, the very purpose of settlement conditioned on vacatur is to avoid future issue preclusion.").

64. Memorial Hosp., 862 F.2d at 1302.
65. 862 F.2d 1299 (7th Cir. 1988).
66. See id. at 1303.
67. See id. (citing United States v. Mendoza, 464 U.S. 154, 162 (1984)).
68. See In re Memorial Hosp., 82 B.R. 478 (W.D. Wis.), appeal dismissed, 862 F.2d 1299 (7th Cir. 1988).
69. See In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988).
vindicating the claim of the losing party.\textsuperscript{71}

While parties often find vacatur useful, it may not encourage settlement at every point in a litigation. Vacatur may discourage early settlement\textsuperscript{72} because a party could seek an initial judgment with the knowledge that should it lose, it could settle and vacate, preserving its right to relitigate.\textsuperscript{73} The danger of relitigation, however, which has not been realized in the past,\textsuperscript{74} may be prevented by judicial sanction.\textsuperscript{75}

Cases and commentators expressing concern about parties shopping for acceptable judgments by vacating unacceptable ones\textsuperscript{76} ignore two

\textsuperscript{[71] See generally Memorial Hosp., 862 F.2d passim. The court in Memorial Hospital expressed concern that the defendant might “escape notice” of a contempt judgment entered against it. \textit{Id.} at 1302. While the court is apparently referring to judicial notice, its analysis applies equally well to public notice.

An observer concerned about the political or social policy implications of this hypothetical would be wary of vacatur. \textit{See Fiss, supra note 60, at 1078 (“The chief executive officer of a corporation may settle a suit to prevent embarrassing disclosures about his managerial policies, but such disclosures might well be in the interest of the shareholders,” or the public.) (citing Wolf v. Barkes, 348 F.2d 994 (2d Cir.), \textit{cert. denied}, 382 U.S. 941 (1965)).

72. The Seventh Circuit, denying vacatur because of its effect on issue preclusion and precedent, briefly noted that its approach encourages settlement before a district court judgment is rendered. \textit{See Memorial Hosp., 862 F.2d at 1302 (“If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision, an outcome our approach encourages.”}). \textit{But see Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277, 279 (Fed. Cir. 1987) (denying vacatur forces continued litigation by discouraging settlement once the district court judgment has been entered); Nestle Co. v. Chester’s Mkt., 756 F.2d 280, 282 (2d Cir. 1985) (same). Underlying the court’s argument is a fear of relitigation. \textit{See Memorial Hosp., 862 F.2d at 1302. As discussed below, vacatur does not necessarily abrogate preclusion and vacatur in past cases has not led to relitigation. \textit{See infra notes 93-111 and accompanying text.}

73. \textit{See Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982) (vacatur “provide[s] the dissatisfied party with an opportunity to relitigate the same issues”) (footnote omitted); see also Note, supra note 37, at 868 (wealthy party may forego settlement for trial, knowing it can press for vacatur as term of subsequent settlement).

74. \textit{See infra notes 110-111 and accompanying text.}

75. \textit{See Nestle Co. v. Chester’s Mkt., 756 F.2d 280, 284 (2d Cir. 1985) (describing penalties for “repetitive” antitrust litigation). The Nestle court wrote that sanctions would mitigate the issue preclusion problem of vacatur, see \textit{infra} notes 93-111, at least in antitrust and trademark cases.

76. \textit{See \textit{In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988); Ringsby, 686 F.2d at 721; see also Note, supra note 37, at 868 (“Settlement conditioned on vacatur ... encourag[es] wealthy litigants to sue until reaching favorable outcomes ...”). Comment, \textit{Letting The Chips Fall: The Second Circuit’s Decision on Toll House}, 52 Brooklyn L. Rev. 1029, 1032 (1986) (“It is not clear that the parties should always be allowed to negotiate away the collateral estoppel claims of others.”).}
facts. First, even a vacated judgment has some persuasive authority, both as precedent and for issue preclusion purposes. Second, the subsequent history of vacated judgments suggests that relitigation is not a valid concern.

B. Precedent

The value that one places on precedent in part depends on the view that one takes of the judicial process. There are many schools of thought, characterized perhaps at their extremes as the older private litigation model and the newer public litigation model.

Courts adhering to the private litigation model favor settlement and reject the idea of forcing parties to be "private attorneys general." Under this view, litigation is primarily a method available to private parties to resolve their disputes. As such, it should remain as free as possible

---

77. See infra note 90 and accompanying text.
78. See infra notes 101-103 and accompanying text.
79. See infra notes 110-111 and accompanying text.
80. Precedent is defined as "[a]n adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law." Black's Law Dictionary 1059 (5th ed. 1979).
81. See Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4 (1982). "In the classical model, litigation is viewed as a mode of dispute settlement... In the contemporary model, the subject matter of the litigation is not a dispute between private parties, but [reflects] a grievance about the content or conduct of policy..."
82. At least one Supreme Court justice has expressed his preference for the classical model. See Hewitt v. Helms, 482 U.S. 755, 761 (1987) (Scalia, J.) (dictum) ("In all civil litigation, the judicial decree is not the end but the means.").

The private litigation model is reflected in the ADR movement, which emphasizes dispute resolution. See supra note 16 and accompanying text. The public litigation model is reflected by the work of Professor Fiss, who emphasizes the importance of final judgment. See Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 29 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes."). Courts tend to implicitly assume an ADR position or a Fiss position when considering vacatur.

For an explanation of the arguments in support of both models, compare Fiss, supra note 60, at 1089 ("Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."); McThenia & Shaffer, supra note 21, at 1664 ("Settlement is a process of reconciliation..."").

The debate over the purpose of litigation is beyond the scope of this Note. However, express adherents to the Fiss position would conceivably oppose vacatur for the same reason that they oppose settlement, because it deprives society of the benefit of judgment. See generally Fiss, supra note 60, at 1085.

82. See Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277, 279 (Fed. Cir. 1987) ("[W]e see no reason to force the parties here to continue the litigation."); Nestle Co. v. Chester's Mkt., 756 F.2d 280, 284 (2d Cir. 1985) ("[T]he district court imposed the heavy burden on trademark defendants of having to continue to litigate when they would prefer to settle, a ruling without precedent."); Nestle Co. v. Chester's Mkt., 596 F. Supp. 1445, 1451 (D. Conn. 1984) ("There can be no doubt that to deny the motion would work some hardship on the parties... Thus the parties will face continued litigation despite their expressed preference for settlement.")., rev'd 756 F.2d 280 (2d Cir. 1985). See generally Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (policy favors compromise and settlement of doubtful rights and controversies rather than litigation of issues).
Courts rejecting vacatur take a contrary view, using the precedential value of the district court judgment as a basis for their refusal to grant vacatur. While initiation of the litigation is exclusively the parties' business, once the legal process has been engaged and the resources of the judiciary have been invoked, the judgment of the court becomes public property with precedential value. Although the result is public property, the process itself is not. If it were, courts that reject vacatur because judgments are public property would be obligated to reject for the same reason settlement before a lower court judgment was rendered.

Thus, the conflict between the value of precedent and the value of settlement, which implicates the value of vacatur, is evident when a premium is placed on creating precedent. Settlement precludes the existence of the precedent embodied in a final appellate judgment. The vacated lower court judgment itself has no formal precedential value. Both of these effects rob the dispute of the social value inherent in precedent. Vacatur, however, is not the same as a reversal or an overruling. A well-reasoned, albeit vacated, district court decision that remains in the reporters will influence future judges and litigants, who may look to it when faced with similar facts and issues. Therefore, vacatur does not, 

83. See supra note 1 and accompanying text.
84. See In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988); Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982). But see Memorial Hosp., 862 F.2d at 1302 (rejecting vacatur, but acknowledging that "litigation is conducted to resolve the parties' controversies; precedent is a byproduct of resolving disputes rather than the raison d'etre of the judicial system.") (citing Hewitt v. Helms, 482 U.S. 755, 761 (1987)).
85. See Memorial Hosp., 862 F.2d at 1302-03 (precedent has "social value"; vacatur "squanders judicial time that has already been invested"; court "retains an interest in the orderliness of its own processes"); Ringsby, 686 F.2d at 721 (parties dissatisfied with trial court's findings should not be permitted to have decision "wiped from the books").
86. See generally Memorial Hosp., 862 F.2d at 1302. The Seventh Circuit Court of Appeals considers a judgment to be a "public act of a public official," which may not be used as a "bargaining chip." Id. This reasoning would apply to the legal process, if it were also considered to be a public activity.
87. See Nestle Co. v. Chester's Mkt., 756 F.2d 280, 284 (2d Cir. 1985).
88. See County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979) (holding that judgment vacated due to moot appeal has no precedential effect). But see id. at 646 n.10 (Powell, J., dissenting) ("expressions of the court below on the merits, if not reversed, will continue to have precedential weight").
89. See In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988); see also Fiss, supra note 60, at 1085.
90. Despite its belief that the value of precedent should be given substantial weight in balancing the costs of vacatur, the Seventh Circuit has acknowledged that the analysis in a vacated judgment will continue to be available for future courts and litigants, see Memorial Hosp., 862 F.2d at 1302, even if its actual legal authority is doubtful. See supra note 88 and accompanying text.
91. See Memorial Hosp., 862 F.2d at 1302. "[Lower court] decisions have persuasive
as its critics contend, wholly deprive the dispute of precedential value. Furthermore, a presumption in favor of vacatur would still allow an appellate court to consider a narrow range of special circumstances. For example, in cases of first impression, courts and litigants need guidance. In these situations, precedent might have unusual importance that would outweigh private interests in ending the dispute and public interest in clearing the docket.\textsuperscript{92}

\subsection*{C. Issue Preclusion}

Motions to vacate are often motivated by a desire to avoid the preclusive effects of the lower court judgment.\textsuperscript{93} Issue preclusion bars a party from relitigating an issue that they have had an opportunity to litigate fully in a previous case.\textsuperscript{94} Most cases, on both sides of the vacatur issue, doubt the issue preclusive effect of judgments vacated pursuant to settlement.\textsuperscript{95} Indeed, vacated judgments are generally not given preclusive effect.\textsuperscript{96} Cases and commentators opposed to vacatur uniformly cite vacatur's effect on issue preclusion as a primary reason for refusal to force as precedent that may save other judges and litigants time in future cases. Some of this force would remain as long as the court's opinion were available to read; it does not vanish on vacatur.” \textit{Id.; see also} 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.10, at 443 (2d ed. 1984) (even vacated opinions have been “tested in the same crucible as all opinions” and are therefore no less persuasive).

\textsuperscript{92} Fiss argues that judges are bound to “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes [by creating precedents]: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.” \textit{See} Fiss, supra note 60, at 1085. Although settlement and ADR appear to contradict this goal, they are designed to make the legal process more efficient and an efficient system is predicated to the ability of judges to “explicate” and “give force” to important values. Many commentators do not believe the present system is efficient. \textit{See}, e.g., supra note 11 and accompanying text. An inefficient system is less likely to produce a just result. Such a system may deny individuals justice in cases in which resolution of disputes is delayed for months or years. Furthermore, inefficiency may deny judges the time necessary to render thoughtful decisions on issues of first impression or on issues having substantial social impact. \textit{See} Miller, supra note 11, at 1 (“It is axiomatic that justice delayed is justice denied.”). Justice is Fiss's ultimate goal. \textit{See} Fiss, supra note 60, at 1085. Both precedent and efficiency serve the same end, justice, albeit in different ways.

\textsuperscript{93} \textit{See} Nestle Co. v. Chester’s Mkt., 756 F.2d 280, 281 (2d Cir. 1985); Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 n.1 (9th Cir. 1982).

\textsuperscript{94} \textit{See} F. James & G. Hazard, supra note 4, § 11.3, at 590-91.

\textsuperscript{95} \textit{See} In re Memorial Hosp., 862 F.2d 1299, 1303 (7th Cir. 1988) (“The parties may be free to contract about the preclusive effects of these decisions inter se . . . [T]hey are not free to contract about the existence of these decisions.”) (emphasis original); Kennedy v. Block, 784 F.2d 1220, 1225 (4th Cir. 1986) (“Dismissal [under Munsingwear] will of course leave open and unresolved the question addressed by the district court in its earlier published opinion.”) (citing United States v. Munsingwear, 340 U.S. 36, 40-41 (1950)).

\textsuperscript{96} \textit{See} No East-West Highway Comm. v. Chandler, 767 F.2d 21, 24 (1st Cir. 1985) (vacated judgment has no preclusive effect); Dodrill v. Ludt, 764 F.2d 442, 444 (6th Cir. 1985) (“[T]he general rule is that a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel.”); De Nafo v. Finch, 436 F.2d 737, 740 (3d Cir. 1971) (same).
grant vacatur; vacatur's critics do not want to afford litigants an opportunity to relitigate.

Vacated judgments are not considered issue preclusive because these judgments are not "final" for preclusive purposes. Finality may be evidenced by appellate review, which is absent when the action is mooted pending appeal. The absence of appellate review in a vacated case, however, does not necessarily mean that there is insufficient finality to bar issue preclusion in future cases. When the parties voluntarily end their litigation through settlement and vacatur, a future court may apply issue preclusion, given that the parties had an opportunity to litigate fully and fairly their dispute. If the parties were fully heard, if the court's opinion were reasoned and if the decision were appealable, then the decision could be considered final for the purpose of preclusion.

Of course, widespread use of issue preclusion in cases when the prior judgment has been vacated might discourage settlement. It would make vacatur less attractive to parties considering settlement, because avoiding a judgment's preclusive effects is a primary reason for vacatur.

97. See, e.g., In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988); Ringsby Truck Lines v. Western Conf. of Teamsters, 686 F.2d 720, 721 (9th Cir. 1982); see also Note, supra note 37, at 862 (arguing importance of preclusive effects).
98. See Memorial Hosp., 862 F.2d at 1302; Ringsby, 686 F.2d at 721.
99. See Chemetron Corp. v. Business Funds, 682 F.2d 1149, 1190 (5th Cir. 1982) ("[T]here must be 'judicial finality' before collateral estoppel can be invoked.")
101. Id. at 38-39.
102. See Chemetron, 682 F.2d at 1190-91. In Chemetron, there was no final judgment entered. See id. at 1192. However, the trial court made findings of fact and conclusions of law which had been set aside as part of the settlement agreement. The Chemetron court applied issue preclusion despite the set-aside and absence of final judgment, remarking that defendant "cannot have it both ways," by avoiding the adverse judgment and its preclusive effects. Id.; see also Pontarelli Limousine v. City of Chicago, 704 F. Supp. 1503, 1514 (N.D. Ill. 1989) (dictum) ("[W]here this court applying federal law ... [the vacated judgment in question] should be given preclusive effect.")
103. Restatement (Second) of Judgments § 13, comment g, at 353-54.
104. See supra note 93 and accompanying text. Naturally, parties seeking vacatur for other reasons, see supra notes 63-71 and accompanying text, would not be deterred.
In the future, circuits seeking to foster settlement through vacatur should resist the temptation to apply issue preclusion to prior judgments vacated as a condition of settlement. At the risk of encouraging relitigation,105 these courts should note that issue preclusion and vacatur serve the same purpose—conservation of judicial resources.106 "Because the policies favoring finality of judgments are intended to conserve judicial and private resources, the denial of a motion for vacatur is counterproductive because it will lead to more rather than less litigation."107

It is unclear whether vacatur or issue preclusion contributes more to judicial economy. Although issue preclusion prevents relitigation,108 it is impossible empirically to measure its effects because one cannot determine how many parties are discouraged from coming to court for a second try, knowing that they are likely to lose as soon as the other party makes a summary judgment motion.109 It is possible to test the effect of vacatur, however. Among 10 judgments reported to have been vacated in 7 circuits between 1968 and 1987,110 none has been reported as having been relitigated.111 This indicates that relitigation has not been en-

105. See Nestle Co. v. Chester's Mkt., 756 F.2d 280, 284 (2d Cir. 1985) (danger of relitigation may be overstated as matter of law); see also infra notes 110-111 and accompanying text.


107. Nestle, 756 F.2d at 282; see also 13A C. Wright, A. Miller & E. Cooper, supra note 91, § 3533.10, at 432.

All of the policies that make voluntary settlement so important a means of concluding litigation apply. The appellee as well as the appellant may prefer settlement, and can bargain for whatever future protection it needs. It cannot be argued that the possible nonmutual preclusion interests of nonparties justify either appellate decision against the wishes of the parties, or an insistence that as a price of settlement the appellant must permit the district court judgment to support nonmutual preclusion. The parties should remain free to settle on terms that require vacation of the judgment, entry of a new consent judgment, or such other action as fits their needs.

Id.; In re Memorial Hosp., 862 F.2d 1299, 1303 (7th Cir. 1988) (suggesting parties can agree privately on preclusive effects of vacated judgment).

108. See supra note 4 and accompanying text.

109. Pursuant to Rule 56, either plaintiff or defendant may move for summary judgment based on affidavits arguing the preclusive effect of a past judgment on the case in question. See Fed. R. Civ. P. 56.


111. On October 21, 1989, the author of this Note conducted a search of the "Courts" file in the "Genfed" library of LEXIS based on the case names and issues litigated. The
couraged by vacatur; the fear of relitigation expressed by the opponents of vacatur appears to be unfounded.

CONCLUSION

When parties settle pending appeal, their agreement often calls for vacatur of the lower court judgment. The decision to vacate involves a conflict between private interests favoring vacatur and public interests opposing it. A careful analysis of the practical effects of vacatur suggests that some public interests favor vacatur. Taken together with the parties’ private interest in ending their dispute, these interests outweigh the speculative fears about wasted judicial resources. Therefore, federal appellate courts should employ a presumption that allows parties to include vacatur as a condition of settlement to encourage the early termination of litigation.

Henry E. Klingeman

search revealed that none of the issues has been the subject of a subsequent reported decision.