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Jill E. Fisch
University of Pennsylvania Law School, jfisch@law.upenn.edu

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REWITING HISTORY: THE PROPRIETY OF ERADICATING PRIOR DECISIONAL LAW THROUGH SETTLEMENT AND VACATUR

Jill E. Fisch†

The power of courts to vacate their prior judgments is not a recent innovation. In the past several years, however, courts have begun to embrace the practice of vacating judgments following a postjudgment settlement of the litigation.1 The practice appears to have its roots2 in the Second Circuit’s decision in Nestle Co. v. Chester’s Market, Inc.3 While many practitioners seem unaware of the availability of vacatur after judgment,4 the possibility of obtaining vacatur and the salutary effect of vacatur upon postjudgment settlements is receiving increasing attention from the bar.5

† Associate Professor of Law, Fordham University School of Law, B.A. 1982, Cornell University; J.D. 1985, Yale Law School. I am grateful to Debbie Batts, Lea Brilmayer, Geoffrey Hazard, Bruce Johnson, Michael Malloy, Mike Martin, Richard Posner, and Steve The! for reading and commenting on earlier drafts of this Article and to Gary Leibowitz for his research assistance. In addition, I would like to thank John Coffee for reminding me that civil procedure is too important to be left to proceduralists. See John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987).

1 This Article will focus on three “primary” cases representing the three approaches recently employed by the Second, Seventh, and Ninth Circuits in ruling on a motion to vacate: National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989); Memorial Hosp. v. United States Dep’t of Health & Human Servs., 862 F.2d 1299 (7th Cir. 1988); Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280 (2d Cir. 1985).

2 Nestle appears to be the first modern decision in which a court concluded that a settling party was “entitled” to vacatur of an adverse trial court judgment. Prior to the Nestle decision, the rule in the Second Circuit seems to have been to the contrary. See Sampson v. Radio Corp. of Am., 434 F.2d 315 (2d Cir. 1970).

3 756 F.2d 280 (2d Cir. 1985).

4 Informal discussions with the Second Circuit officials in charge of the administration of the Civil Appeal Management Program (CAMP) indicate that most practitioners are unaware of the Nestle decision and the possibility of avoiding adverse effects of a trial court judgment through vacatur. It seems likely that the recent attention focused on vacatur and its effects will result in an increased use of motions to vacate by litigants.

One explanation for this attention is the increasing congestion of federal dockets, both at the trial and the appellate levels, which has led courts to search for new ways to resolve disputes and reduce the system's caseload. The Ninth Circuit and most commentators view vacatur after settlement as a useful tool in encouraging settlements and reducing appellate caseloads.

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6 A number of proposals have given rise to discussion, experimentation, and procedural reform in an attempt to reduce the docket congestion of the federal courts. See, e.g., Alan Betten, Institutional Reform in the Federal Courts, 52 Ind. L.J. 63 (1976) (screening procedures, use of per curiam opinions, adding judgeships or circuits); Irving R. Kaufman, The Pre-Argument Conference: An Appellate Procedural Reform, 74 Colum. L. Rev. 1094 (1974) (experimental program of preargument conferences designed to encourage settlement and narrow issues on appeal) [hereinafter Kaufman, Pre-Argument Conference]; Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observances, 53 U. Chi. L. Rev. 366 (1986) (the summary jury trial as an alternative to conventional litigation); William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978) (reducing opinion-writing through the use of unpublished or limited publication opinions). The most highly publicized experimentation has been in the area of alternative dispute resolution (ADR). See Posner, supra, at 366 n.2 (citing ADR literature).

A significant procedural reform at the appellate level is the use of preargument conferences to encourage settlement of cases pending appeal. The Second Circuit has created a program known as the Civil Appeals Management Plan (CAMP) in which litigants must participate in a preargument conference with staff counsel who play an affirmative role in encouraging settlement. See Irving R. Kaufman, Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan, 95 Yale L.J. 755, 758 (1986) [hereinafter Kaufman, Pre-Argument Run the Gamut?]. The Second Circuit claims that its CAMP program has increased the number of cases which are settled pending appeal. See id. at 761; Irving R. Kaufman, New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator, 57 Fordham L. Rev. 233, 261-64 (1988); Kaufman, Pre-Argument Conference, supra, at 1098-1102. That conclusion has been strongly criticized by at least one commentator, who claims that empirical evidence demonstrates that the CAMP program does not have a statistically significant effect on settlement. See Jerry Goldman, Ineffective Justice: Evaluating the Preappeal Conference (1980).

The Second Circuit's program has lead to experimentation in other Circuits. Both the Sixth and the Eighth Circuits have adopted programs modeled on CAMP, which are designed to increase the efficiency of the appellate process. Both programs include an objective the encouragement of settlement. See Donald P. Lay, A Blueprint for Judicial Management, 17 Creighton L. Rev. 1047, 1063 (1984) (Eighth Circuit program involves "attempting to bring the lawyers together and having them meet at an early stage of the appellate process in order to try to effect a settlement"); Robert W. Rack, Jr., Pre-Argument Conferences in the Sixth Circuit Court of Appeals, 15 U. Tol. L. Rev. 921 (1984). The Seventh Circuit experimented with a preappeal program from 1978 to 1982. The program was found to have no significant effect on the rate of settlement of appeals. See Jerry Goldman, The Seventh Circuit Preappeal Program: An Evaluation 49 (1982). The Seventh Circuit subsequently discontinued its program. See Kaufman, Pre-Argument Run the Gamut?, supra, at 762 n.34. The Ninth Circuit has a prebriefing conference program, but its program is designed for the purpose of case management, not encouraging settlement. See Joe S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Projects 81-82 (1985).

7 See Note, Settlement Pending Appeal, supra note 5, at 235-36 (observing the dramatic increase in docket congestion in the federal courts and the responses by the legal community, which have included attempts at ADR and encouragement of settlements). Va-
Although the courts recognize vacatur's salutary effect on settlement, they remain cognizant that vacatur has its drawbacks. The benefits that vacatur may present to a losing litigant are partially offset by the detriments that erasing a valid judgment may have on third parties or the public as a whole. When considering a motion to vacate made in the context of a postjudgment settlement, the courts have framed the analysis in terms of balancing the interests of the public in the finality of judgments against the interests of private litigants in ending the litigation through settlement. Two perceptions underlie the public interest in finality of judgments: the belief that finality increases the efficiency of the judicial system by acting as a bar to relitigation of the same and similar claims and issues, and the opinion that finality increases the integrity of the system by maintaining respect for the judicial process. On the other hand, proponents of vacatur argue that the function of litigation is the resolution of private disputes, and no public interest can outweigh the private interests of the litigants in resolving their dispute. Moreover, the proponents argue that litigants should be entitled to absolute control over the manner in which their dispute is resolved; a decision denying the parties' request for vacatur is thus an impermissible judicial interference with this right.

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8 To the extent that settlement has the effect of reducing docket congestion and resolving cases without further consumption of judicial resources, it obviously serves public as well as private interests. "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." Note, Settlement Pending Appeal, supra note 5, at 236. ADR advocates claim that settlement is preferable to full adjudication because resolution of disputes through settlement conserves judicial resources. With programs such as CAMP, the courts appear to espouse that view. For a critique of the proposition that settlement is, in generic terms, preferable to judgment, see Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073 (1984).

9 For the last hundred years the Supreme Court has followed a course stressing the importance of finality. See, e.g., Southern Pac. R.R. v. United States, 168 U.S. 1, 49 (1897) ("[T]he aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if... conclusiveness did not attend the judgments of such tribunals... "). The Court's interest in promoting finality of judgments is most recently evidenced by its expansion of the doctrines of res judicata and collateral estoppel. See infra notes 115-38 and accompanying text.

10 See, e.g., Nestle, 756 F.2d at 282-83; Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277, 279-80 (Fed. Cir. 1987).

11 This model of litigation, in which the individual choices of the litigants reign supreme, is often referred to as the traditional model of litigation. See Abram Chayes, The Role of the Judge In Public Law Litigation, 89 Harv. L. Rev. 1281, 1282-83 (1976) (describing typical attributes of the traditional model). The prime importance of individual litigants suggests that the model is really one of individual autonomy. See John E. Kennedy, Digging for the Missing Link (Book Review), 41 Vand. L. Rev. 1089, 1092-93 (1988).

12 See 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed-
Recent decisions in the Second, Seventh, and Ninth Circuits reflect three wholly different results in the balance of interests. The Second Circuit approach, reflected in the *Nestle* decision, accepts the importance of encouraging settlement and, accordingly, adopts a rule of law in which settling litigants are entitled to vacatur of the trial court’s judgment virtually as a matter of right. The Seventh Circuit concludes that the public interest in the finality of judgments outweighs the parties’ private interests and determines that motions to vacate should generally be denied. The Ninth Circuit adopts a case-by-case balancing approach in which the courts consider the implications of the analysis on the specific facts of a particular case.

This Article presents the basic question of whether and under what circumstances a court should grant the parties’ motion to vacate when a case is settled after a final judgment. The Article will first examine in detail the approaches espoused by the Second, Seventh, and Ninth Circuits. Second, it will consider the consequences of vacatur, both upon the parties to the litigation and others. Third, using an economic approach, it will assess the impact of vacatur on the settlement process, and will conclude by considering the question of whether postjudgment vacatur truly encourages settlement and if so, at what cost.

The Article reaches the conclusion that, while a decision such as *Nestle* has the result of expediting the termination of litigation in a particular case, a rule of law which routinely permits post-settlement

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13 See *Memorial Hosp.*, 862 F.2d at 1299.
14 See *National Union*, 891 F.2d at 762.
15 A true advocate of the structuralist approach to litigation, such as Professor Fiss, would further criticize postsettlement vacatur by arguing that the encouragement of settlement of cases pending appeal is not a desirable goal. See Owen M. Fiss, *Out of Eden*, 94 Yale L.J. 1669 (1985) [hereinafter Fiss, *Out of Eden*]; Owen M. Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) [hereinafter Fiss, *The Supreme Court*]; Fiss, *supra* note 8. Professor Fiss argues that settlement furthers neither the private goals of the litigants nor the public goals of society in the adjudicative process. Moreover, Fiss replies to those who commend settlement for its conservation of judicial resources that settlement does not actually resolve disputes; rather, it is merely a truce. See Fiss, *Out of Eden, supra* at 1670. As such, it is “a highly problematic technique for streamlining dockets.” Fiss, *supra* note 8, at 1075. Professor Fiss may somewhat overstate his case. Presumably rational litigants would not settle cases unless settlement served their private goals, at least to some extent. Moreover, it is readily apparent that settlement serves the public goal of maintaining the judicial system’s capacity to resolve disputes. If no cases were settled, the courts would surely collapse. A detailed exploration of the merits of resolving litigation by settlement is beyond the scope of this Article, which is limited to the effect of vacatur on the settlement process.
The vacatur of judgments actually distorts the settlement process. Such a rule may encourage litigants to delay settlement until a later stage in the litigation. This delay results in a waste of judicial resources. Further, the effect of vacatur on the litigation process extends beyond judicial waste; it perverts the judicial decision into a negotiable commodity, engendering distortion of, and disrespect for, the role of the courts.

I

THE MOTION TO VACATE

A. The Decision of the Litigants to Vacate: Settlement of Cases After Judgment

Following an adverse judgment at the trial level, an unsuccessful litigant incurs real economic costs—the costs of complying with the imposed remedy.¹⁶ That remedy may require the losing party to pay money damages, comply with an injunction, or alter his or her conduct pursuant to the court’s declaration of the parties’ legal rights. The losing litigant may also incur costs which extend beyond the judgment itself, costs which will be referred to as “collateral costs.”¹⁷ Collateral costs may include the adverse publicity engendered by the decision, damage to reputation,¹⁸ and the spawning of parasite lawsuits, such as copycat or class action claims. Moreover, the court’s findings of fact and law may themselves have a life beyond the instant case which creates additional costs. Modern doctrines of claim and issue preclusion have expanded the use of judicial findings in subsequent litigation against the losing party.¹⁹

¹⁶ Or, in the case of a losing plaintiff, the cost of not obtaining the remedy sought.

¹⁷ The notion that an adverse judgment may have collateral consequences which extend beyond the ad damnum is not original to this Article. Indeed, the collateral consequences of criminal cases have given rise to a doctrine which provides that such cases will not be deemed moot even after the defendant has served the entire sentence, in order that the case may be reviewed on appeal. Under the doctrine, the defendant, if successful, may be relieved of the collateral consequences of the conviction. See Sibron v. New York, 392 U.S. 40, 50-58 (1968) (noting collateral consequences of an adverse criminal judgment including future sentence enhancement and impeachment).

¹⁸ Indeed, an adverse decision in a civil securities litigation may require the litigant to disclose the adverse judgment to the SEC and the public. See, e.g., Instructions to SEC Schedule 13D, Item 2(e), 17 C.F.R. §§ 240.13d-101 (1990) (requiring reporting of whether the filer is subject to a judgment enjoining future violations or finding any violation with respect to federal or state securities laws).

¹⁹ See Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 317-27 (1971) (tracing expansion and development of preclusion doctrines). In Bernhard v. Bank of America National Trust & Savings Association, 19 Cal. 2d 807, 122 P.2d 892 (1942), the California Supreme Court repudiated the traditional requirement that issue preclusion involve only the parties to the original lawsuit. The Bernhard decision to abolish the requirement of mutuality was widely followed, although not until relatively recently. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Brainard Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281 (1957).
The collateral costs of a judgment may be substantially greater for the losing party than the immediate costs of complying with the judgment.\(^{20}\)

Faced with the prospect of incurring such costs, the unsuccessful litigant has three options: to comply with the judgment, to appeal, or to negotiate a settlement with his or her adversary. The expected legal and economic consequences of each option are likely to influence the litigant's choice.\(^{21}\)

A litigant who complies with the adverse judgment must bear the above-described costs of the judgment in full. In addition, compliance with the judgment terminates the litigation by effectively mooting the controversy. A complying litigant thereby forgoes any right to appeal.\(^{22}\)

A litigant who successfully appeals may avoid any liability to the other side. The terms of the trial court judgment may, however, make a successful appeal unlikely. For example, appeal of a judgment based solely on unreviewable findings of fact\(^{23}\) is likely to be

\(^{20}\) For example, the judgment in Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), an early asbestos case, was for $58,534.04 in damages. Id. at 1102. (The jury verdict was for $68,000, which was adjusted, probably to account for prejudgment interest and amounts received from settling defendants. See Michael D. Green, The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation, 70 Iowa L. Rev. 141, 171 n.179 (1984)). Many subsequent asbestos litigants have attempted to use the Borel opinion to collaterally estop defendants from denying that asbestos is an unreasonably dangerous product. See Green, supra, at 172-78. These subsequent cases have cost defendants billions of dollars in compensation and litigation expenses. Id. at 171. Thus, for future asbestos defendants, the cost of the Borel judgment may extend far beyond the $58,000 money damages.

\(^{21}\) Scholars have long accepted that parties base litigation decisions on the expected economic consequences of those decisions. Professor Gould, Landes, and Posner have analyzed the decision to litigate or settle a civil lawsuit in terms of an investment decision, in which the litigant weighs continued participation in the litigation in terms of the expected value to be obtained by such participation against the costs of continuing to litigate. See John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279 (1973); William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1971); Richard Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973). Subsequent commentators have attempted to refine the model of the "litigation investment" in order to reflect more accurately the decisionmaking during the ongoing litigation process. See, e.g., Bradford Cornell, The Incentive to Sue: An Option-Pricing Approach, 19 J. Legal Stud. 173 (1990). For an application of the economic "litigation investment" model to the settlement of cases after judgment, see infra notes 220-31 and accompanying text.

\(^{22}\) A party's compliance with the adverse judgment will render the action moot. See, e.g., United States v. Garcy, 848 F.2d 1307, 1310 (D.C. Cir. 1988).

\(^{23}\) In general, findings of fact by a trial court may only be reversed by an appellate court on the conclusion that such findings are clearly erroneous. See Fed. R. Civ. P. 52(a); see also Pullman-Standard v. Swint, 456 U.S. 273, 286 n.15 (1982) (condemning appellate court practice of subjecting trial court factfinding to more extensive scrutiny through procedure of terming certain facts "ultimate facts"). The Supreme Court re-
In addition, the appellate process is statistically unlikely to result in reversal; records from the federal courts reveal that most judgments are upheld on appeal. Moreover, the decision of the trial court, by demonstrating the court's perception of the applicable law and the application of that law to the facts, may bring home to the unsuccessful litigant the lack of legal merit in his or her legal position.

Such factors often lead to the third available option: settlement. Parties settle a large number of cases during the appellate process and prior to the completion of appellate review. Though the loser is unlikely to escape all costs of the judgment by settlement, the costs of settlement are unlikely to exceed those of complying with the judgment. And by offering the winner a swifter and more certain route to payment than the appellate process, a losing litigant may be able to negotiate a considerable savings through postjudgment settlement.

The settlement process offers the losing litigant an additional benefit. If the losing party is concerned about the collateral consequences of the adverse judgment, he or she may incorporate certain conditions into the settlement agreement to deal with those consequences. These conditions may include dismissing the action predicated on a consent agreement disclaiming liability, limiting the


See Harlon Leigh Dalton, Taking The Right to Appeal (More or Less) Seriously, 95 YALE L.J. 62, 78 (1985) (appellate courts affirm more often than they reverse). Studies of the case statistics in federal courts of appeals indicate that the typical overall reversal rate is less than 20%. See, e.g., Director of the Admin. Office Of the Courts, ANNEX REPORT app. I, Detailed Statistical Tables, at 10, table B-5 (June 30, 1989) (overall percentage of cases reversed by federal Courts of Appeals was 13.3%; percentage of private civil cases reversed was 16.1%); Administrative Office of the U.S. Courts, Federal Court Management Statistics (1984) (showing overall reversal rates in the United States Courts of Appeals during the period 1979 through 1984 as ranging between 15.9% and 17.7%); see also Note, Courting Reversal: The Supervisory Role of State Supreme Courts, 87 YALE L.J. 1191, 1198 n.30 (1978) (authored by Margaret P.P. Mason) (citing empirical study of 16 state supreme courts for the period 1870-1970 and concluding that the aggregate reversal rate was 38.5%).

See Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337 (1986) (the failure to reach settlement is frequently based on parties' inability to assess the legal merits of their position).

Like simple compliance, settlement renders a case moot. Under such circumstances, "the trial court's determinations ought to have the same conclusive effect that they would have if the appellant had not appealed at all." Garde, 848 F.2d at 1310 n.7. This Article questions whether, in the context of a settlement, the lower court's opinion should be treated differently than when a party simply pays the judgment without appealing.
collateral use of the adverse judgment inter se, or between the parties, or stipulating that the parties will request the court to vacate the adverse judgment.

Vacatur is potentially the most powerful of these options. Vacatur enables an unsuccessful litigant to obtain the collateral benefits of reversal, such as removal of the decision from the record books and destruction of any collateral estoppel or res judicata consequences, in exchange for the settlement price. In effect, if a litigant is certain that the court will subsequently vacate an adverse judgment, the availability of vacatur makes going to trial cost-free, apart from litigation costs. A litigant may roll the dice, gamble on a favorable judgment and, if unsuccessful at trial, settle the case after judgment and move for vacatur. After settlement and vacatur of the trial court decision, the litigant will be no worse off than if he or she had avoided a final judgment by entering into a pretrial settlement.

B. The Authority of Courts to Vacate Judgments

The Federal Rules of Civil Procedure provide the federal courts, at both the trial and appellate levels, with explicit authority to modify prior judgments. An example of such authority is found in Rule 60(b), which permits a court to relieve a party from an adverse judgment on grounds which include fraud, mistake, newly discovered evidence, and satisfaction of the judgment.

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28 In a strict sense vacatur may refer to removal of the adverse judgment, withdrawal of the court’s opinion, or both. The consequences of vacating only the adverse judgment are more limited. Though a vacated judgment has no preclusive effect, see infra notes 144-45 and accompanying text, the court’s opinion may still be used to guide the decisions of subsequent courts. This distinction is particularly important when considering the vacatur of appellate court decisions.

29 This assertion is based on the assumption that an unsuccessful litigant will have to pay compensation costs whether he settles or litigates. Obviously a trial court judgment may change the figure for which the litigant will be able to settle—that figure may be higher or lower than the other side’s original settlement demands, depending on whether that party’s original estimate of the expected judgment was accurate. See infra notes 229-31 and accompanying text.

30 The additional litigation costs incurred by postponing settlement until after a trial court judgment may, of course, be considerable, particularly if that judgment is based on a full jury trial verdict.

31 This Article will focus on the procedures in the federal courts. Although the policies and purposes of motions to vacate are the same in the state systems, the applicable procedures may vary.

32 Rule 60(b) permits a court to relieve a party from a final judgment, order, or proceeding on motion and upon such terms as are just, for a series of enumerated reasons. The Rule also includes a catch-all provision which allows relief from a judgment for “any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b).

33 A litigant may also bring a motion to vacate under Rule 59(e) which permits motions to alter or amend a judgment. See, e.g., Wisconsin Truck Center, Inc. v. Volvo
Vacatur requires an affirmative action by the court—dismissal or abandonment of a case does not automatically vacate the judgment therein. If a case undergoes appellate review or if the litigation is simply discontinued, the prior judgment continues to exist and to have full force and effect. By contrast, a vacated decision has no further force and effect; rather, vacatur operates to erase the prior decision and requires affirmative judicial action.

While cases may be vacated for a variety of reasons, this Article is concerned only with motions to vacate made in connection with the postjudgment settlement of an action. In the type of action to which this Article is addressed, the case has been litigated at the trial court level to the point of a final decision and the entry of judgment.

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White Truck Corp., 692 F. Supp. 1010 (W.D. Wis. 1988) (motion to vacate based on constitutional and other objections to judgment brought under Fed. R. Civ. P. 59(e)). Additionally, 28 U.S.C. § 2106 (1988), which applies to both the Circuit Courts of Appeal and the United States Supreme Court, provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

See, e.g., Sup. Ct. R. 53 (when a case before the court is settled, it is dismissed, but not vacated). Although vacatur requires court action, dismissal of a lawsuit may generally be accomplished without the action of the court. See, e.g., Fed. R. Civ. P. 41(a)(1) (an action may be dismissed without order of the court by the filing of a stipulation of dismissal signed by all parties who have appeared in the action).

See 1B JAMES Wm. MOORE, JOHN DESHA LUCAS & THOMAS S. CURRIE, MOORE'S FEDERAL PRACTICE ¶ 0.416[3] (2d ed. 1988) [hereinafter MOORE'S FEDERAL PRACTICE] (a final judgment retains its preclusive effect regardless of the possibility or pendency of an appeal).

See, e.g., Chandler v. System Council U-19, No. CV85-AR-1948-s, slip op. at 4 (N.D. Ala. Oct. 20, 1986) (LEXIS, Genfed library, Dist file) (“A decision which is vacated has no precedential value, and for all intents and purposes never existed.”).

Pending cases are also frequently settled after a variety of preliminary decisions by the district court. These interim decisions may take the form of a partial grant of summary judgment, a grant of interim relief in the form of a preliminary injunction, or a dismissal of some portion of the pending claims. Like final judgments, these preliminary decisions may involve findings of fact and/or findings of law. Similarly, litigants frequently make analogous motions in these cases, requesting that the district court judge vacate his or her prior decision(s). See, e.g., United States v. Gordon, 1987 Ct. Intl. Trade LEXIS 31 (1987). Although a compelling argument can be made for the claim that such preliminary decisions lack the intended permanence of final judgments and should be routinely vacated, this Article asserts that interim decisions can be subjected to the same analysis, and treated the same way, as final judgments. Moreover, the practice of routinely granting “[r]equests to vacate interlocutory opinions and orders in dismissed cases invite[s] a waste of judicial resources.” Id., 1987 Ct. Intl. Trade LEXIS at 3 (refusing to vacate decision and order which did not constitute final judgment).

A final judgment may be based on a decision by judge or jury at trial, the grant of a motion for summary judgment, or a successful motion to dismiss (e.g., dismissal based on a judicial finding that the court lacks personal jurisdiction over the defendant). The decision upon which the judgment is based may have required the court or jury to make findings of fact, findings of law, or both.
ment. Typically one or both parties have filed a notice of appeal, thereby initiating the process of appellate review.\textsuperscript{39} Prior to completion of the appellate process, however, the parties may negotiate a settlement which obviates the need for further litigation.

Postjudgment settlement necessarily entails dismissal of the pending appeal(s).\textsuperscript{40} A settlement does not mandate vacatur, however. Indeed, the vast majority of cases settled pending appeal do not result in vacatur of the trial court’s judgment. Although the parties may explicitly address the issue of vacatur in the settlement agreement,\textsuperscript{41} they need not do so in order to move for vacatur.\textsuperscript{42}

The motion to vacate, in the first instance, is most commonly

\textsuperscript{39} Although the parties need not have initiated the appellate process, only a settlement effected prior to the final date upon which the losing party can challenge the judgment, either by a motion directed to the trial court or by appeal, raises the issue of vacatur. Once a party’s time to appeal has run, there is no justification for vacatur—settlement at that point in the litigation is equivalent to simple compliance with the judgment. \textit{See supra} note 27.

\textsuperscript{40} Federal Rule of Appellate Procedure 42(a) provides that, if an appeal has not yet been docketed, the case 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.” \textit{Fed. R. App. P.} 42(a). If the appeal has been docketed, the parties thereto can have the case dismissed under Rule 42(b) by filing a stipulation of dismissal with the clerk. Even if the parties do not so stipulate, the acceptance by both parties of the settlement renders the action moot, and an appellate court will not retain jurisdiction. \textit{See, e.g., United States v. Garde, 848 F.2d 1307, 1307 (D.C. Cir. 1988); cf. Village Escrow Co. v. National Union Fire Ins., 202 Cal. App. 3d 1309, 248 Cal. Rptr. 687, 694 (1983) (refusing to dismiss appeal settled after oral argument because of the greater importance of the issue presented and the timing and nature of the settlement). The California Supreme Court, in denying review of \textit{Village Escrow}, “ordered that the opinion be not officially published.” \textit{Id.}, 248 Cal. Rptr. at 687 n.6.}

\textsuperscript{41} When negotiating the issue of vacatur, the parties have several options. The most stringent condition that may be imposed by the losing party for the settlement to become effective is that the judgment be vacated. In other words, the losing party only agrees to a settlement conditioned on the court’s grant of the subsequent motion to vacate. Alternatively, the settlement agreement, though not conditioned on vacatur, may require that the winning party join in the motion to vacate. Finally, the agreement may simply require that the winning litigant agree not to oppose the loser’s motion to vacate the judgment.

Distinguishing between these options has some superficial appeal for courts struggling with the propriety of vacatur. A settlement conditioned on vacatur, for example, will be thwarted by denial of the motion to vacate, whereas an unconditional settlement will remain in effect. The agreement by both parties to join in the motion to vacate may affect the mootness analysis. \textit{Cf. National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 757 (9th Cir. 1989) (rejecting unilateral/bilateral distinction). This Article argues that judicial consideration of these three scenarios should be identical. \textit{See infra} notes 243-46 and accompanying text.}

\textsuperscript{42} The motion to vacate may be made jointly, or by the losing party with the winning party failing to object. A nonparty, however, cannot maintain a motion to vacate a judgment. \textit{See, e.g., Citibank Int'l v. Collier-Traino, Inc., 809 F.2d 1438, 1440-41 (9th Cir. 1987) (analogyizing to a nonparty’s attempt to appeal from a trial court judgment and applying similar standards to motions by a nonparty to vacate).}
made to the appellate court, because once the notice of appeal has been filed, the trial court is divested of jurisdiction. If the appeal has not yet been filed, the motion to vacate may be made directly to the lower court. The Second Circuit has suggested that even in cases in which an appeal has been filed, it is appropriate for the district court to consider the motion to vacate first. Whichever court considers the motion must decide the propriety of erasing a prior judicial decision.

II

Judicial Consideration of the Motion to Vacate

There is no direct statutory test governing the court’s authority to vacate a prior judgment. Although the power of a court to vacate a prior judgment is not explicit, courts undisputably possess such power, and the decision to vacate is a matter of judicial discretion. Moreover, the case law interpreting Rule 60(b) suggests that court discretion in this area is quite broad.

In the first cases to address the issue of postsettlement motions to vacate, litigants attempted to argue that vacatur of a judgment

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43 See National Union, 891 F.2d at 765 ("The question of vacatur usually arises on motion to the appellate court, made after a settlement, pending appeal.").

44 Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").


46 See Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280 (2d Cir. 1985). The appellate court can return jurisdiction to the lower court by dismissing the appeal without prejudice. Such a practice seems eminently desirable. It is entirely appropriate for the court which entered the underlying judgment to consider the motion to vacate because that tribunal is most familiar with the relevant factors, including the parties involved, the consequences of retaining the judgment, and whether the parties have had a full opportunity to litigate the issues.


48 See National Union, 891 F.2d at 765 ("[W]e review for abuse of discretion."); Memorial Hosp. v. United States Dept of Health & Human Servs., 862 F.2d 1299, 1302 (7th Cir. 1988) (in reviewing motion to vacate, court must "ensure that the agreement is an appropriate commitment of judicial time and complies with legal norms"); Nestle, 756 F.2d at 282 ("Our inquiry . . . is limited to whether the district court abused its discretion").

49 See Nestle, 596 F. Supp. at 1449-50; see also Klapprott v. United States, 335 U.S. 601, 614-15 (1949) ("In simple English, the language of the "other reason" clause [Fed. R. Civ. P. 60(b)(6)], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.").
after settlement is mandatory. The argument was that the settlement of the action renders the case moot. Under the doctrine of *United States v. Munsingwear, Inc.*, the litigants argued that a court is required to vacate a case which has been mooted prior to completion of the appellate process.

In *Munsingwear*, the United States asked the Supreme Court to hold that the doctrine of res judicata did not apply to a second suit between the United States and Munsingwear. The first action by the United States, alleging violations of a price-fixing regulation, had been litigated with respect to injunctive relief only. Following a judgment that Munsingwear’s pricing had complied with the regulation, the commodity involved was deregulated. Munsingwear moved for dismissal on the basis of mootness, and the court of appeals dismissed the appeal on that ground without vacating the judgment. The United States then initiated a second lawsuit, covering a later time period, seeking treble damages. Munsingwear moved to dismiss, based on the res judicata effect of the first action. The United States argued that, since the first case had become moot prior to appeal, the doctrine of res judicata should not apply.

The Supreme Court disagreed. The Court noted that where a party is prevented from obtaining appellate review through no fault of its own, it has been unfairly prejudiced, and res judicata should not apply. Indeed, the Court referred to its regular practice of vacating judgments in cases which become moot on their way to the Supreme Court. But the Court, finding that the United States acquiesced in the dismissal of the initial action when it should have attempted to preserve its rights by moving for vacatur, held that “having slept on its rights,” the United States could not complain that it was now prejudiced by the application of res judicata.

*Munsingwear* teaches that when a case is mooted through no fault of the parties, the maintenance of the judgment may be pre-j,

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50 See, e.g., *National Union*, 891 F.2d at 765; *Nestle*, 756 F.2d at 281; *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721-22 (9th Cir. 1982).
51 See cases cited *supra* note 50.
54 According to the *Munsingwear* Court:
   The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.
55 *Id.* at 41.
56 The *Nestle* court stated that the *Munsingwear* rule provides that “district court judgments that become moot pending appeal must be vacated.” *Nestle*, 756 F.2d at 281. This reading of *Munsingwear* is far too broad.
judicial to a party who has lost the opportunity to challenge such a judgment on appeal. In such circumstances, "the judgment in a moot case should be vacated to relieve the parties of collateral consequences when they were unable to obtain appellate review."\(^{57}\) The justification for this holding is the reluctance of the Court to bind a party based on a prior judgment when that party has been foreclosed from challenging that judgment on appeal.\(^{58}\) Thus, the Munsingwear doctrine "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."\(^{59}\)

Virtually all courts have refused to apply the Munsingwear doctrine to cases which have been settled.\(^{60}\) According to the courts, Munsingwear does not apply to a voluntary decision to terminate the litigation but rather to a situation in which, through no fault of the losing party, it has lost the opportunity to appeal the adverse decision. Such a situation is readily distinguished from a settlement in which the decision to forgo an appeal is voluntary.\(^{61}\)

For example, in Karcher v. May,\(^{62}\) a case rendered moot by the conduct of a party, the Supreme Court rejected the suggestion that Munsingwear required the case to be vacated. In Karcher, the appellants were legislative officers who, after unsuccessfully defending the constitutionality of a statute in the lower courts, lost their legislative positions. The new legislators dropped the appeal—effectively accepting the judgment entered by the lower court as if no appeal had been taken.\(^{63}\) Appellants then sought to have the judgment vacated. The Supreme Court refused. "This controversy did not become moot due to circumstances unattributable to any of the parties. . . . Accordingly, the Munsingwear procedure is inapplicable. . . ."\(^{64}\) The Supreme Court therefore allowed the judgment of

\(^{57}\) Memorial Hosp. v. United States Dep't of Health & Human Servs., 862 F.2d 1299, 1301 (7th Cir. 1988).

\(^{58}\) Munsingwear, 340 U.S. at 40.

\(^{59}\) Id.

\(^{60}\) See, e.g., Memorial Hosp., 862 F.2d at 1301; Nestle, 756 F.2d at 282; Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 721-22 (9th Cir. 1982). But see Kennedy v. Block, 784 F.2d 1220 (4th Cir. 1986) (vacating as moot under Munsingwear doctrine judgment of district court where parties settled after the trial court's decision).

\(^{61}\) See United States v. Garde, 848 F.2d 1307, 1311 n.8 (D.C. Cir. 1988) ("[T]he primary objective behind vacating a lower court opinion [avoiding prejudice to an appellant who has been precluded from obtaining review] would be distorted if a party were allowed to render deliberately a judgment unreviewable by its own action.").


\(^{63}\) Appellants attempted to continue to litigate the case in their individual capacities, but the court held that the real party in interest was the New Jersey Legislature and dismissed the action. Id. at 80-81.

\(^{64}\) Id. at 83.
the district court to stand.

Courts have applied the same reasoning to cases settled while an appeal is pending. As the Ninth Circuit stated in *Ringsby Truck Lines v. Western Conference of Teamsters*: “We find the distinction between litigants who are and are not responsible for rendering their case moot at the appellate level persuasive.”65 The court explained that if courts were to equate postjudgment settlement with mootness then any litigant dissatisfied with a court’s decision could, by destroying his right of appeal, simply wipe that decision from the books.66

Moreover, in the case of an unconditional settlement, a finding that the controversy is moot does not justify vacatur. The case is no more moot than in any other circumstance in which a party chooses to abandon its claim or to forgo an appeal.67 When settlement is conditioned on vacatur, there is no mootness. If the court refuses to vacate the judgment, the settlement does not take effect, and the case continues. Under such circumstances, there is a live case or controversy.68

If the *Munsingwear* rule does not apply, a court has discretion to vacate. The circuit courts have taken three different approaches regarding the exercise of this discretion. The first approach is that espoused by the Second Circuit in *Nestle Co. v. Chester’s Market, Inc.*69 In *Nestle*, the Nestle Company sued the defendants alleging that defendants’ use of the term “toll house” constituted trademark infringement. The trial court granted defendants’ motion for partial summary judgment, holding that “toll house” was a generic term and thus could not be a trademark. While Nestle’s appeal was pending, the parties settled both the trademark infringement claim and all other pending claims and counterclaims.70 Because Nestle wanted to continue to claim that the use of the term “toll house” constituted trademark infringement, the parties jointly moved the court to vacate the district court’s judgment. The settlement was conditional and would proceed only if the court granted the parties’

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65 *Ringsby*, 686 F.2d at 721.
66 *Id.*
67 See, e.g., *Memorial Hosp.*, 862 F.2d at 1301: (“A settlement while the case is on appeal is a reason why the losing party no longer wants the judgment reversed. The case is neither more nor less moot than it would be if the loser were satisfied with the judgment and complied without appealing.”).
69 756 F.2d 280.
70 The case was settled during the parties’ pre-argument conference with staff counsel for the Second Circuit pursuant to the Second Circuit’s CAMP procedure. *Nestle Co. v. Chester’s Mkt.*, Inc., 596 F. Supp. 1445, 1446 (D. Conn. 1984).
motion to vacate.\textsuperscript{71}

The district court denied the parties' motion to vacate, finding: 1) that the case was not moot; 2) that the decision to vacate the judgment was discretionary; and 3) that the public interests in favor of finality of judgments and in adjudicating trademark validity outweighed the parties' interests in settlement.\textsuperscript{72} The parties then made their motion to the Second Circuit. The Second Circuit reversed the decision, finding that the trial court had "abused its discretion."\textsuperscript{73} The appellate court essentially conducted the same sort of balancing test that the trial court used, but concluded that the trial court's reliance on the public interest in finality of judgments was misplaced. Moreover, the court concluded that the importance of promoting settlement superseded any interest in finality.\textsuperscript{74}

\textit{Nestle} illustrates the federal courts' strong policy\textsuperscript{75} of encouraging settlement.\textsuperscript{76} The court in \textit{Nestle} observed that refusal to vacate the judgment in a case in which settlement is conditioned on vacatur would not only cause the parties to expend additional time and resources, but would force litigants willing to settle to submit to continued litigation.\textsuperscript{77} "We see no justification to force these

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\item Id. (quoting Affidavit of Barry Garfinkel, Attorney for Defendant Saccone's Toll House, ¶ 7).
\item The district court considered its ruling to be discretionary under Rule 60(b).
\item Further, the lower court noted that the Second Circuit had previously affirmed a denial of a Rule 60(b) motion that the parties made after settlement to avoid the collateral estoppel effects of the decision. \textit{Id.} at 1450 n.6 (citing Sampson v. Radio Corp. of Am., 434 F.2d 315 (2d Cir. 1970)).
\item \textit{Nestle}, 756 F.2d at 284.
\item The Second Circuit made no attempt to distinguish or to reverse its previous decision in \textit{Sampson}, 434 F.2d 315, in which it had rejected the notion that a party could use a motion to vacate under Rule 60(b) to avoid the adverse consequences of a settlement decision. \textit{See also} \textit{Cover v. Schwartz}, 133 F.2d 541, 546-47 (2d Cir. 1942) (holding that dismissal of a suit, as distinguished from dismissal of an appeal, should not be automatic when a case is settled or compromised while on appeal), \textit{cert. demed}, 319 U.S. 748 (1943).
\item \textit{See} \textit{Wright, Miller & Cooper, supra} note 12, § 3533.10, at 431-32 (advocating the absolute right of the parties to settle on terms that include vacatur, based on "[a]ll of the policies that make voluntary settlement so important a means of concluding litigation"); \textit{see also} Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277 (Fed. Cir. 1987) (following \textit{Nestle} based on the strong policy of the courts in favor of voluntary settlements).
\item Critics have suggested that the \textit{Nestle} decision stemmed from the Second Circuit's desire to uphold a settlement which had been arranged through the CAMP process and that the Second Circuit's infatuation with the CAMP procedure motivated its decision more than the general goal of encouraging settlement. \textit{See} Mary A. Donovan & Marya Lenn Yee, \textit{Letting The Chips Fall: The Second Circuit's Decision on Toll House}, 52 \textit{Brooklyn L. Rev.} 1029, 1030-31 (1986).
\item The Second Circuit's recent decision in \textit{Long Island Lighting Co. v. Cuomo}, 888 F.2d 230 (2d Cir. 1989), somewhat undermines \textit{Nestle}'s reliance on encouraging settlement as a justification for its decision. In \textit{Cuomo}, the Second Circuit considered the application of \textit{Nestle} to a case which had been settled while on appeal, but in which the
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defendants, who wish only to settle the present litigation, to act as unwilling private attorneys general and to bear the various costs and risks of litigation."\(^{78}\)

Writing for the Seventh Circuit, Judge Easterbrook forcefully rejected the Nestle approach. In *Memorial Hospital v. United States Department of Health & Human Services*,\(^{79}\) the court held that the Seventh Circuit should, as a general rule, refuse requests to vacate.\(^{80}\) Judge Easterbrook opined that a judicial decision is a public act which private agreements cannot and should not erase.\(^{81}\) The court further noted that there are many circumstances in which parties decide to forgo the right to appellate review, but that such a decision does not require the court "reflexively" to vacate the judgment.\(^{82}\)

The *Memorial Hospital* court also disagreed with the Second Circuit's analysis of the effect of vacatur on settlement. It noted that a court is under an obligation to bring independent judgment to a decision in which it is required to act. By automatically complying with the wishes of the settling parties, the court risks becoming a

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78 Nestle, 756 F.2d at 284.
79 862 F.2d 1299 (7th Cir. 1988).
80 Unlike the litigants in Nestle, the parties in *Memorial Hospital* explicitly requested that the court vacate both the district court judgment and the court's opinion. Id. at 1300-01.
81 This rationale may be further supported by the facts in *Memorial Hospital*. There, the motion was for vacatur of the district court's opinion. The Second Circuit in Nestle, in contrast, addressed only the issue of vacating the trial court's judgment. But see Nestle, 596 F. Supp. at 1446 (parties' moving papers sought vacatur "of the ruling and order of this court dated August 23, 1983, together with the findings and conclusions embodied therein").
82 *Memorial Hosp.*, 862 F.2d at 1301.
tool of the settlement process, a "bargaining chip." \(^{83}\) In addition, a legal principle that does not require vacatur will encourage settlement at an earlier stage of litigation and thereby conserve judicial resources.

Finally, the court held that a final judgment implicates not only the public interest in a decision's precedential value and the possible preclusive effect of the judgment on third parties, but also additional public interests, such as vindication of the authority of the courts. \(^{84}\) The process that the Nestle decision sanctioned, whereby the public act of a public official can, in effect, be bought and sold, was particularly troubling to the court. \(^{85}\) The court concluded that these public interests must take priority over the private interests of a litigant in settlement. Although the court agreed that the parties were free to control the progress of their litigation and the resolution of their dispute, the court firmly stated that litigants should not be free to control the permanence of judicial decisions. \(^{86}\)

The Ninth Circuit has adopted an intermediate approach. In two recent cases, Ringsby Truck Lines, Inc. v. Western Conference of Teamsters \(^{87}\) and National Union Fire Insurance Co. v. Seafirst Corp. \(^{88}\) the Ninth Circuit concluded that the decision to vacate should be subject neither to an absolute rule in favor of vacatur nor to an absolute refusal to vacate. In Ringsby, the court rejected the notion that the Munsingwear doctrine compelled vacatur. Further, the court denounced the theory that a party should be able singlehandedly to destroy the collateral consequences of a judgment by giving up his or her right to appeal through postjudgment settlement. \(^{89}\) Rather, according to the Ringsby court, the decision to vacate should depend upon a balancing of "the competing values of finality of judgment and right to relitigation of unreviewed disputes." \(^{90}\) The Ringsby court noted that the district court's findings had already been given collateral estoppel effect in a second action. \(^{91}\) The district court's ability to rely on the judgment in the settled case would have been jeopardized if that case had been vacated. Accordingly, the court declined to undermine that reliance by vacating the original district court judgment.

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\(^{83}\) Id.
\(^{84}\) Id. at 1302-03.
\(^{85}\) Id. at 1302.
\(^{86}\) Id. at 1303.
\(^{87}\) 686 F.2d 720 (9th Cir. 1982).
\(^{88}\) 391 F.2d 762 (9th Cir. 1989).
\(^{89}\) Ringsby, 686 F.2d at 721 (quoting Moore's Federal Practice, supra note 35, \(\\\)\(0.416(6)\)).
\(^{90}\) Id. at 722.
\(^{91}\) Id. at 721 n.1.
In National Union, the Ninth Circuit expanded on the appropriate test to be employed in ruling on motions to vacate. The court first reaffirmed the vitality of Ringsby and its finding that the Munisingwear doctrine is inapplicable to cases which are mooted by settlement. In particular, the court rejected National Union's invitation to distinguish between situations in which one party acts unilaterally to moot an action and those in which mootness is the result of bilateral action, such as settlement.

While recognizing the importance of encouraging settlement, the Ninth Circuit opined that parties should not have an absolute right to destroy the existence of unfavorable judgments at will. The court agreed with the Nestle policy of encouraging settlements. It determined, however, that the cost of forgoing the absolute rule of Nestle was not high enough to outweigh the public interest in the finality of judgments and the legitimate interest of third parties in the preclusive effect of the judgment.

The court also rejected the absolutist approach of Memorial Hospital. In the Ninth Circuit's opinion, such an "inflexible rule . . . would raise the cost of settlement too high." Accordingly, the Ninth Circuit concluded that the most reasonable approach was to consider the individual equities involved in each case. In National Union, that analysis supported the district court's decision to deny vacatur. National Union had actions pending against a number of other parties who had intervened in the motion to vacate for the express purpose of protecting that judgment, along with its attendant collateral effects. The court concluded that, given the existence of these third party interests, it was reasonable to prohibit National Union from erasing the collateral effect of the prior judgment.

III

The Cost of Vacatur

Although the decisions discussed above take different ap-
approaches in analyzing the proper judicial reaction to a motion to vacate, the cases employ the same basic equation: measuring the cost of vacatur against the cost of denying the motion to vacate. Each court expressed a concern for the efficient use of litigant and judicial resources and attempted to balance the public costs of vacatur against the costs of forgoing a possible settlement. Such a calculation is ideally suited for economic analysis.

An analysis of the costs of vacatur may be disturbing to those scholars who embrace a purely private view of litigation. For them, it is inappropriate to prohibit vacatur if a settlement is thereby thwarted because such conduct compels the litigants to be unwilling "private attorneys general," forced to litigate on behalf of the public interest rather than in pursuit of their private goals.

98 Although the difference in treatment between Nestle and the other cases is, in part, on the fact that the settlement in Nestle was conditioned on vacatur, neither the Seventh nor the Ninth Circuit relied on that ground to distinguish Nestle. Moreover, the Second Circuit has expanded the Nestle rule to cases in which settlement was not explicitly contingent on vacatur. See Long Island Lighting Co. v. Cuomo, 888 F.2d 230, 233 (2d Cir. 1989).

99 See National Union, 891 F.2d at 768 ("While [the Nestle] position is not without some merit, ... we elect to weigh the policy interests differently.").


101 In the traditional model of litigation, an action is viewed as bipolar with a self-contained impact; that is, the impact of the judgment is confined to the parties. Traditional litigation is considered party initiated and party controlled. See Chayes, supra note 11, at 1282-83. Professor Fiss terms this model the "dispute-resolution" model of litigation. Fiss, The Supreme Court, supra note 15, at 17.

102 In recent years, scholars such as Professors Chayes and Fiss have observed that much civil litigation has evolved away from this private dispute model. See Fiss, The Supreme Court, supra note 15, at 44 ("Dispute resolution ... does not represent the ideal for adjudication . . . .").

Chayes has observed that civil litigation is now increasingly concerned with enforcing public values, citing areas such as school desegregation cases, antitrust, securities law, and environmental litigation. In all of these areas and many others, the litigants are doing more than addressing a private wrong; they are identifying and seeking to remedy an ongoing mischief and its consequences, not merely for them but for others. Professor Chayes terms this type of litigation "public law litigation" and suggests that this evolution requires a reconsideration of the court's role in the judicial process. See Abram Chayes, The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4 (1982).

103 Professor Fiss answers this argument by asserting that it misapprehends the true costs of a settlement:

To be against settlement is not to urge that parties be "forced" to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying.

Fiss, supra note 8, at 1085.

104 See Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985).
The response to this argument is that judicial action in cases such as *Memorial Hospital* does not prevent the parties from settling the litigation; rather, it simply prevents the parties from agreeing to require an affirmative judicial action—vacatur.

The starting point for Judge Easterbrook’s analysis in *Memorial Hospital* was his observation that a judicial decision is something more than the resolution of a private inter-party dispute. Judge Easterbrook termed a judicial decision, whether in the form of a court decision or a jury verdict, a public act. 105 Curiously, neither the Second nor the Ninth Circuit rejects this characterization; indeed, both expressly accept it as valid. The disagreement concerns how much weight to give the public nature of the decision.

The judicial determination whether to grant a motion to vacate is also a public act. The granting of a motion to vacate is not ministerial. 106 By propounding a rule that motions to vacate will not be routinely granted in situations involving postjudgment settlement, the courts are indicating that this is one of the many areas in which courts will not be bound by the agreement of the parties. 107 For

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105 Moreover, under the public law model of litigation, the court must consider the public impact of rendering any judicial decision. Where the public law model is clearly applicable, judges cannot escape the policy implications of their decisions; their actions have a public effect which extends beyond the impact on the litigants. See Chayes, *supra* note 102. Compare United States v. Mansion House Center North, 95 F.R.D. 515 (E.D. Mo. 1982) (refusing to permit the government to settle a case which it initiated for the purpose of protecting the public interest), rev’d in part on other grounds, 742 F.2d 476 (8th Cir. 1984). “[T]he cases involve issues that in importance rise above the normal matters addressed by private litigants in lawsuits.” Id. at 517.

106 See *supra* notes 47-97 and accompanying text.

107 This concept is not unique to the issue of vacatur. There are many subjects upon which the agreement of the parties has been held insufficient to bind the court. See, e.g., Poe v. Ullman, 367 U.S. 497 (parties cannot confer jurisdiction on the court by agreement), rehe’g denied, 368 U.S. 869 (1961); Swift & Co. v. Hocking Valley R.R., 243 U.S. 281, 289 (1917) (stipulation by parties cannot bind the court in respect of its adjudicatory function); O’Connor v. City of Denver, 894 F.2d 1210, 1225-26 (10th Cir. 1990) (court determines the effect, if any, of stipulations of fact); Technicon Instruments Corp. v. Alpkem Corp., 866 F.2d 417, 421 (Fed. Cir. 1989) (parties cannot raise appellate issue by stipulation); National Advertising Co. v. City of Rolling Meadows, 789 F.2d 571, 574 (7th Cir. 1986) (party may not compel a court to decide a constitutional issue by stipulation); see also JOHN H. WIGMORE, EVIDENCE, IN TRIALS AT COMMON LAW § 7a, at 601 n.35 (Tillers rev. 1983) (discussing judicial reluctance to accept stipulations by parties which contravene the rules of evidence). These decisions place a higher premium on the integrity of the tribunal than on the right of the parties to control their lawsuit. As Professor Wigmore observes, it is not clear that this position actually conflicts with the assumed right of the parties to control the disposition of their dispute. *Id.* at 604. The parties may be free to choose their adjudicative forum, but having chosen it, they may reasonably be bound by the rules of that forum. Those rules may include limitations on the manner by which parties may dispose of actions.

The ability of litigants to “gag” the court through settlement and vacatur is analogous to the use of umbrella protective or “secrecy” orders. These orders involve the sealing of court files after settlement with an agreement by the parties and their attorneys not to reveal the information disclosed during discovery, the fact and amount of a
example, as the court observed in *NLRB v. Brooke Industries, Inc.*, the judicial policy in favor of encouraging settlement does not require the courts to accept and enforce every consent agreement of the parties:

If [the parties] had agreed that Brooke would be ordered to break the knees of its director of labor-management relations, or make the director wear a dunce cap, a court would not be required to enforce a judgment embodying that order. That would be a clear case of a consent judgment’s affecting the rights of a third party. Far from being required to rubber stamp such a judgment, a court would be obliged to reject it.

Similarly, there are circumstances in which the court is explicitly required to consider the effect that termination of a lawsuit has upon third parties or the public interest before permitting settlement or dismissal of the suit. Although a party should not be required to continue with a lawsuit against his or her will, it is not a necessary corollary that a court must do everything in its power to persuade the parties to terminate the litigation.
A strict reading of the Nestle decision suggests that the Second Circuit believes that litigants are entitled to vacatur as a matter of right when they settle a case conditioned on vacatur. Under the Nestle theory, the private interests of the parties in settlement outweigh the public costs of vacatur as a matter of law. Given the judicial discretion inherent in the sources of the courts’ authority to vacate, however, an absolute rule of law must be based on an express or implied judicial resolution of this calculus. Only by appreciating both the public costs of vacatur as well as the effect of vacatur on settlement, can we properly evaluate the Nestle rule.

A. Preclusive Effect of a Final Judgment

1. Claim Preclusion and Issue Preclusion

The most significant cost associated with vacatur is the destruction of a judgment’s preclusive effect. A prior judgment may serve as a bar to future litigation in two ways: as a bar to relitigation of the same claims under the doctrine of res judicata, and as a

unfairness). Several scholars have also observed that judicial involvement in the settlement process has failed to produce any empirically measurable difference in settlement rates. See Menkel-Meadow, supra, at 488 n.19 & 494; Resnick, supra, at 417-24.

112 See Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280, 283 (2d Cir. 1985); Note, Settlement Pending Appeal, supra note 5, at 241 n.55. Indeed, the Seventh Circuit’s opinion in Memorial Hospital can also be read as espousing a mandatory rule of law. See Memorial Hosp. v. United States Dep’t of Health & Human Servs., 862 F.2d 1299, 1300 (7th Cir. 1988).

113 The Second Circuit, which has adopted the most prosettlement rule regarding motions to vacate, is the same Circuit that has adopted the most innovative procedural reform for encouraging settlement of cases pending appeal. See supra note 6. Perhaps the Second Circuit’s prosettlement attitude is more reflective of concerns over the management of appellate dockets than concerns for the rights of litigants. Neither the Seventh nor the Ninth Circuit has a preargument conference program in which the litigants are “encouraged” to settle the action. See id.

114 Based on the trial court’s explicit finding in Nestle that the parties’ interests in settlement were outweighed by the public interest in favor of finality, the Second Circuit’s reversal under an abuse of discretion standard is difficult to justify unless the Second Circuit’s rule is interpreted as an absolute legal standard. See Note, Avoiding Issue Preclusion, supra note 5, at 865 n.34.

115 Preclusive effect under principles of collateral estoppel may apply to less formal determinations as well as to final judgments. See, e.g., Hartley v. Mentor Corp., 869 F.2d 1469 (Fed. Cir. 1989) (preclusive effect given to stipulated judgments); Welborn, Inc. v. T.E. Ibberson Co., 869 F.2d 1166, 1168 (8th Cir. 1989) (collateral estoppel effect may be given to arbitration award).

116 For purposes of this Article, the preclusive effect of a judgment is significant primarily in preventing future litigation with third parties. The usual settlement agreement provides for a resolution of all pending claims between the parties arising from the subject transaction and includes a release of such claims. Therefore, the collateral effect of the judgment is unlikely to be relevant to any later litigation between the same parties. Moreover, because the parties have settled the action, the claims which form the subject of the litigation are not likely to be the subject of further litigation between the original parties, and the res judicata effect of the prior judgment, as between them, becomes insignificant. Cf. United States v. Munsingwear, Inc., 340 U.S. 36, 37 (1950) (at-
binding resolution of issues previously litigated, under the doctrine of collateral estoppel. Under the res judicata doctrine, a prior judgment which resolves litigation bars all future claims between the same parties arising out of that transaction. Res judicata, also known as claim preclusion, bars all claims arising out of the same "nucleus of operative facts" whether or not such claims were actually litigated in the first action. The preclusive effects of the doctrine of res judicata are limited to litigants who were actually parties to the first litigation, parties which were effectively represented in the first litigation, and their privies.

117 Res judicata and collateral estoppel collectively form the law of preclusion. See Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure § 11.3 (3d ed. 1985). It is unclear whether the appropriate law of preclusion in the federal courts is federal law or the law of the forum state. Compare St. Paul Fire & Marine Ins. Co. v. Weiner, 606 F.2d 864, 868 (9th Cir. 1979) (a federal court sitting in diversity should apply the preclusion rules of the forum state) with Allan D. Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich L. Rev. 1723 (1968) (advocating a uniform federal law of preclusion in federal courts).


119 See Restatement (Second) of Judgments § 24 comment a (1982).

120 Professor Semmel describes the concept of privity as follows:
Where a party to the second action was not a party to or in control of the first action he may still be bound if his relationship to a party in the first action is sufficiently close, his interests were adequately represented and there are independent reasons (other than avoiding repeated litigation) for holding the first judgment binding.

Herbert Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Colum. L. Rev. 1457, 1459-60 (1968). For a description of the categories of litigants which may be considered bound by a prior judgment based on the concepts of common interest, adequate representation, or control, see Restatement (Second) of Judgments §§ 39-42 (1982).
Commentators have focused primarily on the effect of vacatur on collateral estoppel, but vacatur may be used to avoid the res judicata consequences of a judgment as well. Indeed, the government in Munsingwear was seeking to avoid application of the doctrine of res judicata. And in National Union, the judgment from which National Union unsuccess­fully sought relief was found to have res judicata effect in a subsequent action by National Union against Seafirst’s attorneys. With the movement away from a strict rule of privity to one in which the courts take a more pragmatic approach—i.e., apply res judicata to litigants whose interests were adequately represented in the prior proceeding—courts must consider both the res judicata and collateral estoppel effects of a judgment when ruling on a motion to vacate.

The preclusion doctrine more commonly implicated by vacatur decisions is the doctrine of collateral estoppel. Collateral estoppel or issue preclusion provides that if an issue is fully and fairly litigated, the loser will be barred from challenging the determination of that issue in a subsequent action. Unlike res judicata, the modern doctrine of collateral estoppel does not require mutuality—that is, collateral estoppel may be invoked by, although not against, a litigant who was not a party to the initial litigation.

The requisites for application of collateral estoppel have been articulated in a number of ways, but the general requirements are undisputed. To give a previous judgment preclusive effect, “the issue must have been actually litigated in the prior proceeding, the parties must have been given a full and fair opportunity to do so, and the issue must provide the basis for the final judgment entered therein.”

Cases frequently suggest other factors, but they are

121 See Note, Settlement Pending Appeal, supra note 5, at 247-50 (discussing effect of vacatur on issue preclusion); Note, Avoiding Issue Preclusion, supra note 5, at 860 (focusing on effect of vacatur on issue preclusion); Note, The Impact of Collateral Estoppel, supra note 5, at 343 (focusing on doctrine of collateral estoppel).


123 The court in Davis, Wright & Jones v. National Union Fire Ins. Co., 709 F. Supp. 196 (W.D. Wash. 1989) found that Seafirst’s attorneys were in privity with Seafirst for purposes of res judicata. In so holding, the court noted that the doctrine of res judicata had expanded to encompass a broader circle of litigants, including those who were effec­tively represented in a prior litigation. “[S]trict rules of privity no longer govern whether res judicata is applicable.” Id. at 201.


125 Although expansion of the doctrine of res judicata increases the possibility that a judgment may be applied to bar relitigation by or against related parties, see supra note 123, the original litigants are not likely to use the judgment between themselves.


merely variations on the three factors articulated in this simple test. For example, in *Parklane Hosiery*, the Supreme Court suggested that collateral estoppel should not apply if the party in the first case did not have “every incentive” to litigate the first action “fully and vigorously.”

Although the Court may have intended to add an element, as a practical matter it was simply providing interpretive guidance for the requirement that a party have a full and fair opportunity to litigate the issue in the first case.

In recent years, the federal courts have become increasingly willing to apply collateral estoppel to prevent multiple or repeated litigation of the same issue. The Supreme Court has explained the policy reasons for the doctrine as follows:

To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

In *Munsingwear* the Court noted the strong policy supporting the use of res judicata and collateral estoppel and expressly approved the “principle which seeks to bring litigation to an end and promote certainty in legal relations.” Accordingly, if the prerequisites are met, courts favor the application of collateral estoppel.

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128 *Parklane Hosiery*, 439 U.S. at 332.
129 See Restatement (Second) of Judgments § 27 (1982).
130 As the Blonder-Tongue Court observed:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or “a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.”


132 United States v. Munsingwear, Inc., 340 U.S. 36, 38 (1950). Indeed, the outcome in *Munsingwear* results from the Court’s conclusion that the need for res judicata in “providing terminal points for litigation” outweighs the government’s claim of prejudice from application of the doctrine. Id. at 41.
133 The federal courts have frequently given preclusive effect to findings in preliminary proceedings, such as motions for preliminary injunctions. See, e.g., Commodity Futures Trading Comm’n v. Board of Trade, 701 F.2d 653, 657 (7th Cir. 1983). The courts’ rationale is that such findings may have been rendered under circumstances which make them sufficiently reliable to preclude relitigation. For example, in *Commodity Futures*, the court noted that the lower court judge had made some 45 detailed findings of fact after a six-day hearing on the preliminary injunction, and that these findings were later affirmed on appeal. The court concluded that the trial court was not required to vacate those findings, an action that would have prevented subsequent courts from giving them preclusive effect.
Litigants may invoke collateral estoppel offensively or defensively. In defensive collateral estoppel, a defendant interposes as a complete or partial defense a prior adverse determination against the plaintiff. The defendant’s argument is essentially “you lost against someone else; you can’t relitigate the same issue against me.” Such use of collateral estoppel prevents a plaintiff who lost in previous litigation from relitigating his or her case against a new opponent.

In offensive collateral estoppel, a plaintiff seeks to prevent the defendant from denying liability on the theory that a court has adjudged the defendant liable in a previous action. For example, a plaintiff in a product liability lawsuit may use offensive collateral estoppel to take advantage of the fact that the defendant manufacturer has already litigated against another plaintiff the issue of whether the product is unreasonably dangerous, and lost.

Commentators have suggested that, whereas defensive collateral estoppel promotes judicial economy by encouraging plaintiffs to join all possible defendants in a single action, offensive collateral estoppel has the opposite effect. A potential plaintiff may observe the progress of the litigation, secure in the knowledge that he or she may take advantage of any favorable results in that litigation, without being bound by any adverse rulings.

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134 The distinction between offensive and defensive collateral estoppel was first articulated in Currie, supra note 19.

135 The Supreme Court has described offensive collateral estoppel as the situation in which “a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff.” Parklane Hosiery, 439 U.S. at 329.

136 Professor Ratcliff terms the ability of a future plaintiff to take advantage of the favorable aspects of a prior litigation while avoiding unfavorable results, the “option effect.” See Jack Ratcliff, Offensive Collateral Estoppel and the Option Effect, 87 Tex. L. Rev. 63 (1988).


138 Some might argue that a court’s decision on a motion to vacate should consider the type of estoppel that may result from the judgment, and that a court should decline to award vacatur in cases in which defensive collateral estoppel may be anticipated. The rationale of this approach is that defensive collateral estoppel promotes efficiency and reduces potential unfairness to future litigants. Courts, however, do not appear to have considered this factor. In Nestle, for example, the court seemed unconcerned that the
2. The Effect of Vacatur on Preclusion

A final judgment by a federal court retains all of its preclusive effect pending appeal; the doctrines of collateral estoppel or res judicata may be applied to a judgment which is pending appeal. Though there is no requirement that a judgment be appealed (and subsequently affirmed) in order to have collateral estoppel effect, the fact that a party has appealed does not prevent a judgment from being used as a basis for collateral estoppel. Nor will a settlement alone destroy the collateral estoppel effect of a judgment.

Vacatur of a judgment, however, generally prevents the use of that judgment for collateral estoppel purposes. “A judgment that has been vacated, reversed, or set aside on appeal is thereby de-

original finding of trademark invalidity could have been used defensively by future litigants against whom Nestle might bring a claim of trademark infringement.

139 See, e.g., SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 370 (Fed. Cir. 1983) (“the law is well settled that the pendency of an appeal has no affect [sic] on the finality or binding effect of a trial court's holding”); Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1497 (D.C. Cir. 1983) (“Under well-settled federal law, the pendency of an appeal does not diminish the res judicata effect of a judgment rendered by a federal court.”); Moore's Federal Practice, supra note 35, at 521 (“pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel” (footnote omitted)); see also 18 Wright, Miller & Cooper, supra note 12, § 4433, at 305-20.

140 The cases recognize the preclusive effect of a judgment from which no appeal is taken. See, e.g., Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) (res judicata applies to an unappealed adverse judgment); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) (“Concededly the judgment in the first suit would be binding in the subsequent ones if an appeal, though available, had not been taken or perfected.”).

The case law, however, distinguishes between situations in which a party has and forgoes a right to appeal and situations in which no appeal is possible. See, e.g., id. at 40. It is often the case that an appeal is technically possible, but practically unavailable. A party may “choose” to forgo an appeal simply because he or she lacks the finances for further litigation. See, e.g., Charles Allan Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 780 (1957) (“If in two similar cases the person rich enough to afford an appeal gets a reversal, however just, while the person of insufficient means to risk an appeal is forced to live with the judgment of the trial court, has justice really been improved?”). Although litigants may argue the unfairness of applying issue preclusion under these circumstances, the law of collateral estoppel does not recognize this form of hardship. The “hardship” attendant in not being able to buy off the collateral effect of an adverse judgment through the settlement process pales next to a party’s inability to attack that adverse judgment directly.


142 Settlement of an action prior to the entry of final judgment generally will not result in collateral estoppel effect on the litigation. See Kasper Wire Works, Inc. v. Leco Eng’g & Mach., Inc., 575 F.2d 530, 538 (5th Cir. 1978).

143 See Hartley v. Mentor Corp., 869 F.2d 1469, 1473 (Fed. Cir. 1989); see also Gould v. Control Laser Corp., 866 F.2d 1391, 1392 (Fed. Cir. 1989); Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 866 F.2d 720, 720 (9th Cir. 1982); Kurlan v. Commissioner, 343 F.2d 625 (2d Cir. 1965) (giving collateral estoppel effect to opinion of appellate court even though case had been settled on remand).
prived of all conclusive effect, both as res judicata and as collateral estoppel. The same is true, of course, of a judgment vacated by a trial court.”144 “[T]he general rule is that a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel.”145

One possible reason for the failure of courts to give a vacated judgment preclusive effect is their perception that the issue of preclusion has been considered and implicitly addressed by the vacatur decision. Moreover, a party which has settled on condition of vacatur is deprived of his or her bargained-for gain if preclusive effect is subsequently applied to the vacated judgment.146

On a more practical note, it is frequently difficult to apply preclusive effect to vacated judgments because of the second court’s inability to discern the basis for vacatur. Although collateral estoppel might be warranted in the case of a vacatur predicated on settlement, vacatur premised on mootness, fraud, or mistake would not justify application of collateral estoppel. In the majority of cases, however, there is no official record of the basis for the vacatur decision.

 Destruction of an adverse judgment’s collateral estoppel effect is the most common reason for a party to seek vacatur. For example, in Munsingwear, the government wanted the prior judgment vacated because Munsingwear was attempting to have the second price-fixing lawsuit against it dismissed, based on the collateral estoppel effect of the first judgment. Similarly, the collateral estoppel effect of the original judgment was an important aspect of the National Union decision. The defendant National Union had actions pending against several other parties based on the same transaction. The settlement agreement between National Union and Seafirst specifically required Seafirst to join in National Union’s motion for vacatur, and Seafirst did so. The third parties then moved to inter-

144 Moore’s Federal Practice, supra note 35, § 0.416[2], at 517; see also Jaffree v. Wallace, 837 F.2d 1461, 1466 (11th Cir. 1988).
145 Dodrill v. Ludt, 764 F.2d 442, 444 (6th Cir. 1985). This principle, though, does not have absolute acceptance. See Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1191-92 (5th Cir. 1982) (permitting use of offensive collateral estoppel where defendant settled lawsuit after trial but before final judgment was entered), vacated on other grounds and remanded, 460 U.S. 1007, initial opinion adhered to on remand, 718 F.2d 725 (5th Cir.), cert. denied, 460 U.S. 1013 (1983). Courts have not widely followed Chemetron and commentators have criticized the case for its failure to give effect to a prior court’s decision to vacate. See, e.g., Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 722 F. Supp. 998, 1010 (S.D.N.Y. 1989); Barker, supra note 5, at 3, col. 1.
146 See Note, Settlement Pending Appeal, supra note 5, at 248 (“widespread use of issue preclusion in cases when [sic] the prior judgment has been vacated might discourage settlement”); Note, Avoiding Issue Preclusion, supra note 5, at 863-64 (“A rule permitting a second forum to preclude relitigation of issues contained in a vacated judgment would reduce settlement conditioned on vacatur to simple settlement.”).
vene in the motion to vacate in order to argue the issue of the effect of vacatur on National Union's other lawsuits.\footnote{See, e.g., National Union Fire Ins. Co. v. Davis, Wright, Todd, Reise & Jones, 157 A.D.2d 571, 550 N.Y.S.2d 315 (1990) (holding that collateral estoppel effect of SeaFirst judgment barred subsequent suit in New York).} As the intervenors demonstrated to the Ninth Circuit, the district court's judgment had already been found by other courts to have preclusive effect—a preclusive effect which would be destroyed were the court to grant vacatur.

The decision to vacate a judgment is, in essence, a determination by the original court that principles of collateral estoppel and res judicata will not apply to that original judgment. Therefore, a litigant who is unhappy with a prior decision will attempt to condition settlement on vacatur, as Nestle did. If the court grants the motion to vacate, the adverse judgment is removed from the record books, and any preclusive effect of that judgment is destroyed.\footnote{Cf Chemetron, 682 F.2d 1149, vacated on other grounds and remanded, 460 U.S. 1007 (1983).}

Commentators have argued that the vacating court need not concern itself with collateral estoppel effects; this issue will be decided if and when a subsequent court is asked to give the prior judgment preclusive effect.\footnote{See, e.g., Restatement (Second) of Judgments §§ 27-29 (1982); Note, Avoiding Issue Preclusion, supra note 5, at 876-78. For example, the subsequent court can decide whether the inability of a litigant to obtain appellate review in the initial action has deprived the litigant of a “full and fair opportunity to litigate.” See Gould v. Control Laser Corp., 866 F.2d 1391, 1395 (Fed. Cir. 1989) (Nichols, J., dissenting).} The applicability of res judicata and collateral estoppel cannot be accurately ascertained\footnote{The Ninth Circuit in National Union found the possibility of a preclusive effect sufficient to justify denying the motion to vacate. National Union Fire Ins. Co. v. SeaFirst Corp., 891 F.2d 762, 769 (9th Cir. 1989).} until the subsequent litigation is commenced. By granting a motion to vacate, the original court essentially would be prejudging the issue and attempting to prevent later courts from giving its judgment preclusion.\footnote{See Gould, 866 F.2d at 1395 n.6: “[T]he Blonder-Tongue issue is of speculative effect until any subsequent litigation is undertaken.” The applicability of Blonder-Tongue, in a situation where an agreed settlement and judgment moots the intended and expected appeal, is best left to such later litigation. Vacating the consent judgment would preclude a collateral estoppel defense in a later case and decide the issue before it arises. (quoting id. at 1395 (Nichols, J., dissenting)).}

On the other hand, the argument in favor of having the initial judge consider collateral estoppel effects is that he or she is in the best position to decide, at least in the first instance, whether his or her judgment should continue to enjoy any vitality. The court which presided over the trial, heard the witnesses, and perhaps played a
role in the settlement of the case, is usually the best arbiter of questions such as whether the parties had a full and fair opportunity to litigate the issues in the case. Usually the trial court is also in the best position to decide whether the settlement of the litigation caused a party to forgo a potentially viable appeal and whether the parties have manipulated the procedural posture of the litigation in an effort to multiply their opportunities to litigate the same issues. Accordingly, the trial court should decide whether its prior judicial actions should be erased by vacatur by assessing these issues. The denial of a motion to vacate would indicate to a later court that the first court felt its judgment to be sufficiently supported by the evidence, sufficiently final, and of sufficient impact to be retained notwithstanding the subsequent settlement.

The problem with allowing a subsequent court to give collateral estoppel effect to a vacated judgment is illustrated by the one discovered case in which a court chose to do so. In Chemetron Corp. v. Business Funds, Inc., a subsequent court gave collateral estoppel effect to findings which had been vacated as a result of settlement. The initial litigation was Cosmos Bank v. Bintliff, a two-month bench trial in Texas. The trial judge in that case made some 221 findings of fact at the conclusion of the trial and awarded judgment against Bintliff, but did not enter a final judgment. Instead, the parties settled the case and jointly petitioned the court to dismiss the action with prejudice and to withdraw its findings of fact and conclusions of law. The court agreed to do so.

In the subsequent securities case, Chemetron sought, by means of offensive collateral estoppel, to rely on a number of factual issues which had been decided adversely to defendant Bintliff in the prior trial. The Fifth Circuit addressed what it considered to be a novel question of law: whether the Cosmos Bank litigation was sufficiently final to permit the application of collateral estoppel, even though the trial judge never entered a final judgment before settlement.

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152 The trial court's decision to vacate a judgment after settlement may also reflect uncertainty about the decision.


154 682 F.2d 1149 (5th Cir. 1982).


156 Chemetron, 682 F.2d at 1187-88 (discussing procedural history of the litigation).
The *Chemetron* court, after considering the policy behind the application of collateral estoppel, concluded that *Chemetron* could preclude Bintliff from relitigating the issues which had been decided in the prior litigation. The court stated that Bintliff had received a full and fair opportunity to litigate the issues in the original litigation and that absolute finality, such as the actual entry of a final judgment, was not required by the doctrine of collateral estoppel.\(^{157}\)

Although the *Chemetron* court gave considerable attention to the finality issue, it did not explicitly consider the effect of the trial court's order withdrawing its findings of fact. That issue was addressed only in the partial dissent of Judge Reavley, who concluded that the application of estoppel was unwarranted where the parties had expressly provided by the terms of their settlement that estoppel should not apply.\(^{158}\) Judge Reavley's opinion went further, however, and condemned the application of collateral estoppel to cases in which the parties reached settlement after final judgment without obtaining vacatur. Stressing the importance of post-trial settlements, he defended the litigant's right to settle a case for the purpose of avoiding the collateral estoppel effect of the district court's findings.\(^{159}\) According to Judge Reavley, judicial interference with that right is "bad law and bad policy."\(^{160}\)

Courts have not widely followed *Chemetron*\(^ {161}\) for a number of reasons. First, by predicating estoppel on findings which had been vacated, the second court deprived Bintliff of the benefit of his bargain: the settlement premised on vacatur. Presumably, courts want to avoid overriding private bargains between the parties. Second, *Chemetron* opens the door for judicial reliance on previously erased judgments. If vacatur based on postjudgment settlement does not erase the vitality of a judgment, what about vacatur based on mootness? *Chemetron* suggests that even in cases which implicate the *Munsingwear* reasoning, a party could be bound by a decision he or she was precluded from challenging on appeal. The approach sug-

\(^{157}\) *Id.* at 1191 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945) for the principle that collateral estoppel does not require a judgment "which ends the litigation . . . and leaves nothing for the court to do but execute the judgment").

\(^{158}\) *Id.* at 1198, 1201 (Reavley, J., dissenting).

\(^{159}\) *Id.* at 1201.

\(^{160}\) *Id.*

\(^{161}\) See, e.g., *Dodrill v. Ludt*, 764 F.2d 442 (6th Cir. 1985). Recently, the Southern District of New York considered whether it should follow *Chemetron* by giving collateral estoppel effect to a judgment which had been vacated pursuant to a postjudgment settlement. In *Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co.*, 722 F. Supp. 998 (S.D.N.Y. 1989), the court noted that even though the *Chemetron* approach would preserve judicial resources, the *Nestle* decision precluded its adoption. "[V]irtually every other sentence in Judge Winter's opinion [in *Nestle*] suggests that litigants prepared to settle may contract with impunity over the preclusive effects of their dispute." *Id.* at 1011.
gested by Chemetron goes too far, dissering both the public and private interests in efficiency, predictability, and finality.

Thus Chemetron does not offer a solution to the vacatur question. A decision by the original court to vacate its judgment should operate to destroy the collateral estoppel effect of that judgment. Parties who demonstrate entitlement to vacatur—either by introducing evidence of unfairness or fraud surrounding the original decision or by establishing that the Munsingwear doctrine applies—should not be bound by the vacated judgment.

The application of this rule, however, imposes a distinct cost on vacatur—namely, that of destroying the collateral estoppel or res judicata effect of the judgment. This cost is felt most directly by other present or potential litigants who might otherwise be able to make use of that decision. The cost associated with forcing these parties to relitigate a previously decided issue is the most commonly cited argument against vacatur.\(^{162}\)

In addition to the private costs suffered by future litigants, relitigation imposes a cost on society\(^{163}\)—the cost of consuming scarce

\(^{162}\) It is unclear whether Nestle rejects as an appropriate basis for denying vacatur the demonstrated prejudice to third parties of destroying the preclusive effect of the judgment. Nestle suggests that such prejudice is too remote and speculative to be worthy of judicial deference. See Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (describing the “plight of hypothetical future defendants facing hypothetical future lawsuits”); see also Note, Settlement Pending Appeal, supra note 5, at 249-50 (suggesting that the fear of relitigation expressed by opponents of vacatur is speculative and unfounded). It is therefore difficult to tell what impact the presence of tangible third parties who are demonstrably prejudiced by vacatur, such as the intervenors in National Union, would have on members of the Nestle school.

\(^{163}\) At least one commentator has suggested that the relitigation costs associated with vacatur are insubstantial and that this objection is therefore unfounded. See Note, Settlement Pending Appeal, supra note 5, at 249-50. One problem with vacatur, however, is the fact that vacating a prior judgment is a largely invisible step in the litigation process. Most motions to vacate never result in a written opinion that might explain to future litigants and the public the reasons behind the court’s decision. In addition, both the West Publishing System and the on-line Reporting Services (LEXIS and WESTLAW) permit the courts to withdraw from publication opinions which have been vacated, leaving the public with such scant guidance as the following:

Editor’s Note: The opinion of the United States District Court, S.D.N.Y., Mason Tenders District Council Welfare Fund v. Akaty Construction Corp., published in the advance sheet at this citation, 724 F. Supp. 209-224, was withdrawn from the bound volume because opinion was vacated and withdrawn by order of the Court.

Akaty, 724 F. Supp. at 209. Thus an attempt to research the relitigation of vacated decisions is unlikely to reveal, for example, the fact that the case referred to above involved the relitigation of an issue decided in an earlier opinion involving the same plaintiff. In fact, the court in Akaty explicitly relied upon the opinion in the earlier case, Mason Tenders District Council Welfare Fund v. Dalton, 648 F. Supp. 1309, vacated upon request of the parties, 648 F. Supp. 1318 (S.D.N.Y. 1986). Akaty, 724 F. Supp. at 219 n.10. Due to the fact that the Akaty opinion was withdrawn from publication and is available only in the West advance sheets, the connection between the two lawsuits is likely to remain permanently obscured.
judicial resources to litigate an issue a second time.\textsuperscript{164} The intervenors in \textit{National Union} cited this cost as a reason for denying National Union's motion to vacate.\textsuperscript{165} They argued that the trial court's judgment, if not vacated, could have a preclusive effect in subsequent litigation between National Union and them.\textsuperscript{166} Though it did not decide the issue of what preclusive effect the lower court's judgment might have, the Ninth Circuit recognized that this potential preclusive effect imposed a significant enough cost to warrant denial of the motion to vacate.\textsuperscript{167}

Commentators have suggested that giving preclusive effect to the judgment in an action which has been settled is unfair to the losing party.\textsuperscript{168} Two arguments have been raised in support of this claim. The first is that settlement is a private bargain between the parties and that the court has no right to become involved in that bargain. The parties should be free to settle their dispute on any terms upon which they agree, and if the terms include vacatur, a court which refuses to vacate is interfering with the settlement process. The problem with this argument is that it views the settlement process with tunnel vision. The very reason the parties seek the aid of the court in vacatur is their inability, through the settlement pro-

\textsuperscript{164} The argument is that vacatur allows a party to relitigate the same issue as long as a supply of new defendants holds out. Giving collateral estoppel effect to the original judgment prevents the losing party from wasting scarce judicial resources on the same issue.

\textsuperscript{165} The court in \textit{National Union} had the benefit of direct information on the preclusive affect of the trial court's judgment, because the third parties who would be affected by vacatur had intervened in order to oppose vacatur. National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 764 (9th Cir. 1989). This situation is atypical; it is rare that third parties who might benefit from the preclusive effect of a judgment will learn of the threat to the judgment in time to make their presence known to the court. The court's decision on a motion to vacate should not depend on the presence of such third parties before the court. Cf. Martin v. Wilks, 109 S. Ct. 2180, 2185 (1989) (citing Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441 (1934)) (the law does not require voluntary intervention by nonparties to preserve their legal rights).


\textsuperscript{167} The \textit{National Union} court noted that the third-party interests in maintaining the preclusive effect of the prior judgment were legitimate, opining that the cost of destroying that preclusive effect was high:

\textit{Given the third-party interests in this case and the possible, although uncertain status of any preclusive effect, the district court did not abuse its discretion in denying the motion to vacate . . . . To the extent there may be preclusive effect, National Union should not be able to avoid those effects through settlement and dismissal of the appeal.}

\textit{National Union}, 891 F.2d at 769.

\textsuperscript{168} \textit{See}, e.g., Note, supra note 100.
cess, to bind third parties to the terms of the agreement. The fact that there are third parties involved who are affected by vacatur demonstrates that the dispute is not a purely private matter between the two parties to the settlement.\textsuperscript{169}

A second and more troubling argument advanced against giving preclusive effect to judgments after settlement is the possibility that a party may be unfairly bound by a judgment that is in some way weak or defective, but has not been appealed due to settlement.\textsuperscript{170} Thus, collateral estoppel effect is being given to a judgment that may be erroneous.\textsuperscript{171}

Many settlements are really compromise verdicts, in which parties compensate for perceived weaknesses in the prevailing party’s case by settling for an amount much less than the initial judgment.\textsuperscript{172} Moreover, the initial judgment, although adverse, may be so small as to make it economically unwise for the loser to appeal, even if the prospects of success on appeal are substantial. Finally, a single adverse judgment may represent an aberration, particularly in repetitive or multi-party litigation.\textsuperscript{173} It might be unfair for courts to prevent a party who has won twenty-five lawsuits on the same issue\textsuperscript{174} from buying his way out of an adverse judgment in the

\textsuperscript{169} Thus a rule against postjudgment vacatur may be more appropriately analogized to the general rule that “parties who choose to resolve litigation through settlement may not dispose of the claims of a third party... without that party’s agreement.” Local 93, Int’l Ass’n of Firefighters v. Cleveland, 478 U.S. 501, 529 (1986).

\textsuperscript{170} See Note, Avoiding Issue Preclusion, supra note 5, at 869.

\textsuperscript{171} The concept that a judgment can or will be clearly erroneous is, of course, subject to some debate. Some scholars believe that there is no correct or incorrect outcome in litigation. See, e.g., Owen M. Fiss, The Death of the Law?, 72 CORNELL L. REV. 1, 12 (1986) (discussing the Critical Legal Studies (CLS) movement and the CLS perception that a judgment represents a choice rather than a “right answer”). Even those who believe that a judgment can be clearly incorrect recognize that the litigation process tends to weed out those cases in which a correct outcome is readily ascertainable. Consequently, those cases which proceed through trial to final judgment are frequently those in which there are no “clearly rightful winners.” See Dalton, supra note 25, at 73-74. The notion that relitigation allows error correction is meaningless if there is no unambiguously correct outcome.

\textsuperscript{172} See Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 333 n.26 (1971) (recognizing possibility that the judgment in the first suit was a compromise verdict as one element of unfairness).

\textsuperscript{173} See Currie, supra note 19, at 285-89.

\textsuperscript{174} An illustration of this issue can be found in the cigarette litigation. After over 30 years of litigation, wherein the tobacco industry successfully defended itself against some 334 claims without paying a single penny in damages, a New Jersey jury recently returned the first verdict in which the tobacco industry was found liable and awarded $400,000 in damages. See Cipollone v. Liggett Group, Inc., 893 F.2d 541, 546 (3d Cir. 1990); see also Note, After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?, 38 AM. U.L. REV. 1021, 1022 n.7 (1989) (authored by Douglas N. Jacobson). Although the Court of Appeals overturned the jury verdict in Cipollone, the verdict raised the question of whether the industry would now be subject to numerous lawsuits that could piggy-back on the success of the Cipollone plaintiffs.
One possible solution is to vacate decisions in which these issues are raised or, alternatively, to vacate routinely when a case is settled pending appeal. This solution suffers from two flaws. First, the elements which may militate against giving a judgment preclusive effect may not be readily ascertainable at the time of the initial vacatur decision. It may be unclear, for example, whether binding a party in a subsequent action will be unfair without knowing the claims alleged in that subsequent action, the prevalence of common issues of law or fact, and the existence and resolution of other related litigation. The court in the original Munsingwear decision, for example, might not have been able to anticipate the government’s decision to reenact Munsingwear for essentially the same violations during a different time period.

Second, the elements of unfairness identified by the commentators are not unique to the application of collateral estoppel after settlement. The expansion of the doctrine of collateral estoppel to situations in which mutuality is absent, the offensive use of collateral estoppel by subsequent “free-riders,” and the risk that a party may be bound by a judgment in an action in which he or she lacked the incentives to defend vigorously, are issues common to the application of collateral estoppel outside the settlement context. Indeed, both the Supreme Court decisions which so expanded the doctrine and the commentary which followed those decisions identified these objections. Despite the possible validity of these objections, the Supreme Court determined that the economies provided by preclusion outweigh such concerns.

Moreover, although the initial court’s decision to vacate should

175 The reference is to Professor Currie’s famous railroad example. See Currie, supra note 19. Whether this result is unfair depends on the reasons why the litigant was unsuccessful in the 26th suit. Was there a distinction in the factual evidence presented? Was there a change in the applicable law? The use of offensive collateral estoppel in the area of mass tort litigation has been widely discussed. Many commentators believe that subjects such as asbestos litigation, the DES cases, and the Dalkon shield litigation are ideal for the application of offensive collateral estoppel to reduce issues and expenditures in these multiple-plaintiff lawsuits. See Green, supra note 20, at 144-45 & accompanying notes. Professor Green explains the complexity of applying collateral estoppel in the area of asbestos litigation. In particular, this complexity results from the difficulty in both ascertaining whether the prior case (upon which a subsequent claimant wishes to rely) was fairly decided and dealing with a multitude of inconsistent or partially inconsistent verdicts. Id. at 200-07. Green concludes that differences in factual issues as well as concerns about the reliability of the first verdict limit the utility of collateral estoppel in this area. Id. at 216.

prevent the preclusive use of the initial judgment, the decision to deny
vacatur need not mandate the application of collateral estoppel. A
subsequent court must nonetheless find that the necessary
predicates for preclusion are present, which includes a finding that
the losing party had a full and fair opportunity to litigate the matter
in the initial action and that application of preclusion would not be
fundamentally unfair. The court has the discretion to refuse to
apply preclusion if these prerequisites are not met and indeed can
reasonably find that the situations identified above create precisely
the kind of unfairness that justifies such a refusal.

B. Other Collateral Consequences

Although estoppel is probably the most significant collateral
impact of an adverse decision, it is not the only one. In ruling on a
motion to vacate, the court must consider other substantial costs.

One of these costs concerns the extra-judicial effect of a judicial
decision. A judgment does not result simply in a prevailing party and
a losing party; it affects the parties' substantive rights. Much civil
litigation does not focus on a two-party contract dispute in which
the effect of litigation is felt exclusively by the parties thereto.
Rather, civil litigation serves to correct unfair or corrupt practices,
remedy tortious wrongs, and resolve quasi-public issues such as
trademark and patent protection. Therefore, the resolution of liti-
gation may have external effects which extend beyond the parties to
the lawsuit. Even in a case in which there are no present or future
litigants waiting in the wings to benefit from the decision, the
public may benefit at the expense of the losing litigant.

\footnotetext[177]{Indeed, the Court in \textit{Blonder-Tongue} specifically suggested that one possible situation in which it would be unfair to apply preclusion is where there is a possibility that the judgment in the first suit was a compromise verdict. \textit{Blonder-Tongue}, 402 U.S. at 333 n.26.}

\footnotetext[178]{For a comparison of the collateral consequences of an adverse criminal judgment, see Sibron v. New York, 392 U.S. 40, 55 (1968) (“[M]ost criminal convictions do in fact entail adverse collateral legal consequences. The mere ‘possibility’ that this will be the case is enough to preserve a criminal case from ending ‘ignominiously in the limbo of mootness.’” (footnote omitted)).}

\footnotetext[179]{Of course, potential future litigants may receive a more direct benefit from a judgment than simply the right to use it as collateral estoppel in a future lawsuit. A sex discrimination suit which results in a finding of a discriminatory environment will benefit not only the plaintiff but other employees who have been victims of discrimination in the workplace. Even if the plaintiff settles his or her monetary claim after judgment, the finding of a discriminatory environment is likely to result in remedial action, whether mandated judicially, administratively, or otherwise.}

\footnotetext[180]{An example of the collateral effect of an adverse judgment is described in Note, \textit{Settlement Pending Appeal}, supra note 5, at 243. The author describes a hypothetical in which a corporate defendant loses a tort action for illegal dumping of toxic waste. The defendant's reputation in the local community will be severely damaged unless the defendant is able to escape the ramifications of the judgment.}
The Nestle case provides an example of these external effects. The Nestle Company sought relief from the lower court’s finding that “toll house” was a generic\(^{181}\) term and therefore not subject to federal trademark protection.\(^{182}\) The trial court decision held that the public, including Nestle’s competitors, could freely use the toll house name. In so holding, the court ordered the term to be removed from the federal register of trademarks.\(^{183}\)

By vacating the judgment, the Second Circuit allowed Nestle to continue to claim trademark protection for the term “toll house.” Assuming that the toll house name was valuable (which it presumably was, based on Nestle’s strong desire for trademark protection), the free use of the toll house name would have had real consequences\(^{184}\) in the economic market for chocolate chip cookies.\(^{185}\) Sanctioning public use of the term allows other manufacturers to enhance their competition with Nestle at a much lower cost. Allowing Nestle to keep the term registered as a trademark, in contrast, effectively means that competitors not wishing to pursue litigation must choose a different, possibly less suitable, name for their product—a choice which significantly raises the market cost of competition.

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\(^{181}\) See Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280, 281 (2d Cir. 1985). A generic word is the ordinary name by which a product or category of products is described in the market. Frequently, a name which is first used as a trademark becomes a generic name after the public associates the name with the generic product rather than the particular manufacturer. See, e.g., Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 116-17 (1938) (explanation of why the term “shredded wheat” is generic and cannot be trademarked).


\(^{184}\) These consequences are not unique to the Nestle case. The Blonder-Tongue court recognized that the determination of patent validity “raises issues significant to the public as well as to the named parties.” Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 331 n.21. Indeed, the willingness of courts to grant postsettlement vacatur seriously jeopardizes the operation of the markets for intellectual property. See Rochelle C. Dreyfuss, *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 Va. L. Rev. 677, 694-705 (1986).

\(^{185}\) Readers who are unimpressed with the significance of a free market for chocolate chip cookies may take refuge in the many cases in this area in which litigation concerns public access to products of substantially more importance. See, e.g., Pharmacia, Inc. v. Frigitronics, Inc., No. 84-1923-K (D. Mass. Jan. 17, 1990 & Feb. 2, 1990) (recognizing public interest in continued availability of chemical products for medical treatment in spite of judicial finding of likelihood of patent infringement).
In addition, Nestle’s resolution put nonlitigant competitors in an even worse position than if there had been no litigation. Not only did the “toll house” name continue to receive trademark protection, but the former defendant Saccone, through the benefit of the settlement agreement, was able to negotiate a trademark license agreement.\textsuperscript{186} By virtue of this agreement, Saccone was entitled to use the toll house name. Thus Saccone obtained an enhanced competitive position\textsuperscript{187} over third-party nonlitigants.\textsuperscript{188}

Certain kinds of litigation which result in findings of illegality have a clear public benefit. An example in this category is litigation challenging the legality of a corporation’s poison pill or other anti-takeover device in connection with tender offers. An anti-takeover device may be illegal because it has been adopted without sufficient disclosure to stockholders or provision for stockholder vote, because it conflicts with the corporation’s charter, or because it violates state or federal law.\textsuperscript{189} Such a device does not suddenly become legal when a prospective purchaser drops its challenge; the remaining public stockholders continue to be burdened with the illegality. Yet vacatur may completely erase the court’s finding of illegality, effectively sanctioning the device for continued use pending future challenge.

Tender offer litigation in particular is notorious for its failure to proceed through the full appellate process. Often described as strategic litigation,\textsuperscript{190} it frequently results in a round of motions for preliminary relief or summary judgment. Once rulings on those


\textsuperscript{187} See Blonder-Tongue, 402 U.S. at 346 (a manufacturer which obtains a favorable judgment or settlement is at a competitive advantage over nonlitigant competitors).

\textsuperscript{188} The district court in Nestle recognized this impact. The court noted that the effect of vacatur would be to require future competitors who wished to use the toll house name to relitigate whether the term was generic. Such litigation would entail significant cost, a cost other competitors might be unwilling to incur. See Nestle, 596 F. Supp. at 1455. Professor Dreyfuss recognizes the serious effect that a settlement and license agreement can have on the intellectual property market. Dreyfuss, supra note 184, at 694-705, explains that the patent licensee loses the incentive to challenge the validity of a patent upon entering into a license agreement and thereafter has as strong an incentive as the original patentee to avoid challenges to the patent’s validity, as he and the original owner are the only ones with a legal right of use. Thus, settlement will not only remove the initial finding of invalidity, but can make it more difficult to challenge the patent successfully.


motions have clarified the bargaining positions of the parties, the cases are settled out of court. Consequently, if parties insist on vacatur as part of the settlement process, any clarification of the stockholders' legal rights that has resulted from the frequently quite costly litigation will be removed.  

To illustrate, in *Policemen and Firemen Retirement System v. Income Opportunity Realty Trust*, the court found that the defendant Trust's purchase rights plan/poison pill was illegal. Plaintiffs, two public trust funds, then settled the litigation with an agreement that the Trust repurchase their shares. The settlement agreement included a provision requiring that the court's findings of fact and conclusions of law, including the illegality of the poison pill, be vacated. The district court entered an appropriate order without comment. The settlement thus precluded other public stockholders from benefiting from the judicial finding that the poison pill was illegal.

A famous example of judicial use of a subsequent decision for purposes other than collateral estoppel is presented in *SEC v. Glenn W. Turner Enterprises, Inc.* Glenn W. Turner Enterprises was found guilty of securities fraud in an enterprise involving the sale of self-improvement courses. The Ninth Circuit stated in its opinion: "The trial court's findings . . . demonstrate that defendants' scheme is a gigantic and successful fraud." Subsequently, the SEC brought suit in the Fifth Circuit against a subsidiary of Glenn Turner for securities fraud arising out of a cosmetics enterprise—*SEC v. Koscot Interplanetary, Inc.* The enterprise was different in the second case, and therefore collateral estoppel did not apply. The Fifth Circuit benefitted, however, from the Ninth Circuit's opinion including its findings as to the method of operation employed by the Glenn Turner companies. According to the Fifth Circuit:

> Our task is greatly simplified by the Ninth Circuit's decision in *SEC v. Glenn W. Turner Enterprises, Inc.*, supra. The promotional scheme confronting the Ninth Circuit is largely paralleled

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191 Unless the settlement requires the tender offeror to reimburse the target company for its attorney's fees, the cost of tender offer litigation including expedited proceedings, extensive discovery, and the most expensive legal talent will be borne by the target company. As a result, the target's stockholders indirectly pay for these "strategic" legal battles.


194 Id. at 478.

195 497 F.2d 473 (5th Cir. 1974).

196 It should be noted that it was the Ninth Circuit's *opinion* that was of value to the Fifth Circuit. A decision by the Ninth Circuit to vacate its judgment in *Glenn Turner* but not to vacate the opinion would have preserved the stare decisis effect that was of use to the later court.
Thus, even though the Ninth Circuit's opinion in *Glenn Turner* lacked collateral estoppel effect, it had other collateral consequences of public value.

An unsuccessful civil litigant may also suffer direct and serious consequences which extend beyond the judgment itself. Statutes and regulations governing filing, disclosure, and licensing frequently recognize the significance of an adverse civil judgment by requiring disclosure of certain such judgments. For example, in some filings required by the federal securities laws, filing parties must disclose adverse civil judgments involving injunctions or violations of the federal or state securities laws. An adverse civil judgment may also prevent an applicant from registering as a broker-dealer under the federal securities laws. In addition, a civil judgment based on a finding of willful violation of the federal securities laws might furnish the basis for a Rule 2(e) proceeding or even for disbarment.

Consideration of the consequences of erasing such judicial decisions illustrates the public cost of vacatur. It is certainly arguable that vacated judgments should be disclosed under federal securities laws. Disclosure is probably not legally mandated, however, since the vacated judgment "is of no further force and effect." Accord-

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197 *Koscot*, 497 F.2d at 484.
199 In particular, 17 C.F.R. § 249.501a requires applicants for registration as a broker-dealer to file SEC Form BD. In completing this form, the applicant must disclose, *infra alia*, whether it has ever been found to be "involved in a violation of investment-related statutes or regulations." Form BD, Question B(2). Section 15(b)(4) of the Securities Exchange Act permits the SEC to deny or revoke registration if it finds that an applicant has willfully violated the federal securities laws. 15 U.S.C. § 78o(b)(4)(A)-(F) (1990). See, e.g., *Capital Funds, Inc. v. SEC*, 348 F.2d 582 (8th Cir. 1965) (upholding SEC's decision to deny registration as a broker-dealer based on applicants' previous violation of the securities laws).
200 Rule 2(e) of the SEC Rules of Practice provides:
The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

17 C.F.R. § 201.2(e) (1990).
202 For example, the Instructions to SEC Schedule 13D, Item 1(e) require the filing party to disclose:
Whether or not, during the last five years, such person was a party to a civil proceeding of a judicial or administrative body of competent jurisdiction and as a result of such proceeding was or is subject to a judgment,
ingly, a litigant who successfully obtains vacatur may be spared the burden of disclosure, the difficulty of obtaining registration, and all other collateral consequences of an adverse decision.

C. Additional Public Costs of Vacatur

In addition to having party-specific impacts, postjudgment vacatur may sacrifice certain public values. A balancing of the costs of settlement against the costs of vacatur must weigh these values as well. The most commonly cited public value is the precedential value of the prior decision. A judgment includes elements of legal analysis which may have important consequences in other cases involving unrelated parties. For this reason, judicial decisions are published in case reporters. The common-law legal system in the United States is based on the premise that previously decided cases have a public value in elucidating the law for future actors, as

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203 These values are impacted even more when a court vacates its judgment but leaves the opinion intact. See supra note 28.

204 Though limited precedential value is an effect of vacatur, it is unlikely that this effect imposes a substantial societal cost. Most vacatur decisions occur at the district court level, where a decision has limited, if any, precedential value anyway. To the extent that a decision represents a groundbreaking legal analysis, such a decision can be cited for its persuasive impact even if vacated. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) (vacated opinion continues to have precedential weight if not reversed on the merits); Holliday v. Consol. Rail Corp., 914 F.2d 421, 423 (3d Cir. 1990); Christianson v. Colt Indus. Operating Corp., 870 F.2d 1292, 1298 (7th Cir. 1989) (citing a vacated decision as “the most comprehensive source of guidance available on the [questions at issue]”); United States ex rel Espinoza v. Fairman, 813 F.2d 117, 125 n.7 (7th Cir., cert. denied, 483 U.S. 1010 (1987) (relying on analysis of decision vacated by Supreme Court as persuasive precedent); see also Note, Settlement Pending Appeal, supra note 5, at 246 n.91. But see Mason Tenders Dist. Council Welfare Fund v. Akaty Constr. Corp., 724 F. Supp. 209, 219 n.10 (S.D.N.Y. 1989) (relying on vacated decision not because of its precedential value but because the prior judge’s analysis was “thorough, incisive and ultimately persuasive”), opinion withdrawn from bound volume at request of the court.

205 Those scholars who contend that the utility of published decisions is limited to decisions of appellate courts might reconsider upon recollecting the large number of trial court opinions which are published annually. See, e.g., John Henry Merryman & David S. Clark, Comparative Law: Western European and Latin American Legal Systems 585 (1978) (“[T]he extent to which and the manner in which judicial decisions are published and made available for use in research reflect their true position and function in the legal system.”); H. Miles Foy, III, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 CORNELL L. REV. 501, 508-09 n.25 (1986) (reporting and publication of judicial opinions permit development and enforcement of stare decisis doctrine); William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1181-85 (1978) (published decisions and the role of stare decisis establish the content of the law itself).
Indeed, one of the social values of litigation is the resolution of uncertainty in the law. This resolution is important not merely for its legal effect in subsequent lawsuits, but for its social impact as well. Judicial decisions influence our perception of what is right and wrong. A decision like that in *Brown v. Board of Education* decides more than the issue of the legality of a segregated public school system in Kansas.

Although a vacated decision may remain in the case reporters, its precedential value is extremely limited. One reason for this is the difficulty of determining the basis for the decision to vacate. As discussed previously, a court may vacate a decision for many reasons that go to the actual validity of the decision, such as fraud, mistake, or newly discovered evidence. A litigant citing a vacated decision cannot be sure that the court did not vacate based on second thoughts about the legitimacy of the legal rulings. No guidance exists for subsequent courts as to the reasons for vacatur, and accordingly, courts view vacated decisions with suspicion.

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206 Part of the justification for public financing of the judicial system is the public value derived from the resolution of private disputes. Indeed, commentators have recently begun to question the legitimacy of shielding disputes resolved through settlement from public scrutiny. Such commentators argue that maintaining the secrecy of a settlement has adverse impacts upon other similarly situated actors and upon the public’s right to know. See Elizabeth Kolbert, *Chief Judge of New York Urges Less Secrecy in Civil Settlements*, N.Y. Times, June 20, 1990, at A1, col. 3 (N.Y. Chief Judge Sol Wachtler and others advocate giving the public greater access to the records of civil cases which have been settled. “‘I think that when you have the courts being used for redressing a wrong, it is the public that is providing and paying for the court procedure and making it available for private litigants.’” Id. at A1, col. 4 (quoting Chief Judge Wachtler)).

207 An untested law or legal theory may have a chilling effect on the actions of nonlitigants. Thus the cost of forgoing a judicial interpretation of that law may include the costs associated with restraint of conduct because of its uncertain legality. See Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Calif. L. Rev. 1385, 1429-31 (1974) (arguing that these social costs are particularly high when the issues involve personal liberties, freedom of expression, or entitlement to social welfare benefits).

208 347 U.S. 483 (1954), supplemented by 349 U.S. 294 (1955). *Brown* is clearly an extreme example; most decisions lack its social significance. The constitutional law textbooks are replete, however, with cases which have revised social consciousness. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (abortion rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (constitutional right to privacy); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise of religion).

209 Professor Fiss describes *Brown* as a case “in which the judicial power is used to eradicate the caste structure.” Fiss, *supra* note 8, at 1089.

210 A case vacated prior to publication of the bound reporter volume will generally be omitted from that volume, causing that case to appear only in the advance sheets.

211 Courts could resolve this problem by stating explicitly the grounds for vacatur whenever they grant a motion to vacate, as they currently do when cases become unreviewable due to mootness. See, e.g., *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979).
In *Memorial Hospital*, Judge Easterbrook cites a public interest in the respect for and integrity of the courts.\(^{212}\) Finality of judgments is an important component of the credibility of the judicial process. A perception that a party with sufficient resources can manipulate the finality of judgments fosters a diminished respect for the institution which allows such manipulation.\(^{213}\) To the extent that courts sanction the use of settlement conditioned on vacatur and provide automatic vacatur on demand, few rational litigants are likely to decline the invitation. With vacatur as a routine procedure, the trial is converted from a method of dispute resolution into a first-round estimate of the parties' rights—a sort of nonbinding arbitration.\(^{214}\)

Equally important is Judge Easterbrook's concern that public acts by public officials become bargaining chips in the settlement negotiation.\(^{215}\) Such a result engenders disrespect for the judicial process. In addition, it allows parties to avoid adverse decisions based on the financial ability to buy their way out.\(^{216}\) This practice takes the New Yorker cartoon query, "How much justice can you afford?,"\(^{217}\) to a new level. If a judicial system in which the rights of the parties are likely to depend more on their finances than on legal merit is to be condemned, a system in which wealthy litigants can use the process simply as a nonbinding gambling procedure is equally abhorrent.

Advocates of the public law model of litigation recognize that private litigation may have socially valuable consequences. These consequences may be recognized less as a cost to the losing litigant than as a boon to society through the acceptance of change in our social structure.\(^{218}\) The value of certain judicial decisions to society

\(^{212}\) *Memorial Hosp. v. United States Dep't of Health & Human Servs.*, 862 F.2d 1299, 1302 (7th Cir. 1988).

\(^{213}\) Moreover, because of the largely invisible nature of the vacatur process and the fact that vacated decisions may be physically removed from the record books, *see supra* note 163, the practice of permitting vacatur assumes the guise of a furtive tool for removing judicial facts from public scrutiny.

\(^{214}\) The judgment does have a real effect on the legal entitlements of the parties; this effect will require the party desiring vacatur to pay for it. The relevant distinction is not between the parties' positions before and after a judgment is rendered, but between litigants who have negotiated a contractual resolution of their legal rights and those who have had those rights resolved by judicial decree.

\(^{215}\) *Memorial Hosp.*, 862 F.2d at 1302.

\(^{216}\) In effect, the parties have obtained a highly authoritative advisory opinion at public expense.

\(^{217}\) J.B. Handelsman, *The New Yorker*, Dec. 24, 1973, at 52 (caption to cartoon showing lawyer with potential client: "You have a pretty good case, Mr. Pitkin. How much justice can you afford?").

\(^{218}\) Some view litigation as a negative sum game, meaning that the overall utility value of a lawsuit is negative, because one party's gain is the other party's loss, assuming both parties expend litigation costs. *See, e.g.*, Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated*.
as a whole may far exceed the cost to the individual losing litigant in the action. Thus, a court does a disservice when it decides to vacate based solely on an analysis of the individual litigants’ costs and benefits.

IV
THE COST OF VACATUR IN THE SETTLEMENT PROCESS

Judge Easterbrook’s concern about the use of vacatur as a bargaining chip is worthy of further exploration, especially in view of the perception of courts, such as the *Nestle* court, that the public value of encouraging settlement is furthered by allowing vacatur at the parties’ request.

A. The Economic Model of the Settlement Decision

As commentators have observed,\textsuperscript{219} the decision of a litigant to settle rather than continue to trial is based on a process of evaluating litigation as an investment opportunity. More specifically, the settlement decision is based on an evaluation of the expected judgment and the cost of securing that judgment, weighed against the value of the proposed settlement. The litigant evaluates the decision to settle based on his or her expected financial condition at the conclusion of the litigation. This may be described as a function of the expected judgment, the probability of obtaining that judgment, and the costs of obtaining that judgment. Assuming that the costs of litigating are independent of the litigation result,\textsuperscript{220} the outcome may be quantified as:

\[ V = \sum_{n} p(n)J(n) - c(t), \]

where

\( V \) = the expected value to be obtained at the conclusion of the litigation;\textsuperscript{221}

\textsuperscript{219} See sources cited supra note 21.

\textsuperscript{220} This assumption, although useful in order to simplify the analysis, is concededly unrealistic. The costs of litigating clearly bear a direct relationship to the expected judgment. For example, obtaining damages for loss of expected earnings may be impossible without the introduction of expert testimony. The costs of litigating are more accurately represented as \( c(n)(t) \), the further litigation cost of obtaining a particular judgment \( J(n) \) at time \( t \). For simplicity’s sake, the analysis in this Article will ignore the possibility that costs may vary as a function of the expected judgment.

\textsuperscript{221} This value need not be viewed simply in terms of a damage remedy. This formula may also describe litigation seeking equitable relief, with the value in such a
\[ J(n) = \text{the range of possible judgments, with each } J \text{ being one possible judgment;} \]
\[ p(n) = \text{the probability of obtaining a given judgment } J(n); \text{ and} \]
\[ c(t) = \text{the cost of continuing to pursue the litigation to its conclusion at any given time } t \text{ (rather than settling or voluntarily discontinuing the lawsuit).} \]

The progress of any litigation can be viewed as the continued acquisition of additional information about the probability of achieving the various possible judgments. Thus, as a litigant goes through the discovery process, his assessment of the values of \( p(1) \) through \( p(n) \) changes, and his assessment of the value of his claim may also change.\(^{222}\)

A rational litigant\(^{223}\) will settle a lawsuit if, at any point during the lawsuit, he has the opportunity to settle for an amount greater than or equal to \( V \). Because the calculation of \( V \) by each litigant is independent, there may, in a lawsuit, be a range of amounts for which both litigants would be willing to settle. Conversely, it is possible that the litigants' expectations as to the outcome of the litigation are so different that there is no settlement amount acceptable to both of them.

To take a simple example, assume that plaintiff (P) and defendant (D) are litigating a products liability claim. P’s complaint alleges $100,000 in damages. D has interposed no counterclaims and there is no prospect of punitive damages. The range of possible judgments at the outset of the case is $0 to $100,000. Based on his initial evaluation, P may assign a probability of 25% to full recovery, a probability of 50% to obtaining a judgment of $50,000, and a

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\(^{222}\) The calculation performed by the other litigant is identical. A judgment in favor of a litigant's adversary may be reflected as a negative number. For example, if defendant calculates that plaintiff will obtain a judgment of $100,000, then defendant will insert this in his calculation as -$100,000. It should be noted that the litigants' estimates of relative probability of various outcomes may not coincide. Thus, the plaintiff may believe his chances of recovery are good, and may set the probability of acquiring a $100,000 recovery at 50%. The defendant may believe there is no merit to plaintiff's claims. Accordingly, the defendant may estimate the probability of a $100,000 judgment in the plaintiff's favor at 5%.

\(^{223}\) Of course, a litigant may have personal characteristics which affect this decision. If, for example, a litigant is risk averse, he will prefer an action which achieves $1000 with 100% probability to an action which achieves $1000 of expected value, based on a 50% probability of acquiring $2000 and a 50% probability of acquiring nothing. A risk averse litigant will therefore be inclined to settle at some amount lower than \( V \) (i.e., the expected value to be obtained at the conclusion of litigation), based on his perception that a bird in the hand is worth more than two or more birds in the bush. Other factors such as insurance coverage may also affect the decision to settle.
probability of 25% to obtaining a judgment of $0. Further assume that P expects to spend $5000 on the discovery and pretrial process and an additional $5000 if the case goes to trial. A rational P would be willing to settle at the outset of the litigation for $40,000, which is the sum of \( p(n)j(n) - 10,000 \).

D's calculation of expected outcome may be different. Indeed, at the outset of litigation, D may believe there is zero probability of a judgment of $100,000, only a 40% probability of a $50,000 judgment, and a large probability (60%) that the plaintiff will be completely unsuccessful. Assuming that it will also cost D $10,000 to litigate, D may then calculate the expected outcome as -$30,000. Since D will not offer more in settlement than his calculation of the expected outcome, D and P will be unable to settle at this time.

Proceeding through the discovery process may change P's calculation, however. Through reviewing documents and taking depositions, P may learn that his chance of recovering $100,000 is in fact zero, and that he is much more likely to recovery only $25,000. P may be forced to reevaluate and may discover that his expected recovery will be only $20,000. P will now be willing to settle for a lower amount than at the start of the litigation. If D has not changed his calculations, there is a range of settlement amounts for which agreement is possible—$20,000 to $25,000.

As the litigation proceeds and discovery provides more information about the relative strengths and weaknesses of each party's

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224 The calculation goes as follows:

\[
\begin{align*}
J(1) &= \$100,000 \\
p(1) &= .25 \\
c(t) &= 10,000 \\
J(2) &= \$50,000 \\
p(2) &= .50 \\
J(3) &= 0 \\
p(3) &= .25 \\
J(4) &= \$25,000 \\
p(4) &= .50
\end{align*}
\]

If the calculation is made at a subsequent point in the litigation, the expected cost \( c(t) \) of bringing the litigation to a conclusion will decrease by the amount already spent. Thus if P considers settlement after expending $5000 in litigation costs, \( c(2) \) will equal $5000. P will add that expenditure to his equation. Therefore, P will not settle for less than $45,000.

225 That figure assumes that P's discovery process reveals the following:

\[
\begin{align*}
J(1) &= \$100,000 \\
p(1) &= 0 \\
J(2) &= \$50,000 \\
p(2) &= .25 \\
J(3) &= 0 \\
p(3) &= .25 \\
J(4) &= \$25,000 \\
p(4) &= .50
\end{align*}
\]

The calculation is as follows:

\[
0(\$100,000) + .25(\$50,000) + .25(\$0) + .50(\$25,000) - 5,000 = 20,000
\]

226 Note that D's expected outcome must now reflect the expenditure of $5000 in expected litigation costs, so that \( V = .40(\$50,000) + .60(\$0) - 5000 = -25,000 \).

227 This scenario may be complicated by the fact that a party's settlement negotiation is based not only on his expectation of the value of the litigation, but on his assessment of the other party's bargaining position. Thus, a party's perception of the other side's litigation costs, economic constraints, or risk aversion might influence his decision to settle.
case, both parties will probably be able to ascertain the expected outcome with greater certainty. Large litigation costs, however, may cause a party to be more reluctant to settle as the litigation progresses, because settlement cannot avoid those costs once spent. This phenomenon has caused some commentators to conclude that the litigation process operates in a counter-intuitive manner, that is, larger litigation costs may actually result in diminished likelihood of settlement.\textsuperscript{228}

Of course, the parties have the most information about the expected outcome after trial.\textsuperscript{229} Once a verdict has been reached, the parties can evaluate the probable outcome with a great deal of certainty, subject only to the variables engendered by the possibility of reversal or reduction in the amount of a damage award.\textsuperscript{230} Such variables entail much less uncertainty than parties' prejudgment assessments, especially since the likelihood of having the case reversed on appeal is small.\textsuperscript{231}

B. The Model Refined: Collateral Consequences and the Availability of Vacatur

The calculation described above does not account for the collateral costs of a judgment, costs which the parties may incur in an asymmetrical manner. For example, assume that a judicial finding that D's product was defective can be used against D by subsequent plaintiffs under the doctrine of offensive collateral estoppel. The cost of losing this litigation must now reflect not only the cost of the

\textsuperscript{228} See, e.g., Linda R. Stanley & Don L. Coursey, Empirical Evidence on The Selection Hypothesis and The Decision to Litigate or Settle, 19 J. LEGAL STUD. 145, 163 (1990); Gordon Tullock, Negotiated Settlement, in LAW & ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION 39 (Goren Skogh & J. Maltihas Graf von der Schulenburg eds. 1986).

\textsuperscript{229} The use of ADR methods, such as the summary jury trial, is premised on the theory that, by providing litigants with sufficient information on the merits of the litigation, settlement can be achieved without the provision of a full trial. See Wayne D. Brazil, What Lawyers Want From judges in the Settlement Arena, 106 F.R.D. 85 (1985); Posner, supra note 6. A study conducted by the American Bar Association found that 85% of the lawyers surveyed viewed the participation of judges in settlement discussions as likely to significantly improve the prospects for achieving settlement. See Brazil, supra, at 85. This perception was no doubt based, in part, on the fact that participation by judges is likely to result in expressions of the judge's opinions of the case—opinions which lawyers view as most valuable in encouraging settlement. Id. at 87. Access by litigants to a judge's opinion of the litigation allows the litigants to evaluate the prospects of success with more accuracy, confidence, and certainty.

\textsuperscript{230} As a practical matter, a verdict may thus increase the possibility of settlement by giving the parties a reasonably accurate description of the value of the plaintiff's claim. Therefore, a plaintiff who steadfastly maintained that his lawsuit would result in a multi-million dollar verdict may be more amenable to settlement overtures after the jury renders a $50,000 verdict. Similarly, a defendant who stubbornly disclaims liability during discovery may reconsider after the trial court rejects his position.

\textsuperscript{231} See supra note 25.
judgment in this case, but the cost of expected future judgments (multiplied by the probability that D will be found liable). This cost is reflected in D's calculation of expected value but not in P's calculation, as the future litigation between D and third parties will not affect P. Therefore, the possibility of additional plaintiffs will be a strong inducement for D to settle and thereby avoid the risk of such collateral effects. Indeed, D may be willing to settle in situations where the amount he expects to pay in the instant lawsuit is quite small, based on the risk posed by subsequent litigation. If, however, D has the option of buying his way out of the judgment and its collateral effects through postjudgment settlement and vacatur, he is unlikely to settle. D will be willing to take his chances on this lawsuit because, if he loses, a rational P would accept his tender of the value of the judgment in return for forgoing the costs of an appeal. If the court permits vacatur, D will be no worse off than if he settled before trial at P's asking price (which D believed to be overly high) and may be affirmatively better off if he is successful at trial.

Vacatur thus becomes an important aspect of D's pretrial evaluation of the prospects of settlement. Absent the possibility of vacatur, D will be strongly inclined to settle the litigation prior to trial, thereby avoiding the possible collateral effects of an adverse judgment. If D can reasonably anticipate that the court will grant a postjudgment motion to vacate, D may be indifferent to the timing of the settlement or even disposed toward waiting until after trial to

\[ V = \sum p(n)J(n) - c(t) - K(n) \]

where K(n) represents the collateral costs to the defendant of a particular judgment J(n).

For example, consider the calculation if D assumes a 10% probability of liability—damages of $50,000 in this case—but is aware that there are 100 similarly situated plaintiffs, with potential damages totalling $5,000,000:

\[ V(\text{for this case}) = .10(-$50,000) + .90($0) - $10,000 = -$15,000; \]
\[ V(\text{for the future cases}) = .10(-$5,000,000) + .90($0) - $100,000* = -$600,000. \]

It is likely that the litigation costs would be substantially reduced if D were to litigate this issue 100 times.

The reader may observe that this argument risks substantial overstatement of the effect that vacatur may have on a settlement decision. The relevant inquiry, as framed by the Nestle opinion, is not whether vacatur is likely to be a substantial factor in the litigants' decision to settle, but rather, if vacatur is a factor, whether a rule such as the Nestle rule actually works to encourage settlement.

Indeed, if the defendant tenders the full amount awarded the plaintiff, and the plaintiff does not intend to challenge the verdict as insufficient, there is no longer a controversy between the parties.

A pretrial settlement will also allow D to avoid the significant litigation costs associated with a trial and the uncertainty of the jury verdict.
attempt to settle, 237 because such a decision will not be costly. 238

The foregoing analysis illustrates a fundamental flaw in the reasoning of the Nestle court and those who advocate routine vacatur of judgments. Although vacatur will permit the parties to settle after judgment in the above example, it will encourage settlement at a much later stage in the action. 239 Rather than encouraging settlement, vacatur in fact is operating to encourage speculative litigation because the potentially unfavorable results of litigation can be avoided. Even where litigation at the trial level has resolved a complex legal issue, the availability of vacatur encourages parties to attempt to manipulate the legal system through settlement conditioned on vacatur.

In addition, the approach of the Second Circuit in Nestle creates a frivolous distinction between litigants who choose to file an appeal and those who simply decide to settle or otherwise comply with the decision of the lower court. 240 Under the Second Circuit’s rule, only the former are entitled to vacatur. Litigants who “voluntarily” give up their right to appeal are not entitled to vacatur under Sec-

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237 See Memorial Hosp. v. United States Dep’t of Health & Human Servs., 862 F.2d 1299, 1302 (7th Cir. 1988) (denying vacatur as a matter of course encourages parties to settle prior to the district court decision).

238 Though the decision to wait until after judgment may not be particularly costly to the defendant, delaying settlement results in real costs to both the plaintiff and society. The plaintiff incurs legal costs in litigating at the trial level which he may never recover. See Fiss, supra note 8, at 1076. If, for example, a plaintiff correctly perceives the ultimate judgment to be $100,000, but must expend $50,000 of legal costs to obtain that judgment, he will be better off settling the case for any amount greater than $50,000. The difference between the settlement value and the expected value after litigation represents a real gain to the plaintiff. After trial (and expenditure of the $50,000 in legal costs), the plaintiff can no longer recoup that gain, even if he wins a $100,000 judgment. Society loses because the court’s time (of which the Second Circuit and others are so solicitous) has already been used in arriving at the trial court judgment. In short, judicial resources have been invested in this judgment. See Memorial Hosp., 862 F.2d at 1302; Fiss, supra note 8, at 1085.

239 This is particularly true in cases in which a losing party is likely to seek vacatur: cases in which the legal or factual issues are sufficiently complex that it is difficult to predict the outcome of the litigation, and in which there is a reasonable possibility that a second court might not reach the same result. Such complexity complicates the parties’ calculation of the expected value of the litigation and increases the difficulty of reaching a pretrial agreement on such a value. A pretrial settlement at a value that both parties view as reasonable may be impossible to achieve, given the substantial differences in the parties’ expectations of the litigation outcome. Although a judgment gives the winning plaintiff a (relatively) clear entitlement to a judgment, thus greatly enhancing the plaintiff’s bargaining position, that entitlement may be worth far less than the plaintiff expected to obtain. Rather than serving as a floor for a subsequent settlement amount, the verdict tends to operate, in such a case, as a ceiling.

240 Indeed, approaches like that of the Second Circuit, coupled with the CAMP program, may directly cause the filing of additional appeals. At least one commentator has expressly criticized the Second Circuit’s program for this reason. See J. Goldman, supra note 6.
Thus in *Long Island Lighting Co. v. Cuomo*, the court vacated that part of the district court judgment which upheld the LIPA Act but did not vacate the part of the judgment which declared the Used and Useful Act unconstitutional. According to the court, the plaintiff was entitled to vacatur because it had reinstated its appeal before the case was rendered moot by settlement. By contrast, the defendants, who had not reinstated their appeals, lost both the decision upholding the validity of the LIPA Act and the right to defend the Used and Useful Act against constitutional challenge.

The reasoning in *Cuomo* suggests that there is a meaningful distinction between litigants which file an appeal before settlement and those who do not. Such a distinction has no clear connection to the *Nestle* court’s rationale of encouraging settlement. All the court is doing in cases like *Cuomo* is encouraging losing litigants to commence an appeal before signing a settlement agreement. The real result of the automatic vacatur rule is to require litigants to consume judicial resources by initiating the appellate process in order to access the vacatur process. As the court warned in *United States v. Garde*: “We do not wish to encourage litigants who are dissatisfied with the decision of the trial court ‘to have them wiped from the books’ by merely filing an appeal, then complying with the order or judgment below and petitioning for vacatur of the adverse trial court decision.”

Moreover, viewing the settlement process as a negotiation based on expected economic consequences illustrates that the *Nestle* court’s concern that denying vacatur will thwart conditional settlements is misplaced. If courts choose to distinguish between conditional and unconditional settlements, a rational losing litigant will always require the settlement agreement to be conditioned on vacatur, a requirement that should be of no consequence to his adversary. If the courts instead follow the lead of the Second Circuit and grant vacatur where the settlement agreement is unconditional, the courts will have no basis for determining the effect of vacatur on the settlement process; that is, it will be impossible to ascertain whether a case will nonetheless be settled if the court de-

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241 See Blackwelder v. Saffauer, 866 F.2d 548 (2d Cir. 1989) (refusing to vacate district court judgment as moot where losing litigant took no appeal).

242 888 F.2d 230, 234 n.5 (2d Cir. 1989).

243 848 F.2d 1307, 1311 (D.C. Cir. 1988) (citing Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 721 & n.1 (9th Cir. 1982)).

244 See *Cuomo*, 888 F.2d at 234 (holding that it is the appellate court’s “duty” to vacate the district court judgment from which an appeal was taken).

245 See supra note 77.
C. Another Look at the Costs of Vacatur

Under either analysis, vacatur becomes an important bargaining chip in the settlement negotiation. In addition to the normal settlement topics such as the amount of payment, the nature of any releases, and negotiations relating to future business dealings, the litigants may now negotiate the subject of vacatur. In the negotiation, the winning litigant is at a distinct advantage; he has little to lose if the case is not settled and incurs no personal cost by consenting to vacatur. Because vacatur is very important to the other side, his bargaining position is greatly enhanced.247

Indeed, a rational and informed P will perceive that the value of postjudgment settlement is asymmetrical, i.e., D will suffer disproportionately by P’s refusal to settle. Consequently, P may be able to negotiate a settlement which is higher than the expected outcome, based on his awareness of D’s need to avoid the collateral consequences of the judgment.248 This additional value to P is a windfall which reflects the value to D of avoiding the collateral consequences of the judgment. If one assumes that the collateral consequences are not only an inconvenience to D but also an affirmative benefit to society, P has appropriated part of the societal value of the judgment for his personal gain.249

This raises an additional issue: if the public loses when a final judgment is vacated after settlement, who gains? Cases such as Nestle suggest that the availability of vacatur creates a societal gain in the increased number of settlements. As the foregoing analysis has demonstrated, vacatur does not encourage settlement; if anything, it discourages it by allowing a party to gamble on two rolls of the dice at the cost of one. By allowing a litigant to erase the adverse effect of a trial, vacatur encourages even the settlement-inclined litigant to

246 Conversely, the courts will be granting vacatur in cases where it is manifestly unnecessary to obtain a settlement.
247 One of the problems with settlement as a means of resolving disputes is the possibility that settlement may be coerced by the party with greater access to information or resources. In addition, to the extent that a party’s willingness to settle is a function of the resources available to that party, the coerciveness of the settlement process continues to be a factor after a trial court judgment. A poor plaintiff who has been successful at trial may be unwilling to fund a defense of that judgment or to hold out through the appellate process before receiving payment. See Fiss, supra note 8, at 1075-76.
248 See supra notes 232-33.
wait until after trial.250

The beneficiaries of the system are actually both of the original parties. The losing party gains by achieving control over the litigation process; the winning party gains an opportunity to appropriate part of the societal value of final judgments for its own benefit. But the vacatur process is, at best, a zero sum game.251 If both the parties to the vacatur decision gain, the public loses.

The foregoing analysis compels the conclusion that the decision to vacate should not be left to individual litigants. Although the decision to litigate may be a private one, the litigants are in an unusually poor position to safeguard the integrity of the system. Examine again the original losing litigant with his three choices of paying the adverse judgment, pursuing an appeal, or seeking a settlement. The litigant’s private assessment of the choices should lead the litigant to negotiate a settlement in almost every case. If the adverse judgment entails significant collateral costs which may be avoided by vacatur, the litigant will choose to condition that settlement on vacatur. The losing litigant has no incentive to defend the integrity of a judgment which he has lost, yet, he has everything to gain by erasing that adverse decision.

Moreover, his adversary, the prevailing party, is a poor defender of the judgment because he will be able to obtain a higher overall outcome by settlement whenever his opponent places a high value on vacatur. Through the postjudgment settlement process, the prevailing party is able to make use of the judicial decision as if it were his own private property.252 If a prevailing party can accurately identify adverse impacts of a judgment on the opponent in addition to the actual verdict, those impacts become part of that party’s overall calculus of settlement.

250 See id. (refusing to permit litigants to settle after oral argument conditioned on the court’s agreement not to publish an opinion). The court in Village Escrow explained its refusal as follows:

For, it would send a message to other appellants and respondents that they can wait until oral argument and, if they sense the probability or possibility the appellate court will rule against them, buy their way out of an unfavorable precedent often at the relatively cheap price asked by the single opponent they face in that appeal.

Id.

251 Some may argue that the decision to settle after judgment must, perforce, result in societal losses. Cf. Fiss, supra note 8, at 1089 (inherent conflict between viewing adjudication in private terms and public terms). No matter how the costs of vacatur are distributed among society and the individual litigants, one cost that can never be repaid is the value of the judicial resources consumed in arriving at the initial judgment. These resources are already expended and cannot be saved by a postjudgment settlement. See Kates & Barker, supra note 207, at 1433-35. Thus, society’s stake in the vacatur decision can be tied to the societal investment in obtaining the initial judgment.

252 See Memorial Hosp. v. United States Dep’t of Health & Human Servs., 862 F.2d 1299, 1302 (7th Cir. 1988).
To illustrate, suppose that Nestle could pursue its toll house litigation against ten different defendants and, if pursued independently, the odds of winning were 40%. A successful defendant could conceivably hold Nestle hostage to the tune of approximately 40% of the expected damages, minus litigation costs, for agreeing to vacate an adverse decision. The first winning plaintiff appropriates the public benefit—the cost savings of forgoing the subsequent nine litigations.

This analysis reveals an additional insight. Rather than being a helpless captive to the other side’s demands for vacatur in the postjudgment settlement negotiation, as suggested by the Nestle court, a prevailing litigant may be the beneficiary of the bargaining advantage afforded not simply by his win, but by the additional costs the judgment imposes on the other side. A well-informed litigant should be able to negotiate a higher postjudgment settlement if he agrees to vacatur as a condition of settlement.

**Conclusion**

Allowing vacatur to be resolved by settlement negotiation between the parties imposes tangible but frequently undetectable social costs. These costs include the public cost of forgoing the collateral estoppel and res judicata effects of the prior judgment. This cost is borne directly by third party litigants but shared by the public interest in preventing duplicative and piecemeal litigation. The costs also include the erasure of collateral consequences of an adverse judgment, the loss of precedential value for judicial decisions, and a diminished respect for the judicial process.²⁵³

Moreover, rather than encouraging the settlement process, a judicial rule encouraging routine grants of vacatur disrupts the process. A procedure which allows parties to obtain vacatur as a matter of right by conditioning a postjudgment settlement on vacatur will encourage parties to delay settlement until after trial because the effects of an adverse judgment can be avoided at little or no cost by postjudgment settlement. The procedure will also permit the prevailing party to obtain as a private windfall the public costs of vacatur, and will place the defense of the integrity of judicial decisions in

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²⁵³ The Village Escrow court recognized the substantial social cost inherent in permitting litigants to buy their way out of unfavorable decisions. “[I]t could even distort the law by allowing parties who possess ample means to prevent the filing of adverse precedents while those without means are unable to do so.” Village Escrow, 248 Cal. Rptr. at 696. The implication of this distortion is particularly acute in cases in which an institutional defendant repeatedly litigates similar claims against individual plaintiffs, such as cases in the mass tort/products liability area.
the hands of litigants who are not in a position to safeguard the pub-
lic values inherent therein.

Accordingly, the settlement of a case pending appeal should
not entitle the litigants to vacatur as a matter of right. Rather, the
courts should review motions to vacate with the presumption that
vacatur is not an appropriate tool for erasing an unfavorable trial
court decision. The standard motion to vacate after a postjudgment
settlement, motivated solely by the losing party's desire to avoid the
collateral consequences of that judgment, should be routinely de-
nied. Though the litigants should retain the opportunity to per-
suade the court that there is particular prejudice in an individual
case, such as the unfairness presented by the Munsingwear doctrine,
the litigants should bear the burden of convincing the court that this
dilemma is not of their own making. Absent such a showing, the
judgment in a case which has been resolved through settlement
should enjoy the same vitality as that in any other case in which the
losing litigant chooses not to appeal.