1993

Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties

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ARTICLES

CAPTIVE COURTS: THE DESTRUCTION OF JUDICIAL DECISIONS BY AGREEMENT OF THE PARTIES

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INTRODUCTION

Some Articles in this colloquium issue examine the role of secrecy in environmental litigation. There are many ways that parties to any lawsuit can keep the information and results of the litigation confidential. These include conducting discovery under the protection of confidentiality agreements, settling cases prior to trial and having the court file and pleadings placed under seal, and engaging in methods of alternative dispute resolution that do not leave a public record.[1] All these procedures have been criticized as interfering with the public's right to know about the case and its outcome.[2] Defenders of secrecy respond that the conduct of the litigation is properly left to the parties and that, so long as they agree to secrecy, there has been no harm to the judicial process.[3] They further claim

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[1] *See, e.g.*, *The Terms of Secrecy*, WASH. POST, Oct. 23, 1988, at A22 (describing methods of resolving litigation in secret).

[2] *See, e.g.*, Philip Carrizosa, *Making the Law Disappear*, CAL. LAW., Sept. 1989, at 65 (describing depublication of judicial opinions in California); Elizabeth Kolbert, *Chief Judge of New York Urges Less Secrecy in Civil Settlements*, N.Y. TIMES, June 20, 1990, at A1 (quoting New York Chief Judge Sol Wachtler and others criticizing secrecy of records in civil cases that have been settled); Benjamin Weiser, *Forging a 'Covenant of Silence'; Secret Settlement Shrouds Health Impact of Xerox Plant Leak*, WASH. POST, Mar. 13, 1989, at A1 (describing the secret settlement of a lawsuit which involved allegations that a Xerox facility leaked toxic chemicals into the groundwater, causing health problems for two families, and how that secrecy is hampering attempts by scientists and the public to learn about the effects of hazardous chemicals).

[3] This argument is consistent with the autonomy model of litigation in which the litigants are the final arbiters of the progress of their litigation. *See* Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277 (Fed. Cir. 1987) (deferring to parties' interests in granting vacatur); Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280 (2d Cir. 1985) (holding that district court abused its discretion in denying parties' joint motion to vacate).

that confidentiality serves a broader public policy, that of encouraging settlement.[4] In this era of excessive litigation, settlement offers a prompter and less costly resolution of disputes, which is consistent with the public interest. As courts held hostage to overcrowded dockets search for ways to lighten their load, they are likely to remain receptive to litigants' requests for secrecy.

In the process of approving secrecy requests, however, courts can lose sight of the purpose behind their deference to the parties' wishes. This has led to a peculiar practice in which courts agree to destroy actual decisions in accordance with a settlement agreement by the parties. The settlement of a case after a decision has been rendered, whether as a result of a motion for summary judgment or a full trial, does not involve the same balance of interests as earlier requests for secrecy. Moreover, erasing a decision at the request of the parties threatens the integrity of the judicial process. It is this method of obtaining litigation secrecy, through the destruction of judicial decisions, that is the focus of this Article.

I

DESTRUCTION OF JUDICIAL DECISIONS

The process of erasing a judicial decision varies somewhat depending on the applicable jurisdiction, although the results are generally the same. In the federal courts and many state courts,[5] the parties may settle the litigation prior to or pending appeal. In accordance with their settlement, the parties then ask either the trial court or the appellate court to vacate the prior judgment, opinion, or both.[6] In some states, additional procedures for erasure are available. For example, the California Supreme Court will, under certain circumstances, order that an opinion by a lower appellate court be "depublished."[7] Finally, courts have occasionally been

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[4] *See, e.g.*, Gina Kolata, *Secrecy Orders in Lawsuits Prompt States' Efforts to Restrict Their Use*, N.Y. TIMES, Feb. 18, 1992, at D10 (quoting trial lawyers who defend the use of secrecy orders on the theory that they induce parties to settle and reduce litigation).

[5] State courts often look to federal courts for guidance in this area. *See, e.g.*, Van Schaack Holdings, Ltd. v. Fulenwider, 798 P.2d 424 (Colo. 1990) (citing federal decisions on mootness and vacatur).

[6] For a detailed description of this process, see Jill Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 593-99 (1991).

[7] CAL. R. CT. 976(c)(2) allows the California Supreme Court simply to order that the lower court opinion not be published. The practice, which appears to be unique to California and is usually executed in response to a letter or petition re-

persuaded that their obligation to encourage settlement requires them to defer still further to the parties' request and actually rewrite a decision to conform to the litigants' wishes. Based on this reasoning, the California Supreme Court recently reversed a jury verdict based on the parties' stipulated request.[8]

The effect of these procedures is the same. The litigation between the particular litigants is resolved in accordance with a settlement agreement. Any finding of liability or wrongdoing is erased, and the parties are relieved of any accountability for it. The decision ceases to have preclusive effect against the parties and cannot be used in subsequent litigation by or against them.[9] Additionally, the public value of the decision is diminished. The court's opinion may be physically removed from the record books or, if retained, may bear no explanation of the rationale behind the decision to vacate.[10] Thus future litigants seeking to rely on the opinion's analysis are left without an indication as to whether vacatur was the result of subsequent judicial doubts about the validity of that analysis. Accordingly, few courts give respect even to the analysis of a

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quest from one of the parties, precludes the opinion from being published in the official California Appellate Reports. *See* Stacy Gordon, *Only California Allows Justices to 'Depublish'*, BUS. INS., June 15, 1992, at 14; Carrizosa, *supra* note 2. In addition, the Rules of Court prohibit the depublished opinion from being cited as binding precedent for any other case. CAL. R. CT. 977(a). As one commentator explains: "the opinion just disappears." Carrizosa, *supra* note 2, at 66.

[8] *See* Neary v. Regents of the Univ. of Cal., 834 P.2d 119, 128 (Cal. 1992). Documents submitted to the court in *Neary* indicated that California courts of appeal had reversed trial court decisions at the request of the litigants 12 times during a four year period. *Id.* at 129 (Kennard, J., dissenting). The supreme court in *Neary* claimed its efforts did not constitute rewriting or erasure. *Id.* at 124 (claiming that "a stipulated reversal is not an attempt to erase or rewrite the record of trial . . ."). Given the fact that the court affirmatively reversed the trial court decision, this disclaimer is not convincing.

[9] *See generally* William D. Zeller, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860 (1987). *Cf.* Cal. R. Ct. 977 (a depublished decision, under the California rules, does retain preclusive, although not precedential effect).

[10] *See* Fisch, *supra* note 6, at 620 n.163, describing the process by which courts can destroy any indication that a vacated decision ever existed. The editor's note located at 724 F. Supp. 209 is illustrative:

> 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 the opinion was vacated and withdrawn by order of the Court.

If a decision is vacated before the advance sheets are printed, the record books will lack even this minimal evidence of its existence.

decision that has been vacated.[11]

Judicial decisions have particular value in environmental litigation, and secrecy in environmental cases is therefore a matter of public concern. In many environmental law suits, courts must interpret complex statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).[12] Courts must wrestle with complicated questions of insurance coverage and evaluate unfolding scientific evidence on the effects of chemicals and toxic substances. Expert testimony is often necessary and public expenditures in terms of judicial resources are considerable.[13]

When an environmental decision is vacated, the public loses the resources that were expended not merely to resolve the dispute, but to develop the law. This is particularly true when the decision has addressed issues of first impression.[14] Litigation in environmental insurance cases, for example, illustrates the success of insurers in retarding the development of the law, a process which is costly to the policyholder.[15] Finally, to the extent that civil litigation operates to develop and enforce public values, the destruction of decisions thwarts such efforts.[16]

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[11] *See* Fisch, *supra* note 6, at 615-24. *But see* Marathon Oil Co. v. Lujan, 751 F. Supp. 1454, 1465 n.23 (D. Colo. 1990), *aff'd in part and rev'd in part*, 937 F.2d 498 (10th Cir. 1991) (relying on the vacated district court opinion in Tosco Corp. v. Hodel, 611 F. Supp. 1130 (D. Colo. 1985), for its analysis).

[12] 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991). CERCLA imposes retroactive liability on companies for the costs of cleaning up hazardous waste.

[13] *See, e.g.*, Kenneth J. Garcia, *Big Rock Mesa Landslide Case a Mega-Trial*, L.A. TIMES, Oct. 10, 1988, § 1, at 1 (describing time and expenses associated with preparing for and trying a large landslide case in California); Jack B. Weinstein, *Factors in Determining the Degree of Public Availability of Judicial Opinions*, 2 N.Y.U. ENVTL. L.J. 244, 246-49 (1993).

[14] Thus, for example, destruction of the appellate court decision in Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Rptr. 2d 358, 364 (Ct. App.), *review granted*, 1992 Cal. LEXIS 2554 (1992), would require subsequent litigants to start from scratch on the issues addressed in the opinion, such as the interpretation of "trigger of coverage." *See* Letter from Kevin Walsh to California Supreme Court re Montrose Chem. Corp. v. Admiral Ins. Co. in Opposition to Request for Depublication at 2 (Apr. 8, 1992) (on file with author). *See also infra* Part IV.C.

[15] *See infra* Part IV.C.

[16] *See* Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (describing civil litigation as developing and enforcing public values and citing examples such as school desegregation, antitrust, and environmental law).

II

THE ECONOMIC MODEL OF THE SETTLEMENT PROCESS

In an earlier piece,[17] I described the settlement of litigation in economic terms, under which a party will agree to settle if his or her expected gain from settlement exceeds the expected judgment less the costs of obtaining that judgment. A party's calculation of the expected judgment can be described as:

$$V = \sum_{1}^{n} p(n)J(n) + c(t) \qquad \text{(equation 1)}$$

where,

V = the expected value to be obtained at the conclusion of the litigation;[18]

J(n) = the range of possible judgments, with each J being one possible judgment;[19]

p(n) = the probability of obtaining a given judgment J(n); and

c(t) = a negative number representing the cost of continuing to pursue the litigation to its conclusion at any given time t (rather than settling or voluntarily discontinuing the lawsuit).

Thus, at any point in the litigation, a defendant should be able to persuade a plaintiff to settle by offering the plaintiff the *ad damnum* discounted both by the plaintiff's perceived risk that the lawsuit will be unsuccessful and by the costs of pursuing the litigation to final judgment. Prior to trial, settlement may not be possible, however, because the parties' perceptions of the likelihood of success may vary.

The settlement process is greatly simplified after a trial court has reached a decision on liability. At this point, much of the potential error associated with calculating the expected value of the judgment has been removed, subject only to the possibility the judgment will be modified or reversed on appeal.[20] Post-decision then,

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[17] Fisch, *supra* note 6.

[18] This number represents, in quantified terms, the relief sought by the litigant. This relief may be legal, such as damages for pollution, or equitable, such as an injunction against further dumping. The expected value will be positive for a plaintiff who expects a net gain from the litigation, and negative for the defendant who views the expected judgment as a cost.

[19] The range of J(n) includes negative numbers for possible adverse judgements. *See supra* note 18.

[20] This risk is relatively small. The vast majority of trial court decisions are

it is relatively easy for plaintiff and defendant to agree on the expected judgment.

The foregoing calculation may be complicated, however, by several factors. First, an adverse judgment may result in collateral costs to a party. If a judgment of liability is associated with a loss of reputation, a finding of immoral or improper conduct, or diminished rights or benefits, the defendant may view the judgment as imposing greater costs than the amount of the verdict. In such a case, the defendant's calculation of the costs of the verdict might be adjusted to read:[21]

$$V = \sum_{1}^{n} p(n)[J(n) + K(n)] + c(t) \qquad \text{(equation 2)}$$

where K(n) is a negative number which represents the collateral costs to the defendant of a particular adverse judgment J(n).

Second, the process is complicated if the litigation is not a one-shot event. If an unfavorable verdict at trial will have adverse collateral consequences, such as collateral estoppel effect in other related cases, or the resolution of a legal issue that will affect the litigant elsewhere, the litigant must take into account not merely the cost associated with the instant judgment, but the effect of that judgment on the related cases. This might cause the formula to read as:

$$V = \sum_{1}^{n} p(n)\,[J(n) + \sum_{1}^{x} V(x, J(n))] + c(t) \qquad \text{(equation 3)}$$

where V(x, J(n)) represents the expected verdict in each of the x other cases affected adversely by judgment J(n). In either situation, the circumstances impose asymmetrical costs upon the litigants, as the potential harm to the defendant from an adverse judgment is much greater than the potential gain to the plaintiff.

III

THE EFFECT OF ASYMMETRICAL COSTS ON SETTLEMENT

The impact of asymmetrical costs imposed upon litigants by a

affirmed on appeal. *See* Fisch, *supra* note 6, at 595 n.25.

[21] The equation has been adjusted to reflect the fact that the total cost imposed on an unsuccessful defendant is the judgment, plus the litigation costs, plus the collateral costs.

judicial decision is considerable. Normally we trust the adversary process to produce settlements that are fair to both parties.[22] Coase's theorem suggests that, if the liability rule is clear (which it is post-decision), and the transaction costs are minimal, the parties will bargain to reach an efficient resolution of the litigation.[23] But in the scenario in which the decision imposes large asymmetrical costs upon the defendant, the plaintiff's bargaining position is enhanced. Instead of being able to obtain a settlement amount up to the amount of the judgment, reduced by the costs and uncertainty associated with appellate review, the plaintiff can extort a larger payment if he or she can offer to have the adverse decision destroyed.[24]

The risk of this distortion to the settlement process is not hypothetical. In *Bankers Trust Co. v. Hartford Accident and Indemnity Co.*,[25] the plaintiff sought insurance coverage for the cost of correcting pollution damage to a river caused by a leaking fuel oil pipe. The District Court granted summary judgment in favor of the plaintiff and, pending a motion for rehearing, the case was settled conditioned on vacatur of the summary judgment decision. Seven years later, in an affidavit filed in another case, counsel for Bankers Trust revealed that the settlement agreement had resulted in Hartford paying Bankers Trust approximately $200,000 *more* than the value of Bankers Trust's claim, with the understanding that the opinion finding Hartford liable would be withdrawn.[26]

This bargaining process presents a problem because the judicial decision is public property.[27] By offering to have that decision de-

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[22] Naturally the imperfections of the judicial system frequently impose pressures on litigants to accept settlements that may not be fair. The settlement process has been criticized, for example, as favoring litigants who come to the process with a better bargaining position, such as greater resources or no need for prompt resolution of the dispute. An analysis of the limitations of the settlement process is beyond the scope of this Article.

[23] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 4 (1960).

[24] *See, e.g.*, *Vacatur is "Bargaining Chip" in Post-Judgment Settlements*, 7 Civ. Trial Man. (BNA) No. 14, at 300 (Aug. 7, 1991) (describing increased popularity of post-judgment vacatur).

[25] 518 F. Supp. 371, *vacated*, 621 F. Supp. 685 (S.D.N.Y. 1981).

[26] *See* Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1192 n.32 (N.D. Cal. 1988) (describing contents of affidavit by counsel for Bankers Trust and terms of settlement agreement in *Bankers Trust* case).

[27] *See* Memorial Hosp. v. United States Dep't of Health & Human Servs., 862 F.2d 1299, 1302 (7th Cir. 1988) ("The precedent, a public act of a public official, is not the parties' property.").

stroyed, the plaintiff obtains a windfall benefit, at the cost of others who would benefit from the decision, including other similarly situated litigants and the public at large. Coase's theorem fails because third party beneficiaries of the decision are not party to the agreement to have it destroyed.

Allowing destruction of judicial decisions also affects the initial settlement process. A defendant who faces a strong possibility of costly collateral consequences if she loses at trial is likely to settle early to avoid that risk. If the defendant can avoid the consequences of an adverse judgment by buying his or her way out of it, there is less incentive to avoid trial altogether. This "free" roll of the dice increases the litigation expenses of both litigants at the costly pretrial and trial level and causes needless consumption of judicial resources.[28] Additionally, where the parties are of unequal bargaining position, the defendant's ability to delay resolution by proceeding to a risk-free trial may enable the defendant to force the plaintiff to settle for even less.

IV

THE ROLE OF VACATUR IN ENVIRONMENTAL LITIGATION

The validity of the foregoing model is peculiarly evident in environmental litigation. Increasingly, parties to environmental litiga-

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[28] Courts frequently defend their decisions to vacate on the ground that settlement conditioned on vacatur conserves judicial resources. *See* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (concluding that granting parties' request to vacate is justified by the importance of promoting settlement). Where parties have consumed the considerable judicial resources necessary to produce a trial court judgment, such arguments are less compelling. The parties in Neary v. Regents of the University of California, 834 P.2d 119 (Cal. 1992), for example, spent more than 12 years in litigation. Prior to the jury trial, which lasted four months, the case reached the appellate division on appeal of a motion for summary judgment. Settlement of the case on appeal did not mitigate this substantial consumption of judicial resources.

Moreover, the practice of permitting vacatur encourages parties to delay settlement until after trial. *See* Fisch, *supra* note 6, at 635-38. As Justice Kennard explained:

> If an adverse judgment can be deleted by a postjudgment settlement with stipulated reversal, parties concerned about the collateral consequences of an adverse judgment will have less incentive to settle their cases before trial and judgment. Cases that would have settled pretrial, with minimal judicial involvement, will be tried before a court or jury, perhaps for days or even months, only to have the court or jury's considered decision erased by a stipulated reversal.

Neary, 834 P.2d at 129 (Kennard, J., dissenting).

tion are using vacatur and related processes to destroy decisions they find unsatisfactory. The growing role of these practices in environmental litigation can be explained by several factors.

A. *Erasing the Finding of Wrongdoing*

One factor that explains the use of vacatur is the public approbation given to those who pollute or cause other environmental harm. Public condemnation of defendants found liable for environmental damage operates as a collateral cost, such as that addressed in equation 2 above. Even in situations where the plaintiff's sole motive is receipt of compensation, the defendant may seek to have the decision destroyed to preserve her good name.

Defendants in *Neary v. Regents of the University of California*[29] justified their request for stipulated reversal on these grounds. In *Neary*, plaintiff's herd of cattle had been treated with an insecticide to prevent a mite infestation. After the treatment, a large number of cattle died. Neary attributed the deaths to the treatment and, eventually, state agricultural officials agreed to have the matter investigated by veterinarians employed by the University of California.[30] Three university veterinarians investigated the incident and subsequently wrote a report attributing the deaths to Neary's mismanagement rather than pesticide poisoning.[31] The report was published under the California Public Records Act.[32]

Neary sued both the University and the veterinarians for libel. After twelve years of litigation, including a four-month jury trial, he obtained a verdict against all defendants for $7 million.[33] The defendants appealed and, while the appeal was pending, offered to settle the case for $3 million, conditioned on the court entering an order, based on the parties' stipulation, reversing the jury verdict and dismissing the case with prejudice.[34] Neary, who was reaching an advanced age and tiring of the protracted litigation, agreed.[35]

According to the California Appellate Division, the condition that the jury verdict be reversed was imposed by the individual defendant veterinarians. Defendants' counsel explained the rationale

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[29] 278 Cal. Rptr. 773 (Ct. App. 1991), *rev'd*, 834 P.2d 119 (Cal. 1992).

[30] *Neary*, 834 P.2d at 131 (Kennard, J., dissenting).

[31] *Id.*

[32] CAL. GOV'T CODE tit. 1, div. 7, §§ 6250-6254.2 (West 1993).

[33] 278 Cal. Rptr. at 777.

[34] 834 P.2d at 120.

[35] The defendants had already received permission to file over-length briefs on appeal. *Id.* at 122.

for this request as follows:

> [R]eversal of the Superior Court's judgment is particularly important to the individual Appellants. Because they view the jury's verdict as a determination that they, along with a dozen other University scientists, knowingly and deliberately participated in writing a false scientific report, they believe the verdict has severely blemished their professional reputations and, as a result, significantly impaired their ability to function as productive members of the scientific community . . . .[36]

Unlike the Appellate Division, the California Supreme Court did not see a need to retain the jury verdict of liability. In spite of the fact that the veterinarians were public officials, whose professional reputations depend on their ability to evaluate accurately the environmental impact of the state's pesticide program, the court did not see a need to preserve the jury's findings. Apparently the court attached no value to the jury's determination that the veterinarians had deliberately falsified their scientific findings in attempting to blame the cattle deaths on mismanagement rather than the state agricultural department's use of a dangerous insecticide.[37]

A desire to avoid the public condemnation associated with environmental wrongdoing may also explain the activities of the Environmental Protection Agency (EPA) and ARCO in *Kitlutsisti v. ARCO Alaska, Inc.*[38] Plaintiffs sued ARCO and Exxon under the citizen suit provisions of the Federal Water Pollution Control Act.[39] The EPA was joined as a party defendant based on its failure to process the defendants' applications for drilling permits under the statute.[40]

After the district court found that ARCO and Exxon had illegally discharged pollutants into Norton Sound and that the EPA had failed to perform its duties under the statute in processing permit applications,[41] the EPA promptly issued the defendants a drill-

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[36] 278 Cal. Rptr. at 775.

[37] *See* 834 P.2d at 131 (Kennard, J., dissenting) ("Here, the majority has determined that the trial court's judgment has no value worth preserving.").

[38] 592 F. Supp. 832, 835-37 (D. Alaska 1984), *vacated*, 782 F.2d 800 (9th Cir. 1986).

[39] 33 U.S.C. § 1365 (1982), *amended by* 33 U.S.C. § 1365 (1988).

[40] 592 F. Supp. at 836.

[41] *Id.* at 838-44 (holding that the EPA violated its statutory duty and finding that the EPA had repeatedly "been using 'creative' administrative techniques of dubious legality to avoid [its] clear statutory mandate . . . of issuing NPDES permits.").

ing permit, mooting the controversy.[42] The defendants[43] then requested the court to vacate the district court decision, and the court agreed.[44] One wonders whether the possibility of erasing the lower court finding of wrongdoing by the EPA influenced the EPA's decision to issue the drilling permit, which allowed the defendants to "discharge a large amount of pollutants into the water."[45]

The consequence of the disappearing decisions in both *Neary* and *Kitlutsisti* is that public officials found liable for wrongdoing were allowed to preserve clean reputations. The public cost of this practice is the loss of their accountability.

B. *Avoiding the Consequences of Collateral Estoppel*

Parties to environmental litigation may also seek to have decisions destroyed because of their collateral estoppel effect on subsequent litigation. Like products liability and other mass torts, environmental cases frequently involve a single incident or transaction that has allegedly caused harm to a large group of plaintiffs. Thus a readily-identifiable group of plaintiffs will benefit from the collateral estoppel effect of a finding of liability.[46] This places the defendant in the equation 3 scenario where failure to destroy the adverse decision will result in virtually certain liability in the many subsequent cases.[47]

Vacatur can also operate in the reverse direction, destroying a decision that has freed the defendant from liability. While preclu-

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[42] 782 F.2d at 801.

[43] Plaintiffs objected to vacatur of the district court decision. *Id.*

[44] 782 F.2d at 802.

[45] 592 F. Supp. at 835.

[46] *See, e.g.*, Zeller, *supra* note 9, at 878 (illustrating this with a mass asbestos tort hypothetical).

[47] *See generally* Fisch, *supra* note 6 (discussing the offensive collateral estoppel doctrine and the implications of vacatur on preclusion); Zeller, *supra* note 9 (same). Some scholars have criticized application of offensive collateral estoppel in mass tort and environmental claims on the grounds that a single unfavorable result has disastrous implications for the defendant. *See, e.g.*, Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) (describing potential unfairness in litigating liability for railroad accident sequentially against 50 plaintiffs). *But see* Fisch, *supra* note 6, at 622-23 (describing fairness analysis which balances the interests of the public in the finality of judgments against the interests of private litigants in ending the litigation through settlement). *See also id.* at 623 n.175 (describing support for the offensive collateral estoppel doctrine as eliminating the costly need to relitigate endlessly issues of liability).

sion doctrines do not bar subsequent plaintiffs from relitigating issues decided in a prior suit to which they were not a party, litigation in mass tort and other multiparty environmental cases has increasingly involved the use of test cases to resolve common questions of liability. Under this approach, a single plaintiff's lawsuit may be litigated with the expectation that the result of that lawsuit will be authoritative, if not technically binding, in resolving or settling the remaining cases.[48]

Under this scenario, vacatur is damaging because it can leave the remaining litigants without the precedent they sought. A decertification order by the California Supreme Court nearly forced a massive relitigation in connection with the 1983 Big Rock Mesa landslide in Malibu, California, which destroyed thirty homes and damaged two hundred more in the Los Angeles area. A test case promised to resolve issues important in all 230 lawsuits.[49] Plaintiff homeowners in *Hansch v. County of Los Angeles*[50] sued the County of Los Angeles alleging that government officials had approved development of the mesa with seepage pits and horizontal drains rather than sewers, which contributed to a rise in ground water triggering the landslide. The parties spent massive sums litigating the case,[51] and the trial resulted in a $2.74 million verdict in favor of the homeowners, a verdict that exposed county taxpayers to potential liability of $500 million.[52]

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[48] Such test litigation reduces the costs of relitigating a complicated issue.

[49] *See* Hansch v. County of L.A., 247 Cal. Rptr. 809, 811-12 (Ct. App. 1988) ("Hundreds of plaintiffs filed scores of actions for damages. These actions were consolidated. The present action was severed from the others 'for the purpose of trying it first as a test case.' "); Koch-Ash v. Superior Court, 225 Cal. Rptr. 657, 658 (Ct. App. 1986) ("the 'Hansch' action was severed from the 47 'Ibarra' actions for the purpose of trying it first as a test case that might resolve various issues of liability pertaining to the 'Ibarra' actions"). *Cf.* Garcia, *supra* note 13 (stating David Casselman, one of the County's attorneys, claimed that the homeowners' lawyers had said *Hansch* would be considered a test case for the other lawsuits and that the other homeowners would be bound by the verdict; homeowners' lawyer Kenneth Chiate allegedly denied the statement). The trial judge refused to dismiss the remaining cases holding that there was insufficient evidence that the parties agreed to be bound by the *Hansch* outcome, in light of the Supreme Court's order vacating *Hansch*. Kenneth J. Garcia, *Ruling on Big Rock Mesa Case Sets the Stage for Huge Trial*, L.A. TIMES, Oct. 29, 1988, § 2, at 10.

[50] 247 Cal. Rptr. 809 (Ct. App.), *review denied and depublication ordered*, 1988 Cal. LEXIS 193 (Sept. 15, 1988), *and cert. dismissed*, 489 U.S. 1074 (1989).

[51] Kenneth Chiate, the homeowners' lawyer, stated that the county spent $5 million defending itself in the *Hansch* case. Garcia, *supra* note 13. *See also* Carrizosa, *supra* note 2, at 66 (quoting Los Angeles lawyer, Gideon Kanner, "A king's ransom was spent preparing and trying that case on the merits.").

[52] Myrna Oliver, *Justices Overturn Award for Damage from Malibu Slide*, L.A.

The trial court decision in *Hansch* was overturned by the appellate division,[53] however, which found that the government's approval of the development plans did not make it liable for the landslide and which condemned the trial court decision for its broad imposition upon the public of liability for this type of disaster. Rather than reviewing the case, the California Supreme Court decertified the appellate division opinion,[54] leaving both sides without a precedent after expending millions of dollars.[55] The entire litigation was nearly repeated in a mass trial[56] when the case was settled for $97 million.[57]

C. *Retarding the Development of Case Law*

Vacatur also destroys a valuable resource: the prior judicial decision. Decisions in environmental cases are particularly valuable because they frequently involve difficult questions of law and fact. Environmental cases cause courts to grapple with such issues as the interpretation and validity of statutes, the interpretation of contract clauses regarding insurance coverage of pollution clean-up costs,[58] and the effects of hazardous substances upon individuals and the environment. Vacatur has destroyed, for example, the effect of a comprehensive fifty-six page opinion interpreting and evaluating the validity of two statutes preventing the operation of the Shoreham Nuclear Power Plant.[59]

A sequence of cases involving litigation over rights to oil shale mining patents under federal mining law illustrates the costs created

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TIMES, June 8, 1988, § 2, at 1.

[53] 247 Cal. Rptr. 809 (Ct. App. 1988).

[54] Hansch v. County of L.A., 1988 Cal. LEXIS 193 (Sept. 15, 1988) (denying review and ordering appellate division opinion depublished).

[55] Carrizosa, *supra* note 2, at 66.

[56] Garcia, *supra* note 13 (describing preparation for the "mega-trial" which was expected to last two to five years and cost more than $100 million in attorneys' fees alone).

[57] Kenneth J. Garcia, *The Case that Won't Go Away*, L.A. TIMES, Mar. 5, 1989, § 9, at 1 (describing settlement terms). Interestingly, the Hansches, who had lost in the appellate division, shared in the settlement. Carrizosa, *supra* note 2, at 66.

[58] On the difficulty of interpreting pollution exclusion clauses to determine insurance coverage for clean-up costs, see Jonathan C. Averback, *Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language—Same Results?*, 14 B.C. ENVTL. AFF. L. REV. 601 (1987).

[59] Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370 (N.D.N.Y. 1987), *vacated in part and remanded with instructions to dismiss*, 888 F.2d 230 (2d Cir. 1989).

by vacatur. The litigation of these rights has been extremely complex, spanning sixty years and involving numerous cases at the trial and appellate level.[60] The lengthy district court opinion in *Tosco Corp. v. Hodel* addressed many difficult issues, yet the Tenth Circuit vacated the district court opinion when the litigants settled their dispute pending appeal.[61] As a result of the vacatur, many of the issues resolved in the *Tosco* opinion subsequently had to be relitigated.[62]

The time and effort invested in resolving these issues is a public resource, which benefits future actors as well as subsequent litigants. The *Hansch* litigation is a prime example of the importance of this resource. The value of the decision is only partially captured in its role as precedent. By clarifying the law, judicial decisions inform parties as to their rights and responsibilities with regard to the environment and cause reform of procedures for handling environmental problems. Litigation may also advance the state of scientific knowledge by examining the handling procedures and health effects of hazardous substances. These benefits are lost and the time and money expended on environmental lawsuits are squandered when judicial resolutions of these issues are destroyed.

The ability of litigants to retard the development of the law by vacating judicial decisions offers a particular opportunity for manipulation in environmental litigation. Unlike many areas of the law in which litigation is a one shot, isolated event in the life of the parties, litigants in environmental litigation are frequently involved in repeated similar cases. Such "repeat players" include manufacturers of hazardous substances, such as toxic chemicals, and insurance companies who are drawn into litigation when their policies cover instances of pollution or clean-up costs. For these litigants, environmental litigation involves more than a resolution of specific transactions; it involves the development of legal doctrine which will continue to govern their rights and responsibilities.

Under these circumstances, the repeat players have strong fi-

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[60] *See, e.g.*, Marathon Oil Co. v. Lujan, 751 F. Supp. 1454, 1456 (D. Colo. 1990), *aff'd in part and rev'd in part*, 937 F.2d 498 (10th Cir. 1991).

[61] 611 F. Supp. 1130 (D. Colo. 1985), *vacated by*, 826 F.2d 948 (10th Cir. 1987).

[62] *See Marathon Oil*, 751 F. Supp. at 1465 n.23 (addressing relitigation of *Tosco* issues); Russell v. Turnbaugh, 774 F. Supp. 597, 599 n.2 (D. Colo. 1991) (vacatur of *Tosco* required relitigation of many issues in *Marathon Oil*). The court in *Marathon Oil* explained that "[i]t is the objective of this opinion to resolve issues inherent in this litigation and also to add clarity and practical application of legal principles that impact mining law." 751 F. Supp. at 1456 n.1.

nancial incentives to monitor the development of the law and to pay to have unfavorable decisions removed from the books, so that they can convincingly relitigate the issue and argue that the weight of authority is on their side.[63] Few judges appear troubled by these transparent efforts to manipulate the weight of authority.[64]

The litigation of insurance coverage for damages and clean-up costs resulting from oil spills, chemical leaks, and other pollution-related events provides an example of this manipulation. As pollution-related liability becomes increasingly common, particularly in connection with environmental legislation such as CERCLA, which imposes clean-up costs on those responsible for pollution-related damage, questions of policy coverage have become increasingly important in determining whether insurers are responsible for paying these costs under general liability policies.[65] These coverage ques-

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[63] Repeat players have a similar incentive to insure that favorable decisions are not overturned. *See, e.g.*, Roger Parloff, *Rigging The Common Law*, AM. LAW., Mar. 1992, at 74 ("a thriving black market has developed in opinions, with top dollar paid to keep them on- or off- the books."). Some commentators suggest that this motivation explains settlements in cases such as Travelers Insurance Co. v. Ross Electric of Washington, Inc., 685 F. Supp. 742 (W.D. Wash. 1988), in which, on a partial motion for summary judgment, the district court issued a pro-insurance company decision holding that the standard form liability insurance policies did not cover response costs under CERCLA. Following the decision, the insurance company settled. Lawyers for Ross Electric described the settlement by stating that Travelers agreed to pay "ultimately what we were asking for, even though they won the summary judgment. . . . We got more money than we would have, because they wished to have that decision on the record. That was clear in the negotiations." Parloff, *supra*, at 77 (quoting John McKerricher, counsel for Ross Electric).

[64] An exception is Judge Earl J. Johnson of the California Appellate Division. In a recent dissenting opinion in Slater v. Lawyers' Mutual Insurance Co., 278 Cal. Rptr. 479 (Ct. App. 1991), Judge Johnson criticized the majority opinion for giving the impression that the "weight of authority" supported the defendant insurance company's position.

> [T]he "weight of authority" . . . is inconclusive on this issue. It is also deceiving, because it has been shaped in part by the well conceived litigation strategy of at least one of the insurance companies involved in these appeals. One important appellate decision . . . has been purged from the law books as a result of a settlement agreement between that insurance company and the successful appellant. A determined attempt was made to do the same in another case.

Id. at 486 (footnotes omitted).

[65] An example is the legal doctrine interpreting the scope of pollution exclusion clauses in general liability insurance policies. Insurance policies typically use a number of standard contract terms. Many such standardized policies excluded coverage for pollution-related injuries, under so-called "pollution exclusion clauses." Pollution exclusion clauses denied coverage for pollution-related injuries unless the injuries arose from pollution that was "sudden and accidental." For a

tions are generally unimportant to policyholders except as they affect a particular case in which the policyholder seeks coverage for a pollution-related injury.

The development of legal doctrine in this area is of far more consequence for insurance companies, however. Cases upholding coverage for pollution-related damages threaten insurers with enormous liability for coverage. One commentator has described the resolution of insurance coverage for clean-up costs under CERCLA as "a trillion-dollar question."[66]

Accordingly, vacatur and similar procedures have been used frequently to erase decisions that broadly interpret pollution-related insurance coverage.[67] Thus the *Bankers Trust* decision described above, which constituted a strong pro-policyholder precedent that general liability policies cover pollution cleanup costs, was erased at a cost of more than the *ad damnum*, the insurance community presumably viewing the ruling as far too damaging to remain on the books. As one commentator observed, the ruling "should have established an important precedent that other policyholders seeking coverage for environmental cleanup costs could cite."[68]

In another example, the Eleventh Circuit in *Reliance Insurance Co. v. Kent Corp.*,[69] reversed the district court's grant of summary judgment in favor of Reliance Insurance. The case addressed the question of whether Reliance was responsible under a comprehensive policy for damages caused by an emission of hazardous gases from Kent property during a fire. The district court had concluded that the emissions constituted a polluting event which was excluded under the pollution exclusion clause.[70]

Although the circuit court did not reverse this aspect of the district court finding, it held that summary judgment was premature because questions of material fact remained as to the cause of the damages.[71] It consequently found that the question of coverage

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comprehensive description of the development of pollution exclusion clauses and judicial interpretations of those clauses, see Averback, *supra* note 58.

66 Parloff, *supra* note 63, at 76.

67 One commentator has stated that a random search of California decisions showed that pro-policyholder decisions had been vacated more frequently than those favoring insurers. Stacy Gordon, *Vanishing Precedents*, BUS. INS., June 15, 1992, at 1, 14.

68 *Id.* at 1.

69 896 F.2d 501 (11th Cir.), *vacated*, 909 F.2d 424 (11th Cir. 1990).

70 896 F.2d at 502-03.

71 In particular, the court took a narrow view of "polluting event," focusing on the question of whether a can of Toluol exploded or was burned in the fire and

could not be resolved and that Reliance continued to have a duty to defend.[72] Shortly after the opinion was issued, the parties settled the litigation, and the circuit court's decision, which could be viewed as broadening the obligations of an insurance company to defend even under a broad interpretation of the pollution exclusion clause, was vacated.[73]

Similarly, an unpublished opinion by Judge Brucia on a motion for summary judgment in *State of New York v. Inwood Petroleum Corp.*,[74] interpreted National Union's coverage obligations broadly in connection with an oil spill and upheld National Union's duty to defend the insured against claims under New York state law for clean-up costs. The case was promptly settled. The settlement agreement provided that the settlement was contingent upon Judge Brucia's vacating his decision.[75]

Most recently, the California Appellate Division issued a pro-policyholder opinion in *Montrose Chemical Corp. v. Admiral Insurance Co.*[76] dealing with Montrose's insurance coverage for the discharge of hazardous waste. The opinion addressed, in particular, the question of when hazardous waste contamination is said to "occur" so as to trigger insurance coverage. Following issuance of the decision, the Association of Defense Counsel of Northern California requested the California Supreme Court to depublish the *Montrose* decision, claiming that its holding was aberrational.[77] The California Supreme Court has granted review of the *Montrose* decision, and the case is pending, yet already the defense insurance bar has advised the court in another pending case that the continued vitality of the *Montrose* decision is questionable.[78]

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caused emission of hazardous gases. *Id.* at 503.

[72] *Id.* at 504.

[73] Reliance Ins. Co. v. Kent Corp., 909 F.2d 424 (11th Cir. 1990) (vacating panel opinion in light of settlement).

[74] State of N.Y. v. Inwood Petroleum Corp., No. 21799-89 (Sup. Ct. Nass. Co. Mar. 8, 1991) (on file with author).

[75] State of N.Y. v. Inwood Petroleum Corp., No. 21799-89, at 3, ¶ 4 (Sup. Ct. Nass. Co. Nov. 18, 1991) (Stipulation of Settlement) (on file with author).

[76] 5 Cal. Rptr. 2d 358 (Ct. App. 1992), *review granted*, 1992 Cal. LEXIS 2554 (1992).

[77] *See* Letter from Kevin Walsh to California Supreme Court re Montrose Chem. Corp. v. Admiral Ins. Co. in Opposition to Request for Depublication (Apr. 8, 1992) (on file with author).

[78] *See* Letter from Elizabeth G. Leavy to the Honorable Ina L. Gyemant re Flintkote v. American Mut. (Mar. 11, 1992) (on file with author) (stating that there is "good reason to believe" that the Supreme Court will either review or depublish the *Montrose* decision, in which case "the decision can have no bearing

It is hard to know how commonly insurance companies employ these procedures. The very fact of vacatur, particularly at the trial level, erases the evidence of the decision that the defendant seeks to destroy. Accordingly, it is not possible to determine, through LEXIS searches or case reporters, how many decisions have been destroyed. Nor is it possible to draw conclusions about the extent to which these decisions, if preserved, might have been useful in future litigation. Much of the information on disappearing decisions takes the form of anecdotal evidence. This evidence suggests that the extent to which the insurance companies' efforts have been successful is considerable. One insurance company lawyer has been quoted as claiming close to a fifty percent success rate in getting adverse appellate court decisions wiped out.[79]

CONCLUSION

The effect of court-sanctioned vacatur, depublication, and similar doctrines is particularly problematic in environmental litigation. In addition to distorting the settlement process, vacatur may destroy the ability of third parties to use a decision for purposes of collateral estoppel. It also frustrates the development of a complex area of the law, causing parties to spend money to relitigate the same issues and preventing future environmental actors from learning their legal rights. Finally, destruction of decisions destroys accountability. Civil litigation in the environmental area, like much civil litigation, supplements government oversight over private conduct. Private causes of action operate not merely to compensate but to uncover and deter conduct deemed detrimental to societal values. Thus environmental litigants are properly viewed as acting, in part, as private attorneys general through their use of the litigation process.[80]

These attributes of litigation are most thoroughly eviscerated by the destruction of decisions imposing liability. Erasing the finding of liability erases the statement to other potential actors that the conduct was wrongful, that this defendant was responsible, and that society requires payment for the consequences. Private civil litiga-

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on the result in the present case").

[79] Carrizosa, *supra* note 2, at 65-66 (quoting Ellis J. Horvitz of Horvitz & Levy).

[80] *Cf.* Nestle Co. v. Chester's Mkt., 756 F.2d 280, 284 (2d Cir. 1985) (refusing to force litigants to continue as "private attorneys general" when they wished to settle conditioned on vacatur).

tion supplements government action through criminal, administrative, and civil enforcement proceedings, in imposing this accountability. Here then lies the answer to those who would defend secrecy by deferring to the right of litigants to control the course of their lawsuit. When the government has provided private litigation as an adjunct to government action, such litigation serves a public purpose, and the disposition of that litigation should not be left solely in the hands of the parties.