

# OUT OF THE FRYING PAN AND INTO THE FIRE: THE EMERGENCE OF DEPUBLICATION IN THE WAKE OF VACATUR

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## I. INTRODUCTION AND HISTORICAL CONTEXT

A little more than ten years ago, members of our firm, which specializes in representing policyholders against insurance companies, discovered that a significant number of the pro-policyholder judicial decisions were being wiped off the law books by the insurance industry. During the early 1990s, the manipulation of the judicial system, probably our most precious heritage, garnered much attention.<sup>1</sup>

It became clear that insurance companies are different types of litigants than policyholders. The overwhelming majority of insurance policyholders are one-time insurance coverage litigants; to a policyholder, a favorable settlement is far more significant than a resounding pro-policyholder opinion. Insurance companies, on the other hand, are repeat litigants that face the same exact issues over and over again in courts across the country. Insurance companies, therefore, have a higher interest in the body of caselaw that is developing. Through vacatur, insurance companies can eradicate or reduce the number of pro-policyholder decisions and then argue that the

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1. See Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589 (1991); Stacy Gordon, *Vanishing Precedents*, Bus. Ins. 1 (June 15, 1992); Roger Parloff, *Rigging the Common Law*, 14 Am. Law. 74 (Mar. 1992).

weight of authority is in their favor.<sup>2</sup> This is also true of other repeat litigants, such as governmental entities and intellectual property holders.

As an example, a classic “sale” of pro-policyholder caselaw occurred in 1981 when Hartford Accident and Indemnity paid \$200,000 to expunge from the case books a decision of United States District Court Judge Morris Lasker of the Southern District of New York.<sup>3</sup>

In *Bankers Trust*, Judge Lasker held that Bankers Trust Company was entitled to coverage from Hartford Accident and Indemnity Company for certain cleanup costs incurred by Bankers Trust in removing oil from its property.<sup>4</sup> Nearly four months later, Judge Lasker signed an order vacating his earlier decision in favor of Bankers Trust. Judge Lasker indicated that he took this action so as to allow Hartford to submit additional materials to the court, after which Judge Lasker would “determine Bankers’ motion for summary judgment de novo.”<sup>5</sup> Apparently, Hartford would pay Bankers Trust \$2.3 million—about \$200,000 more than the amount the court had awarded Bankers Trust in its original decision—with the provision that Judge Lasker would vacate his earlier opinion.<sup>6</sup>

There have even been cases in which the insurance company agreed to settle and pay the policyholder after the insurance company obtained a favorable decision because the insurance company feared that the decisions would be reversed on reconsideration:

[W]hen [the policyholder’s] counsel became aware of two superior court cases that had addressed the same issue before the court, they moved for reconsideration of the

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2. See Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 Notre Dame L. Rev. 325, 356 (1994); Michael W. Loudenslager, Student Author, *Erasing the Law: The Implications of Settlements Conditioned upon Vacatur or Reversal of Judgments*, 50 Wash. & Lee L. Rev. 1229, 1230 (1993).

3. See *Bankers Trust Co. v. Hartford Accident & Indem. Co.*, 518 F. Supp. 371 (S.D.N.Y.), vacated, 621 F. Supp. 685 (S.D.N.Y. 1981); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1192 n. 32 (N.D. Cal. 1988), *aff’d in part, rev’d in part*, 952 F.2d 1551 (9th Cir. 1991); see also Parloff, *supra* n. 1, at 74.

4. See *Bankers Trust*, 518 F. Supp. at 373.

5. See *Bankers Trust*, 621 F. Supp. at 685.

6. *Intel Corp.*, 692 F. Supp. at 1192 n. 32 (citing an affidavit from Bankers Trust Company’s counsel); see also Parloff, *supra* n. 2, at 74.

damages ruling on the basis of these decisions. Judge Bryan then wrote counsel for additional briefing on whether these superior court decisions were binding or if they required certification to the State Supreme Court. Soon thereafter, the insurers settled with Ross Electric. Thus the *Ross* opinion was decided without the benefit of the reasoning of the only Washington court to have addressed the issue.<sup>7</sup>

By paying the policyholder even after obtaining a ruling that would have negated or limited coverage, the insurance company was able to keep a pro-insurance company decision on the books and avoid reconsideration.

The benefit to the repeat litigant of the skillful use of vacatur is clear: If successful in gaining vacatur, the litigant can, in part, control the content of the relevant caselaw without doing more than ask that the courts rely upon what remains in the case reporters.<sup>8</sup> The insurance industry supports its coverage positions in legal briefs and memoranda by representing to courts what “the vast majority of cases hold.” For example, in a brief filed by American Casualty Company of Reading, PA (“ACCO”), ACCO stated that a “majority” of courts have interpreted the “sudden and accidental” pollution exclusion as having a temporal meaning:

By this Supplemental Opposition, ACCO does not concede that the *Broadwell* decision correctly interprets the “sudden and accidental” phrase. Instead, ACCO opposes application of the *Broadwell* interpretation, relying instead on the majority view in [sic] throughout the country that

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7. *Boeing Co. v. Aetna Cas & Sur. Co.*, 784 P.2d 507, 515 (Wash. 1990).

8. It is not possible to conduct after-the-fact research to ascertain whether courts have vacated valuable decisions; when a decision is vacated prior to the publication of a written opinion, there is often nothing left to inform the public what was decided. The only traces of such a decision may be a cryptic statement like the following entry in West’s Federal Reporter for *New England Reinsurance Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 829 F.2d 840 (9th Cir. 1987):

ORDER

Pursuant to the stipulation of the parties,

IT IS ORDERED:

- (1) The court grants the petition of appellee for rehearing;
- (2) the district court’s ruling on the motion for summary judgment of National Union Fire Insurance Company of Pittsburgh is hereby vacated; and
- (3) this court’s opinion filed July 21, 1987, reversing the district court’s order and remanding for proceedings consistent with the opinion is hereby vacated and withdrawn from publication.

“sudden and accidental” has a temporal element, and means “immediate and unexpected.”<sup>9</sup>

In response to this growing trend, when our firm first began publishing a website in April 26, 1996, we created the Vacatur Center, “to help preserve court decisions that have been wiped off the books by losing litigants.”<sup>10</sup> From the beginning, the most important part of the Vacatur Center was the text of vacated and depublished decisions. In many instances, the only publicly available text of these vacated cases was in the Vacatur Center maintained by our firm. Recently, the continuing efforts of other parties, including Westlaw and LEXIS, and the willingness of many courts to publish many of their vacated decisions on the World Wide Web, has shifted the role of the Vacatur Center from less of an archive to more of a general information clearinghouse.

The remainder of this article discusses the development of the modern rules governing vacatur and the impact these generally more restrictive rules have had on a party’s ability to use the tool of vacatur to control precedent. The article then discusses depublishation, which presents the same dangers as vacatur and has increased significantly while the use of vacatur has decreased. The article concludes with a discussion of the trend, growing through private efforts and the willingness of courts to publish on the World Wide Web, to make vacated and depublished decisions generally available.<sup>11</sup>

## II. THE COURTS’ EFFORTS TO RESTRICT VACATUR

Since 1996, when the Supreme Court announced in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*<sup>12</sup> a narrow approach to vacatur after a settlement between the parties moots

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9. Supp. Opposition of Def. Am. Cas. Co. of Reading, Pa. to Pl.’s Mot. for Partial S.J. with Respect to the Price Landfill Claims at 8 n. 5, *Johnson Matthey, Inc. v. Pa. Mfrs. Assn. Ins. Co.*, No. L-78660-87 (N.J. Super., App. Div. May 16, 1993).

10. Anderson Kill & Olick, *Vacatur Center* <[http://www.andersonkill.com/Vacatur\\_Center/Vacatur\\_Center.asp](http://www.andersonkill.com/Vacatur_Center/Vacatur_Center.asp)> (last updated Nov. 26, 2002).

11. Although some authors use the terms interchangeably, in this article the word “vacatur” will refer to decisions that are vacated at the request of the parties, and “depublishation” will refer to decisions that are not officially published as more than an administrative decision by the court.

12. 513 U.S. 18, 28 (1994).

the case on appeal, the formerly widespread use of motions to vacate in the federal circuits has been discouraged.

### A. *Bonner Mall and Its Federal Progeny*

The leading United States Supreme Court decision on vacatur holds that “mootness by reason of settlement does not justify vacatur of a judgment under review.”<sup>13</sup> Vacatur may be granted only after a showing of “exceptional circumstances” that establish “equitable entitlement to the extraordinary remedy of vacatur.”<sup>14</sup>

Essential policy considerations supporting our legal system underlie the decision. “Some litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.”<sup>15</sup> The court recognized, however, that

“[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.” . . . To allow a party . . . to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.<sup>16</sup>

The reasoning of *Bonner Mall* was not novel,<sup>17</sup> but it established a consistent approach for federal courts. Indeed,

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13. *Id.* (stating that “exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur”).

14. *Id.* at 26 (stating further that “[i]t is petitioner’s burden as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur”).

15. *Id.* at 28 (emphasis omitted).

16. *Id.* at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993)).

17. See *Meml. Hosp. of Iowa City v. U.S. Dept. of Health & Human Servs.*, 862 F.2d 1299, 1300 (7th Cir. 1988) (explaining that the Seventh Circuit routinely denies requests to vacate opinions because “an opinion is a public act of the government, which may not be expunged by private agreement”); *Benavides v. Jackson Natl. Life Ins. Co.*, 820 F. Supp. 1284, 1289 (D. Colo. 1993) (noting that post-settlement vacatur “provides no incentive for

although *Bonner Mall* dealt solely with appellate vacatur, federal district courts have echoed the Supreme Court's policy concerns that in heavily litigated areas (e.g., employment discrimination) the development of decisional law provides guidance to both private parties and appellate courts.<sup>18</sup> The Fourth Circuit, holding that vacatur in the district court was equally limited, expressly relied upon the equitable considerations in *Bonner Mall*, and noted that it "could discern no reason why . . . the general presumption against vacatur, which arises by virtue of the extraordinary nature of that relief, should be different for the district court than for the appellate court,"<sup>19</sup> The Fourth Circuit found that "[o]nly the Ninth Circuit—and it only arguably—has rejected the view that the standards set forth in [*Bonner Mall*] should also be relevant to a district court's vacatur decision under Rule 60(b)(6)."<sup>20</sup>

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early settlement" and "encourages litigants to roll the dice," and finding the view that vacatur encourages settlement "empirically unsupported" and contrary to the court's experience); see also *Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991) (quoting *Meml. Hosp.*, 862 F.2d at 1302).

18. See *Carter v. Rosenberg & Estis, P.C.*, No. 95 CIV. 10439 (DLC), 1999 WL 13036, \*3 (S.D.N.Y. Jan. 13, 1999) (stating further that vacatur will discourage parties from settling prior to the rendering of a judgment). A federal circuit court is empowered to vacate a decision under 28 U.S.C. § 1026, while a federal district court may vacate a decision under Fed. R. Civ. P. 60(b).

19. *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 118 (4th Cir. 2000) (citing *Bonner Mall*, 513 U.S. at 26-27).

20. *Id.* at 121 (citing the Ninth Circuit's decision in *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998) (reaffirming a broad equitable balancing test that allows a district court to "decide whether to vacate its judgment in light of 'the consequences and attendant hardships of dismissal or refusal to dismiss' and 'the competing values of finality of judgment and right to relitigation of unreviewed disputes'" (citing *Dilley v. Gunn*, 64 F.3d 1365, 1370-71 (9th Cir. 1995))); see also *Aqua Marine Supply v. AIM Machining, Inc.*, 247 F.3d 1216 (Fed. Cir. 2001) (holding no "exceptional circumstances" where losing party settles); *The Medical Prof. Mut. Ins. Co. v. Breon Lab., Inc.*, 141 F.3d 372, 376 (1st Cir. 1998) (refusing to vacate a settled case where contribution issues were determined); *Pressley Ridge Sch. v. Shimer*, 134 F.3d 1218, 1222 (4th Cir. 1998) (denying a motion to vacate where the mootness resulted from the losing party's decision to settle); *Amoco Oil Co. v. U.S. E.P.A.*, 231 F.3d 694, 699 (10th Cir. 2000) (holding that entering into a consent decree that mooted the appeal did not constitute "exceptional circumstances" and was analogous to settlement); *Krolkowski v. Volanti*, No. 95 C 1254, 1996 WL 451307 (N.D. Ill. Aug. 7, 1996) (finding no "exceptional circumstances" where parties settled and judgment involved punitive damages).

### B. State Court Decisions after *Bonner Mall*

New York, almost immediately after *Bonner Mall* was decided, adopted the reasoning of that decision, and its courts generally refuse to vacate decisions made moot by settlement, absent some overriding consideration mitigating in favor of vacatur.<sup>21</sup> Oregon also recognized the reasoning of *Bonner Mall* shortly after it was rendered.<sup>22</sup> However, more recent decisions from that state leave the state of the law somewhat unclear.<sup>23</sup> Similarly, Connecticut has recognized the presumptive validity of judgments and used the burden created by *Bonner Mall* as a standard.<sup>24</sup> Even though the standard has not been consistently applied in Connecticut to refuse to vacate after a settlement,<sup>25</sup> the ideal that a party should not be permitted to wipe a case out of the law by settling is supported.<sup>26</sup>

The Court of Appeals for the District of Columbia also has adopted the reasoning of *Bonner Mall*, stating that “if the parties have settled the case [on appeal] the proper course of action is to dismiss the appeal as moot.”<sup>27</sup> Similarly, Illinois appellate courts

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21. See *Paramount Communications v. Gibraltar Cas. Co.*, 623 N.Y.S.2d 850, 850 (App. Div., 1st Dept. 1995) (stating “we do not believe it would be advisable to allow private parties to believe that the Court eradicate precedent which they personally find unacceptable” and citing *Bonner Mall*).

22. See *Lowe v. Keisling*, 889 P.2d 916, 918 (Or. 1995) (Unis, J., dissenting) (citing *Bonner Mall* reasoning to support his position that vacatur, rather than the dismissal ordered by the majority, was appropriate when a petition for review is moot because disputed election already took place).

23. See *First Commerce of Am., Inc. v. Nimbus Ctr. Assocs.*, 986 P.2d 556, 561 (Or. 1999) (stating that the general practice should be to vacate mooted decisions and vacating decision involving third-party claims that were mooted when the first-party claims were dismissed) (citing dissent in *Lowe v. Keisling*, 889 P.2d at 918).

24. See *Commr. of Motor Vehicles v. DeMilo & Co., Inc.*, 659 A.2d 148, 159 (Conn. 1995) (citing policy in *Bonner Mall* when recognizing the viability of a lower court judgment, even when its appeal was rendered moot).

25. See *Taft v. Wheelabrator Putnam, Inc.*, 763 A.2d 1044 (Conn. 2000) (granting motion to vacate after settlement on appeal).

26. See *id.* at 1044 (McDonald, C.J., dissenting) (stating that where the parties settled on appeal, the circumstances “present[ed] a classic example of when vacatur is not appropriate” and citing *Bonner Mall*).

27. *Milar Elevator Co. v. D.C. Dept. of Empl. Servs.*, 704 A.2d 291, 293 (D.C. Cir. 1997) (stating that some states apply the exception to this rule when an issue of public importance is before the court). Although the Court of Appeals for the District of Columbia is a federal court, its decision is discussed in this section of the article because this case involved a local government authority.

have refused to grant vacatur where parties have not pursued their statutory remedies to decisions or even challenged the correctness of the decision sought to be vacated.<sup>28</sup> Missouri courts have used permissive language to describe a court's ability to vacate, but they have restricted that ability in situations where a party seeks vacatur after seeking settlement.<sup>29</sup> Other states have adopted positions similar to that taken in *Bonner Mall*.<sup>30</sup>

The decisions of the California and Texas state courts represent the minority view, favoring vacatur of cases upon the parties' request following settlement.<sup>31</sup>

### 1. California

The California Supreme Court ruled in *Neary v. Regents of the University of California*, that vacatur should be granted when sought by stipulated motion "absent a showing of extraordinary circumstances that warrant an exception to this general rule."<sup>32</sup> *Neary* flips the burden of proof upon the party not seeking vacatur, who presumably stipulated to the motion, or

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28. *Chicago City Day Sch. v. City of Chicago*, 681 N.E.2d 126, 129 (Ill. App., 1st Dist., 2d Div. 1997). This case presents circumstances similar to those in *19 Solid Waste Dept. Mech. v. City of Albuquerque*, 76 F.3d 1142 (10th Cir. 1996), in which the Tenth Circuit also denied vacatur where a municipality changed a local law to moot a prior dispute and then sought to vacate that prior decision.

29. *State v. City of Kansas City*, 968 S.W.2d 232, 243 (Mo. App., W. Dist. 1998) (holding "that the normal practice should be to vacate the judgment when one or more parties requests such action in a case moot on appeal. Except where equity demands otherwise, a motion for vacation made by a party who had no control over the mooted event should be granted, at least as to that party.").

30. See e.g. *Dowell v. Dennis*, 998 P.2d 206, 213 (Okla. App., 3d Div. 1999) (citing to *Bonner Mall* and adopting the "exceptional circumstances" standard).

31. Wisconsin also appears to have come down on the minority side of the question. See *Mason Shoe Mfg. Co. v. Firststar Bank Eau Claire, NA*, 596 N.W.2d 373, 374 (Wis. 1999). However, the dissent in *Mason Shoe* relies on *Bonner Mall*. *Id.* (Bradley, J., dissenting).

32. 834 P.2d 119, 121, 122-23 (Cal. 1992) (stating that "[s]imple fairness requires that the first and most weighty consideration be given to the parties' interests and that they be accommodated except in the extraordinary case"); see also Charles House, *Appellate Counsellor Memos, Stipulated Reversals and Vacatur* <<http://www.appellate-counsellor.com/memos/vacatur.htm>> (July 21, 1998) (explaining the California approach to vacatur and distinguishing it from the federal approach).



upon the court to sua sponte determine that there is a countervailing public policy interest mitigating against vacatur.<sup>33</sup>

However, even the California Supreme Court has had to limit the extent of the presumption created by *Neary*. In later decisions, that court has distinguished between a stipulated motion to vacate a trial judgment and a dismissal of an appellate decision.<sup>34</sup> The distinction is two pronged:

First, in *Neary*, we stressed the efficiency of effectuating settlements and thereby avoiding further litigation. As the case proceeds further into the appellate process, however, especially after an appellate decision is actually rendered, more is eradicated by a settlement, and less is gained by the avoidance of further litigation. Second, stipulating that the Court of Appeal opinion not be published and that we not render our own decision would effectively eliminate a precedent-setting appellate decision. As *Neary* itself stressed, “[T]rial courts make no binding precedents.” . . . Published appellate decisions do.<sup>35</sup>

The California Supreme Court has had to limit its broad rule to prevent its own decision from, presumably, being flaunted by well-funded parties who, in the face of an adverse decision, can simply disregard the ruling and the applicable rule of law by settling contingent upon vacation of the adverse decision.<sup>36</sup> Despite its statement that the most weighty consideration be given to the parties’ interests, the California Supreme Court is not willing to permit its own appellate

33. See *Morrow v. Hood Commun., Inc.*, 59 Cal. App. 4<sup>th</sup> 924, 926 (Cal. App., Dist. 1, Div. 2 1997) (granting a stipulated reversal where the submission to the court did not evidence “extraordinary circumstances” under *Neary*). However, the majority stated that although it was bound to follow *Neary*, stare decisis did not prevent it “from respectfully stating [its] agreement with the fundamental principles set forth by Presiding Justice Kline in his dissent” *Id.* at 926. Justice Kline’s dissent argues that *Neary* represents a minority view that was repudiated by the Supreme Court in *Bonner Mall* and undermines the integrity of the judicial process by effectuating the will of private parties in place of the rule of law. See *id.* at 927-28.

34. *State Lands Commn. v. Super. Ct.*, 900 P.2d 648, 654 (Cal. 1995).

35. *Id.* (citation omitted).

36. In so doing, the California courts note publication as an important difference between a trial court judgment and an appellate decision, recognizing that a precedent-setting decision should not be permitted to be depublished by the parties. However, as discussed below, California courts publish less than ten percent of their appellate decisions. See also Committee for the Rule of Law, *Court Statistics Report* <<http://www.nonpublication.com/statistics.html>> (last updated December 1, 2002).

decisions to be disregarded, no matter the interests of the parties. However, parties are still free to buy their way out of an adverse judgment from a lower court.

## 2. Texas

Texas courts have approached the issue of vacatur similarly, making a point of *not* following the reasoning of *Bonner Mall* because that decision “is not binding precedent because the issue decided was one of federal procedural law” not state procedural law.<sup>37</sup> The court in *Panterra* then vacated the lower court judgment and dismissed the appeal, under the “long standing” Texas law that when an appeal is mooted, for whatever reason, “all previous orders are set aside by the appellate court and the cause is dismissed.”<sup>38</sup>

The *Panterra* approach continues to be the Texas approach today.<sup>39</sup> Despite Texas’s slightly more progressive approach to depublication,<sup>40</sup> it still maintains a system in which state court decisions may be vacated simply by stipulated motion. Thus, litigants remain free to purchase freedom from an adverse ruling by paying the opposing party in order to file a stipulated motion to dismiss. It appears that, even distinguishing itself from California, Texas will vacate a decision at any level, appellate or otherwise.<sup>41</sup>

### C. Two Areas Where the Use of Vacatur Has Continued

Although *Bonner Mall* has served to reduce the amount of vacated decisions, courts justify the use of vacatur in cases involving intellectual property claims and cases involving a government agency as a litigant.

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37. *Panterra Corp. v. Am. Dairy Queen*, 908 S.W.2d 300, 300-301 (Tex App. 1995) (granting vacatur and citing multiple Texas Supreme Court decisions as authority).

38. *Id.*

39. *See Weatherford Intl. v. Baker Hughes, Inc.*, No. 01-00-00191-CV, 2001 WL 665584, \*1 (June 14, 2001) (stating that a party’s reliance on *Bonner Mall* was misplaced as that decision is contrary to Texas procedural law).

40. *See infra* n. 96 and accompanying text.

41. *Panterra*, 908 S.W.2d at 300 (stating that Texas’ broad rule is that “when a case becomes moot while on appeal, *all previous orders are set aside* by the appellate court and the cause is dismissed) (emphasis original) (citation omitted).

### *1. Protection of Intellectual Property*

Cases brought to protect one party's intellectual property often involve unique circumstances that courts have held are "extraordinary" under the *Bonner Mall* standard. Specifically, these situations have been held to be extraordinary, and therefore appropriate for vacatur, when the defending party faces a financially devastating judgment, when the challenging party cannot settle without risking collateral attacks that would deprive it of its trademark, and when the public interest in the publication of the district court opinion is minimal.

For example, in *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*, the Second Circuit granted a stipulated motion to vacate a decision that had denied a motion to enjoin defendant Pacific's use of plaintiff MLB's trademarks.<sup>42</sup> Pacific had prevailed in opposing MLB's motion for a preliminary injunction, but the circuit court indicated, after a hearing on an expedited appeal, that the court would grant the injunction and gave the parties time to agree to a bond amount.<sup>43</sup> During that time, the parties settled the lawsuit because an injunction would have been financially ruinous for the defendant. However, the plaintiff could not settle unless the lower court decision was vacated. Plaintiff had to continue to test the merits of the lower court's decision or risk losing its trademarks.<sup>44</sup> The court found exceptional circumstances as "the victor in the district court wanted a settlement as much as, or more than, the loser did. . . . The only damage to the public interest from such a vacatur would be that the validity of [plaintiff's] marks would be left to future litigation."<sup>45</sup>

Applying similar reasoning, the District of Utah granted a joint motion to vacate a judgment for \$26 million against a defendant for trademark infringement, unfair competition, and false advertising.<sup>46</sup> Plaintiff Novell, a computer software

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42. 150 F.3d 149 (2d Cir. 1998).

43. *Id.* at 150.

44. *Id.* at 152. Plaintiff had a duty to defend its marks against all infringers or be subject to the defense of acquiescence. *Id.* Therefore, plaintiff could not leave the district court decision intact and had to either pursue an injunction in the circuit court or obtain a vacatur as part of the settlement.

45. *Id.*

46. *Novell, Inc. v. Network Trading Ctr., Inc.*, 187 F.R.D. 657 (D. Utah 1999).

producer, had sued defendant Network Trading Center, Inc. (NTC) for illegal resale of its computer software. The huge judgment against NTC was destroying its business and the parties eventually reached a settlement while their appeal to the Tenth Circuit was pending.<sup>47</sup> The settlement was contingent on the vacatur of the district court's decision to grant summary judgment denying plaintiff's copyright claims.<sup>48</sup>

Citing *Bonner Mall* and *MLB Properties*, the Tenth Circuit granted the motion to vacate. The "crushing amount" of the judgment, NTC's counsel's unequivocal representations of the desperate final position of the defendants and Novell's status as a "repeat player" with other pending and potential cases against alleged infringers gave it a "substantial interest in partially vacating this court's judgment and settling the case."<sup>49</sup> These facts constituted "exceptional circumstances" under *Bonner Mall*.

However, in a patent case, the Federal Circuit refused to find "exceptional circumstances" where plaintiff Aqua Marine had other means of protecting its patent. Aqua Marine settled after bringing a patent infringement case and losing on summary judgment to defendant AIM Machining, Inc., on technical grounds.<sup>50</sup> The settlement agreement required the parties to submit a joint proposed order vacating the district court judgment holding the subject patent invalid.<sup>51</sup> The district court denied the motion to vacate and declared the patent issue not to be moot.<sup>52</sup>

The Federal Circuit denied the motion to vacate as well because "the defendants' lack of continuing interest in the validity of the 1919 patent is the result of Aqua Marine's own

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47. *Id.* at 659.

48. *Id.* Notably, the parties agreed to leave intact the remainder of the lower court's decision and judgment.

49. *Id.* at 661. A very similar decision was reached in *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998) (vacating where issues became moot due to a merger and noting that "[w]ithout the vacatur [the copyright holder] would lose the right to have the adverse copyright decision reviewed by an appellate court").

50. *Aqua Marine Supply v. AIM Machining, Inc.*, 247 F.3d 1216 (Fed. Cir. 2001). The district court applied the "on sale" rule to find the plaintiff's patent invalid because it had been on sale for over one year prior to the filing of the patent application.

51. *Id.* at 1218-19.

52. *Id.* at 1219.

action entering into the [settlement] Agreement.”<sup>53</sup> Therefore, the court found no “exceptional circumstances,” despite Aqua Marine’s concern that the judgment of invalidity could be used by another infringer to defend against an infringement suit. The court noted that “Aqua Marine could avoid collateral estoppel by arguing that it did not have a full and fair opportunity to litigate the issue of invalidity.”<sup>54</sup>

## 2. Government Agency as a Litigant

In cases involving a government agent as a litigant, either as an arbiter of the dispute prior to an appeal to a district court or as a government agency that is a true litigant prior to an appeal of a judgment against that agency, the courts have recognized legitimate concerns of the government agency as a repeat litigant, but have balanced those concerns against the needs of the private litigants.

In *Am. Family Life Assur. Co. of Columbus v. FCC*, the District Court for the District of Columbia granted a motion to vacate an FCC finding that plaintiff AFLAC, then a licensee of six television stations, had violated a regulation by refusing to sell time to presidential candidates (the Dole-Kemp Campaign) unless they agreed to a forum-selection clause.<sup>55</sup> AFLAC sought to vacate the FCC finding on the grounds that it had sold its interests in the television stations after the FCC ruling but before the district court’s decision.

AFLAC wanted the FCC decisions vacated because the state statute of limitations on some of the offending contracts had not run and it feared it could be sued.<sup>56</sup> The FCC had a continuing interest in regulating offending forum selection clauses, and thus wanted the finding to remain in place.<sup>57</sup> The court vacated, despite the FCC’s continuing interest as a “repeat player,” but a key factor was that AFLAC did not settle with the FCC. AFLAC had announced the sale of its television station

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53. *Id.* at 1221.

54. *Id.*

55. 129 F.3d 625 (D.D.C. 1997).

56. *Id.* at 627-28.

57. *Id.*

interests before Dole-Kemp even complained and AFLAC had not sold the interests to moot the case.<sup>58</sup>

In *19 Solid Waste Department Mechanics v. City of Albuquerque*, the Tenth Circuit refused to vacate a decision where nineteen city employees challenged the drug testing policy of the City of Albuquerque and prevailed before the district court.<sup>59</sup> At oral argument before the circuit court, the city revealed that it had withdrawn the policy at issue and subsequently moved for a declaration of mootness.<sup>60</sup> The circuit court found the case to have become moot, but denied the city's motion to vacate because "the City unquestionably caused the mootness by withdrawing the policy."<sup>61</sup> The court further found that the city's argument that the decision should be vacated because it was wrong "collide[d] head on with the Supreme Court's admonition that a party should not be allowed to use vacatur as a refined form of collateral attack."<sup>62</sup>

In contrast, the First Circuit in *Motta v. INS* recognized the INS as a "repeat player" with legitimate interests, after the parties had settled, in a vacatur of the district court decision granting plaintiff Motta a writ of habeas corpus.<sup>63</sup> The court saw no prohibition of vacatur by *Bonner Mall* because "[t]he INS did not by its own initiative relinquish its right to vacatur . . . . Rather, the INS has at all times sought to pursue its appeal; it has agreed to consider settlement only at the suggestion of this Court."<sup>64</sup> The court granted the vacatur, noting "[h]ere, the INS,

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58. *Id.* at 630-31. In *Panhandle E. Pipe Line Co. v. Fed. Energy Reg. Commn.*, 198 F.3d 266 (D.D.C. 1999), the same court reviewing another agency decision refused to consider whether vacatur was appropriate to vacate two opinions of the Federal Energy Regulation Committee (FERC), where those opinions were rendered moot by settlement between the energy provider, Panhandle Eastern Pipe Line Co., and its customers. The court held that the FERC opinions were only "policy statements," not final rulings, and had no "binding norm" for the parties. *Id.* at 269 (citing 15 U.S.C. § 717r(b) (Section 19(b) of the NGA) which requires a party seeking judicial review to be an aggrieved party). The FERC had "confused matters somewhat . . . by noting the 'ongoing precedential value' of the challenged opinions," but the court placed more weight on the "FERC's failure to issue final judgments on the merits" and on the fact that "Panhandle's rates for the relevant time periods were set by the settlement agreement," not the FERC opinions. *Id.* at 269-70.

59. 76 F.3d 1142 (10th Cir. 1996).

60. *Id.* at 1144.

61. *Id.*

62. *Id.* (citation omitted).

63. 61 F.3d 117 (1st Cir. 1995).

64. *Id.* at 118.

as a repeat player before the courts, is *primarily* concerned with the precedential effect of the decision below. If that decision stands, all possibility of a settlement is eliminated.”<sup>65</sup>

### III. THE INCREASING USE OF DEPUBLICATION WITH THE DECREASING USE OF VACATUR

In the years since *Bonner Mall*, our firm has become aware of fewer cases per year that have become vacated based on mootness by settlement.<sup>66</sup> However, this decline in the use of vacatur has coincided with the increase in the use of depublication by courts. It is estimated that eighty percent of the cases decided by federal appellate courts take the form of “unpublished” decisions.<sup>67</sup>

#### A. Eighth Circuit Approach: Anastasoff

In a ruling by Judge Richard Arnold, the Eighth Circuit declared that its rule authorizing the depublication of case decisions, which designates a decision as having no precedential value, violates Article III of the United States Constitution by impermissibly allowing courts to determine which decisions will have a precedential effect.<sup>68</sup> “Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the constitution. . . . The judicial power of the United States is limited by the doctrine of precedent.”<sup>69</sup>

In arguing the unconstitutionality of depublication, Judge Arnold cited *Marbury v. Madison*<sup>70</sup> for the principle that

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65. *Id.* (emphasis original).

66. Indeed, Anderson Kill has noticed a steady decline in the number of submissions for its own Vacatur Center maintained at its web site.

67. See H.R. Jud. Subcomm. on Courts, the Internet and Intellectual Property, *Statement of Arthur D. Hellman* (June 27, 2002) (presenting persuasive argument in favor of rules permitting litigants to cite to unpublished decisions, even if courts are permitted to designate such decisions as non-binding).

68. *Anastasoff v. U.S.*, 223 F.3d 898, 905 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

69. *Id.* at 905 (reaching its decision after a discussion of the intent of the framers with regard to the binding nature of case decisions on future litigants).

70. 5 U.S. 137 (1803).

“[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law . . . authoritative to the extent necessary for the decision, and must be applied in subsequent cases.”<sup>71</sup> He further traced the origins of that principle back through English common law. This history teaches that “[b]ecause precedents are the ‘best and most authoritative’ guide of what the law is, the judicial power is limited by them.”<sup>72</sup>

In the United States, judicial precedents assist in maintaining a separation of powers in that they require courts to pronounce the law as it is, “rather than ‘will’ about what it should be,” and they remove subjects from “arbitrary judges, whose decisions would then be regulated only by their own opinions.”<sup>73</sup> The opinion is careful to note that it is not about specifically whether an opinion should be “unpublished,” but whether a court may deem a decision not to constitute binding precedent.<sup>74</sup>

Judge Arnold’s decision in *Anastasoff* has sparked debate among commentators and, in part, prompted a legislative look into the practice of depublishation.<sup>75</sup> One commentator expresses a view that, in terms of legal theory, the very danger *Anastasoff* warns against—judicial decisions without a rule of law—is in fact the norm in our judicial system.<sup>76</sup> Mr. Schmier describes specifically the authority in the Ninth Circuit that he argues grants courts in that circuit freedom “to make decisions that do

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71. *Anastasoff*, 223 F.3d at 899-900.

72. *Id.* at 901 (citing 3 Sir William W. Blackstone, *Commentaries on the Laws of England* 25).

73. *Id.* at 901-02 (citing, *inter alia*, 1 Sir William W. Blackstone, *Commentaries on the Laws of England*, \*258-59 and *The Federalist No. 78*, at 507-08).

74. *Id.* at 904 (stating that “So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk’s office and pay a per-page fee, but you can get the opinion if you want it. Indeed most appellate courts now make their opinions, whether labeled ‘published’ or not, available to anyone on line”).

75. See H.R. Jud. Subcomm. on Courts, the Internet and Intellectual Property, *Statement of Arthur D. Hellman* (June 27, 2002).

76. See H.R. Jud. Subcomm. on Courts, the Internet and Intellectual Property, *Statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law* (June 27, 2002) (stating that the law of precedents, “a fundamental element of the rule of law, has been rendered ineffective . . . because the vast majority of our court determinations are now made in unpublished, unciteable, nonprecedential decisions, but [it] would be equally true if only a fraction of one percent of decisions were allowed to be so made”).



not create precedent,” requiring them “to ignore all cases marked unpublished no matter how relevant,” and giving them freedom “to make law of ephemeral application.”<sup>77</sup>

### *B. Ninth Circuit Approach: Hart*

Judge Alex Kozinski of the Ninth Circuit issued an opinion meant to address the arguments raised in the *Anastasoff* decision.<sup>78</sup> The opinion states that applying Eighteenth Century theories to modern issues creates the danger of freezing certain aspects of the law, despite that other aspects continue to change.<sup>79</sup> It also points out that “[t]he overwhelming consensus in the legal community,” including every federal circuit and all but four states (Connecticut, Delaware, New York and North Dakota), have rules limiting the precedential effect of unpublished decisions.<sup>80</sup>

Judge Kozinski argues that the English common law judges and jurisprudence were much more flexible than described by *Anastasoff*, and that case decisions were not pronouncements of law, but the result of research of past decisions and that even those reported decisions were often not verbatim and were prepared by independent reporters.<sup>81</sup> Thus, the opinion states that

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77. *Id.*

78. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001)

79. *Id.* at 1162-1163 (faulting reasoning in *Anastasoff* for relying on Eighteenth Century historical context and arguments).

80. *Id.* at 1163 n. 7 (using this majority stance to argue that *Anastasoff* attempts to color past practices as more adherent to precedent when in fact the “concept of precedent today is far stricter”). However, only the First, Second, Seventh, Ninth, and Federal Circuits actually ban citation to unpublished opinions. Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. of App. Prac. & Proc. 1, 4 (2002) (citing the rules of each circuit). The other eight circuits “discourage citation of unpublished opinions, typically calling it ‘disfavored,’ but grudgingly allow it.” *Id.* Only the Fourth, Sixth, and D.C. Circuits permit citation to unpublished decisions for precedential value, while the Fifth, Eighth, Tenth, and Eleventh Circuits permit citation to unpublished decisions only as persuasive authority. *Id.* at 5. These numbers generally are confirmed by testimony given before the U.S. House of Representatives, Subcommittee on Courts, the Internet and Intellectual Property. See H.R. Jud. Subcomm. on Courts, the Internet and Intellectual Property, *Statement of the Honorable Samuel A. Alito, Jr.* (June 27, 2002). However, his testimony omitted discussion of the Second and Federal Circuits and labeled the Fourth Circuit as only permitting limited citation of unpublished cases and the Fifth Circuit as giving persuasive value to such decisions.

81. *Hart*, 266 F.3d at 1166-67 (citing the practices of Lord Coke and Lord Mansfield).

modern adherence to each opinion as a complete rule of law precedent only developed once there was a rigid hierarchy of courts, with courts binding those below them,<sup>82</sup> and makes “[d]esignating an opinion as binding circuit authority [] a weighty decision that cannot be taken lightly.”<sup>83</sup>

Judge Kozinski concludes by stating that “the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy.”<sup>84</sup> *Anastasoff* limits this power and precludes circuit courts “from developing a coherent and internally consistent body of caselaw to serve as binding authority.”<sup>85</sup> No precedential effect should be granted to an unpublished decision which “is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court’s decision.”<sup>86</sup>

### C. *Reactions to Anastasoff and Hart*

The decisions in *Anastasoff* and *Hart* set the stage for a split among judges and scholars. Commentators point to the dissenting opinion of Justices Scalia, Stevens, and Thomas as support for Judge Arnold’s position in *Anastasoff*.<sup>87</sup> Similarly,

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82. *Id.* at 1175.

83. *Id.* at 1172. Interestingly, in attempting to argue that even today English courts do not recognize all decisions, Judge Kozinski argues that English Court of Appeal only publishes approximately thirty-nine percent of its opinions. *Id.* at 1169 n. 23. This percentage is far more than the figure reported for United States court publication to the House Subcommittee on Courts, the Internet and Intellectual Property on June 27, 2002 which was twenty percent. See H.R. Jud. Subcomm. on Courts, the Internet and Intellectual Property (June 27, 2002).

84. *Id.* at 1175.

85. *Id.* at 1176 (describing how a “rule of decision” must not be announced, but selected after considering the instant facts and countless permutations and be stated with precision).

86. *Id.* at 1178. Though this statement is meant to explain why unpublished decisions should not be binding, it supports the view that courts should be made to fully review and decide each case. See *Anastasoff*, 223 F.3d at 904 (stating that if there is insufficient time to fully review each case, the remedy “is to create enough judgeships to handle the volume,” not to create an “underground body of law”).

87. See Howard J. Bashman, *2002 Brings New Developments in Controversy Over the Precedential Status of Unpublished Appellate Opinions* <<http://www.bipc.com/articles-sz/unpublishedopinions.htm>> (visited December 5, 2002) (noting that Justices Scalia, Stevens and Thomas, in deciding *Rogers v. Tenn.*, 532 U.S. 451 (2001) (Scalia, J., dissenting), supported Judge Arnold’s “understanding of the role of *stare decisis* at the

judges from other circuits have supported Judge Arnold's opinion in dissent or concurring opinions.<sup>88</sup> The United States Bankruptcy Court for the District of New Jersey cited *Anastasoff* and recognized the importance of precedent, but then ignored a prior unreported decision by relying on the Supreme Court decision in *Payne v. Tennessee*<sup>89</sup> for the proposition that stare decisis is a "principle of policy, and not an inexorable command."<sup>90</sup>

The Third Circuit, which has a somewhat unique rule that does not prohibit citation of unpublished decisions by litigants but prohibits the court from citing such decisions as precedent,<sup>91</sup> recently resolved to make its unpublished opinions available on its own website.<sup>92</sup>

State courts have gone both ways in assessing whether to give precedential value to unpublished decisions.<sup>93</sup> California completely bans citation of unpublished decisions, except in very limited circumstances.<sup>94</sup> Arizona has adopted depublication rules echoing the narrow exceptions of California's rules.<sup>95</sup> Texas has drawn a distinction between civil cases and criminal cases. The Texas Supreme Court ordered that unpublished civil cases may be cited, but do not have precedential weight. The

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time of the Constitution's framing"). The five justices in the majority also agreed with Justice Scalia's dissent on this point.

88. *Id.* "Other highly-regarded federal appellate judges have stated views similar to those found in Judge Arnold's decision in *Anastasoff*." Then-Chief Judge William J. Holloway, Jr. of the Tenth Circuit, in a dissent joined by Judges James E. Barrett and Bobby R. Baldock, questioned the practice of denying precedential status to unpublished appellate opinions, in *In re Tenth Circuit Rules*, 955 F.2d 36 (10th Cir. 1992) (Holloway, C.J., dissenting), as has retired D.C. Circuit Judge Patricia M. Wald, *National Classification Comm. v. U.S.*, 765 F.2d 164 (D.C. Cir. 1985) (Wald, J., writing separately) (remarking on "the unfortunate by-products of the overuse of this rapidly growing mode of disposition").

89. 501 U.S. 808, 828 (1991).

90. *In re Mays*, 256 B.R. 555 (Bankr. D.N.J. 2000) (citing *Anastasoff*; *Mays* was decided before *Hart*).

91. See Internal Operating Proc. of the Third Cir. 5.7 (July 1, 2002) (available at <<http://www.ca3.uscourts.gov>> (visited December 5, 2002)).

92. See *Bashman*, *supra* n. 87.

93. See *Dwyer v. J.I. Kislak Mtg. Corp.*, 13 P.3d 240 (Wash. App., 1st Div. 2000) (imposing a fine against counsel for citing unpublished opinion).

94. See Cal. R. of Ct. 977 (West 2002).

95. See Az. Sup. Ct. R. 111 (West 2002); see also Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 Ariz. St. L.J. 175, 186 (2000) (providing an in-depth analysis of the application and effects of Arizona's depublication rules).

Texas Court of Criminal Appeals ruled that unpublished criminal cases may not be cited at all.<sup>96</sup> Texas' newly revised Rule 47 of the Texas Rules of Appellate Procedure will permit citation to depublished cases accordingly.

#### IV. OTHER EFFORTS AGAINST VACATUR AND DEPUBLICATION

##### *A. The American Bar Association*

The ABA resolved, as of August 2001, to “[o]ppose prohibitions against citing or relying on unpublished opinions by federal appellate courts and urge such courts to make their unpublished decisions widely available and to permit citation to relevant unpublished opinions.”<sup>97</sup>

##### *B. Activists*

Two of the most ardent activists, if not the most, working against the use of vacatur and depublishation are Michael and Kenneth Schmier. They have received media attention for their efforts and have taken on the Ninth Circuit's depublishation practice in a lawsuit.<sup>98</sup>

In November 2000, Michael Schmier filed a lawsuit in the Northern District of California against the Ninth Circuit alleging that the Circuit's Local Rule 36-3, prohibiting citation of unpublished cases, violated his constitutional rights. The district court dismissed the action for lack of standing.<sup>99</sup> The district court based its dismissal on the fact that Michael Schmier had never been penalized for citing to an unpublished decision. The circuit court decision affirmed that reasoning. “Simply put, Schmier has failed to allege any action by the Ninth Circuit that

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96. Mary Alice Robbins, *Texas Courts Split on “Do Not Publish” Designation*, 18 Tex. Law. 1 (August 13, 2002).

97. See *American Bar Association Legislative Issues* <<http://www.abanet.org/poladv/legiss.pdf>> (current through October 2002).

98. See Gary Young, *Rule Crusader*, Natl. L.J. A1 (June 24-July 1, 2002).

99. *Schmier v. U.S. Ct. of Appeals for the Ninth Cir.*, 279 F.3d 817, 819 (9th Cir. 2002). Michael was represented by his brother Kenneth in this case and the judges of the Ninth Circuit all recused themselves, leaving the case to be decided by a three-judge panel with each judge sitting by designation.

has immediately and personally subjected him to sanctions or has adversely affected one or more of Schmier's clients in a Ninth Circuit litigation.<sup>100</sup>

Kenneth Schmier recently testified before the United States House of Representatives Subcommittee on Courts, the Internet and Intellectual Property during an oversight hearing on "Unpublished Judicial Opinions."<sup>101</sup> Mr. Schmier appeared at that hearing as chairman of the Committee for the Rule of Law. The Committee's website at [www.nonpublication.com](http://www.nonpublication.com) is an excellent resource, with quotes concerning the Ninth Circuit and California State court practices of forbidding litigants to rely on unpublished cases.

### *C. Congressional Hearings*

On June 27, 2002, the House Committee on the Judiciary held an oversight hearing.<sup>102</sup> At the hearing, Judge Kozinski of the Ninth Circuit was a witness and was joined by others, one of whom appeared to favor depublication abilities for the federal judiciary, and two of whom supported either an end to depublication or broad permission to cite and rely upon unpublished decisions.<sup>103</sup> The Department of Justice also has submitted a Submission of the United States Department of

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100. *Id.* at 822.

101. *See* Schmier Statement, *supra* n. 76.

102. The website for the United States House of Representatives Committee on the Judiciary, Subcommittee for Courts, the Internet and Intellectual Property states:

*F. Nonpublication of federal opinions* During an oversight hearing in the 106th Congress regarding the size and operations of the 9th Circuit, the Subcommittee learned that some opinions in that Circuit are not published. The Circuit's defense is that it is attempting to implement creative administrative practices that will generate resource savings, and involves only "easy-to-decide" cases for which there is clear and ample precedential authority. Still, the notion of not providing an explanation as to why an affected litigant actually lost a Federal case may not square with fundamental notions of due process. This issue needs to be considered in all judicial circuits.

*See* U.S. H. of Rep., Comm. On the Jud., 107th Cong. Comm. Oversight Plan <<http://www.house.gov/judiciary/oversight.htm>> (visited November 12, 2002).

103. The other witnesses were Professor Arthur Hellman of the University of Pittsburgh Law School; Kenneth Schmier, Chairman of the Committee for the Rule of Law; and the Honorable Samuel A. Alito, Jr., of the United States Court of Appeals for the Third Circuit. Judge Arnold, the author of the Eighth Circuit's *Anastasoff* decision, was not present.

Justice to the Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>104</sup>

## V. TECHNOLOGY THAT CHANGES THE REPORTING SYSTEM

### A. *Private Archival Sources*

Anderson Kill's Vacatur Center<sup>105</sup> was once a groundbreaking concept providing litigants with resources unavailable elsewhere, save the archives of institutional litigants such as insurance companies. However, today there are more options. Websites like [www.nonpublication.com](http://www.nonpublication.com) provide insight into the process of depublication and the rules of various states and circuits.

### B. *Electronic Reporting Services*

Perhaps one of the most important factors in improving the free flow of opinions, whether published or unpublished, is electronic reporting. Not only do decisions reach the public at impressively short rates of time, they are made available at low cost. Thus, judicial opinions are readily accessible.<sup>106</sup>

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104. That submission reads in part:

The Department is concerned that the courts of appeals do not have uniform rules on the citation and/or precedential value of unpublished opinions. The lack of such rules adds to confusion about the state of the law. We urge the development of such rules.

Department attorneys also noted a general concern about the availability of unpublished opinions. The availability of unpublished opinions, on computer databases or otherwise, varies from case to case and from circuit to circuit. The lack of uniform availability of decisions poses serious problems for litigants in all circuits by creating confusion about what the law is and where it can be found. Several circuits do post their opinions on the Internet or a comparably accessible database. We recommend that all circuits do so. Moreover, we support development of a publicly available database, with an appropriate media-neutral citation system, for long-term access to all federal judicial decisions.

105. The Vacatur Center can be accessed at <[http://www.andersonkill.com/Vacatur\\_Center/Vacatur\\_Center.asp](http://www.andersonkill.com/Vacatur_Center/Vacatur_Center.asp)> (last updated Dec. 23, 2002).

106. The facts in this section concerning reporting practices were verified by a helpful Westlaw representative.

Those judicial opinions that are deemed “unpublished” by the courts do not appear in the official Federal Reporter, or only appear as part of a table recording the fact that they were decided. Many of those unpublished decisions appear in full reported form on Westlaw and Lexis, however, the availability of those decisions to Westlaw and Lexis varies by Circuit.<sup>107</sup>

Over the course of the past year, West has launched its West’s Federal Appendix designed to report all available circuit court decisions in a new citation format just as if they were published decisions.<sup>108</sup> Such comprehensive reporting has permitted litigants to cite to decisions that a court has concluded are not important or do not involve novel questions of law. Even in circuits where unpublished decisions are not permitted to be reported, litigants have the opportunity to at least review all of the court’s decisions and cite to them if necessary.<sup>109</sup>

## VI. CONCLUSION

The trend making depublished decisions generally available is a success story of committed people working with new technology. Until vacated and depublished decisions can be commonly cited, however, the distortion of the judicial system will continue. While the federal court system and certain states have moved in the right direction, other states continue to assist repeat litigants in twisting the shape of precedent.

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107. See Barnett, *supra* n. 80, at 2 (describing how the Fifth and Eleventh Circuits do not provide West with any information beyond the decision itself as reported in a table).

108. *Id.* (describing the West press release for the Federal Appendix and reporting on an interview with a West representative). The First and Eighth Circuits already have established rules clarifying that the court’s designation as “unpublished” is not altered by West’s publication of a decision so designated. *Id.* In January 2002, the D.C. Circuit amended its citation rules to permit citation to unpublished decisions and permit litigants to argue, against a contrary presumption, that an unpublished decision is binding precedent on a particular issue. *Id.*; see also Bashman, *supra* n. 87.

109. See e.g. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (involving citation by counsel of a decision depublished by the Ninth Circuit).

