

APPELLATE LAW

Vacatur for Mootness

IN *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the Supreme Court clarified the standards for determining whether a lower court decision should be vacated when a case becomes moot on appeal. Vacatur is generally appropriate when a case becomes moot because of “happenstance” or developments unrelated to the litigation, or when the appellee’s actions moot the case, on the theory that the winner below should not be able to manipulate the judicial process to insulate its victory from appellate review.

By contrast, actions by the appellant that moot the case generally do not warrant vacatur, because the appellant has voluntarily relinquished its right of appeal. And, as a voluntary action by both sides, a settlement that moots a case does not warrant vacatur, even if the settlement agreement expressly calls for it.

These are not absolute rules, however. *Bonner Mall* made clear that vacatur is an equitable remedy, and that “exceptional circumstances” may justify vacating a decision below even when a settlement has mooted the case. *Id.* at 29. Over time, decisions applying *Bonner Mall* have yielded patterns of interest to the appellate practitioner, addressing what constitutes “exceptional circumstances,” what special considerations are involved when the government is one of the parties, whether third parties can challenge an order vacating a decision below, and whether district courts must apply

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the same standards in determining whether to vacate their own decisions on remand.

Vacatur more likely if lower court authority questioned

■ *Exceptional circumstances.* Courts appear more likely to find “exceptional

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■ circumstances” justifying vacatur where there is some doubt about the lower court’s authority to issue the ruling in question. See *Microsoft Corp. v. Bristol Tech. Inc.*, 250 F.3d 152, 155 (2d Cir. 2001) (vacating ruling on

punitive damages in part because district court’s authority to reach the issue was “subject to doubt”); *Kaw Nation v. Norton*, 405 F.3d 1317, 1324-25 (Fed. Cir. 2005) (vacating Interior Department Board ruling in part because the ruling may have been “beyond the Board’s jurisdiction”); *In re Gen. Motors Corp.*, No. 94-2435, 1995 U.S. App. Lexis 41270, at *4 (4th Cir. Feb. 17, 1995) (vacating discovery order in part because order improperly compelled disclosure of attorney-client privileged documents). The *Microsoft* court offered another reason for vacatur: The district court’s ruling was of limited precedential value because it construed a state statute, the interpretation of which would ultimately be determined by the state’s courts. 250 F.3d at 155.

In certain specialized areas of the law, courts have been more willing to find that “exceptional circumstances” justify vacatur following settlement. This is true in trademark cases, where as a matter of law a party may be compelled to continue to defend its trademark and therefore couldn’t settle if an adverse ruling were not vacated. In *Major League Baseball Profs. Inc. v. Pacific Trading Cards Inc.*, 150 F.3d 149 (2d Cir. 1998), the 2d U.S. Circuit Court of Appeals vacated a district court order denying Major League Baseball an injunction against an alleged infringer, acknowledging that MLB could not settle without vacatur because it “must defend its mark against all users or be subject to the defense of acquiescence.” *Id.* at 152; see also *Novell Inc. v. Network Trade Ctr. Inc.*, 187 F.R.D. 657, 661 (D. Utah 1999) (finding “exceptional circumstances” justifying vacatur after settlement where trademark holder had to be concerned about “pending and potential

cases against other alleged infringers”).

The public interest in a judicial ruling may weigh heavily against vacatur when a case has settled. In *Krolikowski v. Volanti*, No. 95C 1254, 1996 U.S. Dist. Lexis 11228, at *10 (N.D. Ill. Aug. 7, 1996), for example, the court refused to vacate a § 1983 jury verdict against police officers for unlawful conduct in part because vacating would undermine the deterrent purposes of § 1983. See also *Ryland Group Inc. v. Travelers Indem. Co.*, 2001 U.S. Dist. Lexis 14850, at *7 (W.D. Texas Feb. 15, 2001) (refusing vacatur where it would “eliminate from the public domain one of the few cases” addressing an important issue).

■ *Government cases.* Courts are sometimes more open to vacatur when the government is one of the parties settling the case. They recognize that government agencies, as “repeat players” in the courts, may have legitimate public policy concerns about the effect of an adverse precedent on the agencies’ future enforcement efforts, and therefore may find “exceptional circumstances” warranting vacatur of a ruling against the government. For example, the 1st Circuit vacated, as part of a settlement, a preliminary injunction barring Puerto Rico’s secretary of justice from pursuing an antitrust action against Wal-Mart, acknowledging the future impact of the ruling on the secretary as the commonwealth’s “chief enforcement officer.” *Wal-Mart Stores Inc. v. Rodriguez*, 322 F.3d 747, 749-50 (1st Cir. 2003). That court earlier vacated a district court order in a deportation case, *Motta v. Dist. Dir. of INS*, 61 F.3d 117 (1st Cir. 1995), in part because the Internal Revenue Service was a “repeat player” with a legitimate concern about the impact of the order on future deportation cases.

Government cases can also raise difficult questions about whether the actions mooting the case are attributable to the government agency that is before the court, as illustrated by a series of 10th Circuit cases. As a general rule, legislative changes that have the effect of mooting an appeal are not attributable to the government entity in the litigation and do not preclude vacatur. See *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995). However, where the government agency in the case moots the appeal by withdrawing its own contested policy or regulation, that action ordinarily will preclude vacatur. See, e.g., *19 Solid Waste Dep’t Mechs. v. City of Albuquerque*, 76 F.3d 1142, 1145 (10th Cir. 1996) (refusing

to vacate order holding the city’s drug-testing policy unlawful when the city withdrew the contested policy and mooted appeal, thereby “request[ing] a de facto reversal on the claim it has abandoned”); *Amoco Oil Co. v. U.S. E.P.A.*, 231 F.3d 694, 698-99 (10th Cir. 2000) (vacatur not warranted where the Environmental Protection Agency’s unilateral withdrawal of contested order mooted case).

In some cases, however, “[w]hen the government undertakes remedial measures that do not result in manipulation of the judicial process and eliminate the underlying cause of an injunction, vacatur will be granted.” *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1220 (10th Cir. 2004). For example, when the U.S. Forest Service mooted an appeal by amending one of its rules, enforcement of which had been enjoined, the court vacated the decision below. The court reasoned that since the Forest Service was not appealing the adverse decision (intervening environmental groups had filed the appeal), there was no manipulation of the judicial process and vacatur was appropriate. *Wyoming v. U.S. Dep’t of Agric.*, 414 F.3d 1207, 1213 (10th Cir. 2005).

■ *Intervenor standing.* The *Bonner Mall* decision makes clear that one of the reasons not to vacate a decision below when a case is settled is that judicial decisions are not “the property of private litigants,” 513 U.S. at 26; others may have an interest in the decision and, in particular, in its potential collateral estoppel effect in future litigation. Intervening parties are sometimes in precisely that position, but the courts have not squarely resolved whether an intervening party may appeal a decision vacating a ruling that the intervenor seeks to preserve. In *American Games Inc. v. Trade Prods. Inc.*, 142 F.3d 1164 (9th Cir. 1998), a summary judgment became moot while the case was on appeal because the plaintiff and defendant corporations merged. On remand, the district court vacated its decision, and the 9th Circuit held that an intervening party seeking to preserve the judgment for its preclusive effect had standing to appeal the vacatur decision. *Id.* at 1167.

The 7th Circuit, in contrast, expressed doubt about the “soundness” of *American Games* and held that an intervenor seeking to preserve a vacated decision, so that it would

have collateral estoppel effect in a separate lawsuit, lacked standing to appeal. *Korczak v. Sedeman*, 427 F.3d 419 (7th Cir. 2005) (petition for cert. filed). The court expressed concern that recognizing intervenor standing would deter settlements by effectively making potential intervenors another party to settlement negotiations. *Id.* at 421.

Must district courts use the same standards to vacate?

■ *District court vacatur.* The circuits have differed on whether district courts must use the same standards as appellate courts in deciding whether to vacate when a case becomes moot. Under *Bonner Mall*, when an appeal becomes moot, the appellate court has the option of remanding to the district court to determine whether to vacate its decision under Fed. R. Civ. P. 60(b). 513 U.S. at 29. District courts generally use the same standards set forth in *Bonner Mall* in making this determination. The 4th Circuit has explained that while “[t]he appellate vacatur power derives from 28 U.S.C. § 2106, whereas the district court power derives from [Rule] 60(b),” the standards are “essentially the same,” and *Bonner Mall*’s standards must be “largely determinative of a district court’s decision whether to vacate its own judgment due to mootness.” *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117-18 (4th Cir. 2000).

The 9th Circuit, however, has permitted district courts to use a more flexible “equitable balancing” test, rather than *Bonner*’s “exceptional circumstances” test for determining whether to vacate when a settlement has mooted the case. *American Games*, 142 F.3d at 1167-70; cf. *Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 41 F.3d 1221, 1222 (8th Cir. 1994) (expressly finding no “exceptional circumstances” but nonetheless remanding for determination whether to vacate). The party seeking to vacate may wish to seek a remand if the district courts in that circuit can use a more flexible standard. ■

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