OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: U.S. BANCORP MORTGAGE COMPANY, Petitioner

v. BONNER MALL PARTNERSHIP

CASE NO: No. 93-714

PLACE: Washington, D.C.

DATE: Tuesday, October 4, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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U.S. BANCORP MORTGAGE COMPANY, :

Petitioner :

v. : No. 93-714

BONNER MALL PARTNERSHIP :

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Washington, D.C.

Tuesday, October 4, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

BRADFORD ANDERSON, ESQ., Seattle, Washington; on behalf of the Petitioner.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the U.S., as amicus curiae, supporting Petitioner.

JOHN FORD ELSAESSER, JR., ESQ., Sandpoint, Idaho; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-714, U.S. Bancorp Mortgage Company v. Bonner Mall Partnership. Mr. Anderson.

ORAL ARGUMENT OF BRADFORD ANDERSON

ON BEHALF OF THE PETITIONER

MR. ANDERSON: Mr. Chief Justice and may it please the Court:

This is a case which contains within the question presented, as set forth in the Court's March 28th order, a much more narrowly-focused question, and that question is whether the decision below should be vacated when after this Court granted certiorari the parties settled and mooted the case before this Court, and that settlement did not contain any agreement or condition requiring, or for that matter precluding vacatur.

We also contend for a rule -- a more general application, and that is that the established precedent confirmed in the Munsingwear decision and in later decisions of this Court which require vacatur upon mootness, that those decisions be generally adhered to in cases where mootness arises as a result of settlement.

And because that is the established practice of this Court, we believe that the burden should be on the

respondent, Bonner, to demonstrate why that practice should be changed.

Our position here can be summarized rather succinctly: 1) in a case like this one, where the Court has granted review so that the decision below is not final in the Federal statutory scheme and therefore there is no presumption of correctness, we believe, which attaches, vacatur is appropriate generally and in this specific case.

QUESTION: Mr. Anderson, when you say vacatur, are you referring just to the judgment below, or are you referring also to the opinion, if there was an opinion below?

MR. ANDERSON: We are referring to what in essence is the judgment below.

We do not contend, as has been suggested by Bonner, that the opinion should be somehow expunged from published sources, or that it should be depublished or withdrawn. What we are addressing is the -- what in essence is the judgment below.

QUESTION: And you would leave it to some other rule or set of rules to decide whether the opinion should continue to have precedential value in the circuit, and that sort of thing?

MR. ANDERSON: That's correct, Mr. Chief

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Justice.

QUESTION: Thank you.

QUESTION: Mr. Anderson, may I ask you --

QUESTION: What would a circuit court judge do if there were an opinion and the judgment had been vacated and that opinion is on the book? Is that the law of the circuit in the Ninth Circuit?

MR. ANDERSON: I don't believe it would be the law of the circuit, Your Honor. The -- our position is, and I think it's consistent --

QUESTION: So it's just like an interesting law review article hanging out there?

MR. ANDERSON: No, Your Honor. I think that it would be not comparable to a law review, but perhaps comparable to the decisions that we have found in the Seventh Circuit on this same new value exception issue, where there has been much learned discussion about the issue, most of it -- I guess all of it in dicta, and it has provided, I think, a useful examination of the issue which then ultimately goes to establish the basis for what ultimately will become the precedent.

QUESTION: Now, you've confused me. I thought you just told the Chief Justice you didn't care, that you would leave that to, you know, for another day.

MR. ANDERSON: We do care.

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QUESTION: Yes, you do care.

MR. ANDERSON: But we would leave it to another day, Your Honor, although we --

QUESTION: Well, your position is that it has not precedential effect.

MR. ANDERSON: That's correct.

QUESTION: But I thought you answered just the opposite to me a moment ago. You said the vacatur would not cover the opinion, but only the judgment.

MR. ANDERSON: I'm sorry, Your Honor, I must have misinterpreted your question. It is not necessary to our argument here today that a determination be made as to what the precedential effect, if any, of vacatur is.

QUESTION: Is there any reason why, say, the Ninth Circuit couldn't -- consistent with your position why the Ninth Circuit couldn't have a rule that said, even though a judgment of our court which has been vacated pursuant to Munsingwear, nonetheless we will continue to regard our opinion in that case as a circuit precedent?

MR. ANDERSON: They could have such a rule, Your Honor. I don't believe that is the case, but they could have such a rule.

QUESTION: One frequently sees cases cited at least where they are vacated on other grounds. You cite it for one proposition, you know, paren, vacated on other

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grounds, and that seems to be considered proper authority so long as the vacatur is not for the reason cited.

MR. ANDERSON: I believe that could be the case, Justice Scalia. I was simply stating that our position generally is that, our understanding of the law is that normally a vacated decision would not have precedential or binding effect on the lower courts.

QUESTION: Mr. Anderson, may I ask you a preliminary question about Munsingwear?

Do you think we should read Munsingwear as a case in which the mootness was the result of happenstance, which was the word used in the opinion, or should we read that as a case in which the mootness or the underlying mootness resulted from the acts, the unilateral act of one party, and hence creating the mootness?

MR. ANDERSON: We would contend, Your Honor, that the mootness to the extent it was created there, was created by the unilateral act, and that the reference to happenstance by the court in Munsingwear was not a description of what had happened, but was rather more of an off-hand reference to --

QUESTION: A misdescription of what had happened?

MR. ANDERSON: Possibly a misdescription of what had happened, yes, Your Honor. In fact, as you know,

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Munsingwear did not involve directly the question of mootness. The question before the Court in that case was whether res judicata effect should have been given to the judgment, which the United States did not challenge directly below.

The Court indicated also that, had the United States moved to vacate in the court of appeals, that it would have been entitled to that relief.

QUESTION: Do you think it's fair to say that the court in Munsingwear did not view it the way you have just described it? What was the point of talking about happenstance, and happenstance alone, if it viewed it your way?

MR. ANDERSON: Well, the explanation, Your Honor, I think is reflected in the subsequent decisions of this Court after Munsingwear was decided. There are at least a dozen decisions in which, with Munsingwear standing there as precedent, this Court has granted vacatur in cases where mootness came about as a result of --

QUESTION: Well, yes, but we're now in effect saying, should we be doing that. Your position is stronger if we view it as a case in which the mootness resulted from the unilateral act of a party. You would agree there, I take it?

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MR. ANDERSON: Yes, that is correct.

QUESTION: May I just ask -- you see, I'm not sure your argument tracks your position in your briefs -- is it your position that there should, we should announce a general rule that when there's a settlement there will always be a vacation of the judgment below, or is it to be decided on a case-by-case determination?

MR. ANDERSON: Ultimately, as we have argued in our briefs, the decision whether to vacate is bottomed on discretion by this Court. We believe that discretion is appropriately exercised as a general matter in cases where mootness occurs as a result of the joint action of the parties in agreeing to a settlement where the prevailing party below agrees to --

QUESTION: I'm still a little puzzled as to what you're saying. The discretion should be exercised as a general matter to vacate, but does that mean that we should adopt a rule we should always vacate without looking at the particular facts, or are we simply -- I don't quite understand.

MR. ANDERSON: Well, there may be circumstances, Justice Stevens, where the Court would have to look at the particular facts. I think those circumstances would be unusual and perhaps extraordinary. For example, where you have what in essence might be a sham settlement, or where

the parties can identify a pattern of abusive settlements, but the general rule --

QUESTION: Why would that make any difference?

MR. ANDERSON: Because ultimately vacatur is premised on the exercise of discretion by this Court, and the interests promoted by vacatur, which are fairness and the prudential considerations that we have outlined, would not be promoted, I don't think, in a situation where the settlement was in fact not a settlement. For example, where the losing party below essentially pays the full amount of the judgment.

In essence, what it's saying there is that it is prepared to live with the judgment, it is prepared to comply with the decision below, and in that circumstance, where the prevailing party below has not made any concessions, has not agreed to forego reliance on that lower court decision --

QUESTION: No, but it's willing to pay in the particular case, but it still doesn't like the general rule that the court announced, and that's -- that -- I really don't understand your position, but go ahead.

QUESTION: May I ask you to clarify your position that you care only about having the judgment expunged? The judgment doesn't do anything. What can hurt is either the preclusive effect or the precedential

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value, so what does it mean to vacate a judgment if that judgment is still going to have, if the opinion is going to have precedential value? What do you accomplish by vacating the bare bottom line if everything else is retained?

MR. ANDERSON: Well, Your Honor, in this instance, as the Court said in Munsingwear, one of the purposes of vacatur is to prevent the spawning of any legal consequences, and that would include law of the case.

And in this particular case, the bankruptcy court has retained jurisdiction, the consensual plan to which the parties agreed is to be implemented over a period of 5 years, approximately, it is to prevent collateral estoppel effects flowing from that judgment, and we believe that, notwithstanding the respondent's argument there are collateral estoppel effects that might flow here under the United States v. Mendoza case which applies collateral estoppel to issues of law, and those --

QUESTION: -- indicated that a court could adopt, say, the Ninth Circuit, a rule that vacated opinions to have precedential value, so even though you might prevail in a subsequent quasi collateral estoppel, there would be no collateral estoppel but you'd lose anyway under this hypothetical rule, which seems to me a

very strange rule.

MR. ANDERSON: If there were litigation outside the Ninth Circuit, Your Honor, I'm not sure that would be the case. The precedent certainly might be binding --

QUESTION: No, I'm talking about, assume you're back in the Ninth Circuit.

MR. ANDERSON: We would be in that situation. The precedent would be then binding in the Ninth Circuit.

QUESTION: But no estoppel, even in the Ninth Circuit, because that requires a judgment.

MR. ANDERSON: That's correct. That's correct, Your Honor, although to a certain degree, as Justice Kennedy pointed out, there is a merging of the estoppel effect and the precedential effect within the confines of the Ninth Circuit, and only within those confines.

QUESTION: Well, under your theory that it's within the discretion of the court to decide whether to vacate the judgment or not, if the court were to decide not to vacate this judgment after the settlement, is that an abuse of the court's discretion?

MR. ANDERSON: I don't think so, Your Honor. I think the court may exercise that discretion in any way it seems fit, and I don't believe that would be an abuse of discretion.

QUESTION: So you just leave it entirely open to

the court to weigh the factors one way or another and decide what to do?

MR. ANDERSON: Subject to the general rule that we suggest that vacatur upon mootness where the mootness occurs as a result of settlement is generally appropriate for the reasons that it promotes the values that we have described in our briefs -- fairness between the parties, and the prudential concerns that the judicial system must have with regard to the development of precedent.

QUESTION: Well, in this case, what possible grounds, under your rule, would a court have for refusing to vacate?

MR. ANDERSON: In this particular case?

QUESTION: Yes.

MR. ANDERSON: I don't believe there would be any grounds for refusing to vacate in this case.

QUESTION: Well then, the answer to Justice O'Connor is it would be an abuse of discretion.

QUESTION: You told me it would not be an abuse of discretion to refuse to vacate.

MR. ANDERSON: That's correct, Your Honor, and perhaps I misunderstood your question. Since the decisions of this Court are generally not reviewable, I wouldn't think that -- it could not be characterized as an abuse of discretion.

(Laughter.)

QUESTION: Well, let's talk about a court of appeals.

MR. ANDERSON: I think there are some differences when you begin to talk about the court of appeals, Your Honor.

QUESTION: Okay. It's a court of appeals on these facts, and the court of appeals refuses to vacate the judgment. Is that an abuse of discretion?

MR. ANDERSON: I would think it would be. I would think it would be, and the reason is, as long as there is an appeal pending so that that decision which the court of appeals is reviewing is not final, the court of appeals has not been able to complete its review of that decision, then the judgment should be vacated.

QUESTION: What if the court of appeals has decided the case, but there's a petition for rehearing pending?

MR. ANDERSON: I would say that that would be, the same rule should apply.

QUESTION: They should vacate the decision.

MR. ANDERSON: That decision is not final. That decision is not final.

QUESTION: If the parties settle, that's the end of the ball game.

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QUESTION: Aren't you, in effect, asking the Court to write a term into the settlement agreement that you did not successfully negotiate? Many of these agreements put in the agreement itself that a term of the settlement is that the decision will be vacated. Here, you're asking the Court, in effect, to put in as a term of the settlement what the opposing party and you didn't negotiate.

MR. ANDERSON: Justice --

QUESTION: Because Bonner is resisting the vacation.

MR. ANDERSON: Bonner is resisting it, Justice Ginsburg. However, it was not a term that was negotiated. we do not believe, however, and we do not urge that that be a distinguishing consideration, because the principles underlying vacatur, fairness, and the prudential concerns that I mentioned, particularly fairness we don't believe should be premised on the relative bargaining power of the parties. Fairness --

QUESTION: Well, I don't understand why you're in a different position from somebody who's just decided to forego an appeal, why we should treat you differently from someone who has withdrawn an appeal, or decided not to appeal.

MR. ANDERSON: Well, if I may briefly explain

some of the factual considerations that led us to where we are today, I think that will answer the question.

For example, in this case, the parties were negotiating prior to the filing of the bankruptcy case in 1991. U.S. Bancorp had proposed certain settlement terms that it was willing to live with. Those terms included very basic minimums that it required, a market rate of interest, an adequate loan-to-value ratio, things of that nature.

Those terms were ultimately what was accepted by Bonner in January of 1994 and then some subject to certain other conditions which then also were met later so that the consensual plan could be confirmed in March of 1994.

Bonner was the party that made certain concessions and decided to forego reliance on the decision it had won in the Ninth Circuit. U.S. Bancorp did not exercise unilateral action.

When you look at the facts in that light, I think what you see is that U.S. Bancorp was in the position of having to choose in this dilemma whether to accept an economic settlement which was favorable on its terms or having to defend a decision, or to challenge a decision in the Ninth Circuit which the prevailing party was no longer willing to litigate and was willing to forego, so it is not unilateral action in that sense at

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all.

I think also that the fact that this Court granted certiorari is perhaps one of the most salient elements of this particular case. Another salient element is that the settlement which I briefly described was a bona fide settlement. There's no issue in this particular case of collusion. There's no issue of a deep pocket attempting to purchase vacatur in this case. So those concerns which have been raised by the respondent simply do not apply.

QUESTION: Do you think we should investigate each case for those concerns, have a minifactual hearing every time there's a motion to Munsingwear a case?

MR. ANDERSON: I do not, Your Honor, and I think that the general --

QUESTION: So your proper answer should be, you know, maybe, maybe not, but tough luck?

MR. ANDERSON: I don't think so.

QUESTION: You can't have it both ways. I mean, you either have to acknowledge a possibility that that could happen now and then, or else you're going to have to say, we're going to have to conduct these inquiries.

MR. ANDERSON: I believe it could happen now and then in the extraordinary circumstances that I alluded to earlier as a -- if the general rule which we propose is

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adopted, I don't believe it would be necessary for the Court to engage in those kinds of inquiries.

QUESTION: May I just ask in that regard, this case settled after we granted certiorari, is that right?

MR. ANDERSON: That's correct, Your Honor.

QUESTION: And you advised the Court it had become moot. Did you make a motion to have the judgment vacated?

MR. ANDERSON: Yes, we did, Your Honor.

QUESTION: You did make a motion.

MR. ANDERSON: In our reply to the memorandum filed by the respondent suggesting mootness.

QUESTION: You moved that -- you filed a motion. I didn't remember that.

MR. ANDERSON: Yes, Your Honor, and we requested application of the Munsingwear result.

Going back to Justice Ginsburg's question, as a factual matter, U.S. Bancorp at the time the settlement was being negotiated at the time relied on what it believed was the existing precedent in this Court.

QUESTION: Why wouldn't it make sense just for us to dismiss and you can go to the Ninth Circuit that says it will take these on a one-by-one basis, move under 60(b) for them to reopen and vacate the judgment?

MR. ANDERSON: Well, I think the fact that this

Court has granted certiorari, Your Honor, indicates that it should be this Court that vacates the judgment for the reasons that the grant of certiorari by itself is like creating a doubt about that precedent. Although that precedent is now binding in the Ninth Circuit, it forever will have this question mark attached to it as to the review which was granted by this Court and which was not able to be completed as a result of the settlement of the parties.

QUESTION: So if it didn't grant cert, then it would be proper just when you have the settlement to dismiss outright?

MR. ANDERSON: That may be the correct result, Your Honor. We would urge that this Court adopt explicitly, if it has not already, the Velsicol procedure that was proposed by the Solicitor General, and so that if the Court -- if the matter were cert-worthy at that time, the Court could make the determination that vacatur was appropriate, even if certiorari had not been granted by the time the parties settled.

Finality, then, is one of the key considerations that we believe direct or would require vacatur in this particular case.

I wanted to distinguish this case from, I'm sure, the decision that will be relied upon by the

respondent, and that is the Karcher v. May case. In that case, the court was not dealing with, even with mootness, and not directly dealing with vacatur.

In that case, the parties who were named in the petition had lost their position as legislators in New Jersey, and the court found that they did not have standing to assert any longer the position that they had been asserting, and that therefore the appeal was dismissed for want of jurisdiction.

The reference to happenstance in that case was simply to the argument of those parties that their loss of position was a matter of happenstance. The court pointed out that, in fact, the statutes in place in New Jersey at that time were specifically intended to avoid mootness.

QUESTION: Thank you, Mr. Anderson.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

Since this Court's decision in Munsingwear and, indeed, before that time, this Court has followed a consistent practice of vacating decisions of the lower courts that have become moot as a result of the settlement

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of the parties.

QUESTION: You're talking, then, not just about judgments, you're talking about opinions also?

MR. KNEEDLER: Judgments should be vacated. It follows from that, in our view, that the precedential impact of the decision is also eliminated.

QUESTION: You don't agree, then, with your colleague who just spoke?

MR. KNEEDLER: I do not. One of the important points the Court made in Munsingwear itself was that the decision should be vacated in order to prevent it from spawning any legal consequences, and those legal consequences could be collateral estoppel, they could be law of the case, but they can also importantly be the precedential impact of the decision in other cases.

So it is an important aspect of the vacatur to eliminate the precedential impact of the decision.

QUESTION: Mr. Kneedler, you're right that we've done it often, but almost all the times we've done it, we've done it by way of a per curiam opinion or summary disposition. In fact, In think Munsingwear is the only case I recall where we've discussed the reasons for it, and we also have a principle in matters of procedure and judicial administration stare decisis is least strong.

MR. KNEEDLER: Well, several points I'd like to

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make in response to that. Munsingwear was a discussion of the issue, but included in the Court's discussion in Munsingwear where the Court announced its general rule, it made no mention of the word happenstance. The Court referred to its established practice when a case becomes moot, and cited a number of cases, four of which, as is pointed out in footnote 5 of petitioner's brief, involved settlement.

So the Court was recognizing that the general practice that it had already established at the time of Munsingwear applied to settlement, so there was no need to separately discuss, no need on this Court's part to separately discuss how that rule should apply to settlement because the Court was already relying on cases that involved settlement, and that, the Court's following of that practice since that time simply confirms that there has been a general rule.

The question before this Court is whether the Court should now depart from that general rule, and we think that respondent has shown no reasons for doing so. The problems with a case --

QUESTION: Has the issue been litigated before, as far as you know?

MR. KNEEDLER: I think in general not. I think the party, the parties have recognized the consequence

that mootness leads to vacatur of the decision below.

QUESTION: So this is really the first time we're confronting the issue in an adversary context?

MR. KNEEDLER: The first time the Court has certainly chosen to argue --

QUESTION: -- standing up and arguing both sides of the case.

MR. KNEEDLER: Yes, but my point is that in Munsingwear itself the issue was litigated completely, and at that time the Court was relying on cases that involved settlement, and the Court's consistent practice since then has showed that it is in fact a settled rule, and we see no reason to depart from that.

QUESTION: What do you mean by litigated completely in Munsingwear?

MR. KNEEDLER: Well, the question of what the proper disposition of a lower court judgment should be when a case becomes moot was --

QUESTION: The parties took opposing positions on the question?

MR. KNEEDLER: They did. Well, in Munsingwear the issue arose afterward when the United States tried to avoid the collateral estoppel consequences, or res judicata consequences of a judgment that -- where the appeal was dismissed and the United States did not seek to

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have that judgment vacated, and what the Court said is, to prevent that from happening, the Government should have sought an order having the lower court decision vacated, and the Court referred to its established practice, which included cases that had been settled.

QUESTION: Mr. Kneedler, I'm not sure I have your answer to Justice Scalia's question. Did the parties file briefs on the issue in the Munsingwear case, or did the Court just dispose of it by explaining what it was doing? Do you know?

MR. KNEEDLER: My understanding is the parties filed briefs on the merits, and it was heard on certiorari. It was not disposed of --

QUESTION: Is that not a case that became moot after we had granted certiorari?

MR. KNEEDLER: No. The case became moot because the product was decontrolled while the appeal was pending in the lower courts.

QUESTION: I see.

MR. KNEEDLER: And the appeal was dismissed from the trial court.

QUESTION: I see.

MR. KNEEDLER: The appeal from the trial court to the court of appeals had been dismissed.

QUESTION: And in fact the bottom line was

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preclusion. Munsingwear, the holding in Munsingwear is the Government was precluded.

MR. KNEEDLER: Yes, but because the Government had not sought to have the judgment vacated, and what the Court said is that its established practice had been that if the Government had sought that release, it would have been granted.

QUESTION: Well, on the way to holding that the Government was bound, the Court said, en passant, but if the Government had done this we would have followed our established practice.

MR. KNEEDLER: Yes, and then what -- the Court has continued to follow its established practice in settlement cases. That's the point that I'm making.

QUESTION: Well, but the dictum, the considered dictum of Munsingwear also classified it as a happenstance case, not a settlement case, regardless of what we may have cited.

MR. KNEEDLER: Well, it described the inability, or the lack of review as having occurred by happenstance, but it doesn't appear to me that --

QUESTION: Well, but the happenstance referred, I thought, to the event which resulted in the mootness, wasn't that correct? Isn't that correct?

MR. KNEEDLER: That's not even clear, but we can

assume for the moment that that's correct. I think the Court could have been just saying that the review was precluded by circumstances beyond the Court's control, but the important point, there was just a reference in one sentence to the word happenstance, but when the Court stated its general rule, it did not contain the word happenstance on page 39 where the Court described its established practice, and again referred to cases involving settlement.

Now, to depart from that and adopt a case-by-case rule would have a number of disadvantages. It would take this Court's time in looking at the facts of each case to see whether vacatur would be appropriate. It would also undermine the certainty and predictability for the parties in entering into settlements and, indeed, in Munsingwear the Court announced --

QUESTION: In Munsingwear, though, the Court says the established practice has been to reverse or vacate the judgment below and remand with a direction to dismiss, it doesn't say anything about the opinion.

MR. KNEEDLER: No, it doesn't say anything about the opinion, but the opinion would have precedential effect only because of the judgment. The lower courts, like this Court --

QUESTION: Well, why do you say that?

MR. KNEEDLER: Well, the precedent comes from the judgment of the Court and the opinion explaining the judgment, and the extent of the opinion that's necessary to the judgment becomes precedent, but it is the judgment that is the judicial role, it is the judgment that settles the case or controversy, and therefore the judgment that is binding precedent in other cases.

QUESTION: Mr. Kneedler, have you ever cited a case, has the Government ever cited cases in a brief in which it cites a case as authority and then says, parenthesis, vacated on other grounds?

MR. KNEEDLER: Yes, citing it for its persuasive force if it is -- if the judgment is vacated and not reinstated, I don't think it has binding precedential impact, force. We would cite it for whatever force it might carry, and the fact that it was overturned by a higher court on other grounds suggests that the reasoning might be particularly persuasive, but would not be binding.

QUESTION: The reasoning wasn't reversed, at least, right?

MR. KNEEDLER: Exactly.

QUESTION: But what would you do if you were a district judge in the Ninth Circuit and we follow the procedure you recommend, and the same issue comes up that

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this panel decided? Would you follow the opinion, or would you say well, it doesn't count, if you were a district judge?

MR. KNEEDLER: If the court, if the district court found it persuasive, it could follow it, but the point is, it would be an independent act of judging on the district court's part to decide what the correct result was without having that answer dictated by the court of appeals' decision.

And after all, the court of appeals' decision was rendered tentative at best by virtue of this Court's grant of certiorari, and it seems to us it would be unwise to leave a decision that this Court has found sufficient reason to grant review and perhaps reversed, standing as binding precedent in the court of appeals, and not free the parties to litigate that question in other cases.

QUESTION: Well, but you'd give the same answer as was referenced to the district judge's position if the Ninth Circuit had vacated the opinion after a settlement with quite -- suppose there's a settlement while the case is on rehearing in the Ninth Circuit, no certiorari granted, and then it's vacated. What does the district court do then?

MR. KNEEDLER: It would be the same thing, if the --

QUESTION: All right, so the grant of certiorari is irrelevant.

MR. KNEEDLER: Well, it just indicates from the perspective of this Court's role, this Court sits to resolve conflicts or to resolve differences in the lower courts, and in this case the Ninth Circuit's decision on the new value exception was the first decision after this Court's decision in Northwest Bank sustaining the new value exception.

It would be consistent with this Court's role of superintending the decisions in the lower courts to eliminate that precedent, and to allow the issue to continue to percolate in the lower courts, a practice which this Court has recognized is of considerable benefit.

I'd also like to address the question of fairness. The rule we propose is consistent with the role of the courts. The rule we propose is consistent with the role of the courts sitting to litigate actual controversies between parties, and not to announce broader principles except as a derivative aspect of that judicial role, and there -- yes.

QUESTION: This is perhaps -- this is what we would have done, I think, in the court of appeals. Imagine -- we're out, I think. That's all right.

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QUESTION: Answer Justice Breyer's -- go ahead.

QUESTION: Well, it's going to be -- well, imagine two parties had agreed that the settlement is conditional upon vacating the judgment below. I, as a court of appeals judge, would have sent the whole thing back to the district judge to make a decision about that.

And the reason I would have had him do that is there are not many, but there are quite a few complex litigations involving cleaning up the Boston Harbor, for example, or managing mental health facilities, for example, and the vacating of a judgment might have significant implications on lots of other parties to the mental health litigation or the clean-up-the-harbor litigation, and might have changed their whole strategy were something like that to come up, or might have all kinds of implications that only the district court would know about.

Therefore, even had they agreed on the settlement, I would have sent it back to get the district court's determination about how it affects third parties.

Now, where I don't even have that agreement, I would worry about a rule that said, automatically vacate, for the reason I don't know what counts as a settlement. An appellant may simply stop. Is that a settlement?

Moreover, 99 percent of the time, the appellant

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won't bother to ask for the vacating of the judgment, so sometimes it's there, sometimes it's not there. People later on come in and argue about the significance of that. It sounds complicated.

So that was my reaction when I'm read the brief. I'm not saying that's what I'm actually thinking, but I wanted to know how you see this as working out according to your rule.

MR. KNEEDLER: Okay, several things. The -- when the appellant doesn't dismiss the appeal, the appellant is still seeking review of the judgment below, just as the petitioner does here, so the party is -- it's different from where the party has just decided to let the lower case judgment stand. That's the first thing.

The second thing is that what causes -- what leads the court to vacate the judgment is not the agreement of the party to vacate the judgment, it's the agreement of the party that settles the case which renders the case moot. It's the mootness, then, under the Munsingwear rule, that requires vacatur.

The third and last point that I wanted to make is where the vacatur is conditioned upon approval of the court, in a sense the case may not yet be moot, because the settlement is not conclusive, but where --

CHIEF JUSTICE REHNQUIST: Thank you,

Mr. Kneedler.

Mr. Elsaesser, we'll hear from you.

ORAL ARGUMENT OF JOHN FORD ELSAESSER, JR.

ON BEHALF OF THE RESPONDENT

MR. ELSAESSER: Mr. Chief Justice and may it please the Court:

We argue that this Court should not extend Munsingwear to mandate routine vacatur, or any kind of stipulated reversal on settlement. We argue that such vacatur would erode certainty, it would allow for the manipulation of courts, including judge and forum shopping, and would directly challenge this Court's long-held belief in the fundamental importance of stare decisis.

Public confidence in our judicial system could be undermined if decisions could be bought and sold at will, and the only settlements that would be promoted by such a rule as the Government proposes would be in the rare but important cases where the court's future the court decisions' future impact and future results that a party might suffer has a present monetary value to one of the parties.

I would suggest that these impacts and these results go far beyond even the broadest possible reading of Munsingwear, which the Government does in its proposal.

We suggest a better rule that is short and simple in its application: no vacatur upon settlement.

We believe this rule not only properly follows Karcher v. May, but it limits vacatur to its proper place, an equitable rule that is discussed in Munsingwear, and when mootness is due to circumstances beyond the parties' control, it is unfair to apply preclusion and collateral estoppel to those parties in that dispute.

That would be the only circumstance where routine vacatur should occur, is when you have a situation of happenstance.

QUESTION: What about when the winner throws in the towel, when the winner says I'm afraid what the Supreme Court might do with this, so I'm giving up?

MR. ELSAESSER: Well, in that situation, I don't think that would -- if the winner caves in during the appellate process, I don't think that in any way moots the -- well, you're saying if he just pays the judgment, or does the -- does whatever the other party requests.

Then no, I don't think there would be any grounds to vacate the court decisions below, because the parties are getting everything they wanted in that circumstance, Justice Ginsburg. They've received every -- if the winning party, our party in this particular case, throws in the towel, then the other --

QUESTION: And makes it a condition -- then they have a settlement, and part of the settlement is that the winner is going to give up that victory, so that the case is not decided on appeal.

MR. ELSAESSER: Well, then I think you're getting right back into a stipulated vacatur situation, not as in the record of this case, but on the record of, for instance, the Izumi situation, where you have -- as soon as you go down that road, you're getting to a stipulated vacatur between the parties, and that is not an external cause, or an external grounds that I believe would justify vacatur under those circumstances.

QUESTION: Mr. Elsaesser, you mentioned a moment ago Karcher v. May. Do you disagree with your opponent's characterization of that, that it was simply a loss of standing on the parties who were prosecuting the appeal to appeal?

MR. ELSAESSER: Well, I don't disagree where that was a situation where there was a loss of standing, Mr. Chief Justice, but I do argue that there was no effective difference between the appellant in Karcher simply declining to proceed to go any further and a situation here where, as a result of the settlement agreement between Bonner Mall and U.S. Bank, the petitioner in this case, the appellant in a lower

appellate court situation, simply declines to go any further.

I don't believe there is any effective difference, because in both situations you end up with a dismissal. You end up with a dismissal of the appeal.

QUESTION: Yes, but certainly in Karcher v. May there was nothing consensual about it as to the party who was seeking to appeal, but it was said to have no standing.

MR. ELSAESSER: No, there was nothing consensual in not having any standing, but when the appeal ends, there was no reason to go back down and vacate the lower court opinions, so in that situation I think that's the same result you gain in this particular case, where the bank makes a conscious decision that as part of the settlement, or by settling, by their act of settling they moot the appeal. I think the effect is the same.

QUESTION: Well, the effect may be the same. The procedure is certainly quite different.

MR. ELSAESSER: That's correct, Mr. Chief Justice, it is.

QUESTION: As a practical matter, why do you oppose vacating the judgment here?

MR. ELSAESSER: Your Honor --

QUESTION: Why does your client oppose it? What

use do you anticipate making of it?

MR. ELSAESSER: Your Honor, we oppose vacatur in this setting, in the post mootness, essentially motion before this Court for vacatur. It was no part of our bargain.

I must concede to you that my client in this particular case has no future interest as a result of this settlement, any more than in this particular case the bank has no future interest in this particular settlement.

They have an interest, as they've conceded in their brief, that they want to be able to relitigate the issue in the Ninth Circuit and perhaps their companions elsewhere wish to do the same in other circuits, but it is true that our party has no identifiable interest in vacating a particular judgment, particularly in this situation where it was a pure issue of law from the ground up, if you will, from the bankruptcy court decision all the way up. It made no specific findings of fact.

QUESTION: Is it clear that the petitioner here would not be bound by the decision below insofar as res judicata or collateral estoppel effect is concerned?

MR. ELSAESSER: Your Honor, we agree with the Government in one respect, that if the Court grants the vacatur in this situation, it takes away the precedential and preclusive effects of the decisions below.

QUESTION: I'm not talking about precedent now. I'm talking about, strictly speaking, res judicata effect, or a collateral estoppel effect.

MR. ELSAESSER: I think it would have to dispute of those, too, if there was a vacatur.

QUESTION: No, I understand. But without the vacatur, would there be such an effect?

MR. ELSAESSER: I don't believe there would be true collateral estoppel because it was a pure issue of law. I believe there would be res judicata effect --

QUESTION: But doesn't preclusion apply to issues of law as well as of fact?

MR. ELSAESSER: Yes, they do, Your Honor.

QUESTION: All right. So why couldn't the bank, having litigated and lost this issue, be taken to have litigated it and lost it against all the world, and then there would be preclusion, collateral estoppel with respect to that determination of law.

MR. ELSAESSER: I don't believe, Your Honor, that Mendoza would go so far as to preclude -- if this Court vacates the rulings below, as far as they want them to have vacated, I don't believe that that would have a preclusive effect in another case in another State by a U.S. bank from raising a pure issue of law of whether that applies.

QUESTION: What about in this very case? At least in the petitioner's reply, they do posit this settlement falling through and then their being back in the same circumstance and again the new value issue coming up in this very case.

MR. ELSAESSER: Well, certainly I think in that situation you would have the result that vacatur would allow them to argue the legal issue again and respond, as they have responded in argument, that the precedential value of the Ninth Circuit opinion was only -- well, it really becomes advisory only, no different than any other kind of persuasive authority.

QUESTION: But if you did have a litigation of fact involved here, what would be the res judicata effect if we go your way -- collateral estoppel effect if we go your way?

MR. ELSAESSER: If you had an issue of fact, then I think it would have binding res judicata effect. I don't think there's any que -- the --

QUESTION: So you're not arguing that that is mitigated by the fact that a court later on could in fact consider the settlement as a reason not to give estoppel effect?

MR. ELSAESSER: I'm not sure if I understand that particular point. I think that in a question of fact

there would clearly be binding res judicata effect.

QUESTION: And there would be no way to get out of it on your view, and there should be no way to get out of it.

MR. ELSAESSER: There should be no way.

QUESTION: They didn't have to settle.

MR. ELSAESSER: They did not have to settle, but in addition to that, there are no extrinsic grounds to vacate the lower court decision. There would be no unfairness when the parties to a settlement have essentially contracted -- they've contracted their own res judicata, and they don't really have any needful concerns over what the prior rulings were below, because they've already reached agreement. The only difference to that, of course, is in a situation where they have actually contracted with the vacatur, and while I concede that that's not --

QUESTION: What if that happens? Is your position that even if the parties' settlement agreement provides that the party appealing the decision below shall move the court to vacate it?

MR. ELSAESSER: Well, that was precisely the case in Izumi, and I think that really is even worse. I concede, Justice Scalia, that my client is a business person. They would have accepted a monetary offer at some

level, just as Windmere did in Izumi, to contract out of the court decision. That very well could have happened if the offer had been made and accepted, and I think that is the strongest argument against vacatur upon settlement, is because it clearly allows for the purchase of precedent, even though that is not the circumstance in this case.

QUESTION: So it isn't just the parties' expectations that you're asking to be defended here, but rather the integrity of the process.

MR. ELSAESSER: Well, absolutely, Justice Scalia, because to make that a part of a bargain, it's no more proper in that circumstance to be able to, for us to be able to sell the precedential value of that opinion than for the bank to be able to purchase it. That is simply a contract that should not be allowed to be made when the result is going to be the vacation, in this case, of binding circuit precedent.

QUESTION: Well, Mr. Elsaesser, you take it as a given, I guess, that if there is a vacatur it is not just of the judgment but of the opinion as precedent.

MR. ELSAESSER: I do take that, Your Honor. I think that's the Government's position, and I believe --

QUESTION: It is the Government's position. I don't think it's the petitioner's position.

MR. ELSAESSER: No, it is not -- the peti --

well, I disagree with you there, Mr. Chief Justice, because I think the bank wants it both ways. They argue, as Phillips did, that, well, it could be precedent if someone wants to consider it precedent, but maybe it is or maybe it isn't.

They're really not -- because they clearly want, as a motivation here, to remove that precedent from the Ninth Circuit. It does nothing for the bank to relieve the judgment relieving stay at the trial level. That is -- that's beyond any contemplation of any parties. The only motivation that they would have is to destroy the precedential impact.

QUESTION: And you say that there should never be vacatur?

MR. ELSAESSER: No, I do not say there should never be vacatur. I believe that vacatur is entirely appropriate under the Munsingwear situation, where there is a change in the law, where there is a party, perhaps, who is subject to an injunction who dies, and therefore there is no successor party. In those circumstances where there is external cause, vacatur as an equitable doctrine under Munsingwear is appropriate.

QUESTION: But why, then why should there have been vacatur in Munsingwear, where in effect the Government caused the change which resulted in the case

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becoming moot?

MR. ELSAESSER: Well, I don't agree that there was vacatur in Mun -- I think Munsingwear was prospective in that respect.

QUESTION: Yes.

MR. ELSAESSER: But in answer to that question, you've got the unique situation of the Government where they're making laws and they're enforcing laws, and I think in that particular situation it was merged. The legislative or administrative section of Government changed the regulation, and the council responsible, or the department responsible for enforcement therefore lost its rights. I believe that's an external cost.

QUESTION: Well, can the bank here say that our mortgage loan department made this decision, but I'm the general counsel, I don't want to be bound by it?

MR. ELSAESSER: No. That's not an external situation.

QUESTION: Well, why should it be external with respect to the Government? The party is the United States of America, which represents both the legislature and the executive branch.

MR. ELSAESSER: Well, I believe in that circumstance it will not be a difficult or burdensome rule for this Court or for any circuit court of appeals or for

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that matter district court to determine that happenstance standard if the law governing the dispute that everybody is relying on changes, which is the situation in Munsingwear, than that is an appropriate grounds and, we argue, the only appropriate grounds for vacatur.

QUESTION: Why? I mean, there are about 50,000 appeals every year in the Federal system, and I take it you want the same rule for appeals as for the, as when the Supreme Court's involved, is that right?

MR. ELSAESSER: Yes, Your Honor, and I would point --

QUESTION: And 50,000 cases are coming up, and most of them involve legal issues not of tremendous significance, and all these decisions are written by district judges who may be writing quickly, may have just a couple of sentences.

And if somebody on the appeal says, I'm not going to abandon this further, but I'm worried about the collateral estoppel effect, so the two parties agree that they will settle the matter provided they get rid of that collateral estoppel, what's wrong in the ordinary case from permitting that agreement to take effect, assuming it has no major implications for third parties and isn't in complicated litigation?

MR. ELSAESSER: Well, I think it would be a

unique situation, in answer to your question, Justice Breyer, where it wouldn't affect third parties, because there would be no reason for that party to need vacatur, and what you're describing is the exact situation in Phillips. Phillips bought itself a new judge and a new district, essentially was blessed with forum shopping by obtaining vacatur of the original district court decision, which was just a jury verdict.

It was not Ninth Circuit precedent. It was a jury verdict and a denial of a motion for new trial, which was pending before the Federal circuit. Now they can get around that finding, litigate what they concede is the identical issue in Illinois in the hopes of getting a different result, and I would argue that's precisely the type of relitigation that every Court in the Federal system, including this one, has a vested interest in avoiding. Why --

QUESTION: It's not a victimless situation, you suggest. The courts are the victims.

MR. ELSAESSER: I think the courts are the victims. I think there are --

QUESTION: Res judicata and collateral estoppel are there in part to serve the interests of the courts not to have to redo things all the time?

MR. ELSAESSER: Well, that's -- yes, and I think

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in the Phillips situation, I think that's perhaps the clearest example, is that we know -- we don't have to speculate on this broad question of whether vacatur promotes settlements or doesn't promote settlements.

We know in that situation Phillips has, for $57 million, bought the right to relitigate the issue in Illinois and pretty much as many times as they want, if they have other defendants on the same issue, and in this case, what the bank is asking for, and it's in their brief, is they believe there is a tangible benefit to be gained by really starting a relitigation of the new value rule in the Ninth Circuit all over again from the settlement table to the bankruptcy court to either the BAP or the district court level and all the way up to the circuit.

If there was no need to get rid of the binding precedent, there would be no need for them to move to vacate.

QUESTION: What I'm asking is, I'm, let me say what the case in front of me I'm thinking of. A very large proportion of our appeals concern matters of fact. What are the underlying facts of the contract? What happened in the auto accident?

Lots of them are that way, and what I'm thinking of is if in a fact-based appeal, which comprises a very

large percentage, the parties are -- they want to settle, but they're worried about the collateral estoppel effect of fact-finding, for example, so they say, we'll settle it if you vacate the judgment below. It's an auto accident. Nobody else is involved, just these parties. What's wrong with that?

MR. ELSAESSER: What's wrong with it --

QUESTION: I know one thing is you could say, which is a reasonable point, that well, the court is somehow involved and is a kind of a victim. I've got that. Is there anything else? Is that the only consideration, or are there others?

MR. ELSAESSER: I think in the terms of the district court, the res judicata and collateral estoppel are the important reasons not to do that, because it would be almost impossible to determine. Justice Breyer, you mentioned in response to the other question that you believe the appropriate circuit practice is to remand questions of vacatur to the court that decided it. I'm not necessarily opposed to such a rule, but I think that rule is always leaving open the question.

Parties have rights under Rule 60(b). They can go in and make a case, and in general -- generally, 60(b) is a pretty tough standard to meet with a trial judge, and I don't think the mere settlement of the parties saying X

has bought Y's opposition to a vacatur so vacate should be, in and of itself, a 60(b) grounds, but we could live with a rule that would at least allow the court that made the decision be the court to decide whether or not to vacate.

QUESTION: We could live -- Bonner really has no -- the decision here is not going to affect Bonner one way or another, so I understand you really to be arguing as a friend of this Court, because we asked you to brief the issue. I see the issue as a repeating one for Bancorp, but Bonner has no continuing interest.

MR. ELSAESSER: I concede that, Your Honor. That is correct. Bonner has no continuing action, or no continuing -- they had no reason to agree to a vacatur, but they had no future interest, nor, I believe, does the bank have any future interest, other than a desire to change the law in this case nonlegislatively.

QUESTION: Well, the bank does suggest that it's possible that the new value exception will again become an issue between these parties if the plan that's now on the table isn't confirmed.

MR. ELSAESSER: Well, the plan was -- I'm not sure of the exact --

QUESTION: Well, there's a 5-year period, and if it doesn't work out, it may be back to square one.

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MR. ELSAESSER: Right. In 5 years the bank has to be paid in full. It would be difficult, under the stipulated consensual plan -- it would be virtually -- I would say it would be impossible for Bonner to again invoke the new value exception under those circumstances, other than --

QUESTION: So you are arguing this as kind of a friend of the Court. There's no interest of your litigant in it.

MR. ELSAESSER: Only the remotest. I have to concede this is more in the nature of a friend of the Court.

QUESTION: Well, we're indebted to you for doing that.

(Laughter.)

MR. ELSAESSER: Your Honor, Mr. Chief Justice, I think I would argue that the idea or the concept of evading precedent, or evading preclusion, as a grounds for vacatur, is a recent phenomenon.

I would argue that at the time of Munsingwear, and in the summary treatment that this Court has given Munsingwear since its enactment, that litigants frankly did not see the possibility of being able to buy a court decision, being able to use a procedure that is -- if one reads Munsingwear really has no application.

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But seeing that in the circuits as well as this Court Munsingwear seemed to be an automatic rule for disposition of cases, this presented an opportunity. Only in the last 10 years and, really, to a great amount only in the last 5 years, have the circuits had before them situations which it is clear that, for instance, in the Oklahoma City case the Government is coming in and buying a decision. In the Phillips case, Phillips is coming in and buying a decision.

In the other cases decided in the Second Circuit, where they did make a distinction between appellate opinions and district court judgments, again in the Manufacturers Hanover case just in the past year-and-a-half the concern is there that, if you allow routine vacatur upon settlement, whether or not you're presented -- whether you're ever presented with anything other than a notice by the parties, or whether you're presented, as they were in Oklahoma City, with a joint motion contemplating vacatur, in either of those circumstances, every circuit other than the Federal circuit that had to address vacatur upon settlement in recent times have said, this is not a Munsingwear situation.

This is not happenstance. This has the potential for abuse. It has the potential for

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manipulation of precedent. It has a potential for people being able to purchase decisions.

QUESTION: In principle, how do you distinguish other cases where a case has been moot, for example, by the death of one of the parties? You don't deny that we have authority to vacate the judgment below then. What is your argument?

MR. ELSAESSER: I think the death of a party is -- it's clearly not a voluntary act of that party --

(Laughter.)

MR. ELSAESSER: -- and it's not --

QUESTION: Well, I understand, but I mean, I need some conceptual framework. This is an equitable power that we have, and in that case there is an equity in eliminating the decision below?

MR. ELSAESSER: I think -- I would argue, Justice Scalia, that that's what Munsingwear does provide, is equitable grounds. I don't believe Munsingwear is grounded in Article III. I believe it is in equitable grounds.

We have the doctrine of collateral estoppel. If you follow the results, without vacatur, of this case, there will be unfairness, because an outside occurrence occurred, whether it is the death of a party, or the change of a law, or the modification of an ICC regulation,

and that sort. That is --

QUESTION: And in a case where a party has voluntarily declined to pursue his legal remedy, there's no equity in relieving him of the judgment below?

MR. ELSAESSER: No, and I would argue that that is the finding in Karcher, is that voluntary termination makes no effective difference.

I would further like to argue, and argue in conclusion, that the decision of a court, this Court under these circumstances or any other court, is a decision. I don't believe you -- that it can be avoided that this is a decision, it is a ruling.

I do agree with the Government that it does, a vacatur does specifically vacate precedent. I don't know how the terms vacating can do anything with the Ninth Circuit opinion but to vacate precedent and relegate it to arguable authority.

Without happenstance, without this extrinsic event, this outside event, the decision that any court makes in a vacatur situation is made in a vacuum. There are no grounds presented. There's no reasoning presented.

There has still been no articulate reasoning of why the court should vacate by the bank, other than the Ninth Circuit might have been wrong, we couldn't find out, so there should be an asterisk by the decision that

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renders it not as precedent in the case.

And you would be really in a situation of destroying existing parties -- you couldn't avoid destroying existing -- excuse me. You couldn't avoid destroying existing court decisions without it being on the whim of the parties if you adopted -- if you extend Munsingwear the way the Government proposes to do it, which will be an automatic vacatur.

It wouldn't be practical for this Court to have vacatur hearings. The better rule is simply to determine if it's happenstance that should be apparent, and it's moot. If it's not, dismiss the appeal. If they have grounds, if the losing party below has grounds to go to the circuit, 60(b)-type grounds, or go to the district court, they're not foreclosed by the refusal of this Court to vacate.

The parties can --

QUESTION: What about the people that have been operating under our Munsingwear rule and have bought vacaturs fair and square? What do we tell them now?

MR. ELSAESSER: Justice Scalia, I don't think they've bought it fair and square, because they're really -- the rulings that have followed Munsingwear from this Court have been summary dispositions, first of all.

Second of all, the distinction was raised in

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Karcher, and third, in the various circuits, right now, as we stand here, in the various circuits in either a majority, or nearly a clear majority of the circuits, Munsingwear is specifically limited to happenstance. The courts now, with the Second and Tenth Circuit, are saying this.

Even the California supreme court, which has been truly the champion of vacatur, just last week backed away and vacated an appellate court decision in a per curiam -- I mean, refused to vacate an appellate court decision in a per curiam --

QUESTION: Wasn't there legislation in California, though, that caused that?

MR. ELSAESSER: No, because Governor Wilson just vetoed that legislation just in the -- that and the supreme court's decision just last week. I don't have the cite on it yet. I just have the reporting of it.

In that case, after pronouncing Neary, they distinguished themselves, or they distinguished an appellate decision from Neary. In other words, they were --

QUESTION: You'd say they distinguished themselves, too.

(Laughter.)

MR. ELSAESSER: Well, they wanted to draw that

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line between appellate courts and trial courts, and I don't know if that's a line that really -- really can be effectively drawn. I think 60(b) can take care of what the litigant's problems are in the Federal court.

I thank you, Mr. Chief Justice. I thank Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Elsaesser. The case is submitted.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

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U.S. BANCORP MORTGAGE COMPANY, Petitioner v. BONNER MILL PARTNERSHIP

CASE NO.:93-714

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)