UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

JOINT MOTION TO VACATE DENIED: September 9, 2009

CBCA 1305

LIBBEY PHYSICAL MEDICINE CENTER AND HOT SPRINGS HEALTH SPA,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Charles A. Banks and Robert W. Francis of Banks Law Firm, PLLC, Little Rock, AR, counsel for Appellant.

Charles B. Wallace, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **WALTERS**.

WALTERS, Board Judge.

Appellant, Libbey Physical Medicine Center and Hot Springs Health Spa (Libbey), and respondent, the Department of the Interior (DOI), jointly have moved to vacate an earlier Board ruling and to dismiss the appeal with prejudice. The joint motion is accompanied by a stipulation for conditional compromise settlement and release, which expressly conditions settlement and the requested dismissal on this Board's vacating its February 26, 2009, ruling, which denied DOI's motion to dismiss the appeal for lack of subject matter jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA). The Board denies the present joint motion to vacate.

Discussion

The background relating to the instant appeal is fully set out in our earlier decision on DOI's motion to dismiss. *Libbey Physical Medicine Center and Hot Springs Health Spa v. Department of the Interior*, CBCA 1305, 09-1 BCA ¶ 34,080.

In their joint motion, the parties predicate their request for dismissal on the Board's vacatur of its decision on jurisdiction. Because the earlier ruling, an interlocutory decision, is not immediately appealable to the Federal Circuit, they argue, they will be forced first to litigate the instant appeal, unless the Board accedes to their request to vacate the decision. They rely heavily on a 1987 decision of the Court of Appeals for the Federal Circuit, *Federal Data Corp. v. SMS Data Products Group, Inc.*, 819 F.2d 277 (Fed. Cir. 1987) – and on an even earlier decision of the Court of Appeals for the Second Circuit, *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985). These two decisions pre-date the Supreme Court's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), and were based on language in a 1950 Supreme Court decision, *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

The Supreme Court, in *Bancorp*, addressed how and when vacatur is to be used and underscored the fundamental value of judicial precedent to our system of law, even where a matter has been settled after the decision is issued:

> Judicial 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.

Bancorp, 513 U.S. at 26. The Court explained that, barring "exceptional circumstances," vacatur should only apply to cases involving mootness that has been brought about by "happenstance," i.e., mootness resulting from "circumstances unattributable to any of the parties," rather than mootness that is the result of the parties' decision to settle and thereby forego their rights of appeal. *Id.* at 25, 29.

The parties have not demonstrated the existence of "exceptional circumstances" that would justify vacatur. The parties have opted to include vacatur as a precondition of their settlement; equities do not here favor vacatur. *See Reidell v. United States*, 47 Fed. Cl. 209, 212 (2000).

Decision

Accordingly, the joint motion to vacate is **DENIED**.

RICHARD C. WALTERS
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JEROME M. DRUMMOND
Board Judge