South Carolina Law Review

Volume 30 | Issue 4 Article 3

1979

# Relief from Unfairly Obtained Verdicts in Federal Court: Determination and Analysis of the Level of Fraud Required for Vacation of Judgements Under Fed. R. Civ. P. 60(b)

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# NOTE

## RELIEF FROM UNFAIRLY OBTAINED VERDICTS IN FEDERAL COURT: DETERMINATION AND ANALYSIS OF THE LEVEL OF FRAUD REQUIRED FOR VACATION OF JUDGMENTS UNDER FED. R. CIV. P. 60(b)

### I. INTRODUCTION

Prior to the adoption of present rule 60(b) of the Federal Rules of Civil Procedure,[1] few areas of federal practice were as clouded and uncertain as that of acquiring relief from fraudulently obtained verdicts. Historically, a federal district court had power to grant relief from a judgment during the term in which it was rendered.[2] Following the term, however, relief was available only through (1) the invocation of a variety of writs,[3] devices that were "shrouded in ancient lore and mystery;"[4] (2) the initiation of an independent action in equity,[5] at best an uncertain remedy; and (3) the infrequent application of the doctrine of the court's inherent power over its judgments.[6] The adoption of origi-

1. FED. R. CIV. P. 60(b):
On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
2. *See* note 15 and accompanying text *infra.*
3. *See* notes 16-32 and accompanying text *infra.*
4. Advisory Committee Notes to Rule 60(b) (1946).
5. *See* notes 33-34, 126-51 and accompanying text *infra.*
6. *See* notes 35-41 and accompanying text *infra.*

nal rule 60(b) in 1936 did little to clarify this procedure, and, as one distinguished commentator has stated, its only "redeeming . . . feature [lay in its] ambiguity . . . ."[7] The drastic overhaul of rule 60(b) in 1946[8] substantially rectified the insufficiencies of the original rule and greatly clarified federal practice in the area of extraordinary relief from judgments.[9] Fraud of an adverse party, mention of which was absent in original rule 60(b), was expressly stated as a ground of relief by motion in the amended rule,[10] and the ancient writs, which had been left untouched by original rule 60(b), were abolished.[11] Despite these, and other highly commendable revisions, a few deficiencies still remain in rule 60(b). One of these results from the unification of traditional equitable practice and modern motions procedure. As it presently stands, rule 60(b) authorizes relief from unfairly obtained judgments on four possible grounds: (1) on motion, subject to a one-

7. 7 MOORE'S FEDERAL PRACTICE ¶ 60.17, at 91 (2d ed. 1975) [hereinafter referred to as MOORE].

8. REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 78-84 (1946). The amendments were adopted on December 27, 1946, but did not become effective until March 19, 1948. Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief" —Rule 60b(6)*, 33 MO. L. REV. 427, 427 n. 2 (1968).

9. An article that had great impact on the drive for amending FED. R. CIV. P. 60(b) appeared in 1946 Yale Law Journal. Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623 (1946).

Since the amendment of the rule in 1946 a large body of scholarship has grown up around the rule. A number of articles appeared at the time the amendments became effective. Comment, *Invalidating a Judgment for Fraud . . . and the Significance of Federal Rule 60(b)*, 3 DUKE B.J. 41 (1952); Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77 (1951); Comment, *Temporal Aspects of the Finality of Judgments*, 17 U. OF CHI. L. REV. 664 (1950); Note, *Intrinsic and Extrinsic Fraud and Relief Against Judgments*, 4 VAND. L. REV. 338 (1951); Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 YALE L.J. 76 (1952). Since this period of initial interest, a number of other articles have appeared. Wham, *Federal District Court Rule 60(b): A Humane Rule Gone Wrong*, 49 A.B.A.J. 566 (1963); Note, *Attacking Fraudulently Obtained Judgments in the Federal Courts*, 48 IOWA L. REV. 398 (1963); Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60b(6).* 33 MO. L. REV. 427 (1968); Note, *Federal Rule 60(b): Finality of Civil Judgments v. Self-Correction by District Court of Judicial Error of Law*, 43 NOTRE DAME LAW. 98 (1967); Note, *Federal Rules 52(a) and 60(b)—A Chinese Puzzle*, 21 SW. L.J. 339 (1967). One of the most recent, and certainly the most scholarly, treatments of amended rule 60(b) is a student comment by Thomas D. Clark in the California Law Review. Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CALIF. L. REV. 531 (1972). The latest work on rule 60(b) concentrates on subdivision (6). Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41 (1978).

10. *See* note 47 and accompanying text *infra.*

11. *Id.*; notes 49-52 and accompanying text *infra.*

year time limit, for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" under clause (3); (2) on motion, subject to no express time limit (but within a reasonable time), for "any other reason justifying relief from the operation of the judgment" under clause (6); (3) by way of the first saving clause, which states that the rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; and (4) by way of the third saving clause, which states that the rule does not limit the power of a court "to set aside a judgment for fraud upon the court."[12]

The substantive basis for relief under each of these clauses remains undefined, however, and some questions arise: What constitutes fraud or misconduct of an adverse party? Must this conduct be wilful or intentional? Would the same conduct that would constitute grounds for relief under 60(b)(3), and would therefore be subject to the one-year time limitation, also come within the scope of 60(b)(6), a clause that is subject to no express time limit? Would the same fraud or misconduct of an adverse party also support an independent action in equity, subject to no time limitation but that of laches? What kind of fraud constitutes fraud on the court, a ground that is subject to absolutely no equitable limitations? These questions admit to no easy answer; however, if the ultimate purpose of rule 60(b) is to strike a proper "balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done,"[13] general definitions of the type of fraud required by each clause of the rule should be attempted and gradations made. The purpose of this Note is to determine the substantive grounds for the vacation of judgments under rule 60(b) through analysis of cases decided under the rule and to delineate the type of misconduct necessary to support an action for relief based on each ground.

## II. SOURCES OF FEDERAL RULE 60(b)

### A. Analysis of Traditional Procedure

Before the adoption of the Federal Rules of Civil Procedure in 1938, the procedure for vacating unfairly obtained judgments

12. Note 1 *supra.*

13. Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), *cert. denied,* 399 U.S. 927 (1970).

consisted of a perplexing amalgamation of anachronistic common-law writs, confusing equitable devices, and unpredictable "powers" of court. This haphazard array of remedies was due in large part to the schizophrenic attitude courts have long held concerning relief from judgments. On one hand, federal courts have disfavored relitigation of civil actions, adhering to Justice Story's admonition that "it is for the public interest and policy to make an end to litigation,"[14] but on the other, have been reluctant to allow unjust judgments to stand. The first policy of upholding the finality of judgments was expressed in the "term rule." Generally, during the term of court, the district judge had

> "plenary power . . . to modify his judgment . . . or even revoke it altogether," but the court could not ". . . set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term," or the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period.[15]

Opposed to the inflexible standard set by the term rule was the utilization, under certain circumstances, of (1) the extraordinary remedies of *audita querela, coram nobis* (or *vobis*), bill of review, or bill in the nature of a bill of review—ancient writs created by the common law and equity to mollify the injustice resulting from rigid operation of the term rule; (2) the independent action in equity—an appeal to the conscience of the chancellor to enjoin the enforcement of the judgment; and (3) the doctrine of the inherent power of a court over its judgments—a power that was actually in conflict with the term rule. A brief review of these remedial devices is necessary to a clear understanding of the present means of relief available under rule 60(b).

The writ of *audita querela,* as Professor Moore explains, was an ancillary writ that originated in the common-law courts of England in the fourteenth century.[16] Although the writ of *audita querela* was originally limited "to a ground of discharge occurring subsequent to the entry of the judgment,"[17] such as reversal of an

14. Ocean Ins. Co. v. Fields, 18 F. Cas. 532, 539 (C.C.D. Mass. 1841) (No. 10,406). Justice Story continued: "[S]uits may not be immortal, while men are mortal." *Id.*

15. Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure,* 25 TEMP. L.Q. 77, 78 (1951) (quoting Zimmern v. United States, 298 U.S. 167, 169-70 (1936); United States v. Mayer, 235 U.S. 55, 67 (1914)).

16. 7 MOORE ¶ 60.13, at 33; Moore and Rogers, *supra* note 9, at 659.

17. Moore & Rogers, *supra* note 9, at 660 (quoting Luparelli v. United States Fire Ins.

earlier verdict upon which the judgment relied, the writ was later extended to "matters arising before [the judgment's] rendition,"[18] such as lack of jurisdiction over the defendant and extrinsic fraud.[19] Similar to *audita querela* was the writ of error *coram nobis* (or *vobis*).[20] This writ of *coram nobis* was a writ "applied for at a subsequent term of the same court . . . which rendered the judgment to have the judgment revoked for errors of fact not apparent on the record nor negligently withheld from the court by the applicant."[21] Under this definition, operation of the writ would seem to extend to cases where the adverse party fraudulently withheld pertinent facts from the applicant and the court, and some cases have so held.[22] One court, however, has stated that the writ would not provide relief for fraud or mistake because these were distinct grounds for relief in the original action in equity.[23] Since the grounds for both the writs of *audita querela* and *coram nobis* were never very clear and the results achieved were often in conflict, the use of the writs was in most courts supplanted by motion.[24]

The bill of review (or bill in the nature of a bill of review)[25] was an "equitable remedy relating solely to decrees in equity which was filed with the court in which and only after the decree had become final."[26] There were three grounds for bills of review: "first, error of law apparent on the face of the record without

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Co., 117 N.J.L. 342, 188 A. 451 (1936), *aff'd,* 118 N.J.L. 565, 194 A. 185 (1937)).

18. *Id.*

19. Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CALIF. L. REV. 531, 534 (1972).

20. Moore explains that only a nominal distinction exists between the two terms. The writ of error *coram nobis* was brought in the King's Bench to set aside a judgment by the king while the writ of error *coram vobis* was brought in the Court of Common Pleas to vacate a decision by the king's justices. 7 MOORE ¶ 60.14, at 46 (quoting 2 TIDD, PRACTICE IN PERSONAL ACTIONS 1056 (1807)).

21. Orfield, *The Writ of Error Coram Nobis in Civil Practice,* 20 VA. L. REV. 423, 424 (1934).

22. Sowers-Taylor Co. v. Collins, 14 S.W.2d 692 (Mo. App. 1929); Chapman v. North Am. Life Ins. Co., 292 Ill. 179, 126 N.E. 732 (1920).

23. Simms v. Thompson, 291 Mo. 493, 236 S.W. 876 (1922).

24. Comment, *supra* note 19, at 535. As early as 1834 the South Carolina Supreme Court stated that the liberal practice of granting summary relief by motion had rendered the use of the writ of *audita querela* useless. Longworth v. Screven, 20 S.C.L. (2 Hill) 298 (1834).

25. Only technical procedure separates these two writs. A bill of review is proper when the judgment has been enrolled, whereas a bill in the nature of a bill of review "lies only when there has been no enrollment of the decree." Whiting v. Bank of the United States, 38 U.S. (13 Pet.) 6, 13 (1839).

26. Note, *supra* note 15, at 79.

further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result;"[27] and third, fraud practiced by the adverse party in obtaining the judgment.[28] The time for filing of the bill was limited only by the equitable doctrine of laches, except for a bill based on the first ground, which was usually required to be filed within the time allowed for appeal.[29] Bills of review, as well as writs of *coram nobis* and *audita querela,* were used only rarely in the federal courts at the time of the adoption of rule 60(b) in 1938, relief being available by motion in most instances. Nevertheless, the courts frequently looked to decisions on the substantive grounds of the ancillary writs in order to determine when an attack by motion was proper.[30] Even today the writs are theoretically available in some state courts,[31] although in practice their use is about as common as "trial by ordeal."[32]

The second means of attacking a fraudulently obtained verdict that was available in federal courts prior to adoption of the rules of procedure was the independent action in equity. Expressly preserved by present rule 60(b), "[t]he independent action was a collateral attack on a judgment instituted in the same or a different court, generally on the ground that one party had not had an opportunity to present his claims fully before judgment."[33] Because of the viability of an independent action against a fraudulent judgment in present practice, the mechanics of the device will be discussed in greater detail below.[34]

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27. Scotten v. Littlefield, 235 U.S. 407, 411 (1914).

28. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). "While Story recognized fraud as a basis for impeaching a decree, he thought that it could be brought forward only by an original action—'an original bill in the nature of a bill of review.' " 7 MOORE ¶ 60.15[1], at 57 (quoting STORY, COMMENTARIES ON EQUITY PLEADINGS § 426 (10th ed. 1892)).

29. Note, *supra* note 15, at 79.

30. *E.g.,* Cavallo v. Agwilines, 2 F.R.D. 526 (S.D.N.Y. 1942); Preveden v. Hawn, 36 F. Supp. 952 (S.D.N.Y. 1941).

31. Apparently, all of the ancillary writs are abolished in South Carolina. Carolina Nat'l Bank v. Homestead Bldg. & Loan Ass'n, 56 S.C. 12, 33 S.E. 781 (1899); see note 44 *supra.*

32. Comment, *Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b),* 17 U. OF CHI. L. REV. 664, 665 (1950) (comment made with reference to the writ of *audita querela,* but now aptly describes the use of the remainder of the ancillary writs). *But cf.* Comment, *Bill of Review: The Requirement of Extrinsic Fraud,* 30 BAYLOR L. REV. 539 (1978) (a type of bill of review, similar to the independent equitable action, is in present use in Texas).

33. Comment, *supra* note 19, at 535.

34. See notes 126-51 and accompanying text *infra.*

The third method by which an unjust verdict could be set aside was through utilization of the doctrine of a federal district court's inherent power over its own judgments. As explained by Justice Black in *Hazel-Atlas Co. v. Hartford-Empire Co.*,[35] "[f]rom the beginning [of the federal court system] there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."[36] This all-encompassing residual power in the district court[37] was generally invoked only on those occasions "where enforcement of the judgment [was] 'manifestly unconscionable,' "[38] but "where there was no clearly articulated ground for relief."[39] Because of the vague parameters of this equitable power, the doctrine was clearly at odds within the term rule. As stated by Moore: "Indiscriminate use of the doctrine of inherent power would undermine, if it did not destroy, the sound principle of finality that should attach to a final adjudication."[40] For this reason the doctrine has been exercised only sparingly, but since the grounds for invocation of the power have never been distinctly enumerated, apparently conflicting decisions have resulted.[41]

### *B. Original Rule 60(b)*

Original rule 60(b), enacted as part of the 1938 Federal Rules of Civil Procedure,[42] changed very little of the traditional practice. Although some of the proposed drafts of this rule were very liberal,[43] in the end the Federal Rules Advisory Committee opted for conservatism, promulgating a rule that was substantially the same as section 473 of the California Code of Civil Procedure. It read:

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35. 322 U.S. 238 (1944).

36. *Id.* at 244.

37. An appellate court has the same power over judgments rendered on appeal. *Id.*

38. *Id.* at 244-45.

39. Comment, *supra* note 19, at 535.

40. 7 MOORE ¶ 60.17[5], at 89.

41. *Compare* Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (exercising relief for "fraud upon the court") *with* United States v. Throckmorton, 98 U.S. 61 (1878) (refusing to grant relief for substantially similar fraud as that in *Hazel-Atlas*); see notes 137-42, 152-60 and accompanying text *infra*.

42. The federal rules were drafted pursuant to the Federal Rules Enabling Act of 1934, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1976)) and became effective in 1938. FED. R. CIV. P. 86(a).

43. PRELIMINARY DRAFT OF RULES FOR CIVIL PROCEDURE (3d draft) 115 (1936), *reprinted in* 7 MOORE ¶ 60.10[2], at 12.

> (b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, USC, Title 28, § 118, a judgment obtained against a defendant not actually personally notified.[44]

The rule had two substantial effects. First, the term of court was rendered unimportant in relation to the district court's power over its final judgments[45] and was replaced by a six-month time limit.[46] Second, the rule codified a motions procedure that was, at least for those grounds expressly stated in the rule, distinctly superior to the use of the ancient extraordinary writs. Despite these improvements, however, the rule was clearly deficient in its enumeration of the instances in which the court could vacate a judgment. As one commentator observes:

> A literal application of the rule would have allowed relief by motion only for the movant's *own* mistake, inadvertence, sur-

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44. CAL. CIV. PROC. CODE § 473 (Deering 1937), *reprinted in* 7 MOORE ¶ 60.10[4], at 13-14. The South Carolina provision is very similar. It reads:

> The court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code the court may, in like manner and upon like terms, permit an amendment of such proceeding so as to make it conformable thereto.

S. C. CODE ANN. § 15-27-130 (1976). Unlike the California courts, however, the South Carolina Supreme Court has interpreted § 15-27-130 to be the exclusive remedy for vacation of judgments, taking the place of a petition for rehearing and bill of review. Carolina Nat'l Bank v. Homestead Bldg. & Loan Ass'n, 56 S.C. 12, 33 S.E. 781 (1899).

45. Original rule 60(b) must be read with original rule 6(c), which provided that the expiration of a term of court should in no way "affect the power of a court to do any act or take any proceeding in any civil action which has been pending before it." FED. R. CIV. P. 6(c) (now rescinded).

46. The six-month limit was the maximum time allowed. A motion, although made within six months, could have been rejected as not being made within a "reasonable time." *See* text accompanying note 44.

> prise, or neglect, and by independent action only for fraud, mistake, and accident. There was no mention of fraud or newly discovered evidence as grounds for relief by motion, nor ancillary remedies.[47]

These inadequacies were remedied by judicial construction. Liberal California practice, which authorized relief by motion from a judgment "superinduced by the fraud of the other party,"[48] was adopted by the federal courts. The courts also interpreted rule 60(b)'s clause allowing "an action" to maintain the ancillary writs of *coram nobis, audita querela,* and bill of review[49] (if these writs were filed within the six-month time limit) and to preserve the independent action in equity.[50] Thus, "[a]s construed, [the rule] operated reasonably well,"[51] but very little of the former procedure had changed. As one writer stated, the practice of "leaving the shrouded ancient writs" or a "host of court-made exceptions" to take care of the ambiguities and deficiencies of the original rule was incompatible "with a modern code of procedure."[52]

### *C. The 1946 Revisions*

In accordance with the premise that "the rules should be complete . . . and define the practice with respect to any existing rights or remedies to obtain relief from final judgment,"[53] the Federal Rules Advisory Committee extensively revised rule 60(b) in 1946. "The amended rule represented an expansive, liberal approach to procedure"[54] and corrected the major inadequacies of the original rule. The major changes relevant to this discussion were as follows: (1) fraud, whether intrinsic or extrinsic,[55] and newly discovered evidence were expressly made grounds for motion; (2) the rule was amended to allow a party to obtain relief whether the mistake, surprise, neglect, or inadvertence was his own or that of others; (3) the maximum time to move for relief

47. Comment, *supra* note 19, at 536 n. 45.

48. Bacon v. Bacon, 150 Cal. 477, 484, 89 P. 317, 320 (1907). Adopting this stance was Fiske v. Buder, 125 F.2d 841 (8th Cir. 1942).

49. 7 MOORE ¶ 60.12, at 33.

50. *Id.* ¶ 60.16[3], at 77 (citing Preveden v. Hawn, 36 F. Supp. 952 (S.D.N.Y. 1941).

51. 7 MOORE ¶ 60.17, at 91.

52. Note, *supra* note 15, at 82.

53. Advisory Committee Notes to Rule 60(b) (1946).

54. Comment, *supra* note 19, at 538.

55. See notes 137-43 and accompanying text *infra.*

was raised from six months to one year for the first three subdivisions of the rule; (4) a new clause was added that reserved to the court power to vacate a judgment for "any other reason justifying relief," which was subject to no time limit; (5) "an action" was amended to read "an independent action;" (6) the ancient ancillary writs were abolished; and (7) "fraud on the court"[56] was added as a ground of relief.

As was the case with original rule 60(b), the amended rule generally has been liberally construed in the interest that justice be done.[57] And "[i]t has been said that the dearth of cases involving unjust results or judicial confusion bears out the opinion that Rule 60(b), as amended, is 'a carefully drafted, smoothly-operating Rule of Civil Procedure.' "[58] Nevertheless, as was stated in the introduction to this Note, questions arise concerning the relationship between the stated grounds in the rule and the level of fraud required by each before a judgment will be overturned. Though it was not the purpose of 60(b) "to prescribe the substantive grounds for vacating judgments,"[59] some standard must be drawn to allow for internal consistency within the rule. Four methods are provided for attacks against verdicts: (1) by motion on the ground of fraud, (2) by motion on the basis of the court's residual power, (3) by independent action for fraud, and (4) by motion or independent action for fraud on the court. Varying time limitations are attached to each of the grounds, from the one-year time limit for fraud, as prescribed in subdivision (1) of the rule, to the indefinite time limit for fraud on the court. Clearly, if no substance is imported to each ground of the rule and all types of fraud are cognizable under any of the clauses, the time limits become meaningless and no balance between finality of litigation and individual justice is struck at all. Therefore, case law must be analyzed to determine the substantive level of fraud required by each method of relief available under rule 60(b).

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56. See notes 151-69 and accompanying text *infra*.

57. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2852, at 143 (1973) [hereinafter referred to as WRIGHT & MILLER].

58. *Id.* § 2851, at 143.

59. Advisory Committee Notes to Rule 60(b) (1946).

## III. Analysis of the Nature and Type of Fraudulent Misconduct Required for Relief from Judgments under Rule 60(b)

### A. Clause (3) of Rule 60(b): Fraud, Misrepresentation, and Other Misconduct

Added by way of the 1946 amendments to the rule, clause (3) of rule 60(b) authorizes a court on motion to "relieve a party or his legal representative from a final judgment" for fraud, misrepresentation, or other misconduct of an adverse party.[60] Although rule 60(b) also states that it does not limit the power of a court to entertain an independent action or to relieve a party from judgment for fraud upon the court, the scope of clause (3) is impliedly broader. The confusing dichotomy between extrinsic and intrinsic fraud is expressly abolished by rule 60(b)(3), although the extrinsic-intrinsic distinction may remain viable for an independent action or an action based on fraud on the court.[61] Clause (3) is also subject to strict time limitations. A motion seeking relief under this provision must be brought within a reasonable time and in no event "more than one year after judgment was entered."[62] Thus, because of the liberal attitude expressed by the clause and the strict limitations imposed on it, it is not unusual that the courts have found 60(b)(3) to have a broad sweep, capable of reaching any conduct that can be said to have subverted the integrity of the judicial process or to have precluded a "fair contest"[63] between the parties.

A good example of the liberal construction given rule 60(b)(3) is *Rozier v. Ford Motor Co.*,[64] a recent decision of the Fifth Circuit Court of Appeals. In *Rozier,* plaintiff's decedent was killed when the 1969 Ford Galaxie in which he was riding was struck from behind by another automobile. The collision ruptured the Ford's fuel tank, spraying gasoline over the entire vehicle. A conflagration resulted, engulfing the car in flames. The driver, William Rozier, suffered severe burns from which he died less than twenty-four hours later.[65]

Approximately one year after the accident occurred, Martha

60. Note 1 *supra.*
61. *See* notes 137-49 and accompanying text *infra.*
62. Note 1 *supra.*
63. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).
64. 573 F.2d 1332 (5th Cir. 1978).
65. *Id.* at 1337.

Rozier, widow of the deceased, filed suit, alleging that Ford had negligently designed the 1969 Galaxie by placing the gasoline tank in a location that was vulnerable to a rear-end collision. After a week-long trial, the jury returned a verdict for Ford. Approximately ten months after the judgment, however, plaintiff's counsel learned of the existence of a document prepared in 1971 by a Ford cost engineer that explored the possibilities of alternative fuel tank placements for full-sized Ford automobiles for that year.[66] This document was arguably within the scope of discovery, since plaintiff had requested "any written reports or analyses [prepared by Ford within the last ten years] of alternate locations, (e.g., on top of the rear axle or in front of the rear axle) for fuel tanks in the full-sized sedans and hardtops, including the 1969 Galaxie 500."[67] A subsequent court order required Ford to produce any such information, stating "[t]he fact that a written requirement, cost/benefit analysis or written report may also be applicable to vehicles *other than* the 1969 Ford Galaxie 500 does *not* render it beyond the scope"[68] of discovery. Because Ford had failed to produce this document in response to the court's order, plaintiff filed a motion for a new trial under rule 60(b)(3). Nevertheless, after listening to oral arguments and considering briefs of counsel, the district court refused, without written opinion, to vacate the judgment.[69]

On appeal, the Fifth Circuit reversed the district court's denial of the 60(b)(3) motion and remanded the case for a new trial.[70] Judge Simpson, speaking for the three-judge panel, stated that the discretion granted to the trial court by 60(b)(3) was extremely expansive and the district court had abused its discretion by not vacating the judgment. It analogized the district court's power under 60(b)(3) to the plenary power that earlier federal courts possessed prior to the running of the term.

> Although Rule 60(b) substitutes a general one year limitations period for the earlier "term rule," it continues to reflect a strong policy favoring an end to litigation by severely restricting the relief available after the one year limit has run. In the year after a judgment has been entered, however, the district courts have greater discretion to balance the policy of finality of judgments

66. *Id.* at 1340.
67. *Id.* at 1339.
68. *Id.* at 1340 (emphasis in original).
69. *Id.* at 1337.
70. *Id.* at 1349.

> against the other salutary policies embodied in the alternate grounds for relief provided in sub-sections (1) through (3) of Rule 60(b). Essentially, this discretion, as guided by the Rule, furnishes an escape valve to protect the fairness and integrity of litigation in the federal courts.[71]

In this case, Judge Simpson continued, Ford was guilty of misconduct "in withholding information called for by discovery."[72] In such a case, rule 60(b)(3) "does not require that the information withheld be of such nature as to alter the result in the case;" it only needs to have "prevented the losing party from fully and fairly presenting his case or defense"[73] or to have precluded "the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure."[74] The "fair contest" standard alluded to by Judge Simpson seems to be one of mere arguable relevance. The cost/benefit analysis that was not produced in *Rozier* was one that was produced in 1971, at least two years *after* the manufacture of the car.[75] As the court conceded, proof of the relevance of the report to the preproduction period would have been difficult.[76] Where the court says the report would have been relevant, however, was to proof of negligence in the post-production period. "In the post-production period . . . Ford may have had a duty to warn consumers of a latent danger such as a defectively designed fuel tank."[77] This argument is speculative in two respects. First, the court could cite no Georgia cases explicitly holding that a duty to warn would exist in a "second collision" case.[78] Second, plaintiff evidently regarded the duty to warn issue to be of little merit. She made no effort to produce evidence on the question and had no objection to withdrawal of the issue from the jury's consideration.[79]

This is not to say, however, that the case was wrongly decided. The scope of 60(b)(3) should be broad enough to reach even the hint of misconduct. The fraud in *Rozier* was not fraud in its usual sense, but rather in the sense of failure to abide by the rules.

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71. *Id.* at 1338-39.
72. *Id.* at 1339.
73. *Id.*
74. *Id.* at 1346 (quoting United States v. Proctor Gamble Co., 356 U.S. 677, 683 (1958)).
75. *Id.* at 1340.
76. *Id.* at 1343.
77. *Id.* at 1344.
78. *Id.* at 1344 n. 13.
79. *Id.* at 1345.

House counsel for Ford discovered the document a week before trial,[80] and even though its relevance was questionable, the proper course of conduct "was to seek a ruling by the district court at that point and not a year after the trial and then only when, by chance, the plaintiff learned of it."[81]

On the facts of the *Rozier* case it is not too difficult to square the decision of the Fifth Circuit with the purposes of 60(b)(3). When there is evidence of evil intent, even if it is only a trace, the fraud will not be weighed.[82] But what about those cases where evidence, arguably within the scope of discovery, is inadvertently withheld and no evil intent on the part of the adverse party can be inferred? Will 60(b)(3) expand to reach these situations, which are presumably becoming more frequent because of the increasing complexity of litigation and use of discovery devices? The few cases on point indicate that 60(b)(3) is applicable, and a new trial will be granted if the judgment, in good conscience, should not be allowed to stand.[83]

A case decided in 1965, *Bros, Inc. v. W. E. Grace Manufacturing Co.*,[84] illustrates the almost plenary power a federal court has over its judgments under 60(b)(3). In *Grace,* plaintiff, patentee of a "pneumatic-tired earth compactor" obtained judgment in a federal court in Ohio against defendant for infringement of its patent.[85] On the basis of this verdict, plaintiff secured a summary judgment in a federal district court in Texas.[86] In a similar suit in Minnesota, however, new evidence was obtained which showed, contrary to plaintiff's assertions contained in an affidavit introduced in the Ohio suit, that a brochure describing the machine had been published more than one year before the patent application.[87] While the Texas summary judgment was still in the process of appeal, defendant moved to set aside the

80. *Id.* at 1340. The court added that the house counsel of Ford who discovered the document "did not participate in the trial itself or in the appeal" and that the attorneys who handled the trial "were personally unaware of the Trend Cost Estimate until Mrs. Rozier filed her motion to vacate . . . ." *Id.* at 1342 n. 10.

81. *Id.* at 1342.

82. *See* Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145 (7th Cir. 1966).

83. Contrast this standard with the demanding standard required to prove that a judgment is "factually incorrect," the subject of 60(b)(2), or newly discovered evidence. *See* note 89 *infra.*

84. 351 F. 2d 208 (5th Cir. 1965).

85. William Bros. Boiler & Mfg. Co. v. Gibson-Stewart Co., Inc., 116 U.S.P.Q. (BNA) 138 (D. Ohio 1957).

86. Bros, Inc. v. W. E. Grace Mfg. Co., 158 F. Supp. 786 (D. Tex. 1958).

87. Browning Mfg. Co. v. Bros, Inc., 134 U.S.P.Q. (BNA) 231 (D. Minn. 1962).

verdict on the basis of the evidence of prior publication.[88] The Texas district court ruled that plaintiff's affidavit, which claimed publication "long after" application for the patent, was fraudulently made and vacated the summary judgment. On appeal, the Fifth Circuit upheld the trial court's vacation of the judgment, but modified the lower court's characterization of plaintiff's intent in filing the affidavit.

> Out of the Patentee's records, the Williamson . . . affidavit was therefore proved to be incorrect. It was untrue. But was it something more? Deliberate? Knowingly false? Although this record details other circumstances which raise questions why the fact was not earlier uncovered, we think the record as a whole . . . does not warrant the Trial Judge characterizing this affidavit as a "false statement" and manifestly untrue and knowingly [so] made. It may have been given too hastily as a response to the efforts to reopen the 6th Circuit decision . . . and perhaps too much reliance was put on the earlier escape clause in Par. 3 of the affidavit that "the following information is true to the best of my knowledge and belief." But we do not think it shows a

88. The motion was actually based on FED. R. CIV. P. 59, but the Fifth Circuit treated it as "the substantial equivalent of one under 60(b)." Bros, Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594, 607 (5th Cir. 1963). The Fifth Circuit refrained from "examining at this moment the form or name of the procedural remedy" in the above suit. *Id.* at 606. It is enough that "there is a sufficient probable showing of circumstances which, if finally sustained after proof and hearing, would justify some character of equitable relief." *Id.* at 607. The circumstances surrounding the action, however, would dictate that 60(b)(3) apply. The newly-discovered brochure clearly fit into the categories covered by clauses (2) or (3) of 60(b)(3), thus ruling out 60(b)(6). *See* Klapprott v. United States, 335 U.S. 601 (1949); *see* notes 114-25 and accompanying text *infra.* Additionally, the court found it "not necessary to formally institute an independent equitable action if relief can be granted under sub-paragraphs (1) through (6) of the Rule." 320 F.2d at 608. Fraud on the court was not mentioned by the court. The only obstacle to granting 60(b)(3) relief was the running of the "critical one-year period." *Id.* at 608 n. 33. By refusing to "label" the equitable power the district court possessed, however, the court avoided the question of when the judgment became final. Nevertheless, the court did state that "if for 60(b) the 'final judgment, order' is the really final, final judgment of October 17, 1961, awarding infringement damages, attorney's fees, costs, etc. . . . then the July-November 1959 motions earlier filed in the 6th Circuit asserting these very same contentions were timely (though perhaps premature)" under either 60(b)(2) or (3). *Id.* at 608 n. 33. (A later decision has come to the opposite conclusion. The time for motion runs from the decree sustaining infringement, not from the final assessment of damages. Valmont Indus., Inc. v. Yuma Mfg. Co., 50 F.R.D. 408 (D. Colo. 1970)).

Despite the failure of the court in *Grace* to state explicitly that the case fell under 60(b)(3), the Fifth Circuit has recently decided that *Grace* was in fact decided on that basis. Citing *Grace,* the court in Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977) stated that "in one somewhat unusual case this court has ruled that a trial court may grant a 60(b)(3) motion without a showing of evil intent on the part of the adverse party . . . ." *Id.* at 737.

> deliberate evil purpose to misstate or conceal or thereafter engage in foot-dragging lest the truth might be uncovered.
>
> But this does not alter granting 60(b) relief. Because of the unique factors of this case and this type of public interest litigation . . . relief was justified, if not compelled. Stated with such positiveness, the affidavit, accompanied by strong memorandum briefs . . . undoubtedly had a decisive impact on the 6th Circuit. The 6th Circuit's reliance on its liberal truth closed the door there, and by res judicata here. The effect was the same whether there was evil, innocent or careless, purpose. In either event it was the action of the party taken while the case was still "alive" and when had the truth now revealed been disclosed quite a different result might have come about.[89]
>
> Expunging now the aspersions of purposeful misconduct, we are nonetheless certain that the broad reach of 60(b) reaches this far. The Judge was correct, therefore, in granting 60(b) relief to introduce belatedly, but permissibly, the new defense of § 102(b) prior publication.[90]

A very recent case from the Second Circuit Court of Appeals, *Israel Aircraft Industries, Ltd. v. Standard Precision,*[91] comes to the same conclusion. The action in *Israel Aircraft* arose from the crash of a jet airplane in Israel that resulted in personal injury to the crew members of the plane and property damage to the owner, Israel Aircraft Industries, Ltd. (IAI). The insurer of IAI, along with the Israeli crew members, commenced suit in a federal district court in New York against Standard Precision, the manufacturer of the defective component part that caused the crash.[92] Standard Precision, in turn, counterclaimed against IAI on the ground that modifications by IAI to the component part rendered the piece defective.[93]

The case proceeded to trial, and the jury, deciding the liability issue separately, found that Standard's negligence contributed thirty-five percent to the crash and IAI's negligence sixty-five percent. During the hearing on damages, however, American counsel for IAI learned for the first time that the crew members

89. *Compare* the phrase—"a different result might have come about"—*with* the burdensome standard set by 60(b)(2): "the evidence must be of such a material and controlling nature as will probably change the outcome." 7 MOORE ¶ 60.23[4], at 275 (citing Krock v. Electric Motor and Repair Co., 339 F.2d 73 (1st Cir. 1964)).

90. 351 F.2d at 211.

91. 559 F.2d 203 (2d Cir. 1977).

92. *Id.* at 205.

93. Israel Aircraft Indus. v. Standard Precision, 72 F.R.D. 456, 458 (S.D.N.Y. 1976).

had, in return for a settlement of some $11,000, signed contracts of release with their employer, IAI.[94] Before the substance of the releases could be obtained from IAI in Israel, the jury returned a verdict finding the property damage of IAI to be $860,000 and the personal injury damage of the crewmen to be $425,000.[95] The full texts of the releases were subsequently obtained by the counsel of IAI, who then moved to assert the releases as a defense to Standard's counterclaim and to reduce the crew members' recovery from Standard by sixty-five percent, the amount of IAI's proportionate share of liability.[96] In response, Standard Precision moved to amend its answer to assert the defense of release against the claims by the crew members, arguing that, under Israeli law at the time the releases were signed, the release of one tortfeasor by an injured party released all tortfeasors.[97]

"Needless to say, the District Judge was greatly upset when he learned of the undisclosed releases."[98] Instead of ruling on either of the post-trial motions, the district court made a motion of its own.

> Although defendant SP has raised the issue of fraud on the court, it has not gone so far as to move under Rule 60(b)(3) . . . to dismiss all claims of both plaintiffs on that basis. Nevertheless, the court on its own motion may take such action as is necessary in response to fraud of a serious dimension . . . .[99] [Furthermore, under rule 37(a)(2), t]he court has the power to dismiss all claims solely on the ground of failure to make proper responses to defendant's pre-trial discovery efforts.[100]

Concluding that "plaintiffs knowingly and fraudulently withheld from defendants, the court and jury, matters material to the fair disposition of claims prsented in this lawsuit,"[101] the district court summarily dismissed all plaintiffs' claims in their entirety.

The Second Circuit Court of Appeals vehemently disagreed with the trial judge's extreme actions. Because the suit was dismissed without hearing and because "[t]he reputations of two established New York law firms, an internationally known Israeli

94. 559 F.2d at 206.
95. *Id.*
96. *Id.* at 207.
97. 72 F.R.D. at 459.
98. 559 F.2d at 207.
99. 72 F.R.D. at 462.
100. *Id.* at 461-62.
101. *Id.* at 463.

corporation and at least five individuals are at stake,"[102] the court of appeals painstakingly examined the record "in the same fresh light as did the District Judge."[103] The conclusion of the court of appeals: "There were misunderstandings, lack of communication and, in some instances, carelessness. However, there was no intentional fraud."[104]

The court of appeals based its conclusion on three grounds. First, the court viewed the releases as being substantially of the same nature as Workmen's Compensation benefits and as constituting no bar to third party recovery. The court thought it incredible that, either IAI or the crew members would jeopardize a potentially large recovery from third parties by signing a binding release for a relatively miniscule amount. Second, intentional concealment of the releases would require cooperative deceit on an international scale, a scheme that the court viewed as preposterous. Third, the court did not find it incredible that plaintiff's attorneys in New York were unaware of the releases in Israel. "[A]n open line of communication [often does not exist] between the insured and the insurer's attorney,"[105] especially after the losses have been covered by the carrier. "Where, as here, four thousand miles of ocean separate the foreign insured from the New York attorneys, full and complete disclosure is even less likely to occur."[106] The court stated clearly that it would not condone the failure by the plaintiffs' attorneys to make every possible effort to obtain the releases. But it also refused to "equate laxity with fraudulent intent."[107]

Therefore, in line with its findings, the court of appeals reversed the order of dismissal. Nevertheless, the court agreed with the trial judge that under the 60(b)(3) motion raised *sua sponte,* "because of the mistakes and inadvertences which have admittedly occurred, the verdicts . . . should not be allowed to stand."[108] The court remanded the case to the district court for retrial despite the absence "of the element of fraud which led the District Court to dismiss the complaint."[109]

The conclusion that can be drawn from *Rozier, Grace,* and

102. 559 F.2d at 207.
103. *Id.*
104. *Id.*
105. *Id.* at 208.
106. *Id.*
107. *Id.*
108. *Id.* at 208-09.
109. *Id.* at 209.

*Israel Aircraft* is that a district court has almost unqualified power to set aside a judgment under 60(b)(3). Where evil intent can be inferred on the part of the adverse party, the impact of the misconduct upon rendering of the judgment will not be examined. In a case where evidence is fraudulently withheld, such as in *Rozier,* the evidence merely need be admissible or arguably relevant before the judgment can be vacated. Where, however, no fraud can be inferred and the undisclosed evidence, or conduct complained of, has decisive relevance to the case, such as in *Grace* and *Israel Aircraft,* the district court may still set aside the verdict. Therefore, by means of 60(b)(3), a losing party may succeed in having an inequitable judgment overturned, despite the absence of fraud, and without having to meet the burdensome standard of subdivision (2) of the rule—that the newly discovered evidence be of such nature that a new trial would produce a different result.

### *B. Clause (6) of Rule 60(b)*

Subdivision (6) of Rule 60(b) states that the court, on motion, may relieve a party from a judgment "for any other reason justifying relief from the operation of the judgment."[110] This "unprecedented addition to the Rules"[111] made by the 1946 amendments to rule 60(b) represents an effort to escape the "harsh and inequitable results" that are produced by exclusive enumeration of the "situations when relief can be afforded by motion."[112] But it is just the "catch-all" nature of the clause, coupled with the absence of a time limit (save that of "reasonable time"), that "cause[s] more than a little trouble."[113] If 60(b)(6) is interpreted to include those grounds for motion contained within the first three subdivisions of the rule, the one-year time limitation is virtually emasculated. Recognizing this problem the United States Supreme Court in *Klapprott v. United States*[114] stated: "In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified,* vests power in courts adequate to enable them to vacate judgments

110. Note 1 *supra.*

111. Note, *Federal Rule 60(b): Relief from Civil Judgments,* 61 YALE L.J. 76, 81 (1952).

112. Moore & Rogers, *supra* note 9, at 688.

113. Note, *supra* note 15, at 83.

114. 335 U. S. 601, *modified,* 336 U.S. 942 (1949).

whenever such action is appropriate to accomplish justice."[115]

This interpretation, however, is also fraught with difficulty, as pointed out by Judge Learned Hand in *United States v. Karahalias.*[116] In *Karahalias,* plaintiff sought to reopen a default judgment of denaturalization that had been entered against him seventeen years earlier. Plaintiff's excuse for not contesting the judgment was that he was in Greece and was prevented from returning to the United States by his wife's illness and, later, the Second World War. Judge Hand labelled plaintiff's actions as "excusable neglect" and held that, even though this ground was covered by clause (1) of 60(b), this did not prevent the court from reopening the decree under clause (6).[117] Judge Hand stated:

> Confessedly Karahalias may not invoke subsections (1), (2) or (3) of that rule, because of the [time] limitation . . . . If he is to succeed, therefore, he must bring himself within subsection (6); and literally, he may not do so, because there can be no doubt that his ground of relief is "excusable neglect"; and unless subsection (6) be read as providing an exception to subsection (1), the order on appeal was right. It seems to us that subsection (6) must be so read, not only as to subsection (1) but as to (2) and (3). It is extremely difficult to imagine any equitable grounds for relief that these three subsections do not cover, for subsections (4) and (5) are not really for equitable relief at all. Subsection (6) on the other hand is itself clearly for equitable relief, and, if confined to situations not covered by the first three subsections, would be extremely meager, even assuming that we could find any scope at all. Moreover, if we could, *it would be a strange purpose to ascribe to the Rule to say that, although subsection (6) was no more than a kind of receptacle for vestigial equities, it should be without any limit in time, while the other and usual equitable grounds for relief were narrowly limited.* We do not believe that this was its purpose; we think that it was meant to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2), and (3) do not cover, but those that they do. In short—to put it quite baldly—we read the subsection as giving the court a discretionary dispensing power over the limitation imposed by the Rule itself on subsections (1), (2) and (3) . . . .[118]

On rehearing, this opinion was repudiated because of its con-

115. *Id.* at 614-15 (emphasis added).
116. 205 F.2d 331 (2d Cir. 1953).
117. *Id.* at 332-33.
118. *Id.* at 333 (emphasis added).

flict with *Klapprott*.[119] The court's final conclusion was that "no neglect, however excusable, will survive the [one-year] limitation of Rule 60(b)."[120] This change of mind, however, did not alter the final disposition of the case. The court also found that it had erred in its characterization of plaintiff's inaction as neglect. What was "excusable neglect" six weeks earlier was now a result of "forcible obstacles imposed upon his defense"[121] and within the ambit of 60(b)(6).

Though Judge Hand was compelled to retract his statements made in the first opinion the logical force of his argument remains. The result of the *Klapprott* limitation is that many courts follow the *Karahalias* "semantic tour-de-force"[122] and simply refuse to acknowledge that the acts of an adverse party fall into one of the first three subdivisions of rule 60(b). Thus, for "a strong court," subdivision (6) provides an extremely "flexible device for avoiding the time limits of Rule 60(b)."[123] A court may simply say, for example, that "[w]hile the circumstances . . . bear many of the earmarks of a mere plea for reopening for . . . fraud under [clause] (3), it is something more,"[124] thus placing the action within the coverage of 60(b)(6). The best remedy for the dilemma posed by *Klapprott* and *Karahalias* would be to place a one-year time limit on subdivision (6)[125] and relegate actions under the clause that do not fall within the time limitation to a more stringent remedy of an independent action.

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119. *Id.* at 334.

120. *Id.* at 335.

121. *Id.*

122. McKinney v. Boyle, 404 F.2d 632, *cert. denied*, 394 U.S. 992 (1968).

123. WRIGHT & MILLER § 2864, at 219.

124. Bros, Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594, 609 (5th Cir. 1963). Because of the problems of determining when the final judgment had been entered and whether the one-year limitation had run, the court alternatively sought to place its decision to reopen the question of the patent's validity on the basis of 60(b)(6). Note, however, that the court stated that "[i]n the light of the last sentence of 60(b), subsection (6) must mean to make available those grounds which equity has long recognized as a basis for relief." *Id.* at 608. Thus, the court says subdivisions (6) and (3) give relief for similar grounds, a statement that is contrary to the *Klapprott* decision. In Transit Cas. Co. v. Security Trust Co., 441 F.2d 788, 792 (5th Cir. 1971), however, the court repudiated what it had said in *Grace* about 60(b)(6) and relied on the strict Second Circuit interpretations of *Klapprott*. *E.g.*, United States v. Erdoss, 440 F.2d 1221 (2d Cir. 1971); Rinieri v. News Syndicate Co., 385 F.2d 818 (2d Cir. 1967). Finally, in Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977), the court stated that it granted relief in *Grace* on the basis of 60(b)(3), without mention of the case in its discussion of 60(b)(6). *Id.* at 737.

125. Coming to the same conclusion is Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 86 (1978).

### C. *Independent Action in Equity*

The first saving clause of rule 60(b) states that the rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding."[126] The independent action in 60(b) "is not an affirmative grant of power but merely allows continuation of whatever power the court would have had to entertain an independent action if the rule had not been adopted."[127] As a result, "courts must delve into history to discover"[128] the requirements of the independent action.

Although under established doctrine there are various grounds for relief in an independent action,[129] the majority of federal cases invoking this method of relief have involved fraud.[130] These cases have established certain procedural guidelines for the action. Generally, there exists no time limit on when an independent action may be brought; but since the doctrine is a creation of equity, laches applies and undue delay may forestall relief.[131] A petition for review of an inequitable judgment that fails as an ancillary motion may be treated as an independent action.[132] Historically, an independent action, because it was an equitable device that sought to *bar* enforcement of a judgment, could have been brought in any court of competent jurisdiction.[133] Presently, however, this procedure is of doubtful validity. A court, as a matter of comity, should refuse to vacate the judgment of a sister court.[134] Therefore, under modern practice, an independent action is the procedural equivalent of a 60(b)(3) motion, but without the time limit.

Substantively, the general requirements for an independent action do not differ greatly from those of a 60(b)(3) motion. The most common statement of the elements constituting an independent equitable action lists them as follows:

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126. Note 1 *supra.*

127. WRIGHT & MILLER § 2868, at 237.

128. Comment, *supra* note 19, at 542.

129. In addition to fraud, an independent action lies for accident, mistake, void judgments, and newly discovered evidence. *Id.* at 542-43; see 7 MOORE ¶ 60.37[1], at 608-09, 621-23.

130. 7 MOORE ¶ 60.37[1], at 609; WRIGHT & MILLER § 2868, at 239.

131. WRIGHT & MILLER § 2868, at 241.

132. Bankers Mortgage Co. v. United States, 423 F.2d 73 (5th Cir.), *cert. denied,* 399 U.S. 927 (1970).

133. WRIGHT & MILLER § 2868, at 242-43.

134. Lapin v. Shulton, Inc., 333 F.2d 169 (9th Cir.), *cert. denied,* 379 U.S. 904 (1964).

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good [claim or] defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented [the assertion of the claim or defense]; (4) the absence of fault or negligence on the part of the [claimant]; and (5) the absence of any adequate remedy at law.[135]

Though the list is a succinct summary of established equitable requirements, it does little more than to reiterate the elements also generally required of a 60(b)(3) motion, which is a descendent of equitable practice as well. Another distinction that the courts attempt to draw between a 60(b)(3) motion and an independent action is that, unlike the general availability of subdivision (3), "[r]esort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances."[136] This statement, however, says little of substance, and "unusual and exceptional circumstances" can be manufactured by an enterprising court from the facts of any given case.

The greatest limiting force on the use of the independent action as a method of relief, however, is the uncertainty of whether the action is available for intrinsic, as distinguished from extrinsic, fraud. The extrinsic-intrinsic distinction arises from a United States Supreme Court case decided in 1878, *United States v. Throckmorton.*[137] In *Throckmorton,* defendants' transferor, one Richardson, had obtained from a corrupt Mexican official a falsely antedated land grant covering a tract of property in California. In 1853, a federal territorial board confirmed the validity of the grant, and three years later, a federal district court affirmed the board's decree. In 1876, a United States attorney discovered the fraud and filed an original bill in equity to vacate the judgment of the district court. The bill was denied, and the Supreme Court, in an opinion written by Justice Miller, affirmed. The Court recognized that relief could be granted for "frauds, extrinsic or collateral, to the matter tried by the first court,"[138] such as "where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent

135. Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir.), *cert. denied,* 399 U.S. 927 (1970).

136. WRIGHT & MILLER § 2868, at 239.

137. 98 U.S. 61 (1878).

138. *Id.* at 68.

a party and connives at his defeat."[139] The Court, however, stated that

> [i]n all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.
>
> On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.[140]

The rationale for the holding in *Throckmorton* "is that intrinsic fraud is discoverable through the ordinary processes of the trial itself, such as the right to cross-examine"[141] and that extrinsic fraud never enters into the judgment. This distinction has been heavily criticized by both the courts and the commentators "as difficult to understand and apply."[142] Even the Supreme Court seemed to have second thoughts only thirteen years after *Throckmorton,* in its decision in *Marshall v. Holmes.*[143]

In *Marshall,* plaintiff initiated an independent equitable action in a state court to enjoin the enforcement of a judgment against him that was based on perjury. A petition for removal to federal court was filed, and the question arose whether the federal court had jurisdiction. The Supreme Court answered that removal was proper, assuming diversity of citizenship and the proper jurisdictional amount.[144] The court, however, did not end the discussion there. It continued:

> "[A]ny fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Marine Ins. Co. v. Hodgson,* 7 Cranch 332, 336 . . . .[145]

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139. *Id.* at 65-66.
140. *Id.* at 66.
141. Lockwood v. Bowles, 46 F.R.D. 625, 630 (D.D.C. 1969).
142. WRIGHT & MILLER § 2861, at 192.
143. 141 U.S. 589 (1891).
144. *Id.* at 600-01.
145. *Id.* at 596.

Despite this apparent contradiction in language, most courts continue to adhere to the holding in *Throckmorton,*[146] rather than follow the vague dicta in *Marshall.*[147] And, it is interesting to note, the minority view, which repudiates the extrinsic-intrinsic distinction in the independent action, has been on the wane since the 1946 addition of 60(b)(3),[148] which abolishes the distinction entirely for the one-year period after judgment. The reason for the decline is clear: if the distinction is not drawn, the independent action, under its present requirements, would become no more than a 60(b)(3) motion, and would severely threaten the principle of finality expressed by the one-year time limitation imposed on that clause.

Although the extrinsic-intrinsic distinction serves as an effective check on "the mischief of retrying every case"[149] by preventing the circumvention of the one-year time limit, a more just means is required. This could be accomplished through the formulation of a stricter substantive standard for the independent action. The elements of this standard would not differ greatly from those generally required for vacation of a judgment under newly discovered evidence.[150] This proposed standard would be as follows: (1) the misconduct complained of must be of such a material nature as would likely lead to a different decision on the merits of the case; (2) the moving party must not have known of the fraud or misconduct at the time of trial; (3) the moving party must have exercised due diligence at the trial in attempting to expose any fraud of the adverse party; and (4) the action must have been filed within a reasonable time after discovery of the fraud or misconduct.

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146. Comment, *supra* note 19, at 546 n. 112.

147. *But cf.* Publicker v. Shallcross, 106 F.2d 949 (3d Cir. 1939) (where the court stated that *Throckmorton* was no longer the law of the Supreme Court). The best criticism of the extrinsic-intrinsic distinction is found in a New Jersey Supreme Court opinion by Judge (now Mr. Justice) Brennan. Shammas v. Shammas, 9 N.J. 321, 88 A.2d 204 (1952). Judge Brennan stated: "Plainly, the encouragement of vexatious litigation is the lesser evil. We prefer to follow the equity of the matter and to take away an unjust judgment obtained by vital perjury when the injustice and inequity of allowing it to stand are made evident." 88 A.2d at 209.

148. Since Publicker v. Shallcross, 106 F.2d 949 (3d Cir. 1939), few courts have questioned the wisdom of the extrinsic-intrinsic distinction. "[N]o federal court has subsequently repudiated the *Throckmorton* rule on the authority of *Publicker.*" Comment, *supra* note 19, at 547. *See, e.g.,* Serzysko v. Chase Manhattan Bank, 461 F.2d 699 (2d Cir. 1972) (where the court refused to consider plaintiff's motion as an independent action because "his papers present no basis for finding of fraud *inter partes.*" *Id.* at 702.).

149. United States v. Throckmorton, 98 U.S. at 68.

150. *See* note 89 *supra.*

By requiring that the misconduct be of such nature as to probably change the result of the former trial, the court would ensure that unfair verdicts are overturned, and that in speculative cases, the principle of finality of judgment would be upheld. The standard would also reject the sometimes arbitrary distinction between extrinsic and intrinsic fraud and would require the court to examine instead the likelihood that the party, exercising due diligence, would have exposed the fraud at trial. The standard also requires that the party must not have actually known of the fraud at trial and that he must act expeditiously in moving for a new trial, elements required under a 60(b)(3) motion as well. Imposing this standard on the independent action would revive this much ignored method of obtaining relief and would create a useful and just adjunct to the 60(b)(3) motion.

### *D. Fraud Upon the Court*

Clearly the most powerful means of obtaining relief under rule 60(b) is through invocation of that part of the rule allowing for an action on the basis of "fraud on the court."[151] As was the case with the provision retaining the independent action, the drafters of the rule made no attempt to define the substantive basis for fraud on the court. The Advisory Committee notes to the rule only made reference to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[152] as an instance of proper use of this method of relief. Because "[a]lmost all of the principles that govern a claim of fraud on the court are derivable from [this] case,"[153] *Hazel-Atlas* should be analyzed in detail.

In 1926 Hartford filed for a patent on a type of glass-making known as "gob-feeding." The Patent Office was not particularly impressed with the novelty of this process and initially refused to issue a patent. To overcome Patent Office opposition, "certain officials and attorneys of Hartford . . . published in a trade journal an article signed by an ostensibly disinterested expert which . . . describ[ed] the 'gob feeding' device as a remarkable advance in the art of fashioning glass by machine."[154] In January 1928, the Patent Office granted the application.

Six months after the award of the patent, Hartford brought

151. Note 1 *supra.*
152. 322 U.S. 238 (1944).
153. WRIGHT & MILLER § 2870, at 249.
154. 322 U.S. at 240.

suit in a federal district court charging Hazel-Atlas Glass Co. with infringement. The district court found no infringement and Hartford appealed. In 1932, the Court of Appeals for the Third Circuit reversed, "[q]uoting copiously from the article to show . . . the 'new and differentiating elements' of the 'gob feeding' patent."[155] Following the judgment of the court of appeals, Hazel-Atlas investigated rumors of the fraud, but after an $8,000 payment to the "disinterested expert" by Hartford, the investigation was not successful.[156]

In 1941, during an antitrust prosecution against Hartford, the " 'sordid story' " of the fraud was fully disclosed. On the basis of this evidence Hazel-Atlas commenced suit in the circuit court to vacate its decree. The circuit court denied relief on three grounds: "first, . . . the fraud was not newly-discovered; second, . . . the spurious publication, though quoted in the 1932 opinion, was not the primary basis of the 1932 decision; and third, . . . it lacked the power to set aside the decree of the District Court because of the expiration of the term . . . ."[157]

The United States Supreme Court reversed, holding that, even if Hazel-Atlas were guilty of laches and lack of due diligence, the judgment must be vacated.

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.[158]

Justice Black, continuing his scathing attack upon the scheme in question, further pointed out the differences between "fraud on the court" and fraud of an ordinary nature.

> This matter does not concern only private parties. There are issues of great moment to the public in a patent suit . . . . Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an

155. *Id.* at 241.
156. *Id.* at 242-43.
157. *Id.* at 243-44.
158. *Id.* at 245-46.

> injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.[159]

Justice Black stated that Hartford cannot claim either that the article was immaterial evidence or that it was substantively accurate.

> Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.[160]

Three main themes surface in Black's opinion: fraud on the court involves (1) fraud that affects more than merely the litigants involved; (2) conduct that corrupts the integrity of the judicial process; and (3) fraud that is the result of the direct effort or encouragement of attorneys or other officers of the court. And, because the "power to vacate a judgment for fraud on the court is so great, and so free from procedural limitations,"[161] courts and commentators alike have attempted to blend these themes together into a workable definition of what conduct constitutes fraud on the court.

The Ninth Circuit offered this definition in *England v. Doyle*:[162] "[T]o set aside a judgment or order because of fraud upon the court . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision."[163] Under this definition, however, any conspiracy to commit perjury would suffice as fraud on the court. Mere conspiracy alone should not be enough, for this was exactly the type of conduct complained of in *Throckmorton* for which the Supreme Court would not grant relief. In a recent article, one commentator gave another definition: "[F]raud upon the court embraces a wider scope of fraud than that directed only against public organs of justice; it may in appropriate circumstances ex-

159. *Id.* at 246.

160. *Id.* at 247.

161. WRIGHT & MILLER § 2870, at 252. "There is no time limit on setting aside a judgment on this ground, nor can laches bar consideration of the matter. It does not matter whether a party bringing the fraud to the court's attention has clean hands." *Id.* at 250-51.

162. 281 F.2d 304 (9th Cir. 1960).

163. *Id.* at 309.

tend to a case where injury to the public is primarily and extraordinarily involved."[164] This definition fails for lack of specificity. When does the public become primarily involved? Is not the public extraordinarily involved each time a judgment is given the binding effect of res judicata or collateral estoppel? The final, and best, attempt at definition comes from Professor Moore:

> "Fraud upon the court" embrace[s] only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjud[g]ing cases that are presented for adjudication.[165]

Even this definition, however, has not escaped criticism. The court in *Toscano v. Commissioner*[166] stated:

> [W]e do not find [Moore's definition] very helpful. What is meant by "defile the court itself"? What is meant by "fraud perpetrated by officers of the court"? Does this include attorneys? Does it include the case in which an attorney is deceived by his client, and is thus led to deceive the court? The most that we can get out of Moore's definition is that the phrase "fraud on the court" should be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest. We agree, but do not find this of much help to us in deciding the question before us.[167]

The court in *Toscano* was, perhaps, a bit unfair to Professor Moore. Moore, in a preceding paragraph, states what is the essential distinction between fraud and fraud on the court, and what separates *United States v. Throckmorton* from *Hazel-Atlas:*

> One point of difference [between *Throckmorton* and *Hazel-Atlas*], although not stressed by the Court in *Hazel-Atlas*, is that an attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for an attorney is an officer of the court. While he should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest

164. Comment, *supra* note 19, at 557; *see* S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972) (where the Court, in dictum, echoes this view).

165. 7 MOORE ¶ 60.33, at 515.

166. 441 F.2d 930 (9th Cir. 1971).

167. *Id.* at 933-34.

> dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.[168]

This distinction is the cornerstone of what the Court in *Hazel-Atlas* labelled "fraud upon the court." And, for sake of clarity, the phrase "fraud on the court," which is authoritative in tone but vague in substance, should be deleted from rule 60(b) in favor of a definition that distinctly states that only the fraud of a judicial officer will justify the absence of any procedural limitation upon its later consideration. Such a definition would read: Nothing shall limit the power of the court from consideration of any fraud participated in, or counselled by, an attorney, or any other officer of the court, during the conduct of a case. A statement drawn in this way clearly would limit the most egregious type of fraud to the knowing misconduct of an officer of the court. This definition would reject inclusion of fraud that affects the public interest. Although protection of the public is a laudable consideration, it is difficult, if not impossible, to incorporate such an evanescent concept into any workable definition. Fraud narrowly limited to the misconduct of judicial officers would protect the ultimate integrity of the legal process, while serving the "deep-rooted policy in favoring of the repose of judgments."[169]

## IV. CONCLUSION

The 1946 amendments to original rule 60(b) vastly improved the state of federal practice regarding relief from judgments. Since 1948, however, when minor amendments were made, the rule has remained unchanged.[170] After twenty years of experience with rule 60(b), it is clear that it is again time for refinement. The Federal Rules Advisory Committee should propose that a one-year time limit be added to subdivision (6) of the rule to prevent circumvention of the requirements of the first three clauses. The Committee also should abolish the distinction between extrinsic and intrinsic fraud for the independent action and should make clear through advisory notes to the rule that this method of relief should only be invoked when the result of the former trial would probably be changed. Finally, the Committee should delete the

168. 7 MOORE ¶ 60.33, at 513.

169. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 244.

170. The Federal Rules Advisory Committee suggested minor amendments to the rule in 1955, but these were not adopted. REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 61-63 (1955).

ambiguous phrase "fraud upon the court" and add in its place a saving clause that would remove any limitation on a court from consideration of the misconduct of a judicial officer. These revisions would ensure consistent application of the rule in practice and would make its operation more fair and equitable.

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