SYNOPSIS

trinsic fraud will also afford the basis for such an action.[10] Since Rule 60(b) does not limit the power of the district court to entertain an independent action to relieve a party from a judgment, order, or proceeding,[11] the distinction between and the difference in effect of intrinsic and extrinsic fraud has a continuing importance relative to the independent action.[12] And since Rule 60(b) also does not limit the power of the court to set aside a judgment for fraud upon the court,[13] and this power is not subject to any fixed time limit,[14] the distinction between intrinsic and extrinsic fraud may have some importance in that connection.[15]

The necessity to draw a distinction between intrinsic and extrinsic fraud is academic if a timely motion for relief under 60(b)(3) is made in the court which rendered the judgment, since this clause provides that relief may be obtained for:

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

But a motion for relief under clause (3) must be made within a reasonable time and, in any event, not later than one year after the judgment, order, or proceeding was entered or taken.[16]

If, then, the motion is made within the year period it is unimportant whether the fraud be intrinsic or extrinsic, or whether it be fraud upon the court.[17] If made after the year period, it then becomes important to determine whether the fraud is of such nature that it can properly be denominated as fraud upon the court. And if an independent action is brought, which need not be brought in the court which rendered the judgment,[18] the troublesome distinction between intrinsic and extrinsic fraud must be faced.[19]

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[10] See ¶¶ 60.10[8], 60.15[5], *supra;* ¶ 60.37, *infra.*

[11] ¶ 60.31, *infra.*

[12] ¶ 60.37, *infra.*

[13] ¶ 60.33, *infra.*

[14] See ¶ 60.15[5], *supra;* ¶ 60.33, *infra.*

[15] See ¶ 60.33, *infra.*

[16] ¶ 60.24[4], *infra.*

[17] For discussion of this point and the noting of some possible situations when the distinction may be important, see ¶ 60.24[5], *infra.*

[18] ¶ 60.36, *infra.*

[19] ¶ 60.37, *infra.*

This would be subject to the following qualification. If the independent action to enjoin the enforcement of a federal judgment be brought in the same federal district court that rendered the judgment and the action is brought within a year of rendition, any distinction between intrinsic and extrinsic fraud of the adverse party should be

inherent power to grant relief from a judgment obtained by fraud upon it;[8] and an independent action in equity would lie to enjoin the enforcement of a judgment when warranted by equitable principles.[9]

[4]—General Analysis of Relief Under Amended Rule 60(b); Time.

When 60(b) was extensively revised in 1946 to state the various grounds for relief from a judgment and what powers of the court were not limited,[1] it was natural to include fraud, misrepresentation, or other misconduct of an adverse party as a ground for relief by motion.[2] Fraud, whether extrinsic or intrinsic, and the like now appear as a ground for relief from a final judgment in clause (3) of Rule 60(b); and, as subsequently pointed out, the maximum time limit within which to move for relief under 60(b)(3) is one year.

The present Rule deals further with fraud and related conduct by providing that the Rule does not limit the power of a court: (1) to entertain an independent action to relieve a party from a judgment, and fraud is the usual basis for such an action;[3] and (2) to set aside a judgment for fraud upon the court.[4] The Rule does not prescribe any time limits upon these powers; and, as we shall see, the only time limit upon the independent action to enjoin the enforcement of a federal judgment is normally laches,[5] and for relief for fraud upon the

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statutory tax lien had been tried in the lower court, which held in favor of the validity of the lien. An appeal was taken in one of the cases, and the lower court was reversed and the tax lien invalidated. The losing party in the unappealed case then made a motion for relief from judgment, on the ground that an oral agreement had been entered into by the attorneys in the unappealed case to the effect that there should be but the single appeal, and that the decision reached in the appealed case should govern for the unappealed case as well. The court of appeals held that relief should be granted if the lower court found the facts to be as alleged by the moving party. The court of appeals stated that it was unnecessary to determine whether or not the bill of review afforded relief in this instance for at least the writ of audita querela did. [C]ourts have never hesitated to grant equitable relief against a judgment, if to execute it would give the judgment creditor an unconscientious advantage procured through his own fraud or some excusable mistake, or unavoidable accident on the part of the judgment debtor."

[8] ¶ 60.16[5], *supra.*

[9] ¶¶ 60.11, 60.12, *supra.*

[1] See ¶ 60.18, *supra.*

[2] See Advisory Committee's Comments, ¶ 60.01[8], *supra.*

[3] ¶¶ 60.36, 60.37, *infra.*

[4] ¶ 60.33, *infra.*

[5] ¶ 60.37[2], *infra.*

because of fraud and related misconduct, by motion under 60(b)(3), made the motion subject to a maximum time limitation of one year.[11]

There is, however, no maximum time limit upon the power of the court to set aside a judgment rendered by it because of fraud perpetrated upon it.[12] Since this motion, like the motion under 60(b)(3), is addressed to the court which rendered the judgment,[13] there will usually be no need to attempt to determine the type of fraud involved where the motion is made within the year period.[14] But where the motion is made after the year period it then becomes necessary to determine whether the fraud involved is fraud upon the court—a type of fraud that is not defined by the Rule; and, in this connection, it is possible that the distinction between intrinsic and extrinsic fraud may have some importance.[15]

If a proceeding, although initiated as an independent action, is brought in the court which rendered the judgment and within the maximum year period that governs a 60(b)(3) motion, then it should be unimportant whether the fraud be extrinsic or intrinsic for the proceeding can properly be treated as a motion under 60(b)(3). By contrast, if an independent action is brought after the maximum year period, or, although brought within the year period, is brought in a federal court that did not render the federal judgment, or is brought in a federal court for the purpose of enjoining the enforcement of a state judgment, then the basis for the action is important and the troublesome problem as to intrinsic and extrinsic fraud must be faced.[16]

[5]—What Constitutes Fraud, Misrepresentation and Other Misconduct of an Adverse Party.

Rule 60(b) provides that the court may, in the exercise of a sound discretion in light of all relevant factors,[1] relieve a party or his legal representative from a final judgment because of

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party,

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11 Lockwood v. Bowles (D DC 1969) 46 FRD 625, 13 FR Serv2d 60b.51, Case 1, citing Treatise.

12 ¶ 60.33, *infra.*

13 ¶¶ 60.28[1], 60.33, *infra.*

14 See subhead [5], *infra,* for discussion.

15 ¶ 60.33, *infra.*

16 ¶¶ 60.36, 60.37, *infra.*

1 ¶ 60.19, *supra.*

provided the motion for relief is made within a reasonable time and, in any event, not later than a year.[2] It is, therefore, unimportant, when the motion is timely, that the fraud be in the presentation of a claim or defense, as in the use of a fraudulent instrument or perjured evidence—generally denominated intrinsic fraud; or that the fraud be in preventing a real contest, as where a party is wrongfully kept away from court or his attorney corruptly sells out to the other side—generally denominated extrinsic fraud.[3]

In addition to fraud, 60(b)(3) includes "misrepresentation, or other misconduct of an adverse party." Because Rule 60(b) is remedial and to be construed liberally,[4] and because of the comprehensive sweep of 60(b)(3) any fraud, misrepresentation, circumvention or other wrongful act of a party in obtaining a judgment so that it is inequitable for him to retain the benefit thereof, constitute grounds for relief within the intendment of 60(b)(3).[5] Failure of plaintiff's

(*Text continued on page 60-214*)

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[2] See subhead [4], *supra*.

[3] See United States v. Throckmorton (1878). 98 US 61, 25 L ed 93, relative to the distinction between intrinsic and extrinsic fraud.

[4] ¶ 60.18[8], *supra*.

[5] See Oliver v. City of Shattuck, Okla. ex rel Versluis (CCA10th, 1946) 157 F2d 150, 9 FR Serv 60b.51, Case 3; Assmann v. Fleming (CCA8th, 1947) 159 F2d 332, 336, 10 FR Serv 60b.25, Case 1 ("Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case."); Fiske v. Buder (CCA8th, 1942) 125 F2d 841, 5 FR Serv 60b.51, Case 1; Hadden v. Rumsey Products (CA2d, 1952) 196 F2d 92, 18 FR Serv 69b.51, Case 1.

See Square Const. Co. v. Washington Metro Area Transit Auth. (CA4th, 1981) 657 F2d 68. Defendant terminated a construction contract with plaintiffs and obtained a favorable administrative decision for default and excess reprocurement costs. After the district court affirmed the administrative order, plaintiffs learned that defendant had withheld an estimate of the cost of completion that was substantially lower than the estimate adopted. The court of appeals held that it was an abuse of discretion to deny plaintiffs' motion for relief based on misconduct under Rule 60(b)(3). Plaintiffs met the requirements of Rule 60(b)(3) by (1) raising a meritorious defense as to the assessment of reprocurement costs, (2) substantiating their claim that defendant's misconduct stemmed from its deliberate withholding of relevant documentary evidence, and (3) showing that this misconduct prevented them from fully and fairly presenting their defense. The policy of deterring misconduct in the fact-finding process outweighed considerations of finality of judgments.

See Rozier v. Ford Motor Co. (CA5th, 1978) 573 F2d 1332. Defendant failed to produced a document plaintiff had requested by interroga-

attorney, in taking a judgment by confession upon cognovit notes in accordance with applicable law, to inform the court that defendants had asserted defenses to the notes does not constitute fraud authorizing relief from the federal judgment; but fraud in the procurement of the notes is a basis for an independent action to enjoin the enforcement of the judgment.[6] Thus it should follow that the latter fraud would afford the basis for relief under 60(b)(3),[7] if a timely motion

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insurer did not file its motion for summary judgment within the one-year prescriptive period and within the time fixed by the court for filing defensive pleadings, when a timely filing of the motion and disclosure of the facts would have warned plaintiff of the peril to his class, the insurer is estopped to deny a certain party was an employee or agent of the insured. The motion for relief was, however, denied; and see Cass v. Youngstown Sheet and Tube Co. (CA5th, 1964) 329 F2d 106, 8 FR Serv2d 60b.25, Case 1, cert denied (1964) 379 US 828, 85 S Ct 57, 13 L ed2d 37.

Walker v. Bank of America Nat'l Trust & Sav. Ass'n (CA9th, 1959) 268 F2d 16. "The asserted 'fraud' consisted of a statement made to the court by opposing counsel at or about the time of the hearing on the motion to dismiss, to the effect that 'if all of the facts stated by plaintiff were admitted to be true, this would be of no benefit to plaintiff.' The statement complained of, whether or not true, was only an expression of opinion as to the law, and hence could not constitute fraud within the meaning of Rule 60(b), Federal Rules of Civil Procedure."

United States v. Rexach (D PR 1966) 41 FRD 180, 10 FR Serv2d 60b.25, Case 2 (the United States may not re-open a judgment for the taxpayer in an action for income taxes on the ground of fraud where there is no showing that by fraud or deception practiced by the taxpayer the government was prevented from exhibiting fully its case); Berleheimer v. Pennsylvania R.R. (WD Pa 1959) 25 FRD 29.

For pertinent and related authority and discussion, see ¶ 60.15[5], *supra,* relative to the bill of review; ¶¶ 60.36, 60.37, *infra,* relative to the independent action in equity.

[6] Hadden v. Rumsey Products (CA2d, 1952) 196 F2d 92, 18 FR Serv 60b.51, Case 1.

[7] Since the independent action to enjoin the enfrocement of federal judgment is not subject to the maximum time period of a year, as is the motion under 60(b)(3), but in general laches is the only time limit upon such an independent action, see ¶ 60.37[2], *infra;* and since both intrinsic and extrinsic fraud will support a 60(b)(3) motion, while there is considerable authority that only extrinsic fraud will support the independent action, see ¶ 60.37[1], *infra,* it should certainly follow that any type of fraud on the part of the adverse party that would afford the basis for an independent action should, under the broad language of 60(b)(3), afford the basis for relief by a timely motion thereunder. The

is made in the court which rendered the judgment.[8]

There was a possible implication in the district court case of *In the Matter of Hadden v. Rumsey Products*[9] that Rule 60(b)(3) does not apply where fraud upon the court is involved. This principle is misleading if not applied with discrimination. The provision in 60(b) that the Rule does not limit the power of a court to set aside a judgment for fraud upon it does not detract from 60(b)(3); it recognizes an additional or cumulative power. Hence if a motion is made within a reasonable time and not later than the maximum period of a year, which is applicable to a 60(b)(3) motion, and the fraud is that of the adverse party, it should be immaterial what type of fraud is involved. If, although the motion is made within the year period, there is a question whether it is made within a reasonable time, then it may be necessary to make a distinction between fraud generally and fraud upon the court, for if fraud upon the court is involved laches of the moving party may not necessarily bar relief, although if only fraud in general is involved the moving party's laches might well justify a denial of relief.[10] And, for reasons to be presently discussed, if the fraud is not attributable to the adverse party, a distinction between fraud generally and fraud upon the court may need to be drawn.

Naturally the moving party is not entitled to relief from a judgment on the basis of his own fraud or other related misconduct.[11]

60(b)(3) motion must be made in the court which rendered the judgment. See nn 16, 17, *infra*.

[8] See nn 16, 17, *infra*.

In Hadden v. Rumsey Products (CA2d, 1952) 196 F2d 92, 18 FR Serv 60b.51, Case 1, the confessed judgment was entered in a federal court in Ohio; and was then registered in the Western District of New York. Relief therefrom was sought in the latter district, and the Second Circuit held that since an independent action on the basis of fraud would lie in the latter district it was unnecessary to determine whether a 60(b)(3) motion could be made in the latter district. For discussion of this problem, see ¶ 60.28[1], *infra*.

[9] (WD NY 1951) 96 F Supp 988, 15 FR Serv 60b.25, Case 1, rev'd on other grounds Hadden v. Rumsey Products (CA2d, 1952) 196 F2d 92, 17 FR Serv 60b.51, Case 1.

[10] ¶ 60.33, *infra*.

[11] See Simons v. United States (CA2d, 1971) 452 F2d 1110, 15 FR Serv2d 857. A divorced wife who had obtained United States citizenship on the representation that she and her husband planned to reside permanently in the United States could not attack her own naturalization decree and that of her former husband, then deceased, on an allegation that the decrees were obtained by fraud in that they always had the intention of returning to Europe.

Suppose, however, that the fraud, misrepresentation or other misconduct is not that of the moving party, but is that of a third person. If the wrong of the third person is fairly attributable, under general legal principles, to the party for whom judgment went, then the fraud, misrepresentation, or other misconduct is legally that of the prevailing party, and 60(b)(3) applies. But suppose that the wrong of the third person cannot be fairly attributable to the prevailing party under general principles of legal responsibility. For example, suppose that a witness has given perjured testimony or that a third person has tampered with the jury or in some other manner has been guilty of fraudulent or other misconduct, that the party for whom judgment went is completely innocent and wholly unrelated to and not legally responsible for the fraud or misconduct of the witness or third person, and that it is reasonable to conclude that this independent fraud or other misconduct was material, or was likely to have been, in producing the judgment. Does 60(b)(3) authorize relief? Literally it does not,[12] for it clearly states that the court may relieve a party from a final judgment because of fraud, misrepresentation, or other misconduct of an *adverse party.* It could be contended that since the adverse party benefited, or reasonably may have, from the fraud, that the fraud or other misconduct should be said to be "constructive" fraud or other misconduct. But this is pure fiction. Granted that a judgment produced by the fraud, misrepresentation, or other misconduct of an independent third person is unjust and that a court should not be impotent to grant relief, we believe that relief should be given under some provision other than 60(b)(3), and that the Rule does afford the means for relief either under residual clause (6);[13]

See Menashe v. Sutton (SD NY 1950) 90 F Supp 531, 14 FR Serv 15a.21, Case 1 (defendant's motion for relief from a judgment on the ground that plaintiff, a citizen of New York, had perpetrated a fraud upon the court in falsely alleging that defendants were citizens of Hawaii, instead of new York, for purposes of diversity, denied; if there was any fraud it was on the part of defendants in not raising lack of diversity).

[12] See In re Crateo, Inc. (CA9th, 1976) 536 F2d 862, 21 FR Serv2d 1411, cert denied (1976) 429 US 896, 97 S Ct 259, 50 L ed2d 180. Rule 60 (b)(3) could not be used to grant relief where allegedly fraudulent actions could not be charged to adverse parties; McKinney v. Boyle (CA9th, 1968) 404 F2d 632, cert denied (1969) 394 US 992, 89 S Ct 1481, 22 L ed2d 767 (Rule 60 (b)(3) not applicable because fraud, if any, was not that of adverse party).

[13] While "reasonable time" is the only time limitation upon relief under 60(b)(6), ¶ 60.27[3], *infra,* there would seem to be no justification for giving relief against the fraud of a third person action independently at

new trial under Rule 59[2] or for relief under related rules;[3] by appeal; by motion for relief on one or more grounds stated in clauses(1),[4] (2),[5] (3),[6] (5),[7] and (6),[8] which motion invokes the discretion of the district court[9] and cannot be used as a mere substitute for appeal;[10] by motion under power reserved to the court by Rule 60(b);[11] or, although valid, the enforcement of the judgment is enjoined because of some accepted equitable principle, for example, that the judgment was obtained by extrinsic fraud and it would be inequitable to allow the party obtaining the judgment to profit by the fraud.[12] While it

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[2] See ¶¶ 59.03, 59.07, 59.08, *supra.*

[3] As by a motion to alter, amend or vacate the judgment under Rule 59(e), ¶ 59.12[1], *supra;* for judgment notwithstanding the verdict under Rule 50(b), ¶ 50.10, *supra;* to amend or make additional findings and amend the judgment under Rule 52(b), ¶ 52.11, *supra.*

For relationship of these various rules, see ¶ 59.04[5], [6], *supra;* and to Rule 60(b), ¶¶ 59.04[7], 60.03[3], *supra.*

[4] ¶ 60.22, *supra.*

[5] ¶ 60.23, *supra.*

[6] ¶ 60.24, *supra.*

[7] ¶ 60.26, *supra.*

[8] ¶ 60.27, *infra.*

Clause (4).—A motion for relief under clause (4), now being discussed, is also a direct attack, but this clause deals with relief from a void judgment and the text is presently concerned with relief from a valid judgment.

[9] ¶ 60.19, *supra.*

[10] ¶ 60.18[8], *supra.*

[11] To set aside an in rem judgment as to a defendant not personally served nor personally notified, as provided in 28 USC § 1655, ¶ 60.32, *infra;* and to set aside a judgment for fraud upon the court, ¶ 60.33, *infra.*

And see ¶ 60.35, *infra,* that relief under supplementary legislation is not affected by Rule 60(b).

[12] ¶¶ 60.36, 60.37, *infra.*

The independent action in equity to enjoin the enforcement of a valid judgment might be termed an indirect attack, for unlike the other methods of "direct" attack set forth in the text which must be made in the district court that rendered the judgment, except the appeal and this attack is made to an appellate court having jurisdiction over the district court rendering the judgment, the independent action in equity need not be brought in the court which rendered the judgment. ¶ 60.36, *infra.* But although it may be brought to enjoin the enforcement of a void judgment, subhead [1], *supra,* it may, of course, be brought to enjoin the enforcement of a valid judgment. Here the action recognizes that the judgment is valid, but seeks to establish certain conduct or matter that renders the enforcement of the valid judgment inequitable.

can be seen that a variety of attacks[13] may be made upon a valid judgment, those that are most likely to succeed, as the motion for new trial or related relief[14] or the appeal, must be made within a relatively short time; and, although made within due time, the attack must fail unless harmful error has been committed.[15] If attack is made under the provisions of Rule 60(b), referred to above, a longer time is permitted, but the movant must, nevertheless, be diligent.[16] The attack can properly succeed only when one or more of the grounds therein provided are established and, when appropriate, the movant shows that he as a meritorious claim or defense.[17] And, if relief is granted, just terms may be imposed.[18] All this is as it should be in the sound interest of finality that underlies a valid judgment.

If the federal judgment is valid and has not been reversed or otherwise set aside or its enforcement enjoined, it must be given effect in the federal court which rendered it[19] and in any other federal

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[13] And see related discussion in ¶ 60.09, *supra.*

[14] See nn 2, 3, *supra.*

[15] ¶ 59.04[8], *supra;* ¶¶ 61.10, 61.11, *infra.*

[16] ¶ 60.28[2], *infra.*

[17] Assmann v. Fleming (CCA8th, 1947) 159 F2d 332, 10 FR Serv 60b.25, Case 1; Fernow v. Gubser (CCA10th, 1943) 136 F2d 971; Sebastiano v. United States (ND Ohio 1951) 103 F Supp 278, 15 FR Serv 60b.29, Case 2, aff'd (CA6th, 1952) 195 F2d 184.

[18] ¶ 60.19, *supra;* ¶ 60.27[1], *infra.*

[19] Reed v. Allen (1932) 286 US 191, 52 S Ct 532, 76 L ed 1054, 81 ALR 703; Chicot Co. Drainage Dist. v. Baxter State Bank (1940) 308 US 371, 60 S Ct 317, 84 L ed 329.

See also National Leasing Corp. v. Williams (WD Pa 1978) 80 FRD 416. In a diversity action defendant moved to vacate a confessed judgment on a promissory note after judgment had been entered against him by the clerk. Rejecting defendant's argument that the judgment was void because it was not specifically authorized by a district court judge, the court held that the Federal Rules did not preclude the clerk's ministerial act of recordation of a valid confession of judgment and did not require any order or intervention of a judge. The defendant gave an attorney the power of a court to render judgment against him, hence the clerk had the power to enter it.

See also Lowenschuss v. Kane (SD NY 1974) 392 F Supp 59, involving a Rule 60(b) challenge to a district court order on the grounds that since an appeal was pending at the time of entry of the order, the district court was divested of jurisdiction to act. As at the time of the challenge, the court of appeals had already decided that the appeal was invalid, the district court held its order had been validly entered.

court,[20] when it is properly pleaded or its effect is otherwise appropriately presented. And such a valid judgment must be given full faith and credit by a state court.[21]

A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective.[22] And while, if it is a judgment rendered by a federal district court, the court which rendered it may set it aside under Rule 59, within the short time period therein provided,[23] or the judgment may be reversed or set aside upon an appeal taken within due time where the record is adequate to show voidness.[24] The judgment may also be set aside under

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[20] Baldwin v. Iowa State Traveling Men's Ass'n (1931) 283 US 522, 51 S Ct 517, 75 L ed 1244; Caterpillar Tractor Co. v. International Harvester Co. (CCA3d, 1941) 120 F2d 82, 139 ALR 1.

See In re Universal Display & Sign Co. (CA3d, 1976) 541 F2d 142, 22 FR Serv2d 158, citing **Treatise**, holding issue of jurisdiction was res judicata after defendants appeared specially in bankruptcy court to contest it and, having lost there, defaulted in further proceedings. The court noted the trustee in bankruptcy had raised no objection to the power of the transferee court to decide a Rule 60(b)(4) motion.

[21] Hancock National Bank v. Farnum (1900) 176 US 640, 20 S Ct 506, 44 L ed 619; Stoll v. Gottlieb (1938) 305 US 165, 59 S Ct 134, 83 L ed 104.

[22] Kalb v. Feuerstein (1940) 308 US 433, 60 S Ct 343, 84 L ed 370; Williams v. North Carolina (1945) 325 US 226, 65 S Ct 1092, 89 L ed 1577; Jordan v. Gilligan (CA6th, 1974) 500 F2d 701, 18 FR Serv2d 1280, cert denied 421 US 991, 95 S Ct 1996, 44 L ed2d 481; Wyman v. Newhouse (CCA2d, 1937) 93 F2d 313, 115 ALR 460, cert denied (1938) 303 US 664, 58 S Ct 831, 82 L ed 1122; Bass v. Hoagland (CA5th, 1949) 172 F2d 205, 12 FR Serv 55a.22, Case 1, cert denied (1949) 338 US 816, 70 S Ct 57, 94 L ed 494; Graciette v. Star Guidance, Inc. (SD NY 1975) 66 FRD 424, 19 FR Serv2d 1429, citing **Treatise**.

See Barrett v. Southern Ry. (D SC 1975) 68 FRD 413 (state court default judgment was null and void because federal not state court had jurisdiction due to removal, at time of entry).

See also Rose v. Himely (1808) 4 Cranch 241, 2 L ed 608 (void decree of prize court); Thompson v. Whitman (1873) 18 Wall 457, 21 L ed 897; Windsor v. McVeigh (1876) 93 US 274, 23 L ed 914; Pennoyer v. Neff (1877) 95 US 714, 24 L ed 565; Old Wayne Life Ass'n v. McDonough (1907) 204 US 8, 27 S Ct 236, 51 L ed 345; Wetmore v. Karrick (1907) 205 US 141, 27 S Ct 434, 51 L ed 745; McDonald v. Mabee (1917) 243 US 90, 37 S Ct 343, 61 L ed 608.

Cf. n 62, *infra*, and accompanying text.

[23] Subhead [3], *infra*.

[24] *Id.*

60(b)(4)[25] within a "reasonable time," which, as here applied, means generally no time limit,[26] or the enforcement of the judgment may be enjoined.[27] The judgment may also be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in the subsequent proceeding.[28] Even the party which obtained the void judgment may collaterally attack it.[29] And the substance of these principles are equally applicable to a void state judgment.[30]

A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity,[31] but he must es-

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[25] *Id.*

[26] Subhead [4], *infra.*

[27] Subhead [1], *supra;* subhead [3], *infra;* ¶ 60.37[1], *infra.*

[28] Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp. (CA7th, 1975) 521 F2d 1210, citing **Treatise.** In an action by judgment creditor to recover on state judgment, defendant contended the judgment was void for lack of personal jurisdiction. Fact that defendant improperly labeled his motion attacking the judgment as arising under Rule 60(b) had no effect on the challenge. The contention that a state court judgment is void may be asserted in any proceeding where the validity of the judgment is put in issue.

As to what judgments are legally ineffective, see cases cited in n 22, *supra,* ¶ 60.41, *infra.*

[29] McDonald v. Mabee (1917) 243 US 90, 37 S Ct 343, 61 L ed 608.

[30] Most of the cases cited in n 22, *supra,* involve collateral attacks upon void state judgments.

[31] Hicklin v. Edwards (CA8th, 1955) 226 F2d 410, 21 FR Serv 60b.26, Case 1; Schwarz v. Thomas (CA DC, 1955) 222 F2d 305, 21 FR Serv 4d.131, Case 1. This was true, for example, in the federal cases cited in n 22, *supra,* with two possible exceptions. In Bass v. Hoagland defendant's meritorious defense was a makeweight factor in allowing a collateral attack upon a judgment that should not have been held void. And merit on the part of the defendant was noted in *Wetmore v. Kerrick,* although this factor was probably not decisive.

See Jordon v. Gilligan (CA6th, 1974) 500 F2d 701, 18 FR Serv2d 1280, citing **Treatise,** cert denied (1975) 421 US 991, 95 S Ct 1996, 44 L ed2d 481.

See also United States v. Melichar (ED Wis 1977) 56 FRD 49, 16 FR Serv2d 738. Defendants, not having filed answers or other pleadings, obtained vacation of default because court had no authority to enter underlying judgment and that judgment had to be set aside.

spective application. Under the Rule it is not necessary to determine whether the judgment would formerly have been a judgment at law or a decree in equity; the crucial issues are whether the judgment has prospective application and whether it is no longer equitable that it have such application. Thus 60(b)(5) is applicable to a declaratory judgment insofar as the judgment, like a continuing injunction, operates prospectively.[36] When it is inequitable that a judgment should continue to be a lien on the judgment debtor's property, relief from the lien may be given.[37] And in any other situation when the judgment has prospective application relief may be given from its prospective features when subsequent events make it no longer equitable that the judgment have prospective application.[38] On the other hand,

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[36] A declaratory judgment may declare rights fully accrued, or it may be directed to events to come, much as a continuing injunction (in fact declaratory and injunctive relief are often sought together), or it may deal with both present and prospective events. ¶ 57.10, *supra.* Insofar as the declaratory judgment has prospective application, akin to that of a continuing injunction, relief therefrom should be available along lines applicable to the continuing injunction previously discussed.

[37] United States v. Edell (SD NY 1954) 19 FR Serv 60b.29, Case 3, 15 FRD 382 (both clauses (b)(5) and (6) relied on).

[38] Equitable Life Assurance Society of United States v. MacGill (CA5th, 1977) 551 F2d 978, citing Treatise (party was released from stipulation as to attorney's fee which was based on mistake of applicable state law. Court said relief was available under either Rule 60(b)(5) or (6) but did not specify which Rule it was utilizing to grant relief).

See Block v. Thousandfriend (CA2d, 1948) 170 F2d 428 (As an alternative ground the court held that relief could be given from a judgment for treble damages under the third ground of clause (5), now under discussion, because of a subsequent reversal of an administrative order upon which the treble damage action was based. While relief was proper in this case under the second ground of clause (5), see discussion in subhead [3], *supra,* or under residual clause (6), ¶ 60.27, *infra,* the judgment for treble damages is not a judgment having *prospective* application and relief therefrom is not warranted under the ground presently discussed.); United States v. 12.381 Acres of Land (D NM 1953) 109 F Supp 279, 18 FR Serv 60b.29, Case 1 (In a condemnation action stipulations were entered into between the government and the landowner that $250 was just compensation for use of the land for a period of one year and that in the event the government elected to extend the term the amount of $250 annual rental would be just compensation for the extended additional year or years; and a judgment in accordance with the stipulation was entered in 1945. Thereafter the land, which was located on the outskirts of a fast-growing city, increased in value and in 1951 the landowner objected to the agreed rental; and subsequently

Rule 60(6), as revised in 1946, incorporates generally the substance of the old common law and equitable ancillary remedies.[5] To the extent that precedent dealing with these old remedies would warrant relief in a situation not covered by clause (1)–(5), then that precedent is persuasive for the *grant* of relief under residual clause (6).[6] If, however, the precedent is *against* relief or no precedent under the old remedies can be found, then that is not conclusive that relief should not be granted under clause (6), for the 1946 revision did not intend to perpetuate the uncertainties and historical limitations, which worked unjustly in certain situations.[7] The Supreme Court was certainly on sound grounds in taking this position in the leading case of *Klapprott v. United States*[8] in holding that movant's allegations, averring that his failure to defend the denaturalization proceeding was due to obstacles that made defense nearly impossible, stated reasons which, if established, warranted relief under clause (6) from the denaturalization decree. As Justice Black stated,

> In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate the enable them to vacate judgments whenever such action is appropriate to accomplish justice.[9]

1328. The appellate court determined that Rule 60(b)(6) encompassed a motion to set aside a stipulated condemnation judgment on grounds that the settlement was unauthorized because of a dominant navigational servitude. Although the motion was filed four years after the condemnation judgment, it was deemed timely under 60(b)(6) because of the significant government and public rights involved.

[5] See ¶ 60.18, *supra*.

[6] United States v. Edell (SD NY 1954) 19 FR Serv 60b.29, Case 3, 15 FRD 382 (citing author's article dealing with audita querela, which is incorporated in ¶ 60.13, *supra*).

Rule 60(b)(6) was intended to make available grounds that equity long recognized as bases for relief. Laguna Royalty Co. v. Marsh (CA5th, 1965) 350 F2d 817.

[7] ¶ 60.18, *supra*.

[8] (1949) 335 US 601, 614, 336 US 942, 69 S Ct 384, 93 L ed 266, 1099.

[9] Klapprott v. United States (1949) 335 US 601, 614–615, 69 S Ct 384, 93 L ed 266.

But court does not have the power to reduce $60,000 penalty to $20,000 under the rule authorizing relief from a final judgment for any reason justifying relief from operation of statute, on ground that enforcement of forfeiture would penalize defendants beyond degree commensurate with their culpability. United States v. Cato Bros., Inc. (CA4th, 1959) 273 F2d 153, 2 FR Serv2d 60b.29, Case 4. A district court does not have discretionary power under

While the allegations of the party moving for relief in the *Klapprott* case presented an extraordinary situation and Justice Black's statement must be read in that context,[10] it does, nevertheless, properly point out the purpose of clause (6), Like Rule 60(b) generally, clause (6) should be liberally applied to situations not covered by the preceding five clauses so that, giving due regard to the sound interest underlying the finality of judgments, the district court, nevertheless, has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice.[11]

It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon some reason other than those stated in clauses (1)–(5); and second, the other reason urged for relief must be such as to justify relief.

In reference to the first qualification, the very cast of the Rule and the language of clause (6) indicate that this residual clause is dealing with matter not covered in the preceding five clauses.[12] Further, the maximum time limitation of one year that applies to clause (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3).[13] *Klapprott* so recognized and held. In

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FRCP 60(b)(6) to reduce or remit a civil penalty under the False Claims Act, 31 USC § 231 (1958). United States v. Brown (CA4th, 1960) 274 F2d 107.

[10] Von Wedel v. McGrath (D NJ 1951) 100 F Supp 434, 436, aff'd (CA3d, 1952) 194 F2d 1013.

[11] See ¶ 60.27[2], *infra*.

[12] See Corex Corp. v. United States (CA9th, 1981) 638 F2d 119 (plaintiff's only suggested reason for relief was newly discovered evidence; therefore, it could not also allege relief under clause (6)); Wm. Skillings & Assoc. v. Cunard Transp., Ltd. (CA5th, 1979) 594 F2d 1078 (Rule 60(b)(6) is unavailable when relief sought is within the coverage of some other provision of Rule 60(b)); De Filippis v. United States (CA7th, 1977) 567 F2d 341 (government was precluded from invoking simultaneously subsections (b)(5) and (b)(6) of Rule 60 in light of the separate and exclusive nature of 60(b)(6). That section, allowing relief from a judgment for "any other reason justifying relief," bars claims of relief under any other subsections); Carr v. District of Columbia (CA DC, 1976) 543 F2d 917, 22 FR Serv2d 403, citing Treatise.

[13] Stradley v. Cortez (CA3d, 1975) 518 F2d 488, 20 FR Serv2d 515; Bershad v. McDonough (CA7th, 1972) 469 F2d 1333, 16 FR Serv2d 1076; Serzysko v. Chase Manhattan

United States v. Karahalias,[14] which like *Klapprott* involved a motion to set aside a denaturalization decree made long after the year period applicable to clauses (1), (2) and (3) had run, and where as in *Klapprott* clauses (4) and (5), which are subject only to a reasonable time

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Bank (CA2d, 1972) 461 F2d 699, 16 FR Serv2d 169, cert denied (1972) 409 US 883, 93 S Ct 173, 34 L ed2d 139; Gulf Coast Bldg. & Supply Co. v. International Bthd. of Electrical Wkrs., Local No. 480, AFL-CIO (CA5th, 1972) 460 F2d 105, 16 FR Serv2d 172, citing **Treatise**; Simons v. United States (CA2d, 1971) 452 F2d 1110, 15 FR Serv2d 857; Transit Cas. Co. v. Security Trust Co. (CA5th, 1971) 441 F2d 788, citing **Treatise**, cert denied (1971) 404 US 883, 92 S Ct 211, 30 L ed2d 164; Gambocz v. Ellmyer (CA3d, 1971) 438 F2d 915, 14 FR Serv2d 1323, cert denied (1971) 403 US 919, 91 S Ct 2232, 29 L ed2d 697; Rinieri v. News Syndicate Co. (CA2d, 1967) 385 F2d 818, 11 FR Serv2d 60b.29, Case 1, citing **Treatise**; Boehm v. Office of Alien Property (CA DC, 1965) 344 F2d 194, 9 FR Serv2d 60b.29, Case 4; Tobriner v. Chefer (CA DC, 1964) 335 F2d 281, 8 FR Serv2d 59b.21, Case 2, citing **Treatise**; Costa v. Chapkines (CA2d, 1963) 316 F2d 541, 7 FR Serv2d 60b.31, Case 1, citing **Treatise**; United States ex rel Bonner v. Warden (ND Ill 1978) 78 FRD 344 (The court held that a motion was untimely under Rule 60(b)(3), and that time limit could not be extended. Although the motion was made within a reasonable time for purposes of Rule 60(b)(6), the court said that that clause could not be used to circumvent the one-year filing requirement); Cooper Agency v. United States (D SC 1971) 327 F Supp 948, 15 FR Serv2d 465; Price v. United Mine Workers of Am., Sunfire Coal Co. v. United Mine Workers of Am. (ED Ky 1963) 35 FRD 27, 7 FR Serv2d 60b.31, Case 4, aff'd (CA6th, 1964) 335 F2d 958; Stancil v. United States (ED Va 1961) 200 F Supp 36, 5 FR Serv2d 41b.33, Case 1.

See Chicago & North Western Ry. v. Union Packing Co. (CA5th, 1976) 527 F2d 592, 21 FR Serv2d 236, court declining to reopen its mandate under Rule 60(b) where motion was not made within one year limit of clause (1), and where an exceptional situation such as would justify relief under clause (6) was not shown.

Cf. Lester v. Empire Fire & Marine Ins. Co. (CA8th, 1981) 653 F2d 353. Plaintiff alleged that a nonparty witness had fraudulently stated his qualifications as an expert. Although a motion to set aside a judgment for fraud by a nonparty is governed by Rule 60(b)(6) which only requires filing of the motion within a reasonable time after judgment, such motion will be deemed untimely under Rule 60(b)(3) one year filing requirement which governs fraud by a party. The court said it would be unreasonable to reopen a judgment on grounds of nonparty fraud because a similar motion based on party fraud would have been time barred.

[14] United States v. Karahalias (CA2d, 1953) 205 F2d 331, 333, 18 FR Serv 60b.29, Case 4.

contained in any of the preceding clauses; and attention may be focused on a determination as to whether the reason justifies relief.

Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, failure to obtain relief through the usual channels of appeal is not another reason justifying relief.[2]

The district court has power to grant relief when appropriate under certain power reserved to it by the Rule,[3] when warranted by any of the clauses (1)–(5), which state the traditional and common grounds for relief; and, as stated in clause (6), for any other reason justifying relief from the operation of the judgment. Seen in this perspective, clause (6) is clearly a residual clause to cover unforeseen contingencies. It is intended to be a means for accomplishing justice in exceptional situations; and, so confined, does not violate the principle of finality of judgments.

As with so much of procedural law, any discussion of the limits of the authority of the district court to vacate a final judgment on motion made under Rule 60(b)(6) must proceed with relatively little guidance from authoritative decisions of the Supreme Court. The sum of such guidance seems to be two immigration cases, *Klapprott v. United States*[4] in 1949, and *Ackermann v. United States*[5] in 1950. At surface level, these two cases provide the poles between which the discretion operates. They were decided within a year of each other. They dealt with precisely the same subject matter. In one relief was held available; in the other unavailable. Small wonder, then, that all discussion of Rule 60(b)(6) begins with these cases.

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basis for relief is clause (1) or (2) or (3) or (6); and although the motion is made after the one year period if the basis for relief is not comprehended within clauses (1), (2) and (3), but the issue is whether the reason is within clause (4), (5) and (6) is not controlling, for all of these clauses are subject only to a reasonable time limitation. See subhead [1], *supra*.

[2] See generally ¶ 60.18[8], *supra*.

See ¶ 60.27[1], *supra*.

[3] To entertain an independent action and grant relief thereunder when warranted by equitable principles, ¶ 60.31, *infra;* to grant relief when warranted by 28 USC, § 1655, ¶ 60.32, *infra;* to set aside a judgment for fraud upon the court, ¶ 60.33, *infra;* and to grant relief when warranted by supplementary legislation, such as the Soldiers' and Sailors' Civil Relief Act, ¶ 60.35, *infra*.

[4] (1949) 335 US 601, 336 US 942, 69 S Ct 384, 93 L ed 266, 1099.

[5] (1950) 340 US 193, 71 S Ct 209, 95 L ed 207.

In *Klapprott,* movant sought to vacate a default judgment, alleging that at the time the judgment was entered he was ill, penniless, and in jail, and thus unable to appear and interpose his defense. The Supreme Court held that the circumstances set forth in Klapprott's motion[6] amounted to inability to make a defense rather than "neglect" and thus the case was taken out of Rule 60(b)(1) and was cognizable under Rule 60(b)(6) within a reasonable time.

In *Ackermann* the United States had brought separate denaturalization proceedings against Mr. and Mrs. Ackermann and Mrs. Ackermann's brother on the basis of fraud; the three cases were consolidated for trial; all three defendants were represented by counsel and, following a trial on the merits, separate judgments of denaturalization were entered. Mrs. Ackermann's brother appealed from the adverse judgment rendered against him, and the judgment was reversed on the Government's admission that the evidence was insufficient to support the judgment. The Ackermanns did not, however, appeal from the adverse judgments rendered against them; but approximately four years after the entry of the judgment sought relief therefrom on motions alleging financial inability to appeal and reliance upon advice of a government official in charge of the detention camp in which they had been placed after the rendition of the denaturalization decrees. The Court held that the circumstances set forth did not justify relief under Rule 60(b)(6). The Court noted that the Rule is not a substitute for appeal,[7] that there "must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from,"[8] that the allegations as to financial inability to appeal insufficiently established that fact;[9] that the movant had no right to rely upon the advice of the government official;[10] and on a practical comparison of the facts in *Klapprott* and Ackermann, the

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[6] Klapprott failed to prove his allegations on the subsequent hearing following the Supreme Court's remand. United States v. Klapprott (D NJ 1949) 9 FRD 282, aff'd (CA3d, 1950) 183 F2d 474, cert denied (1950) 340 US 896, 71 S Ct 238, 95 L ed 649.

[7] On this point, see ¶ 60.18[8], *supra.*

[8] Ackermann v. United States (1950) 340 US 193, 198, 71 S Ct 209, 95 L ed 207. In Kiyono v. Clark (D DC 1955) 20 FR Serv 60b.29, Case 1, the court refused to set aside a compromise settlement openly made by competent counsel, absent a showing of fraud, coercion or other substantial reason for relief, even though a committee of the Senate had expressed an opinion that the judgment was inequitable.

[9] 340 US 193, 198–199.

[10] 340 US 193, 197–198.

The principles governing judgments entered after a trial generally should govern summary judgments, as the latter are dispositions on the merits in which the attack is normally upon the substantive correctness of the decision. Judgments disposing of a case without consideration of the merits (default judgments, voluntary dismissals, and dismissals for failure to observe the Rules and orders of the court) present somewhat different considerations, for they must be considered against a background of general preference for disposition of cases on their substantive merits.[23] On the other hand, they generally result from mistake, oversight, or neglect, and therefore normally fall within Rule 60(b)(1) and may be reopened only on motion made within the one-year time limit applicable to that subdivision of the rule.[24] When special circumstances take the case out of the "neglect" area, however, the *Klapprott* doctrine has been applied.[25]

(*Text continued on page 60-282*)

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fense of their prosecution for Medicare fraud. The district court vacated its judgment and remanded for administrative reconsideration of allowable costs, and the court of appeals affirmed. The three month delay in presenting the court with this fact did not seriously prejudice the plaintiff.

When plaintiff failed to adduce additional evidence at hearing because evidence was in course of preparation for presentation at second hearing on permanent relief, and such hearing was deemed unnecessary in the light of the evidence presented at the first, and where court wished to consider all relevant evidence, there was sufficient reason for reopening the judgment under Rule 60(b)(6). Chicago & E. Ill. R.R. v. Illinois Cent. R.R. (ND Ill 1966) 261 F Supp 289.

[23] See ¶ 60.19, *supra*.

[24] See ¶ 60.22[4], *supra*; ¶ 60.28[2], *infra*.

[25] United States v. Karahalias (CA2d, 1953) 205 F2d 331, 18 FR Serv 60b.29, Case 4; United States v. Backofen (CA3d, 1949) 176 F2d 263, 12 FR Serv 60b.29, Case 2 (circumstances tending toward but less extreme than *Klapprott* put case within *Klapprott* rule; decision, however, antedated *Ackermann*).

See Marshall v. Boyd (CA8th, 1981) 658 F2d 552. Defendants appealed from a denial of their Fed.R. Civ.P. 60(b)(6) motion to vacate a declaratory judgment in favor of the government. Plaintiff alleged that defendants wrongfully withheld payment of overtime compensation and minimum wages. As the result of a pretrial conference in which defendants' pending discharge in bankruptcy was revealed, the parties agreed to postpone the scheduled trial pending resolution of the bankruptcy proceeding. However, the district court was unaware of the postponement and adopted, without notice, the government's proposed findings of fact and conclusions of law because of defendants' failure to

[3]—Time.

Under Rule 60(b), a motion for relief under clauses (1)–(3) must be made within a reasonable time and, in any event, not more than one year after the judgment was entered.[1] On the other hand, a motion for relief under clauses (4)[2] and (5)[3] and residual clause (6) is, however, subject only to a reasonable time limitation.[4]

When the motion under Rule 60(b)(6) is made within the one-year period, the requirement that it be made within "a reasonable time" is to interpreted in the same fashion as it would be had the motion fallen under subdivisions (1)–(3).[5] When the motion is made within one year, it is generally not necessary to determine under what particular subdivision the case is decided.[6]

Since motions under the first three subdivisions of the rule must be brought within the one-year time limitation, many of the cases

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[1] ¶¶ 60.22[4], 60.23[3], 60.24[4], *supra.*

[2] ¶ 60.25[4], *supra.*

[3] ¶ 60.26[1], *supra;* and see also ¶ 60.26[4], *supra.*

[4] See ¶ 60.28[2], *infra.*

[5] See United States v. Cirami (CA2d, 1976) 535 F2d 736, 21 FR Serv2d 1180 (motion under 60(b)(6) for relief from judgment on basis of attorney's negligence was under the circumstances timely when brought within one year).

See Schepp v. Langmade (CA9th, 1969) 416 F2d 276, 13 FR Serv2d 60b.27, Case 2 (motion for new trial made 7 months after entry of judgment on the ground of unauthorized waiver of a jury trial was denied, court indicating that the fact that movant waited 7 months cast doubt upon his contention that he hadn't consented); McCullough v. Walker Livestock, Inc. (WD Ark 1963) 220 F Supp 790, 7 FR Serv 60b.31, Case 5, in which relief from judgment predicated upon an agreement was denied because motion was not filed until 70 days after entry of judgment. These cases are examples of the principle that when relief from a deliberate choice is sought, taking it out of the realm of mistake, it falls within Rule 60(b)(6), but nevertheless must be sought promptly.

[6] See, *e.g.,* Caraway v. Sain (ND Fla 1959) 23 FRD 657, 2 FR Serv2d 60b.21, Case 1, in which it was held of a motion made within fifty-five days of entry of judgment and seeking amendment of the judgment to provide that the amount of a settlement against a judgment be applied as a set-off was cognizable under Rule 60(b)(1) as mistake, or under 60(b)(5) as a partial payment, or under 60(b)(6).

Conversely, when the motion is filed after the one-year limit under subdivisions (1)–(3), but not within a reasonable time, it is not necessary to determine whether the one-year limit applies. See, *e.g.,* Morgan v. Sou. Farm Bureau Cas. Ins. Co. (WD La 1967) 42 FRD 25, 11 FR Serv2d 60b.31, Case 1.

dealing with the question of reasonable time under Rule 60(b)(6) deal with motions made after the one-year period has run. In these cases the movant seeks to show special circumstances that under the *Klapprott* doctrine take the party's failure to act out of the area of "neglect" and into the "other reasons" language of subdivision (6).[7] In such cases what is a reasonable time must depend to a large extent upon the particular circumstances alleged. In cases like the *Klapprott* case itself, where duress prevents actions, of course the length of the duress is itself an important factor in the determination of reasonable time. Thus in *United States v. Karahalias*,[8] where because of the illness of his wife and the inability to return to the United States without her, defendant in a denaturalization proceeding was unable to take steps to vacate a default decree, a motion was granted after about seventeen years.[9]

When the motion is predicated on lack of notice of the judgment, the most important factor is, of course, the time at which the party did in fact learn of the entry of judgment,[10] or should have learned

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[7] See subheads [1], [2], *supra*.

[8] (CA2d, 1953) 205 F2d 331, 18 FR Serv 60b.29, Case 4.

For denaturalization cases in which it was held that the movant had not brought motion within a reasonable time under the circumstances, see Zurini v. United States (CA8th, 1951) 189 F2d 722, 726, 15 FR Serv 60b.31, Case 2; Sebastiano v. United States (ND Ohio 1951) 103 F Supp 278, 15 FR Serv 60b.29, Case 2 (eleven years not timely), aff'd (CA6th, 1952) 195 F2d 184.

[9] The time periods in denaturalization cases should not necessarily be taken as the measure in all civil cases, because the problem of settled private rights and financial reliance upon the judgment is not involved. See discussion of this aspect of denaturalization cases in Justice Black's dissenting opinion in Polites v. United States (1960) 364 US 426, 81 S Ct 202, 5 L ed2d 173, 3 FR Serv2d 60b.29, Case 4. Joined by three other members of the Court, Justice Black believed that denaturalization decrees should be viewed as continuing decrees and subject to relief under Rule 60(b)(5).

[10] See McKinney v. Boyle (CA9th, 1971) 447 F2d 1091, 15 FR Serv2d 620 (motion was denied where appellant had learned of settlement of his case nine months after it was dismissed but did not file 60(b) motion until some four and a half years after entry of order).

In Radack v. Norwegian Am. Line Agency, Inc. (CA2d, 1963) 318 F2d 538, 7 FR Serv2d 60b.29, Case 2, where the contention was that the clerk had failed to notify counsel of the judgment, the court of appeals was careful to note that on remand, the district court should inquire as to whether there was actual knowledge through other channels. The motion to vacate filed within one month of discovery of the entry of judgment was timely.

will look at length of apeal time, as in *Goldfine v. United States,*[13] wherein the court held that a motion to vacate an order to approve a proposed sale predicated upon the allegation that the party had failed to hear of the entry of the judgment until the sixty day appeal time had run is untimely if it is filed later than sixty days after discovery of entry of the judgment, since a litigant who excuses failure to act on want of notice must act at least within the period he would have had if he had received the notice.

When the motion is grounded upon events subsequent to the entry of the judgment, of course the time of occurence of such events is pertinent.[14] In those cases in which it has been held that gross ne-

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See also Mizell v. Attorney General (CA2d, 1978) 586 F2d 942, cert denied (1979) 440 US 967, 99 S Ct 1519, 59 L ed2d 783.

[13] (CA1st, 1964) 326 F2d 456, 8 FR Serv2d 60b.31, Case 3.

[14] Compare L. M. Leathers' Sons v. Goldman (CA6th, 1958) 252 F2d 188, 25 FR Serv 60b.28, Case 1, in which the motion to vacate a judgment entered upon stipulation of settlement was entertained after a lapse of eighteen months on a showing of failure to perform a condition to the agreement, with Ahmad v. Texas Co. (SD NY 1957) 21 FRD 2, 25 FR Serv 60b.33, Case 3, in which it was held that a motion to vacate a judgment entered on stipulation of settlement on the ground of failure to consummate the settlement came too late when it was made slightly less than a year after entry).

See Pierce Oil Corp. v. United States (ED Va 1949) 9 FRD 619 (reversal of a companion case; motion entertained when filed within a reasonable time after the reversal, though more than a year after the original judgment). See Tsakonites v. Transpacific Carriers Corp. (SD NY 1970) 322 F Supp 722, in which the district court vacted a judgment five years after it was entered on the ground of a decision of the Supreme Court expressly repudiating the decision on which the jugment was based. Such cases as these raise the question of whether mistakes of law can be reached by motion under Rule 60(b) after the running of the time for apeal. See ¶ 60.22[3], *supra.* But so far as "reasonable time" is concerned, they could hardly require the filing of the motion before the decision of the case relied upon, though intervening rights might bar relief nevertheless. Delay in bringing the motion after the change in law, of course, may result in denial. Sunbeam Corp. v. Charles Appliances, Inc. (SD NY 1953) 119 F Supp 492, 19 FR Serv 60b.28, Case 1 (twenty-nine months too late).

For a case involving relief from a judgment based upon an administrative decision later reversed, see Block v. Thousandfriend (CA2d, 1948) 170 F2d 428.

See also United States v. Edell (SD NY 1954) 15 FRD 382, 19 FR Serv 60b.29, Case 3 (relief from the lien of a judgment given on motion

glect or misconduct of counsel is a ground for relief under Rule 60(b)(6),[15] a reasonable time has been held to depnd upon the composite circumstances of the case. In most such cases either the conduct of the attorney was such as to mislead the litigant into failure to take action,[16] or the attorney's neglect was considered together with circumstances of nonage, illness, ignorance, and poverty in various combinations. Illustrative of this type of case was *In re Estate of Cremidas*,[17] where the court set aside a judgment adverse to a minor,

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under Rule 60(b)(6) after approximately two years); Grand Union Equip. Co. v. Lippner (CA2d, 1948) 167 F2d 958 (relief from bankruptcy injunction needed to permit a creditor to sue the bankrupt for the purpose of thereafter suing the insurer).

[15] See subhead [2], *supra*.

[16] Barber v. Turberville (CA DC, 1954) 219 F2d 34, 20 FR Serv 60b.24, Case 2 (motion entertained after seventeen months when lawyer had assured client that he was taking care of case and she was warranted to assume that settlement negotiations in progress in a closely related case related to hers as well); L. P. Steuart, Inc. v. Matthews (CA DC, 1964) 329 F2d 234, 8 FR Serv2d 60b.31, Case 1, cert denied (1964) 379 US 824, 85 S Ct 50, 13 L ed2d 35 (two years not untimely when client had received assurances that case was proceeding and would be settled soon after it has been dismissed for want of prosecution due to lawyer's neglect occasioned by personal problems).

[17] (D Alaska 1953) 14 FRD 15, 18, 18 FR Serv 60b.29, Case 3.

See United States v. Williams (WD Ark 1952) 109 F Supp 456, 18 FR Serv 60b.31, Case 1 (relief afforded from decree quieting title of United States rendered approximately three years previously). Defendant had been abandoned by her husband, had little means, and had been living on the land in question with her children. She had employed a lawyer, who apparently did little or nothing for her.

Fleming v. Mante (ND Ohio 1950) 10 FRD 391, 14 FR Serv 60b.29, Case 1 (defendant husband was in a tuberculosis sanatorium at the time the action was instituted). Defendant wife was on relief part of the time. Although penniless they retained a lawyer who filed an answer but then ceased to represent them, and they had no knowledge of the trial at which they were assessed for treble damages. Motion for relief from the judgment was granted some three years after its entry.

See also Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co. (ND Ga 1970) 319 F Supp 1308, in which a motion for vacation of a default occasioned by defendant's lawyer's failure to answer was granted after more than a year, though apparently defendant, who had assumed his own defense in a supplementary proceeding, was charged with knowledge of the entry of the judgment. The district judge had had great difficulty in communicating with the defendant who did

Clause (6), which gives the district court power to relieve a party for any other reason that justifies relief from the operation of the judgment, is mutually exclusive of the preceding clauses; and does not give the court a dispensing power to afford relief on grounds that are legitimately within clause (1), or (2), or (3) when relief thereunder is barred by the one year period that is applicable to them.[42] Clause (6) is reserved for exceptional cases;[43] and if the ground for relief is properly within that clause then what constitutes a reasonable time must, of necessity, vary with the particular facts of the case.[44]

If the power of the court to grant relief is not barred by a fixed time period, such as the one year period applicable to clauses (1)–(3), the grant or denial of the motion normally rests in the exercise of a sound discretion by the district court applied in light of all attendant circumstances and relevant factors, including the factor of reasonable time.[45] If the trial court has power and exercises its discretion, its action will be disturbed by an appellate court only for abuse.[46]

[3]—Practice; Service; Formulation of Issues; Method of Trial; Costs; Reconsideration.

Relief under Rule 60(b) is by motion to the district court which rendered the judgment,[1] "by a party or his legal representative."[2] This should include one who is in privity with a party.[3] But one who is not a party or in privity with a party is not entitled to invoke Rule 60(b).[4]

No independent federal jurisdictional requirements are needed to support the motion proceeding, since it is a continuation of the main

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42 ¶ 60.27[1], *supra.*

43 ¶ 60.27[2], *supra.*

44 ¶ 60.27[3], *supra.*

45 ¶¶ 60.19, 60.27[1], [3], *supra.*

46 *Id.*

1 ¶ 60.28[1], *supra.*

Whether a district court in which a judgment has been registered may grant relief under 60(b) is discussed in ¶ 60.28[1], *supra.*

Neither the 60(b) motion nor the response to it is a pleading.—Bigelow v. RKO Radio Pictures (ND Ill 1954) 16 FRD 15, 20 FR Serv 13.15, Case 1, citing **Treatise.**

2 ¶ 60.19, *supra.*

3 *Id.*

4 Screven v. United States (CA5th, 1953) 207 F2d 740, 19 FR Serv 60b.1, Case 1; Karnegis v. Schooler (ND Tex 1944) 57 F Supp 178, 180.

Subject to what has just been said about jury trial, the court, under Rule 43(e),[29] may hear the issues arising under the 60(b) motion on affidavits,[30] or wholly or partly on oral testimony or depositions.[31] Where relief hinges upon a factual issue and credibility is involved, the taking of oral testimony will ordinarily be desirable.[32]

Rule 52 does not literally require the court to make findings of fact and conclusions of law in connection with a 60(b) hearing.[33] Many courts do, however, follow the commendable practice of making findings and conclusions where there has been a hearing on the evidence.[34] When made, findings of fact will not be set aside by an appellate court unless clearly erroneous.[35]

Just terms may be imposed in granting relief.[36] And where the district court has power to grant or deny relief, its discretionary exer-

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[29] ¶ 43.13, *supra*.

[30] See, *e.g.*, United States v. Karahalias (CA2d, 1953) 205 F2d 331, 18 FR Serv 60b.29, Case 4.

See Jones v. Jones (CA7th, 1954) 217 F2d 239, 20 FR Serv 60b.33, Case 1.

But see Laguna Royalty Co. v. Marsh (CA5th, 1965) 350 F2d 817, where the Court of Appeals for the Fifth Circuit observed that it is the duty of the court to give effect to the rule in the interest of doing justice and a hearing on affidavits alone punctuated by counsel's "ceaseless comments" was not enough.

[31] See, *e.g.*, Assmann v. Fleming (CCA5th, 1947) 159 F2d 332; United States v. Klapprott (D NJ 1947) 9 FRD 282, aff'd (CA3d, 1950) 183 F2d 474, cert denied (1950) 340 US 896, 71 S Ct 238, 95 L ed 649; United States v. Williams (WD Ark 1952) 109 F Supp 456, 18 FR Serv 60b.31, Case 1.

[32] See Federal Dep. Ins. Corp. v. Alker (CA2d, 1956) 234 F2d 113, 22 FR Serv 60b.38, Case 1.

[33] ¶ 52.08, *supra*.

If, however, the court goes beyond a decision of the 60(b) motion and in effect readjudicates the main claim, it should make findings and conclusions. See United States v. Williams (WD Ark 1952) 109 F Supp 456, 18 FR Serv 60b.31, Case 1.

[34] See, *e.g.*, Assmann v. Fleming (CCA8th, 1947) 159 F2d 332, United States v. Klapprott (D NJ 1949) 9 FRD 292, aff'd (CA3d, 1950) 183 F2d 474, cert denied (1950) 340 US 896, 71 S Ct 238, 95 L ed 649.

[35] Assmann v. Fleming (CCA8th, 1947) 159 F2d 332.

[36] Himalyan Indus. v. Gibson Mfg. Co. (CA9th, 1970) 434 F2d 403, 14 FR Serv2d 917; Pierce Oil Corp. v. United States (ED Va 1949) 9 FRD 619; Fleming v. Mante (ND Ohio 1950) 10 FRD 391, 392; and see ¶ 60.19, *supra*.

Cf. Willard C. Beach Air Brush Co. v. General Motors Corp. (D NJ 1950) 88 F Supp 849.

An order denying relief under 60(b) is a final appealable order.[8] An order granting relief under 60(b) must be tested by the general principles of finality and if it disposes of the case at the district court level it is final and appealable.[9] If, on the other hand, the grant is akin to an order granting a new trial and hence leaves the case undisposed of the order is interlocutory.[10]

The scope of appellate review will depend upon the issue involved. For example, an issue of law is involved and reviewable as such: where the issue is whether the motion is made within the maximum time permitted by the Rule so that the district court has power to grant relief;[11] where the issue is whether as a matter of law relief is proper.[12] On the other hand where the grant or denial of relief depends upon a discretionary appraisal of the facts of the particular case, the district court's determination is subject to review only for abuse.[13]

If the district court has made findings of fact, an appellate court will not set them aside unless they are clearly erroneous.[14]

[2]—Effect of Pending or Completed Appeal on Obtaining Relief.

During the pendency of an appeal, clerical mistakes in a judgment may be corrected by the district court, pursuant to Rule 60(a), "before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." [1]

The traditional rule is that when an appeal is taken from the district court, the latter court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the ap-

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[8] ¶ 60.30[3], *infra.*

[9] *Id.*

[10] *Id.*

[11] ¶¶ 60.19, 60.27[1], *supra.*

For discussion of time, see ¶ 60.28[2], *supra.*

Whether a court of registration may grant relief under 60(b) from the registered judgment, see ¶ 60.28[1], *supra,* may also raise a question of power.

[12] ¶¶ 60.19, 60.27[1], *supra.*

For example, if relief is sought under 60(b)(4) on the ground the judgment is void, see ¶ 60.25, *supra,* the issue may be solely a legal one as to whether the judgment is void or valid.

[13] Independence Lead Mines Co. v. Kingsbury (CA9th, 1949) 175 F2d 983, 988; ¶¶ 60.19, 60.27[1], *supra.*

[14] ¶ 60.28[3], *supra.*

[1] ¶ 60.08[2], *supra.*

pellate court.[2] As a result, the district court is without power to *grant* relief under Rule 60(b), whether the motion is made prior to[3] or after[4] the appeal is taken, except with permission of the appellate court.[5]

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[2] ¶ 59.09[5], *supra;* ¶ 203.11, *infra;* Miller v. United States (CCA7th, 1940) 114 F2d 267, 3 FR Serv 59a.62, Case 1, cert denied (1941) 313 US 591, 61 S Ct 1114, 85 L ed 1545.

United States ex rel Tillery v. Cavell (CA3d, 1961) 294 F2d 12, 4 FR Serv2d 73a.42, Case 2.

[3] Switzer v. Marzall (D DC 1951) 95 F Supp 721, 722–723, 15 FR Serv 73a.42, Case 2.

Norman v. Young (CA10th, 1970) 422 F2d 470, 13 FR Serv2d 37b.244, Case 1 (where defendant's attorney filed a notice of appeal prior to argument on a 60(b) motion, the case was taken from the trial court's jurisdiction).

[4] See Frasier v. Public Serv. Interstate Transp. Co. (CA2d, 1958) 254 F2d 132, citing **Treatise**; Freedman v. Overseas Scientific Corp. (SD NY 1957) 150 F Supp 394, 24 FR Serv 73a.42, Case 1, aff'd (CA2d, 1957) 248 F2d 274; Schempp v. School Dist. of Abington Township, Pa. (ED Pa 1959) 184 F Supp 381 (appeal from three-judge court to Supreme Court); Ritter v. Hilo Varnish Co. (SD NY 1960) 186 F Supp 625; Smith v. Pollin (CA DC, 1952) 194 F2d 349, 16 FR Serv 73a.42, Case 3; Daniels v. Goldberg (SD NY 1948) 8 FRD 580, 12 FR Serv 60b.34, Case 1 (citing **Treatise**), judgment aff'd (CA2d, 1949) 173 F2d 911; Schram v. Safety Investment Co. (ED Mich 1942) 45 F Supp 636, 6 FR Serv 60b.24, Case 1; and see Hirsch v. United States (CA6th, 1951) 186 F2d 524, 15 FR Serv 73a.42, Case 1.

[5] Smith v. Pollin (CA DC, 1952) 194 F2d 349; Baruch v. Beech Aircraft Corp (CA10th, 1949) 172 F2d 445, cert denied (1949) 338 US 900, 70 S Ct 251, 94 L ed 554; Zig Zag Spring Co. v. Comfort Spring Corp. (CA3d, 1953) 200 F2d 901; Switzer v. Marzall (D DC 1951) 95 F Supp 721; Daniels v. Goldberg (SD NY 1948) 8 FRD 580.

See concurring opinion in Bershad v. McDonough (CA7th, 1972) 469 F2d 1333, 16 FR Serv2d 1076, citing **Treatise**.

Where the motion is denied, an appeal from the order denying the motion is treated as a motion to remand for consideration by the trial court. Weiss v. Hunna (CA2d, 1963) 312 F2d 711, 6 FR Serv2d 60b.24, case 1, cert denied (1963) 374 US 853, 83 S Ct 1920, 10 L ed2d 1073. But where the motion in the district court asked only whether the court would "entertain" a motion under Rule 60(b), rather than whether it would "grant" it, the court of appeals declined to remand for consideration of the motion, holding that the refusal of the district court to consider the motion was interlocutory, but indicated that after the appeal had been disposed of, the movant could pursue the motion in the district court. Canadian Ingersol-Rand Co. v. Peterson Prods. of San Mateo, Inc. (CA9th, 1965) 350 F2d 18, 9 FR Serv2d 60b.35, Case 2.

VI. Saving Provisions of Rule 60(b)

¶ 60.31. Independent Action Saved.

Present 60(b) states:

> 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. . . .

It remains clear, as it has from the beginning, that Rule 60(b) does not limit the power of a court to entertain an independent action.[1] And since nomenclature is unimportant a proceeding for relief under 60(b) may in an appropriate case be treated as an independent action;[2] and similarly an independent action may be treated as a proceeding under 60(b).[3]

The need for the independent action in equity as an instrument for obtaining relief from federal judgments has been reduced, because present Rule 60(b) does provide a comprehensive motion procedure.[4] Nevertheless the independent action may in some cases be a more plain and adequate remedy, as when it is uncertain whether a court of registration may give relief from the registered judgment under 60(b).[5] The independent action may afford the only avenue of relief, as where the time to move for relief on the basis of mistake or fraud, for example, precludes relief under 60(b)(1) or (3).[6] And, of course, since 60(b) applies only to *federal* district court judgments rendered in civil actions, the independent action must be used if there is resort to the federal courts for relief from a state judgment.[7]

¶ 60.32. Relief Under 28 USC § 1655 Saved

The first saving clause of present 60(b) preserves the independent action in equity.[1] The second saving clause reads:

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[1] ¶ 60.01[8], *supra.*

¶ 60.37[1], [2], *infra.*

The history of independent actions as providing a basis for relief from judgments may be found in ¶¶ 60.10[8], 60.11, 60.12, *supra.*

[2] ¶ 60.18[8], *supra.*

[3] See ¶ 60.28[3], *supra.*

For procedural similarity of independent action and 60(b) motion, see ¶ 60.28[3], *supra.*

[4] For summary of relief under 60(b), see ¶ 60.21, *supra.*

For related discussion, see ¶ 60.37[2], *infra;* also ¶ 60.40, *infra.*

[5] See ¶ 60.28[1], *supra.*

[6] See ¶ 60.24, *supra;* ¶ 60.37[1], [2], *infra.*

[7] See ¶¶ 60.37[3], 60.39, *infra.*

[1] ¶ 60.31, *supra.*

> This rule does not limit the power of a court. . . to grant relief to a defendant not actually personally notified as provided in Title 28, USC § 1655. . . .[2]

If a defendant cannot be served within the state or does not voluntarily appear, § 1655 authorizes constructive service of process in an in rem action[3] by service of the court's order to appear "on the absent defendant personally if practicable, wherever found"; and if such service is not practicable then by publication of the court's order. If this latter type of constructive service is made, § 1655 goes on to provide:

> Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

The above provision applies to cases where service has been made by publication.[4] In that event "the right to appear and have a cause reopened is not dependent upon terms to be fixed by the court, except to the extent that the statute provides for terms as to costs."[5] Exercise of the power to reopen under § 1655 differs, then, from the court's exercise of power to grant relief on grounds (1)–(6)[6] of 60(b), for under § 1655 the court has no discretion, except as to costs, when the defendant comes within § 1655,[7] while the court having power to grant relief under one or more of the 6 grounds of 60(b) may exercise a sound discretion in granting or denying relief.[8]

¶ 60.33. Rule Does Not Limit Power To Set Aside a Judgment for Fraud Upon the Court.

The district court may grant relief from a judgment because of fraud, by granting a new trial under Rule 59 either on the timely motion of a party or upon its own timely initiative;[1] but since the time

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[2] The reference in original 60(b) was to § 57 of the Judicial Code, USC, Title 28, § 118, the statutory predecessor of 28 USC § 1655 of the Judicial Code of 1948; but the substance of the second saving clause of original 60(b) was the same as the present saving clause quoted in the text. ¶ 60.11, *supra*.

[3] ¶¶ 4.34–4.41, *supra*.

[4] Perez v. Fernandez (1911) 220 US 224, 31 S Ct 412, 55 L ed 443.

[5] See ¶ 4.36, *supra*.

[6] See ¶ 60.21, *supra*, for these 6 grounds.

[7] N 5, *supra*.

[8] ¶¶ 60.19, 10.27[1], *supra*. See also ¶¶ 60.28[3], 60.30[1], *supra*.

[1] ¶ 59.08[1]–[4], *supra*.

period for the motion or the court's action *sua sponte* is quite short[2] effective relief from a fraudulent judgment must in many cases come from another quarter.[3]

Rule 60(b) deals directly or indirectly with this problem in three ways.

1. *Rule 60(b)(3)*

Clause (3) of 60(b) authorizes the district court which rendered the judgment[4] to grant relief, on motion, from a final[5] judgment because of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."[6] The motion must be made within a reasonable time and in any event not later than a year.[7]

2. *Independent Action*

The first saving clause 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.[8] Perhaps the chief, although certainly not the exclusive, basis for the independent action is fraud;[9] and while there is some authority that intrinsic fraud will support such an action the general view is that the fraud must be extrinsic.[10] The independent action may, but need not, be brought in the federal district court which rendered the judgment;[11] and the time limitation upon such an action for relief from a federal judgment normally is laches.[12]

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[2] Not later than 10 days after the entry of judgment. ¶¶ 59.09, 59.11, 60.03[3], *supra*.

[3] ¶ 60.24[1], *supra*.

For related analogous discussion pointing out that although relief may be obtained from a judgment by new trial because of newly discovered evidence, effective relief must often come from another quarter, see ¶ 60.23[3], *supra;* and similarly as to relief from a void judgment, see ¶ 60.25[2]–[4], *supra*.

[4] ¶ 60.28[1], *supra*.

[5] ¶ 60.20, *supra*.

[6] ¶ 60.24, *supra*.

[7] ¶ 60.24[4], *supra*.

Under present 60(b) the year period is computed from the entry of judgment.

[8] ¶ 60.31, *supra*.

[9] ¶¶ 60.36, 60.37[1], [2], *infra*.

[10] ¶ 60.37[1], [2], *infra*.

[11] ¶ 60.36, *infra*.

[12] ¶ 60.37[2], *infra*.

Lockwood v. Bowles (D DC 1969) 46 FRD 625, 13 FR Serv2d 60b.51, Case 1 (plantiffs greatly prejudiced by defendant's fourteen year delay, citing **Treatise**).

3. *Fraud Upon the Court*

The third saving clause states that the Rule does not limit the power of a court "to set aside a judgment for fraud upon the court."[13] This clause was added by the 1946 revision;[14] and recognizes the inherent power of a court to grant relief when fraud has been perpetrated upon it.[15] This inherent power is to be exercised by the court upon whom the fraud is practiced, district[16] or appellate,[17] as the case may be.

As to time limitation for federal relief from state judgments, see ¶ 60.37[3], *infra.*

[13] See Taft v. Donellan Jerome, Inc. (CA7th, 1969) 407 F2d 807, 12 FR Serv2d 60b.51, Case 1, citing **Treatise**; Wilkin v. Sunbeam Corp. (CA10th, 1968) 405 F2d 165, 12 FR Serv2d 60b.34, Case 1; Lim Kwock Soon v. Brownell (CA5th, 1966) 369 F2d 808.

Applicability to interlocutory or final judgments.—Undoubtedly a federal court can set aside an interlocutory judgment where fraud has been practiced upon it, for it has plenary power over all of its interlocutory orders, whether the product of fraud or not, ¶ 60.20, *supra.* The saving clause is, therefore, not needed to preserve that power and is primarily concerned with a *final* judgment, with which 60(b) is concerned; ¶ 60.20, *supra.*

[14] ¶ 60.01[1], [7], *supra.*

[15] See Committee Note of 1946, ¶ 60.01[8], *supra.*

For discussion of this inherent power doctrine, see ¶ 60.16[5], *supra.*

[16] Like a motion generally under 60(b), based on one or more of the grounds stated in clauses (1)–(6), which is to be made in the district court which rendered the judgment, ¶ 60.28[1], *supra,* the context of 60(b) indicates that if a fraud is practiced upon a district court it is that court which, on the inherent power theory, should give relief from the judgment rendered by it. See by analogy cases cited in n 17, *infra.*

Taft v. Donellan Jerome, Inc. (CA7th, 1969) 407 F2d 807, 12 FR Serv2d 60b.51, Case 1 (independent action seeking to enjoin enforcement of a default judgment on the basis of lack of in personam jurisdiction and fraud was properly denied where brought in court other than the one in which judgment was rendered, citing **Treatise**).

And normally this principle should be followed, even though the judgment is registered in another district. If, on the other hand, the fraud practiced is upon the registering court it would seem that it is the proper court to grant relief from the registered judgment. See ¶ 60.28[1], *supra.*

Cf. Pfotzer v. Amercoat Corp. (CA2d, 1977) 548 F2d 51, a motion to set aside on basis of fraud, a stipulation of dismissal which referred to oral stipulation entered into in state court action, was untimely under Rule 60(b)(3) and assuming ar-

Although the saving clause is concerned with power reserved to the district courts to enable them to grant relief in cases where fraud has been perpetrated upon them,[18] it in no wise detracts from an appellate court's inherent power to give relief where the fraud has been practiced upon the appellate court.[19] Even though this court has only appellate jurisdiction it has the power to grant relief both where the facts are admitted[20] and where a trial of the facts is necessary,[21] and

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guendo that the pleadings could be interpreted as alleging fraud on a court, it was on the state court and not on the federal court which had no duty to ascertain whether the court stipulation had been conformed with. Goodwin v. Home Buying Investment Co. (D DC 1973) 352 F Supp 413, citing **Treatise** (fraud, if any, was practiced not upon district court hearing this action to set aside a judgment, but upon Superior Court).

17 Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944) 322 US 238, 64 S Ct 997, 88 L ed 1250; Universal Oil Products Co. v. Root Refining Co. (1946) 328 US 575, 66 S Ct 1176, 90 L ed 1447; Root Refining Co. v. Universal Oil Products Co. (CCA3d, 1948) 169 F2d 514, cert denied (1949) 335 US 912, 69 S Ct 481, 93 L ed 444.

See Porcelli v. Joseph Schlitz Brewing Co. (ED Wis 1978) 78 FRD 499, citing **Treatise**, aff'd without opinion (CA7th, 1978) 588 F2d 838 (where order was entered by court of appeals, relief should have been sought there, not in district court).

18 Since Rule 60(b) deals with relief from final judgments by the district courts in civil actions.

19 Since Rule 60(b), like the Federal Rules generally, is dealing with district court practice it does not affect an appellate court's power, inherent or otherwise, to deal with its judgments.

An "extraordinary" petition seeking to have an affirmed judgment holding a patent invalid and not infringed set aside on the ground that the trial judge had a substantial interest in the patent-suit defendant and additionally seeking various forms of relief from the defendant on the basis of alleged fraud on the trial and appellate courts was treated as one requesting leave to proceed with a motion under 60(b) or an independent action and hearings in the district court were ordered. Kinnear-Weed Corp. v. Humble Oil & Refining Co. (CA5th, 1968) 403 F2d 437.

20 Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944) 322 US 238, 64 S Ct 997, 88 L ed 1250.

21 Universal Oil Products Co. v. Root Refining Co. (1946) 328 US 575, 66 S Ct 1176, 90 L ed 1447; Root Refining Co. v. Universal Oil Products Co. (CCA3d, 1948) 169 F2d 514.

in this latter situation it properly acts as trier of the facts and judge of the law.[22]

The defrauded court may act on motion of an aggrieved party,[23] or upon its own motion, and even though the prevailing party opposes the proceeding and the party cast in judgment does not desire to reopen the judgment.[24] An interested third person may be allowed to intervene.[25] It has also been held that a claim of fraud on the court may be raised by a non-party who does not formally intervene.[26] The usual safeguards of adversary proceedings must be observed.[27] Al-

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[22] Root Refining Co. v. Universal Oil Products Co. (CCA3d, 1948) 169 F2d 514.

[23] Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944) 322 US 238, 64 S Ct 997, 88 L ed 1250.

See Kupferman v. Consolidated Research & Mfg Co. (CA2d, 1972) 459 F2d 1072, 16 FR Serv2d 160; citing **Treatise**. Motion was made by a former director of the defendant corporation, now defunct, who was being personally sued on a related matter. Calling the director the real party in interest, the court said that although it would have been more orderly if he had sought intervention pursuant to Rule 24, a finding of fraud on the court empowers the district court to set aside the judgment sua sponte, and that the director had standing to suggest that it do so.

[24] Root Refining Co. v. Universal Oil Products Co. (CCA3d, 1948) 169 F2d 514 (and a justiciable controversy is presented), cert denied (1949) 335 US 912, 69 S Ct 481, 93 L ed 444.

[25] Root Refining Co. v. Universal Oil Products Co. (CCA3d, 1948) 169 F2d 514 (and laches of the intervenor are not necessarily fatal).

[26] Southerland v. Irons (CA6th, 1980) 628 F2d 978. In a personal injury suit, the state medicaid program was subrogated to the plaintiff's right of recovery. The state notified plaintiff's attorney of its interest and, believing its interest to be protected, did not formally intervene in the suit. A settlement agreement was approved by the court, without allocating damages to the parties. Plaintiff's attorney had represented to the court that he would pay the state lien and the expenses of the suit from his contingent fee. The state then filed a Rule 60(b) motion, claiming that its lien had not been paid and that the attorney had committed a fraud on the court. The district court agreed, reduced the attorney's fee, and reallocated the settlement proceeds. On the attorney's appeal, the court of appeals said that the state did not have to intervene to raise the issue of fraud, since a claim of fraud on the court may be raised by a non-party. The court also said that the district court's findings on the fraud issue would be upheld as not clearly erroneous.

[27] Universal Oil Products Co. v. Root Refining Co. (1946) 328 US 575, 66 S Ct 1176, 90 L ed 1447; Root Refining Co. v. Universal Oil Products Co. (CCA3d, 1948) 169 F2d 514.

Fraud in obtaining jurisdiction may at times be a fraud upon the court.[56] But appropriate relief can usually be afforded under other concepts of fraud;[57] and better judicial administration will result in most cases if this species of fraud is not put within the rather nebulous category of fraud upon the court. While fraud as to jurisdiction may improperly put the judicial machinery in operation, it usually does not corrupt the judicial power. And even where the fraud goes to federal jurisdiction this affects the proper distribution of judicial power between federal and state courts, but normally does not debauch the power of adjudication.[58]

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, subvert the integrity of 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 adjudging cases that are presented for adjudication,[59] and relief should be denied in the absence of such conduct.[60] Fraud

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[56] See Menashe v. Sutton (SD NY 1950) 90 F Supp 531, 14 FR Serv 15a.21, Case 1 (fraud, if any, relative to plaintiff's allegation of defendant's citizenship was that of defendant, and not plaintiff, in defendant's failure to deny the allegation; and would not justify setting aside the judgment twenty eight months later on defendant's motion; see ¶ 60.24[5], *supra*).

[57] By answer or motion to dismiss under Rule 12(b), ¶ 12.07, *supra;* by suggestion at any stage of the pending proceeding that the court lacks jurisdiction of the subject matter, and a court, even on appeal, may raise such defect on its own motion, ¶ 12.23, *supra;* by collateral attack on the ground that the court did not have the requisite jurisdiction over the defendant to render a valid judgment, Wyman v. Newhouse (CCA2d, 1937) 93 F2d 313, 115 ALR 460, cert denied (1938) 303 US 664, 58 S Ct 831, 82 L ed 1122; ¶ 60.25[2], [3], *supra;* ¶ 60.41, *infra;* by motion to vacate under 60(b)(4) if the fraud rendered the judgment void, ¶ 60.25[3], *supra;* by motion to set aside the judgment for fraud under 60(b)(3), ¶ 60.24, *supra;* by independent action to enjoin enforcement of the judgment.

[58] And certainly the general proposition is that a federal judgment, while subject to direct attack for lack of federal jurisdiction in the rendering court, is not subject to collateral attack; ¶ 60.25[2], *supra.*

[59] Toscano v. CIR (CA9th, 1971) 441 F2d 930, citing **Treatise** (fraud upon court was showing from facts presented, and the showing was strong enough to require a tax court hearing).

See Southerland v. Irons (CA6th, 1980) 628 F2d 978.

[60] Kerwit Med. Products, Inc. v. N. & H. Instruments, Inc. (CA5th, 1980) 616 F2d 833, citing **Treatise** (mere nondisclosure of facts pertinent to the controversy does not amount to fraud upon the court); Kupferman v. Consolidated Re-

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[56] See Menashe v. Sutton (SD NY 1950) 90 F Supp 531, 14 FR Serv 15a.21, Case 1 (fraud, if any, relative to plaintiff's allegation of defendant's citizenship was that of defendant, and not plaintiff, in defendant's failure to deny the allegation; and would not justify setting aside the judgment twenty eight months later on defendant's motion; see ¶ 60.24[5], *supra*).

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inter partes, without more, should not be a fraud upon the court, but

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search & Mfg. Co. (CA2d, 1972) 459 F2d 1072, 16 FR Serv2d 160, citing **Treatise.** (attorney's failure to disclose a document he reasonably thought his adversary knew about was not fraud on the court); Serzysko v. Chase Manhattan Bank (CA2d, 1972) 461 F2d 699, 16 FR Serv2d 169, cert denied (1972) 409 US 883, 93 S Ct 173, 34 L ed2d 139 (perjury of a witness does not amount to fraud upon the court); Wilkin v. Sunbeam Corp. (CA10th, 1972) 466 F2d 714, 16 FR Serv2d 606, cert denied (1973) 409 US 1126, 93 S Ct 940, 35 L ed 258 (insufficient showing of fraud); Keys v. Dunbar (CA9th, 1969) 405 F2d 955, cert denied (1969) 396 US 880, 90 S Ct 158, 24 L ed2d 138 (no substantial basis for claim that state committed fraud on court in habeas corpus proceeding); Martina Theatre Corp. v. Schine Chain Theatres (CA2d, 1960) 278 F2d 798 (finding no fraud upon the court, quoting **Treatise**); England v. Doyle (CA9th, 1960) 281 F2d 304 ("unconscionable plan or scheme which is designed to improperly influence the court in its decision" not present); Hawkins v. Lindsley (CA2d, 1964) 327 F2d 356, 8 FR Serv2d 73a.42, Case 1, citing **Treatise**; Williams v. Board of Regents of the University System of Georgia (MD Ga 1981) 90 FRD 140, citing **Treatise** (where the only implications were that plaintiff knowingly withheld information material to the defense, and perjured himself on the issue of damages, a deliberate scheme to defraud the court was not shown); Armour & Co. v. Nard (ND Iowa 1972) 56 FRD 610, citing **Treatise.**

See Addington v. Farmer's Elevator Mutual Ins. (CA5th, 1981) 650 F2d 663, citing **Treatise.**

See Israel Aircraft Ind., Ltd. v. Standard Precision (CA2d, 1977) 559 F2d 203. In an acion by the insurer of an aircraft owner and by injured members of the crew, against the aircraft manufacturer for damages sustained in a plane crash, the district court set aside a jury verdict for plaintiffs and *sua sponte* dismissed the complaint after learning of releases given by the crew members to the owner. The court of appeals affirmed the setting aside of the jury verdict but reversed the dismissal and remanded. The appellate court found that neither appellants nor their attorneys were guilty of fraud upon the court and that failure to disclose execution of the releases was due to misunderstandings, lack of communication and some carelessness. Under the circumstances involved, *i.e.,* an Israeli insured and New York attorneys pursuing a subrogation claim, the court of appeals did not find it incredible that plaintiff's attorney's were unaware of the releases.

See Kenner v. Comm'r (CA7th, 1968) 387 F2d 689, cert denied (1968) 393 US 841, 89 S Ct 121, 21 L ed2d 112 (no fraud shown, quoting **Treatise**); see also Lockwood v. Bowles (D DC 1969) 46 FRD 625, 13 FR Serv2d 60b.51, Case 1.

redress should be left to a motion under 60(b)(3) or to the independent action.[61]

¶ 60.34. Common Law and Equitable Remedies Abolished; Value of the Old Precedents.

Material formerly found here relative to the ancient forms of relief is contained in ¶¶ 60.13–60.15, *supra*. Precedents dealing with those remedies, that are useful in understanding Rule 60(b) are found there. The abolishment of those writs is also discussed in those sections and in ¶ 60.15[8], *supra*.

See ¶ 60.14 for the continued applicability of the writ of coram nobis to criminal proceedings.

Matter formerly found here relative to the deficiencies of original Rule 60(b) may be found in ¶ 60.18[1], *supra*.

See ¶ 60.01[8], *supra*, for Committee Note of 1946 explaining the 1946 amendments to Rule 60(b).

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[61] Porcelli v. Joseph Schlitz Brewing Co. (ED Wis 1978) 78 FRD 499, citing **Treatise**, aff'd without opinion (CA7th, 1978) 588 F2d 838. The district court granted summary judgment for defendants, but the decision was adopted, and the order entered, by the court of appeals. The court of appeals denied a motion for relief from judgment but granted leave to move in the district court for relief. Nevertheless, the district court denied a motion brought under Rule 60(b)(3) to set aside the order of the court of appeals, since such a motion must be addressed to the court which entered the order. The basis of the motion was that the summary judgment ruling in favor of defendants was obtained partly on the depositions of defendants, which plaintiff now claimed contained false testimony. The court said that the fraud contemplated under Rule 60(b)(3) is one which interferes with the judicial machinery itself. Perjury by witnesses does not constitute such a fraud.

See Williams v. Bd. of Regents of Univ. of Ga. (MD Ga 1981) 90 FRD 140, holding that with respect to a claim of perjury, the proper avenue of relief would have been a timely motion under Rule 60(b)(3), but defendants did not avail themselves of such a motion. Under the circumstances, the court denied relief from the judgment; Olson v. Arctic Enterprises, Inc. (D ND 1976) 21 FR Serv2d 423; Petry v. General Motors Corp., Chevrolet Div. (ED Pa 1974) 62 FRD 357, 18 FR Serv2d 1551 (in personal injury action, act of defendant in filing allegedly false and misleading answers to interrogatories did not consititute fraud upon the court).

See also Lockwood v. Bowles (D DC 1969) 46 FRD 625, 13 FR Serv2d 60b.51, Case 1, quoting **Treatise**.

portunity to present his claim or defense different considerations come into play. *United States v. Throckmorton*[4] held that if fraud is relied on for relief, the fraud must be extrinsic. This case involved an original action brought by the United States in a federal circuit court to declare null a decree which had been rendered by a district court nearly twenty years earlier. The district court's decree had affirmed a decree of the board of commissioners of private land claims in California which had confirmed the claim of one Richardson under a Mexican land grant. The fraud alleged in support of the bill was that Richardson, after filing his petition before the board, went to Mexico and caused one Micheltorena, a former political chief of California, to sign a fraudulently antedated land grant, so as to impose upon the court the belief that it had been made at a time when Micheltorena had the power to make such grants in California. It was also alleged that in support of this simulated and false document Richardson procured and filed therewith the depositions of perjured witnesses. In affirming the circuit court, which had sustained a demurrer to the bill and dismissed it on the merits, the Supreme Court stated:

> But . . . in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or 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 a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing (citing authority). . . .

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litigated in a subsequent denaturalization proceeding; Simons v. United States (CA2d, 1971) 452 F2d 1110, 15 FR Serv2d 857 (since 8 USC § 1451(a) limits attack on naturalization decrees by independent action to proceedings brought under that section by the Attorney General, a private party may not attack such a decree by independent action). For applicability of 60(b) motion practice to denaturalization proceedings, see Petition of Field (SD NY 1953) 117 F Supp 154, 19 FR Serv 60b.1, Case 2 (see ¶ 60.19, *supra*). For related discussion, see ¶ 59.04[12], *supra*.

[4] (1878) 98 US 61, 25 L ed 93.

> In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practised 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. . . .
>
> . . . We think these decisions establish the doctrine on which we decide the present case; namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.[5]

At the same time the Court noted that an allegation of negligence on the part of one of the Government's law agents before the land board did not warrant relief; while relief would have been warranted under the extrinsic rule if it had been alleged that the agent had been bribed or otherwise corrupted by the applicant for the land patent.[6]

The principle of res judicata "that suits may not be immortal, while men are mortal" [7] is given primacy by *Throckmorton* over the principle of individual justice, which, in theory at least, might be better achieved through the process of relitigation.

Under the *Throckmorton* doctrine the fraud must be such as was not in issue in the former suit,[8] nor could have been put in issue by

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[5] United States v. Throckmorton (1878) 98 US 61, 25 L ed 93.

[6] United States v. Throckmorton (1878) 98 US 61, 69, 25 L ed 93 ("If there had been a further allegation that Howard was then interested in the Richardson claim, or that Richardson had bribed him, or that from any corrupt motive he had betrayed the interest of the government, the case would have come within the rule which authorizes relief."). For related discussion relative to fraud upon the court, see ¶ 60.33, *supra*.

[7] See Toledo Scale Co. v. Computing Scale Co. (1923) 261 US 399, 425, 43 S Ct 458, 67 L ed 719 (quoting Justice Story); also Harrington v. Denny (WD Mo 1933) 3 F Supp 584, 586, app dism'd (CCA8th, 1933) 68 F2d 1004.

[8] United States v. Throckmorton (1878) 98 US 61, 25 L ed 93; Aetna Casualty & Surety Co. v. Abbott (CCA4th, 1942) 130 F2d 40; Chisholm v. House (CCA10th, 1947) 160 F2d 632; Josserand v. Taylor (CC PA 1946) 159 F2d 249; Dowdy v. Hawfield (CA DC, 1951) 189 F2d 637, 15 FR Serv 60b.53, Case 1, cert denied (1951) 342 US 830, 72 S Ct 54, 96 L ed 628; see Independence Lead Mines Co. v. Kingsbury

the exercise of reasonable diligence.[9] Fraud is extrinsic where a party is prevented by trick, artifice or other fraudulent conduct from fairly presenting his claim or defenses[10] or introducing rele-

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(CA9th, 1949) 175 F2d 983, cert denied (1949) 338 US 900, 70 S Ct 249, 94 L ed 554.

See Dairy Distributors, Inc. v. Western Conference of Teamsters (CA10th, 1961) 294 F2d 348, cert denied (1962) 368 US 988, 82 S Ct 604, 7 L ed2d 525.

See also cases cited in n 28, *infra*.

[9] West Side Irrigating Co. v. United States (CCA9th, 1921) 269 F 759, aff'g (ED Wash 1920) 264 F 538, app dism'd (1923) 260 US 756, 43 S Ct 246, 67 L ed 498; Toledo Scale Co. v. Computing Scale Co. (CCA7th, 1922) 281 F 488, aff'd (1923) 261 US 399, 43 S Ct 458, 67 L ed 719; Derrisaw v. Schaffer (ED Okla 1934) 8 F Supp 876.

[10] United States v. Throckmorton (1878) 98 US 61, 25 L ed 93; Pacific R.R. of Mo. v. Mo. Pac. R. Co. (1884) 111 US 505, 4 S Ct 583, 28 L ed 498; Town of Boynton v. White Const. Co. (CCA5th, 1933) 64 F2d 190; Chicago, R.I. & P. R. Co. v. Callicotte (CCA8th, 1920) 267 F 799 (extensive review of cases), cert denied (1921) 255 US 570, 41 S Ct 375, 65 L ed 791.

See Wood v. McEwen (CA9th, 1981) 644 F2d 797, cert denied (1982) 102 S Ct 1437.

See Luttrell v. United States (CA9th, 1980) 644 F2d 1274, citing **Treatise**. In an action filed by plaintiff as a result of injuries sustained by him as a seaman aboard a merchant vessel belonging to the U.S., the district court did not have subject matter jurisdiction to reconsider a prior judgment based on allegations of newly discovered evidence or the claim that the judgment was obtained through extrinsic or intrinsic fraud. A court has equitable jurisdiction to set aside a judgment where a party has been prevented from fully presenting his case, by fraud or deception practiced upon him. Plaintiff's allegations that the U.S. was not properly represented, due to the fact that one of government's attorneys was not specifically appointed by the Attorney General to represent the U.S. pursuant to 28 USC § 515, did not rise to the level of fraud upon the court on the basis of which an independent action to set aside the original judgment might be found.

The fraud must really have prevented the complaining party from making a full and fair presentation of his claim or defense. Toledo Scale Co. v. Computing Scale Co. (CCA7th, 1922) 281 F 488, aff'd (1923) 261 US 399, 43 S Ct 458, 67 L ed 719.

See Konigsberg v. Security National Bank (SD NY 1975) 66 FRD 439, quoting **Treatise**; Armour & Co. v. Nard (ND Iowa 1972) 56 FRD 610, citing **Treatise**. Independent actions would not lie in either of these cases based, as they were, on claims of perjury.

vant and material evidence.[11] For example, actions have been permitted where the unsuccessful party's attorney in the original action connived to lose,[12] and where the trustees under a mortgage combined with the purchasers at the sale to allow them to control the foreclosure proceedings and to purchase at the sale at a sacrifice price.[13]

A fiduciary or other related legal relationship between the parties in the original action or proceeding may make conduct actionable that would otherwise not be so. Thus where there is no such relationship and material evidence has not been fraudulently suppressed, failure of one party to furnish evidence to his adversary to weaken its own claim or defense is not actionable fraud.[14] On the other hand where one party because of a fiduciary or other legal relationship has a duty to make a full and fair disclosure to the adverse party of relevant and material facts a failure to do so is actionable fraud.[15] So also where the "fiduciary" practices duress upon the other party,[16] or otherwise practices a fraud or deception in violation of the relationship existing between the parties.[17]

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[11] *Cf.* Toledo Scale Co. v. Computing Scale Co. (CCA7th, 1922) 281 F 488, aff'd (1923) 261 US 399, 43 S Ct 458, 67 L ed 719.

But no action will lie where the suppressed evidence was inadmissible. Kithcart v. Metropolitan Life Ins. Co. (CCA8th, 1937) 88 F2d 407. See also Hewitt v. Hewitt (CCA9th, 1927) 17 F2d 716.

[12] See Bizzell v. Hemingway (CA4th, 1977) 548 F2d 505 (collusion by attorney); United States v. Aakervik (D Ore 1910) 180 F 137.

[13] Sahlgard v. Kennedy (CC D Minn 1880) 2 F 295.

[14] Toledo Scale Co. v. Computing Scale Co. (1923) 261 US 399, 423, 43 S Ct 458, 67 L ed 719 (no need to make distinction between extrinsic and intrinsic fraud), aff'g (CCA7th, 1922) 281 F 488.

See Goodwin v. Home Buying Investment Co. (D DC 1973) 352 F Supp 413.

[15] Pickens v. Merriam (CCA9th, 1917) 242, 363 (concealment of assets by administrator); Park v. Park (CCA5th, 1941) 123 F2d 370 (fraud of guardian toward ward); Chisholm v. House (CCA10th, 1947) 160 F2d 632 (trustee's reports were false and misleading.

[16] Griffith v. Bank of New York (CCA2d, 1945) 147 F2d 889, 160 ALR 1340, cert denied (1945) 325 US 874, 65 S Ct 1414, 89 L ed 1992.

[17] Fiske v. Buder (CCA8th, 1942) 125 F2d 841, 847, 849, 5 FR Serv 60b.51, Case 1 ("A life tenant is a quasi trustee for the remaindermen. . . . It is always extrinsic fraud for an attorney to fail fully to disclose to his client all material facts in any transaction in which their interests are adversary and when such fraud results in a failure of the client to defend against the claim of his attorney.").

As generally stated, intrinsic fraud, such as perjury (including false pleadings or forged documentary testimony) will not lay a foundation for an original action under the *Throckmorton* doctrine.[18] Doubt was, however, cast upon this doctrine by the Court's language, if not its holding, in *Marshall v. Holmes,*[19] decided some thirteen years after *Throckmorton.* The Court's language in *Marshall* puts the basis for relief upon the following very general terms:

> While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any 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, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to

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[18] Wood v. McEwen (CA9th, 1981) 644 F2d 797, cert denied (1982) 102 S Ct 1437; Serzysko v. Chase Manhattan Bank (CA2d, 1972) 461 F2d 699, 16 FR Serv2d 169, cert denied (1972) 409 US 883, 93 S Ct 173, 34 L ed2d 139; Olson v. Arctic Enterprises, Inc. (D ND 1976) 21 FR Serv2d 423; Konigsberg v. Security National Bank (SD NY 1975) 66 FRD 439, citing Treatise.

See Lockwood v. Bowles (D DC 1969) 46 FRD 625, 13 FR Serv2d 60b.51, Case 1 (motion denied where alleged fraud was primarily that of perjury, citing Treatise). See n 18, *supra.*

[19] (1891) 141 US 589, 12 S Ct 62, 35 L ed 870.

The narrow holding was that an action in a Louisiana state court to enjoin enforcement of several judgments, each for less than the jurisdictional amount but in the aggregate more, was removable on the basis of diversity, where the fraud tied the judgments together. The fraud relied on in the bill was a letter allegedly forged by the now defendant, which purported to be from the now plaintiff giving an authorization to an agent, which if genuine would have rendered her liable on the contracts sued on in the original actions. There was, however, an allegation in the bill that the forgery of the pretended letter was unknown to the now plaintiff at the time of the trial and could not have been known to or anticipated by her. Citation of *United States v. Throckmorton* in the *Marshall* case would indicate that the Court in *Marshall* regarded the situation as such as to come within the *Throckmorton* definition of extrinsic fraud. *Cf.* the explanation in Griffith v. Bank of New York (CCA2d, 1945) 147 F2d 899, 904, n 4, 160 ALR 1340, cert denied (1945) 325 US 874, 65 S Ct 1414, 89 L ed 1992.

> a court of chancery.' *Marine Ins. Co. v. Hodgson* [¶ 60.36, *supra,* n 2]. . . .[20]

Shortly thereafter the Court refused to resolve the asserted conflict;[21] and later in the *Hazel-Atlas* case did not find it necessary to distinguish between extrinsic and intrinsic fraud where the issue was relief from a judgment because of fraud perpetrated upon the court which rendered the judgment.[22]

The Third Circuit, in *Publicker v. Shallcross,* while careful to stress factors that would warrant relief under the extrinsic doctrine of *Throckmorton,* did, however, state that "we do not believe it [*Throckmorton*] is the law of the Supreme Court today," and

> In our judgment, and if the case arises, the harsh rule of United States v. Throckmorton . . . will be modified in accordance with the more salutary doctrine of Marshall v. Holmes. . . . We believe truth is more important than the trouble it takes to get it.[23]

And at times it is a journey into futility to attempt a distinction between extrinsic and intrinsic matter.[24] Since, at times little is to be

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[20] Marshall v. Holmes (1891) 141 US 589, 596, 12 S Ct 62, 35 L ed 870.

[21] In Graver v. Faurot (CC ND Ill 1894) 64 F 241, rev'd (CCA7th, 1896) 76 F 257, cert dism'd (1896) 162 US 435, 16 S Ct 799, 40 L ed 1030, the court, feeling that *United States v. Throckmorton* and *Marshall v. Holmes* were in direct conflict and not knowing which was to govern, sent the case to the Supreme Court on a certificate of importance. The Supreme Court refused to hear the merits, disposing of the case on a technicality as to the validity of the use of a certificate of importance.

[22] ¶ 60.33, *supra.*

[23] Publicker v. Shallcross (CCA3d, 1939) 106 F2d 949, 950, 952, 126 ALR 386, cert denied (1940) 308 US 624, 60 S Ct 379, 84 L ed 521. In this case the court held that an order approving a compromise of a large claim held by a receiver against X for one cent on the dollar could be set aside after a lapse of two years where X had perjuriously concealed large assets and his true financial condition. Factors which the court stressed to take the case out of *Throckmorton* were: the receiver, in charge of collecting the assets of the insolvent company, was an officer of the court; at the hearing on the offer of compromise the receiver did not treat X as an adversary but assumed the role of an advocate for X's offer; a private litigant is working for himself and is apt to make a greater effort to discover perjury than a person such as a receiver; and the court itself has an interest in ascertaining the truth on behalf of the creditors and others, and X's perjury not only misled the receiver but impinged directly upon the administration of justice.

[24] See, *e.g.,* Chicago, R.I. & P. R. Co. v. Callicote (CCA8th, 1920) 267 F 799, 16 ALR 386, cert denied

gained by a rigid classification of fraud into intrinsic and extrinsic categories, the more reasonable course to pursue is to weigh the degree of fraud and the diligence with which such was unearthed and proceeded on; hold the claimant for relief to strict standards of pleading fraud and other elements necessary to sustain action[25] and

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(1921) 255 US 570, 41 S Ct 375, 65 L ed 791.

It was necessary to classify that case, which involved a conspiracy to defraud the court as well as perjury, as one involving extrinsic fraud, since the Eighth Circuit did not regard the *Marshall* case as being in conflict with *Throckmorton*. In the Annotation to the *Callicotte* case, 16 ALR 386, 397, on the subject of fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries, the commentator, however, states: "With the exception of the reported case the authorities upon the question under annotation, applying the general rule that a judgment will not be set aside for fraud or perjury unless it be extrinsic or collateral to the matter originally tried, have denied relief against the judgment."

Conspiracy.—Ordinarily a charge of conspiracy does not convert intrinsic fraud into extrinsic or collateral fraud. Moffett v. Robbins (CCA10th, 1936) 81 F2d 431, 436; see Toledo Scale Co. v. Computing Scale Co. (1923) 261 US 399, 43 S Ct 458, 67 L ed 719.

[25] In reference to relief from a judgment against a defendant, the court in the *Callicotte* case has stated: "All of the elements essential to a good cause of action in equity are present in the case. In National Surety Co. v. State Bank, 61 LRA 394, 56 CCA 657, 120 F 593, this court stated those elements as follows: 'The indispensable elements of such a cause of action are: (1) A judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; (5) the absence of any adequate remedy at law.' " Chicago, R.I. & P. R. Co. v. Callicotte (CCA8th, 1920) 267 F 799, 810, 16 ALR 386, cert denied (1921) 255 US 570, 41 S Ct 375, 65 L ed 791.

Where the former plaintiff seeks relief, see Hendryx v. Perkins (CCA1st, 1902) 114 F 801, 807, cert denied (1902) 187 US 643, 23 S Ct 843, 47 L ed 346.

Fraud must be pleaded with particularity. Aetna Casualty & Surety Co. v. Abbott (CCA4th, 1942) 130 F2d 40; and see Independent Lead Mines Co. v. Kingsbury (CA9th, 1949) 175 F2d 983, 985, cert denied (1949) 338 US 900, 70 S Ct 249, 94 L ed 554.

"It is a rule of consistent observance that discovery of the alleged fraud after entry of the judgment attacked not before, is an essential

tice to the defendant, and the latter had no notice of the suit and had a perfect defense to the suit.[36]

Relief may also be granted on the basis of extrinsic mistake;[37] and mutual mistake of fact.[38] The United States has been allowed to maintain an action where in the former litigation the district attorney without authority agreed to a settlement.[39] And an action will lie to enjoin the enforcement of a judgment consented to by an attorney who has no authority to act on behalf of the party whom he purports to represent.[40]

Under circumstances which render it manifestly unconscionable that a judgment be given effect, an independent action will lie to enjoin its enforcement because of newly discovered evidence; but properly the rules which limit equitable interference on this ground are stringent.[41] And certainly the finality of judgments will not admit of

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[36] For the indispensable elements of the cause of action, see n 25, *supra*.

[37] *Cf.* Zaro v. Strauss (CCA5th, 1948) 167 F2d 218, 11 FR Serv 17c.3, Case 1 (judgment against an incompetent; see ¶¶ 17.26, 55.05[4], 55.10[2], 60.27[2], *supra*).

[38] West Virginia Oil & Gas Co. v. George C. Breece Lumber Co. (CCA5th, 1954) 213 F2d 702, 706, 19 FR Serv 60b.51, Case 2 (After time for obtaining relief under 60(b)(1) had run, see ¶ 60.22[2], [4], *supra*, independent action would lie to correct and reform a judgment, because of mutual mistake. Citing article upon which **Treatise** is based, Judge Wright stated: ". . . a federal court, in an independent action, has jurisdiction to modify a final judgment in a former proceeding on the ground of mistakeas well as fraud, at least where mutual mistake is shown and where the party seeking relief is without fault or negligence in the premises."); Perkins v. Hendryx (CC D Mass 1906) 149 F 526; Hiawasee Lumber Co. v. United States (CCA4th, 1933) 64 F2d 417; Bankers Trust Co. v. Hale & Kilburn Corp. (CCA2d, 1936) 84 F2d 401, 406.

[39] United States v. Beebe (1901) 180 US 343, 21 S Ct 371, 45 L ed 563.

[40] Robb v. Vos (1894) 155 US 13, 15 S Ct 4, 39 L ed 52 (but party precluded from proceeding in equity because of estoppel).

[41] Pickford v. Talbott (1912) 225 US 651, 657, 658, 661, 32 S Ct 687, 56 L ed 1240; Carr v. District of Columbia (CA DC, 1976) 543 F2d 917, 22 FR Serv2d 403, citing **Treatise**; Harrington v. Denny (WD Mo 1933) 3 F Supp 584, 591 (Judge Otis listed the rules as follows: "1. The newly discovered evidence relied on must be *evidence*, that is, it must be competent. 2. It must be *newly* discovered, that is, it must have been discovered at a time too late for use at trial resulting in the complained of judgment. 3. The failure to discover it when it could have been issued must not be due to any lack of diligence. 4. It must be more than merely cumu-

an action to impeach a prior judgment merely because it was against the weight of the evidence,[42] or because the judgment is thought to be unjust, erroneous, and contrary to that which the court in which the independent action is instituted might have reached.[43]

An independent action will not lie merely because the trial court failed to follow instructions of the appellate tribunal.[44] Nor can it be successfully maintained where the present complainant negligently failed to press the matter in the original action;[45] or where he is guilty of laches in seeking relief from the original judgment.[46] Ordi-

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lative. 5. It must be evidence of such character as that it proves conclusively that a wrong judgment was had."), app dism'd (CCA8th, 1933) 68 F2d 1004; and see American Bakeries Co. v. Vining (CCA5th, 1936) 80 F2d 932.

Philippine Nat'l Bank v. Kennedy (CA DC, 1961) 295 F2d 544, 5 Fr Serv2d 60b.27, Case 1.

See Johnson Waste Materials, Inc. v. Marshall (CA5th, 1980) 611 F2d 593, citing **Treatise**, holding that certain evidence, misplaced and not produced at trial by defendant through lack of a diligent search did not warrant relief under newly discovered evidence rule, but that that lack of diligence could not preclude reformation of the judgment assessing damages against defendant where defendant's evidence conclusively showed partial satisfaction of the defendant's indebtedness to plaintiff.

For related discussion of newly discovered evidence as a basis for a new trial, see ¶ 59.08[3], *supra;* for bill of review, see ¶ 60.15[3], *supra;* for relief under 60(b)(2), see ¶ 60.23, *supra.*

[42] Moffett v. Robbins (CCA10th, 1936) 81 F2d 431, cert denied (1936) 298 US 675, 56 S Ct 940, 80 L ed 1937.

[43] Town of Boynton v. White Const. Co. (CCA5th, 1933) 64 F2d 190.

[44] Matheson v. Nat'l Surety Co. (CCA9th, 1934) 69 F2d 914.

[45] Wheiles v. Aetna Life Ins. Co. (CCA5th, 1933) 68 F2d 99; City of Kansas City, Kan. v. Union Pac. R. Co. (CCA8th, 1911) 192 F 316, 317 ("Accident is a well-known ground of equity jurisdiction, but it is universally agreed that he who invokes it to vacate a judgment or decree must, to prevail, be free from negligence in himself or his agent."); Realty Acceptance Corp. v. Motgomery (D Del 1934) 6 F Supp 593, aff'd (CCA3d, 1935) 77 F2d 762.

See Caputo v. Globe Indem. Co. (ED Pa 1967) 41 FRD 436, 10 FR Serv2d 60b.51, Case 2.

[46] Brown v. County of Buena Vista (1877) 95 US 157, 159, 160, 24 L ed 422 ("But . . . relief [because of accident and mistake] is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases he must be without fault or negligence. If he be not within this

narily a party seeking to impeach a judgment must make a showing that the merits lie with him.[47] And a court should not disturb the rights of third persons vested or aquired in good faith reliance upon the judgment.[48]

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category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief . . . a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court.").

Sciria v. United States of America (CA6th, 1956) 238 F2d 77.

Cf. Boone County v. Burlington & Missouri River R. Co. (1891) 139 US 684, 11 S Ct 687, 35 L ed 319 (Nebraska statute of limitations of four years, as to an action for relief on the ground of fraud, and the doctrine of laches, apply to a suit by a county in Nebraska, brought in the federal circuit court for Nebraska, to set aside a decreee of the same court for fraud); Andrade v. United States (Ct Cl 1973) 485 F2d 660, citing **Treatise**, cert denied (1974) 419 US 831, 95 S Ct 55, 42 L ed2d 57 (relief sought under Court of Claims Rule 152(b), which is identical to Rule 60(b)); West Virginia Oil & Gas Co. v. George E. Breece Lumber Co. (CA5th, 1954) 213 F2d 702, 707, 19 FR Serv 60b.51, Case 2.

[47] Pickford v. Talbott (1912) 225 US 651, 32 S Ct 687, 56 L ed 1240; National Surety Co. v. State Bank (CCA8th, 1903) 120 F 593, 61 LRA 394; Chicago, R.I. & P. R. Co. v. Callicotte (CCA8th, 1920) 267 F 799, cert denied (1921) 255 US 570, 41 S Ct 375, 65 L ed 791; Matheson v. Nat'l Surety Co. (CCA9th, 1934) 69 F2d 914; Continental Nat. Bank v. Holland Banking Co. (CCA8th, 1933) 66 F2d 823, 829; Miller Rubber Co. v. Massey (CCA7th, 1930) 36 F2d 466, cert denied (1930) 281 US 749, 50 S Ct 354, L ed 1161.

Cf. n 31, *supra,* where the suit is to enjoin a void judgment.

Lack of wrong on part of successful party.—Where relief is sought on the basis of no adversary trial it is ordinarily obtainable only where the successfull party was guilty of something misleading or deceptive. Miller Rubber Co. v. Massey, *supra.*

[48] Hopkins v. Hebard (1914) 235 US 287, 35 S Ct 26, L ed 232; West Virginia Oil & Gas Co. v. George E. Breece Lumber Co. (CA5th, 1954) 213 F2d 702, 707, 19 FR Serv 60b.51, Case 2; Bradburn v. McIntosh (CCA10th, 1947) 159 F2d 925, 933 ("Equitable relief, however, will not be granted as against an innocent third person who, in good faith, has acted on the faith of the challenged judgment."); see Hazel-Atlas Glass Co. v. Hartford-Empire Co. (1944) 322 US 238, 246, 64 S Ct 997, 88 L ed 1250; United States v. Irving Trust Co. (SD NY 1943) 49 F Supp 663 (Unreasonable delay of United States in instituting present suit had prejudiced present defen-

While an independent action to obtain relief from a judgment on established equitable principles does not unduly impinge upon the principles of res judicata and full faith and credit,[49] a party is precluded by res judicata from relitigating in the independent action or, for that matter by a Rule 60(b) motion, issues that were made or open to litigation in the former action where he had fair opportunity to make his claim or defense in that action.[50] And, similarly, under those circumstances the former judgment is entitled to full faith and credit in a suit to enjoin enforcement, brought in another forum, which merely seeks a relitigation of matter previously adjudged.[51] If there is no real ground for the independent action, the court which rendered the judgment may proceed to secure to the successful party the benefits of its judgment[52] and, if necessary, enjoin further prosecution of the independent action.[53] But if a valid judgment is entered in the independent action, this judgment, in turn, is res judicata as to the matters therein adjudged and is entitled to full faith and credit in another forum.[54]

[2]—For Relief From Federal Judgment.

If a judgment, order, or proceeding is interlocutory the court having jurisdiction of the action or proceeding has plenary power to deal with the matter; and neither the principles of Rule 60(b) nor those governing an independent action come into play.[1] If on the other

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dant who, in the interim, had distributed fund in question.).

[49] See ¶ 0.407, *supra.*

[50] See ¶¶ 0.407, 0.443[2], *supra.*

See Bankers Mortgage Co. v. United States (CA5th, 1970) 423 F2d 73, 13 FR Serv2d 60b.51, Case 3, cert denied (1970) 399 US 927, 90 S Ct 2242, 26 L ed2d 793, citing Treatise; Dairy Distributors, Inc. v. Western Conference of Teamsters, (CA10th, 1961) 294 F2d 348, cert denied (1962) 368 US 988, 82 S Ct 604, 7 L ed2d 525.

Cf. Chicago, R.I. & P. R. Co. v. Callicotte, subhead [3], *infra,* where the issues were not open in a prior coram nobis proceeding.

[51] See ¶ 0.408[2], *supra.*

[52] Toledo Scale Co. v. Computing Scale Co. (1923) 261 US 399, 43 S Ct 458, 67 L ed 719; Cornue v. Ingersoll (CC D Mass 1909) 174 F 666, aff'd (CCA1st, 1910) 176 F 194; and see subhead [2], *infra.*

[53] Toledo Scale Co. v. Computing Scale Co. (1923) 261 US 399, 43 S Ct 458, 67 L ed 719; see ¶ 110.26, *infra.*

See Villarreal v. Brown Express, Inc. (CA5th, 1976) 529 F2d 1219, 21 FR Serv2d 1196, citing Treatise.

[54] ¶ 0.407, *supra.*

[1] ¶ 60.20, *supra.*

hand, the judgment is final, the district court which rendered the judgment may grant relief therefrom by a new trial or by altering or amending the judgment within the relatively short time period by Rule 59;[2] and, may grant relief on one or more of the grounds stated if clauses (1)–(6)[3] of 60(b) on motion made within the particular time period applicable to the ground urged.[4] The rendering court may also grant relief in the situations warranted by the power reserved to it by the second[5] and third[6] saving clauses of 60(b).

Rule 60(b) makes no attempt to state the bases for the independent action.[7] These are left to be determined by equitable principles[8] previously discussed,[9] subject to the subsequent discussion relative to the effect of state law. This independent action to enjoin or otherwise obtain relief from a federal judgment need not be brought in the district court which rendered the judgment;[10] but it may be and, when it is, there is not much procedural difference between it and a motion for relief under 60(b) and hence, disregarding nomenclature, the court, unless a party would be adversely affected, may treat a motion as the institution of an independent action and an independent action as a motion for relief.[11]

An independent action will lie when warranted by equitable principles although an appeal is pending from the judgment attacked;[12] and will also lie to obtain relief from a judgment which has been affirmed or otherwise entered pursuant to an appellate mandate, without the necessity of obtaining leave of the appellate court.[13]

Since Rule 60(b) affords extensive relief from a final judgment rendered by a district court in a civil action,[14] on motion made to the

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[2] ¶¶ 59.09, 59.11–59.13, 60.03[1], [3], *supra.*

And appeal is, of course, open and the common remedy for relief, by an appellate court, from a district court judgment; ¶ 60.03[8], *supra.*

[3] ¶¶ 60.21–60.27, *supra.*

[4] ¶ 60.28[2], *supra.*

[5] To set aside within one year, pursuant to 28 USC § 1655, an in rem judgment entered against a non-appearing defendant not personally notified; ¶ 60.32, *supra.*

[6] To set aside a judgment for fraud upon the court, without any rigid time limitation; ¶ 60.33, *supra.*

[7] ¶ 60.31, *supra.*

[8] ¶¶ 60.11–60.12, 60.31, *supra.*

[9] ¶¶ 60.36, 60.37[1], *supra.*

[10] ¶ 60.36, *supra.*

[11] ¶ 60.31, *supra;* ¶ 60.38[3], *infra.*

[12] ¶ 60.36, *supra.*

[13] ¶ 60.36, *supra.*

[14] ¶¶ 60.21–60.27, *supra.*

district court which rendered the judgment,[15] the need to resort to an independent action either in that court or some other court is greatly lessened. Fraud, as a ground for relief, may be taken as a good illustration. On motion made, within a reasonable time and not later than one year.[16] to the district court which rendered the judgment, this court may grant relief without determining whether the fraud is intrinsic, extrinsic, or a fraud upon the court;[17] and after the year may also grant relief if the fraud is upon the court.[18] But even where the time for relief under 60(b) has not run, relief by independent action may be desirable and warranted because the remedy by motion may not be plain, adequate and complete.[19] But where such a remedy is afforded by a motion under Rule 60(b) to the court which rendered the judgment, an independent action brought in another court[20] would not normally serve a useful purpose and, if it does not, the latter court in exercise of a sound discretion could refuse to proceed.[21]

More often, the independent action will be resorted to where the time for relief by motion under 60(b) has run; and this is proper and the independent action here serves a useful purpose where established equitable principles warrant relief in an independent action.

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[15] ¶ 60.28[1], *supra*.

[16] After the "judgment, order, or proceeding was entered or taken"; ¶ 60.28[2], *supra*.

[17] ¶¶ 60.24[5], 60.33, *supra*. But as there pointed out a distinction may need to be drawn in an occasional situation.

[18] ¶ 60.33, *supra*.

[19] Hadden v. Rumsey Products (CA2d, 1952) 196 F2d 92, 17 FR Serv 60b.51, Case 1 (uncertain whether relief by motion under 60(b) could be obtained from the court where the judgment had been registered; for discussion, see ¶ 60.28[1], *supra;* also ¶ 60.33, *supra;* ¶ 60.37[1], *supra*).

[20] It would normally be unimportant if the independent action be brought in the court which rendered the judgment, since if it is material the court may treat it as a motion under 60(b). See n 11, *supra*.

[21] See Goodyear Tire & Rubber Co. v. H.K. Porter Co. (CA6th, 1975) 521 F2d 699, 20 FR Serv2d 1273. Defendant moved under Rule 60(b) to set aside judgment on basis of fraud and also filed independent action attacking the judgment in another district on the same ground with transfer being made to court where the 60(b) motion was pending. The trial court was within its discretion in dismissing the independent action without prejudice. Court of appeals noted relief available to petitioner was by motion *or* by independent action.

Transfer.—Instead of dismissing the court, it would seem, might transfer the action, pursuant to 28 USC § 1404(a), to a more convenient forum, namely the district court which had rendered the judgment.

Thus in *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*[22] the court held that although the one year period within which to obtain relief from a judgment under 60(b)(1) had run, the district court had the power to grant appropriate relief in an independent action on the basis of mutual mistake. In any case, then, when established equitable principles warrant relief in an independent action from a judgment on the basis of accident, mistake, newly discovered evidence, or fraud,[23] relief may be given although the time for relief by motion under 60(b) has run.[24] Such actions are, however, governed by the doctrine of laches in the absence of a federal statute.[25]

What law, state or federal, should determine whether the equitable principles warrant relief? It appears that there is not much discrepancy between state and federal cases. But this question must be answered in the situations where federal and state law do not coincide.

Let us assume that an independent action is brought in a federal district court in state (1) to obtain relief from a federal judgment rendered by a district court sitting in state (1). In some situations such an action may clearly involve a federal matter as where the basis for the action is that the federal judgment is void for lack of procedural due process. Let us assume, however, that the independent action does not involve such an attack, but that the basis is fraud, or accident, or mistake, or newly discovered evidence. Is the basis to be determined by the law of state (1) or independently of that law, by federal chancery principles, which we shall call federal common law?

The question may be answered in at least three different ways. Each answer is supported to some extent by precedent and pertinent lines of legal reasoning.

(*1*) *State law should govern*

From the very beginning federal courts grounded the right to give relief in an independent action in the general principles of equity ju-

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[22] (CA5th, 1954) 213 F2d 702, 19 FR Serv 60b.51, Case 2 (citing article upon which Treatise is based).

[23] ¶ 60.37[1], *supra.*

[24] See Committee Note of 1946, ¶ 60.01[8], *supra.*

Johnson Waste Materials v. Marshall (CA5th, 1980) 611 F2d 593; Carr v. District of Columbia (CA DC, 1976) 543 F2d 917, 22 FR Serv2d 403; In re Casco Chemical Co. (CA5th, 1964) 335 F2d 645, 8 FR Serv2d 60b.51, Case 2; West Virginia Oil & Gas Co. v. George E. Breece Lumber Co. (CA5th, 1954) 213 F2d 702, 19 FR Serv 60b.51, Case 2.

[25] See n 48, *infra.*

VIII. Collateral Attack.

¶ 60.41. Collateral Attack.

[1]—Relationship to Direct Attack.

By their nature void judgments have no legal binding effect.[1] Whether a judgment is valid or void, however, presents a problem that may be far from simple and, in some situations, is, indeed, difficult and complex; although, as we have seen, the principles evolved by the court lead in the bulk of cases to validity, rather than to voidness, of judgments.[2] The existence of a judgment, though, even if it be eventually adjudged void, may in the interim prove embarrassing to one or more of the parties, and hence it is desirable that there be methods whereby a judgment may be adjudicated void, if such it be.

If the judgment is that of a federal district court rendered in a civil action that is subject to the Federal Rules, there are a number of simple, straight-forward proceedings available for that purpose. These proceedings are direct attacks, as by a motion under Rule 59, in the court which rendered the judgment, or by appeal to an appellate court having jurisdiction over the federal district court which rendered the judgment.[3] But as pointed out, these direct attacks are subject to short time limits,[4] and hence are ineffective in many situations to give relief from a void judgment. An effective direct attack is, however, afforded by Rule 60(b)(4), which authorizes a motion for relief from a void judgment to be made in the court which rendered the judgment,[5] subject only to a "reasonable time" limitation, which generally means no time limit.[6] When warranted by equitable principles, the independent action in equity to enjoin the enforcement of the void judgment, which need not be brought in the court which rendered the judgment, affords another remedy.[7]

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1 ¶ 60.25[2], *supra.*

2 *Id.;* and see Walling v. Miller (CCA8th, 1943) 138 F2d 629, 632.

3 ¶ 60.25[3], *supra;* and see ¶ 60.25[2], *supra.*

4 ¶ 60.25[3], *supra.*

5 *Id.*

6 ¶ 60.25[4], *supra.*

7 ¶¶ 60.25[1], 60.36, 60.37[1], *supra.*

While this is generally denominated as a direct attack because the purpose of the action is limited to a judicial declaration that the challenged judgment is void, since the action may be brought in a different court than the one which rendered the judgment, it is in some respects between the usual direct attacks and a collateral attack, and may for pur-