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Relief from Federal Judgments: A Morass Unrelieved by a Rule

By Mary Kay Kane*

Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to ye conscience of him ye is chancellor, and as ye is larger or narrower soe is equity Tis all one as if they should make ye Standard for ye measure wee call A foot, to be ye Chancellor's foot; what an uncertain measure would this be; One Chancellor ha's a long foot another A short foot a third an indifferent foot; tis ye same thing in ye Chancellor's Conscience.

The problem of when to allow relief from a civil judgment after the time for an appeal has run is one that has plagued courts and rulemakers since the beginning of court systems. The ageless quality of this issue is not surprising because it demands the delicate balancing of two often opposing principles: that there should be an end to every piece of litigation, and that the primary aim of the judicial system should be to find truth and to render justice to the deserving claimant. Typically, American courts have placed finality before truth in the hierarchy of values. As stated by Justice Story: "[I]t is for the public


1. TABLE TALK OF JOHN SELDON 43 (F. Pollock ed. 1927).
2. An early English statute dealing with judgments provided that any judgment entered from the assizes should in no way be amended or altered. 2 Henry IV, c. 3 (1409). Provision for some relief was made in later centuries through the use of various writs. The issue whether relief was warranted in a given case, however, remained an important and difficult one. See, e.g., Cannan v. Reynolds, 119 Eng. Rep. 493 (K.B. 1855). See generally 3 W. BLACKSTONE, COMMENTARIES *407.
3. For a more detailed discussion of these dual aims, see text accompanying notes 134-43 infra.
5. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.1, at 527-29 (2d ed. 1977). A good example of this preference is the continued expansion of res judicata and collateral estoppel, which establish the scope of the binding effect of a judgment. The American Law Institute has proposed a transactional test of a claim for purposes of merger and bar, rather than the narrower, historic cause of action test. See RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment (Tent. Draft No. 5, 1978). At the same time the doctrine of mutuality, which acted as a significant limitation on the invocation of collateral estoppel, largely has been abandoned. See Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942); Currie, CIVIL PROCEDURE: THE TEMPEST BREWS, 53 CALIF. L. REV. 25, 38-46 (1965).
interest and policy to make an end to litigation . . . [so that] suits may not be immortal, while men are mortal." 6 Despite this American preference, there has been a concomitant recognition that some exceptions to the finality principle must exist.

Since 1948 7 the Federal Rules of Civil Procedure have provided four principal methods by which litigants may attempt to reopen final judgments in the federal courts. These methods are set out in Rule 60(b). 8 In brief, the rule permits an independent action, 9 the utilization of existing statutory procedures, 10 an application to set aside a judgment for fraud through use of the inherent equity powers of the court, 11 and a motion under the rule itself based upon any one of the sixteen grounds listed therein. 12

7. Prior to 1948, the federal rule provided specifically for relief for mistake, inadvertence, surprise, and excusable neglect and also allowed relief to be sought under the principles of the old ancillary common-law and equitable remedies. See generally 7 Moore's Federal Practice ¶ 60.10 (2d ed. 1975). The rule was amended in 1948 to better clarify when relief was appropriate. See Note, History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure, 25 Temp. L.Q. 77 (1951); Note, Federal Rule 60(b): Relief from Civil Judgments, 61 Yale L.J. 76 (1952).
8. Federal Rule of Civil Procedure 60(a) provides for the correction of clerical errors in the judgment. Although such a correction may relieve a party from an erroneous judgment, this procedure does not require the judgment to be reopened or the case to be retried as is true under subdivision (b). It involves only a clerical change and, thus, has not posed the same difficulties that have arisen under the latter provision. See generally 11 C. Wright & A. Miller, Federal Practice and Procedure §§ 2854-2855 (1973) [hereinafter cited as Wright & Miller].
10. See generally 7 Moore's Federal Practice ¶ 60.35 (2d ed. 1975).
11. See generally 7 Moore's Federal Practice ¶ 60.33 (2d ed. 1975); 11 Wright & Miller, supra note 8, § 2870.
12. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for ob-
Most of the grounds for relief listed in Rule 60(b) codify well-recognized and concrete exceptions to the finality principle, formulated to permit relief in situations in which the desire for truth is deemed to outweigh the value of finality. For example, mistake and neglect, listed in clause (1) as grounds for reopening judgments, were embodied in the original rule and can be traced to prerule practice. Clauses (2) and (3) simplify the relief procedure that previously existed, because the grounds listed, newly discovered evidence and fraud, were the bases for obtaining relief through special writs and independent actions. In a case invoking any of these first three clauses of the rule, relief is restricted further in that it must be sought within a year of the entry of judgment. Clauses (4) and (5), referring to void and satisfied judgments, also represent well-established grounds for equitable relief by the courts. Motions under these clauses must be made “within a reasonable time.”

The most controversial provision, at least at the time of its adoption, was clause (6), which permitted “any other reason justifying relief from the operation of the judgment.” Its adoption was consistent with the general approach of the revisers to provide a rule that would be all-inclusive. However, its very vagueness appeared to give boundless discretionary power to the trial courts. Fears spread that finality and certainty would be lost because of the absence of exact time limits on the courts’ exercise of that power; discretion was limited only by the “reasonable time” restriction. Viewed most critically, the “any other reason” clause potentially destroyed any notion of finality, and severely undercut the time limitations placed on invoking the other grounds listed in the rule. It is not surprising, then, that the immidi-

13. See note 7 supra.
14. See, e.g., Kaw Valley Drainage Dist. v. Union Pac. R.R., 163 F. 836 (8th Cir. 1908); Hall v. Chisholm, 117 F. 807 (6th Cir. 1902).
17. See 7 Moore’s Federal Practice ¶¶ 60.25-.26 (2d ed. 1975).
20. “[W]hatever the stated intent of the drafters of the ‘any other reason’ clause may be,
ate reaction to the rule was mixed.\textsuperscript{22} Almost thirty years have passed since the debate began. In large measure, the focus during that time has been on specific problems or questions that have arisen under the rule. This Article, by means of an overview, attempts to determine in fact and in principle how well the rule has operated. This study has two different, but complementary, concerns. First, the Article investigates the boundaries the courts have placed on the ability of litigants to successfully invoke relief under Rule 60(b)(6).\textsuperscript{23} Second, this Article identifies particular problem areas.\textsuperscript{24} The problems currently faced by the courts suggest not only the defects in the present rule, but also their probable causes.\textsuperscript{25} Thus, statutory changes are suggested that will better enable the legal system to balance the competing goals of truth and finality highlighted by the relief-from-judgment situation.\textsuperscript{26}

\section*{General Observations}

The cases in which Rule 60(b)(6) has been invoked can be divided roughly into five categories. The first three categories do not warrant more than brief mention, as they do not aid in evaluating the signifi-
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In the first, the courts cite clause (6) even though relief is sought within a year of judgment and on grounds clearly within one of the first three clauses of the rule, or relief is available under clauses (4) or (5) of the rule. In these situations the courts seem to use the provision merely as further support for their decisions to grant relief, as one might add one more case to a long and already authoritative string citation. Because the clause has no independent significance, the courts do not attempt to explain how it aids their analysis. The second category includes cases in which the "other reason" clause has been invoked for the purpose of construing the other clauses of the rule, as well as cases involving motions for relief from default judgments under Rule 55(c). In these cases, the


These cases should not be confused with the situation in which clause (6) is used as an additional reason for granting relief and the court explains its applicability, notwithstanding that the party's motion may be granted under some other portion of the rule. See, e.g., Equitable Life Assurance Soc'y v. MacGill, 551 F.2d 978 (5th Cir. 1977); Rooks v. American Brass Co., 263 F.2d 166 (6th Cir. 1959); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 246 (3d Cir. 1951); Caraway v. Sain, 23 F.R.D. 657, 660 (N.D. Fla. 1959).


The courts also have granted relief under clause (6) when the movant more properly should have moved under Rule 59 but the motion is made before the time for appealing has expired. See, e.g., Hand v. United States, 441 F.2d 529 (5th Cir. 1971); Chicago & E. Ill. R.R. v. Illinois Cent. R.R., 261 F. Supp. 289 (N.D. Ill. 1966).


courts have noted that the presence of clause (6) with its broad language indicates the rulemakers' desire\(^\text{31}\) that all of the provisions for relief from judgments be construed and applied liberally in order to do equity.\(^\text{32}\)

The third category involves cases similar to those decisions invoking the clause in the interests of liberal construction. In this category the courts grant an otherwise timely Rule 60(b) motion under Rule 60(b)(6), noting that it is unnecessary to decide under which portion of the rule the motion is proper as clause (6) would allow relief.\(^\text{33}\) The courts thereby avoid potentially difficult questions of statutory construction, using Rule 60(b)(6) instead as a general authorization to grant relief.

In the fourth category, the courts are faced with a true conflict of values because of the less rigid time restrictions applicable to motions under clause (6). As noted earlier, invocation of the first three clauses of Rule 60(b) is specifically limited to one year. Time restrictions also confront the losing party at a trial in terms of the ability to obtain other types of review. A party can obtain an amendment of the findings\(^\text{34}\) or make a motion for a new trial\(^\text{35}\) only within ten days of judgment; an appeal must be taken within thirty days of the judgment.\(^\text{36}\) In contrast, the "reasonable time"\(^\text{37}\) constraint of Rule 60(b)(6) permits its use beyond these time limits. It should not be surprising, then, that the vast majority of cases under the rule are attempts to avoid these other time

\(^{31}\) Inquiry into the intent of the rulemakers must rely heavily on the Advisory Committee Notes to the 1948 amendment which are inconclusive in this instance because the committee did not specifically explore the purpose of clause (6). The most that can be said from the notes is that the committee meant to simplify the procedure for obtaining relief and to liberalize the practice somewhat by extending the time for moving from six months to one year. See Advisory Committee Report of Proposed Amendments to Rules of Civil Procedure, reprinted at 5 F.R.D. 436, 477-80 (1946).

\(^{32}\) See, e.g., Laguna Royalty Co. v. Marsh, 350 F.2d 817 (5th Cir. 1965).

\(^{33}\) See, e.g., In re Four Seasons Sec. Laws Litigation, 502 F.2d 834 (10th Cir.), cert. denied, 419 U.S. 1034 (1974); Hand v. United States, 441 F.2d 529 (5th Cir. 1971); Patapoff v. Vollstedt's Inc., 267 F.2d 863 (9th Cir. 1959); District of Columbia v. Stackhouse, 239 F.2d 62 (D.C. Cir. 1956).

\(^{34}\) FED. R. CIV. P. 52(b), 59(e).

\(^{35}\) FED. R. CIV. P. 59(b).

\(^{36}\) FED. R. APP. P. 4(a).

\(^{37}\) What constitutes a reasonable time cannot be considered in the abstract. Rather, the amount of time between the judgment and the motion for relief typically is noted and considered reasonable or unreasonable depending on factors such as the nature and equities of the movant's case. See text accompanying notes 49-54 infra. Of course, in some circumstances so much time has passed that the court denies relief without much discussion, simply noting the length of time involved. See, e.g., Zurini v. United States, 189 F.2d 722 (8th Cir. 1951) (15 years); United States v. Manos, 56 F.R.D. 655 (S.D. Ohio 1972) (12-1/2 years).
limits. The courts uniformly have ruled that clause (6) must be deemed exclusive of these other provisions and cannot be applied to render them nugatory. However, the courts also have tried to give some independent meaning to the “other reason” clause, or to explain why a given case falls within it rather than any of the other review provisions, so that the granting of relief is proper.

In order to allow relief in deserving cases without generally abrogating time restrictions, the courts have developed and applied what will be called the “extraordinary circumstances” test. Examining the cases applying this test is an excellent way to see how the rule has operated, as well as how the courts have attempted to balance the goals of truth and finality. Moreover, examination of the typical situations in which relief is sought permits some conclusions about why and when relief might be proper.

The fifth and final category of cases are those in which the courts actually have found, or tried to find, some “other” reason for granting relief. These cases do not involve attempts to avoid otherwise existing time limitations. Rather, they present situations apparently not covered by any other subsection of the rule, arguably just those situations for which clause (6) was created. Given thirty years experience under Rule 60(b), and after considering these cases, some judgments can be made about the usefulness of this catchall clause and the need for it as an equitable outlet in its present form.

The next portion of this Article examines these last two categories of cases, those involving “extraordinary circumstances” or an “other reason.” Because they present situations in which Rule 60(b)(6) has been invoked and interpreted by the courts, a review of those cases will facilitate an evaluation of how well clause (6) has worked in practice and its impact on the availability of relief from federal judgments.


39. See text accompanying notes 55-103 infra.

40. See text accompanying notes 144-83 infra.

41. See text accompanying notes 104-29 infra.
The Findings

Before scrutinizing the tests or standards the courts have developed for granting and denying relief under Rule 60(b)(6), some words of caution are necessary. The ability to generalize is hampered somewhat by the different settings or types of judgments involved and by varying notions of finality and its importance in these different contexts. For example, relitigation is most often allowed in the case of default judgments because of the preference for a judgment based on a full adversarial exploration of the issues.\textsuperscript{42} Judgments entered because of a failure to prosecute often benefit from this same preference.\textsuperscript{43} The preference for full litigation of the issues is secondary, however, to the need to enforce penalty dismissals\textsuperscript{44} and the general rule imputing the lawyer's negligence to the client.\textsuperscript{45} Furthermore, it has been suggested that judgments entered pursuant to settlements\textsuperscript{46} or voluntary\textsuperscript{47} dismissals require even greater adherence to finality than do judgments entered after a full contest of the issues because they represent a conscious choice by the parties. Class action judgments raise additional concerns about binding persons not actually parties to the action.\textsuperscript{48} While the

\textsuperscript{42} See cases cited in note 146 infra. The relief problems of default judgments are discussed at text accompanying notes 144-50 infra.


\textsuperscript{46} See, e.g., Petry v. General Motors Corp., 62 F.R.D. 357 (E.D. Pa. 1974). On the other hand, courts have been quite liberal in granting relief when one of the parties refuses to comply with the agreement. See, e.g., Kelly v. Greer, 334 F.2d 434 (3d Cir. 1964); L.M. Leathers' Sons v. Goldman, 252 F.2d 188 (6th Cir. 1958).


\textsuperscript{48} Class action judgments typically have been the result of settlements. That fact produces peculiar tensions. On the one hand, to allow relief on behalf of one class member may be impossible when the settlement already has been partially distributed. Even if it has not, relief may destroy the entire settlement when the opposing party consented only because of the inclusiveness of the judgment. On the other hand, because the absent class
process of generalization that follows necessarily may blur these distinctions, they should not be overlooked. Rather, this layer of complexity must be considered as an essential element in the exercise of the courts’ discretion.

One further caveat must be added. Because Rule 60(b)(6) is viewed as invoking the equitable sensibilities of the courts, a wide range of discretionary factors may influence a court’s decision on the motion.49 For example, the court’s sense of what constitutes a reasonable time within which to seek relief frequently depends upon facts other than the actual amount of time involved. The court will be influenced significantly by whether the motion was made as soon as the grounds for relief were discovered, or with reasonable diligence thereafter,50 or whether the movant has an excuse for the delay.51 The potential prejudice to the opposing party were relief to be granted is also of prime importance.52 In some cases the courts have taken into ac-

49. See generally 11 WRIGHT & MILLER, supra note 8, § 2857.


count the merits of the movant’s underlying claim or defense. In others, the courts have been influenced by the underlying substantive policy on which the action is based, finding that it encourages relief. The use of these nonrule factors is perfectly proper, as they each bear on whether equitable considerations requiring relief are present. These additional factors, however, complicate the cogent articulation of the courts’ standard for when to utilize Rule 60(b)(6). Although the presence of so many variables makes analysis difficult, the broader contours of a test may be outlined.

“Extraordinary Circumstances”

Development of the standard

An inquiry into the development of the requirement of extraordinary circumstances in order to reopen a judgment under Rule 60(b)(6) must begin with the Supreme Court’s 1949 decision in Klapprott v. United States. This case involved an action to set aside a four-year-old default judgment cancelling a certificate of naturalization on the ground that the certificate had been obtained fraudulently. The petitioner had been a German citizen before his naturalization in 1933. The denaturalization proceeding charged that he had not actually renounced his German allegiance, as he had participated in various German societies and had been the leader of the German American Bund. Klapprott sought to reopen the default under Rule 60(b)(6), arguing that he had a defense but had not been able to appear or defend. He claimed that he had been jailed from 1942 to 1946 while being tried for violation of the Selective Service Act and, later, for sedition. Although


54. See, e.g., Menier v. United States, 405 F.2d 245 (5th Cir. 1968) (Bankruptcy Act); Bros Inc. v. W.E. Grace Mfg. Co., 320 F.2d 594, 609 (5th Cir. 1963) (patent); L.M. Leathers’ Sons v. Goldman, 252 F.2d 188 (6th Cir. 1958) (patent).

Klapprott originally had been convicted, those convictions ultimately were reversed. Further, he described how he had been moved from jails in New York to Michigan, and then to the District of Columbia during this period. He noted that he was impoverished and had written to the American Civil Liberties Union to defend him, but that the FBI had prevented his letter from being mailed. Finally, he pointed out that the default was entered solely on the basis of a complaint verified by an FBI agent on information and belief.

In a five-to-four decision, the Supreme Court granted relief. Although there were two separate concurring opinions, the Court's opinion, written by Justice Black, provided the basis for the development of the extraordinary-circumstances test. Justice Black focused on three issues: whether a default judgment was proper in a denaturalization proceeding; whether the relief Klapprott sought belonged more properly under Rule 60(b)(1) or (4); and, finally, whether the discretion conferred on the courts by clause (6) was sufficient to allow relief. With regard to this last point, the Court found that the invocation of Rule 60(b)(6) was not restricted to those situations in which the old common law writs were available: "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Applying this broad standard, the Court stated:

Petitioner is entitled to a fair trial. He has not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing.

It is worth noting at this juncture that the language above, which focuses heavily on the default character of the earlier action and the lack of a fair trial, suggests that Klapprott had been denied due process in the first proceeding. This interpretation seems even more plausible when it is remembered that the underlying issue was citizenship, not simply relief from a money judgment. Nonetheless, for reasons that are not clear, the Court rested its decision on an interpretation of clause

56. *Id.* at 610-12.
57. *Id.* at 613.
58. *Id.* at 614-15.
59. *Id.* at 615.
60. "Denaturalization consequences may be more grave than consequences that flow from conviction for crimes." *Id.* at 611. See also the concurring opinion of Justices Rutledge and Murphy, *id.* at 616.
(6), denying the applicability of clause (4) by specifically finding that the judgment was not void. Reliance on the "other reason" clause also forced the Court to reconcile clause (6) with the other, more rigidly timebound grounds for relief. Thus, the majority ruled that there was not any mistake or inadvertence, so that the case did not potentially overlap with situations falling under Rule 60(b)(1). Interestingly, three of the dissenting judges argued that finality should prevail, largely because they felt that the facts fell within Rule 60(b)(1) and Klapprott's motion was beyond the one-year limit.61

One year later, in Ackermann v. United States,62 another denaturalization case, the Supreme Court made clear its desire to treat Klapprott as the general standard for relief under Rule 60(b)(6). Like Klapprott the Ackermanns moved to reopen a four-year-old denaturalization judgment. However, they had been present at the trial proceedings but had not appealed when their attorney advised them of the cost. Appealing would have required them to sell their only asset, a house, and the alien control commissioner at their internment camp advised them not to sell it, as he was certain that at the end of the war all persons in their position would be freed. Mrs. Ackermann's brother, who had been denaturalized at the same time and under the same charge, appealed and won. At that point the Ackermanns moved for relief, noting their reasons for not appealing and contending that the original judgment was clearly erroneous.

In a five-to-three decision, the Supreme Court upheld the trial court's denial of their motion. The majority found that the Ackermanns' basis for relief had to be either excusable neglect, governed by Rule 60(b)(1) and its one-year limit, or inexcusable neglect, in which case Rule 60(b)(6) could not be invoked because no extraordinary circumstances were present.

The comparison [between Klapprott and Ackermann] strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. . . . Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within Klapprott or Rule 60(b)(6).63

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61. Id. at 625-27. This difference between the majority and the dissent highlights the importance of the Court's first finding that the movants' allegations were outside of the other provisions of Rule 60(b). At the same time, the fact that the justices could disagree so strongly on how to apply the rule to the same facts indicates the difficulty courts have had in construing the rule.
63. Id. at 202.
Thus, extraordinary circumstances exist only when the movant earlier was denied the chance to choose between appealing or not appealing a judgment. This interpretation of Klapprott, as establishing the necessity of showing extraordinary circumstances to merit relief under Rule 60(b)(6), has produced the current standard under the rule. Although the standard seems clear, cases examined in the next two subsections of this Article show the difficulty and contradictions that have befallen courts in applying it.

It is important to note in Ackermann, and its interpretation of Klapprott, the underlying policy judgments of the Supreme Court as it struggled with the age-old question: truth or finality? Ackermann posed that question squarely, as it was certain that the original judgment was erroneous; in Klapprott the issue was whether the petitioner should have the right to a full hearing at which he might prevail. The Ackermann majority made it clear that finality must control. “There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.” The Court characterized the Ackermanns’ choice as deliberate because they had no right to rely on the advice of their custodian. Against that broad philosophy, Klapprott was distinguished as extraordinary and Rule 60(b)(6) as only a narrow loophole. The dissenters, two of whom had joined in the Court’s opinion in Klapprott, rejected this categorization by the majority in its entirety:

The result of the Court’s illiberal construction of 60(b) is that these foreign-born people, dependent on our laws for their safety and protection, are denied the right to appeal to the very court that held (on the Government’s admission) that the judgment was unsupported by adequate evidence. It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court’s resort to ancient common-law concepts.

Application by the lower courts

This Article’s analysis of the lower courts’ treatment of the extraordinary-circumstances test proceeds along two lines. The first examines how well or how easily the courts have been able to identify cases falling within the standard. The second assesses the degree to which the lower courts have adhered to the finality philosophy of the

64. Id. at 198.
65. Id.
67. 340 U.S. at 205.
**Ackermann** majority; in other words, whether the actual use of the test has served to protect finality, as the Supreme Court suggested it should.

The extraordinary-circumstances test has been used predominantly when a Rule 60(b)(6) motion is invoked to avoid the limits of some other avenue of relief. If the reasons for seeking relief could have been considered in an earlier motion under another subsection of the rule, then the motion will be granted only if extraordinary circumstances are present. The same is true when the movant's basis for relief itself seems inconsistent with other portions of Rule 60(b). For example, on its face it seems ridiculous to allow a movant guilty of excusable neglect only one year to seek relief, but to permit a movant guilty of inexcusable neglect the use of the more flexible reasonable-time standard. If a movant clearly demonstrates some other consistent reason justifying relief, the extraordinary-circumstances test seems not to come into play. 68

The vast majority of cases utilizing the extraordinary-circumstances test involve situations in which the grounds for relief appear to be some type of mistake or neglect that more properly should have been raised under Rule 60(b)(1). In almost all of those cases, relief has been denied. 69 Examination of actions in which the grounds for relief appear to fall under either clause (2) or (3) of Rule 60(b) reveals a similar trend. Claimants have been totally unsuccessful in invoking Rule 60(b)(6) more than one year after judgment on the grounds of new evidence 70 or fraud. 71 The courts have failed to find any ex-

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68. Unfortunately, the identification of "other reasons" is problematic. Sometimes in the gray areas, courts use the **Klapprott** test to avoid what otherwise might be an extremely difficult analytical problem. See text accompanying notes 104-29 infra.


traordinary circumstances justifying relief. Indeed, as explained by one judge:

Almost every losing litigant can point to some corroborating witness he might have called or to some line of relevant questioning his attorney failed to exhaust on cross-examination.

... Finality of judgments rendered after trial of the merits is the general rule; relief from their operation is the extraordinary exception.72

Thus, it appears that the finality philosophy expressed by the Supreme Court has been adhered to by the lower courts, and that the extraordinary-circumstances test has not been used to erode that principle, but rather to uphold it. However, this result consequently raises the question of the utility of the extraordinary-circumstances test itself. Because Rule 60(b)(6) relief is granted so seldomly when the grounds relied upon are highly similar to those provided in other subsections of the rule, how does the Klapprott test aid the court in deciding whether to grant the motion? Why is it not sufficient simply to rely on the other-reason limitation on the face of clause (6)?

Unfortunately, that question is not answered merely by pointing to cases in which a Rule 60(b)(6) motion was granted under the extraordinary-circumstances test.73 In at least one, the court refused to read clause (6) as providing for relief exclusive of the other sections of the rule, thus implicitly rejecting the Klapprott limitation.74 In another, the finding of extraordinary circumstances is inconclusive, as relief also appeared to be available under some other provision.75 In yet another, relief was granted on facts similar to those of other cases in which no extraordinary circumstances were found to be present.76 Finally, in two cases involving bankruptcies, relief was granted because the courts interpreted the substantive law underlying the actions as requiring re-

74. United States v. Karahalios, 205 F.2d 331, 333 (2d Cir. 1953).
Thus, the extraordinary circumstances did not pertain to the facts of the case, but to the kind of proceeding involved.

Examining the cases in which relief was denied under the *Klapprott* standard likewise reveals nothing about the actual usefulness of the test. In most cases, the courts simply make conclusory statements to the effect that the petitioner has demonstrated only ordinary mistake or neglect, or inexcusable neglect, or a claim of only ordinary fraud, or one simply presenting new evidence, and that no extraordinary circumstances exist to place the motion outside of the first three clauses of Rule 60(b) and within Rule 60(b)(6). Because of such abbreviated statements of the standard and its application, it is

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78. In a few cases the courts have explained why the extraordinary-circumstances test was not met. See, e.g., Rinieri v. News Syndicate Co., 385 F.2d 818 (2d Cir. 1967); James Blackstone Memorial Ass'n v. Gulf, M. & O.R.R., 28 F.R.D. 385 (D. Conn. 1961).


The same conclusory finding of no extraordinary circumstances appears in several cases in which the movant attempts to use Rule 60(b)(6) to move for a new trial after the 10 days allowed in Rule 59(b) have elapsed. See, e.g., Hansen v. United States, 340 F.2d 142 (8th Cir. 1965); John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., 239 F.2d 815 (3d Cir. 1956); Davidson v. Dixon, 386 F. Supp. 482 (D. Del. 1974); Tann v. Service Distrib., Inc., 56 F.R.D. 593 (E.D. Pa. 1972), *aff'd*, 481 F.2d 1399 (3d Cir. 1973); FDIC v. Alker, 30 F.R.D. 527 (E.D. Pa. 1962), *aff'd per curiam*, 316 F.2d 236 (3d Cir.), cert. denied, 375 U.S. 880 (1963). Motions made when the movant has failed to file a timely appeal also have been found, summarily, to fail the *Klapprott* test. See, e.g., Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977); Martinez-McBean v. Virgin Islands, 562 F.2d 908 (3d Cir. 1977); International Controls Corp. v. Vesco, 556 F.2d 665 (2d Cir. 1977); Horace v. St. Louis Sw. R.R., 489 F.2d 632 (8th Cir. 1974); Whitleather v. United States, 264 F.2d 861 (6th Cir. 1959); Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952); Stewart Sec. Corp. v. Guaranty Trust Co., 71 F.R.D. 32 (W.D. Okla. 1976); Geigel v. Sea Land Serv., Inc., 44 F.R.D. 1 (D.P.R. 1968).
difficult to determine if *Klapprott* has produced a workable and meaningful standard.\(^8\) Indeed, the only cases which seem clearly to have benefited from the test are other denaturalization cases. In those situations not only has *Klapprott* provided a needed relief mechanism, but the courts appear able to tell easily when extraordinary circumstances are present by looking to whether there was a default, whether the defendant was incarcerated and unable to obtain counsel, and whether the defendant was in a condition to make decisions concerning his defense.\(^8\)

Denaturalization cases, however, represent a limited number of cases and do not justify the wholesale adoption of the test in areas where issues concerning the defendant’s diligence and ability to defend are more hazy. Thus, it is not surprising that the test does not seem to have contributed much to the quest for fair and identifiable relief standards in other settings.

The greatest apparent impact of the extraordinary-circumstances test has been to force the trial courts to focus on whether the movant made a fair and deliberate choice at some earlier time not to move for relief. If so, there would be no reason now to relieve the movant of that choice.\(^8\) Although at first glance this might seem to be a serious and important addition, in practice its impact is minimal.\(^7\)

Unlike the facts in many denaturalization proceedings, in virtually all other ac-

\(^8\)4. One way to identify a standard from such abbreviated statements is by listing and describing the facts of those cases that have granted and those that have denied relief—a task best suited to a treatise writer. *See* 7 MOORE’S FEDERAL PRACTICE ¶ 60.27 (2d ed. 1975); 11 WRIGHT & MILLER, supra note 8, ¶ 2864.


\(^8\)7. The *Ackermann* criteria were particularly influential in Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., 319 F. Supp. 1308 (N.D. Ga. 1970). The court granted relief from a default judgment entered when defendant’s attorney failed to file an answer and then disappeared. However, the court makes it clear how few situations would meet the test: “Here the defendant was an uneducated layman. He does not read well and even after patient explanation has difficulty comprehending the involutions of a legal proceeding. It also appears from the evidence that during the period in question he also suffered from extreme anxiety about his business and spent several successive periods in a veterans hospital while he was being treated for hypertension.” *Id.* at 1312. *See also* Lucas v. City of Juneau, 20 F.R.D. 407 (D. Alas. 1957).
tions the parties are represented by counsel and the fact that an attorney has made the decision, or negligently has failed to make it, seems to convince the courts that the decision was “informed.” Moreover, the courts are faced with the general rule that a lawyer’s negligence is to be imputed to the client, thereby precluding relief. Because of these principles, reference to the “free and deliberate” choice rationale in Ackermann most frequently has served merely as another talisman supporting the denial of relief.

The failure of the courts to explain more fully what constitutes an extraordinary circumstance does not indicate necessarily that the standard is meaningless. It does suggest, however, the difficulty in articulating the criteria on which the test is based. In many ways we are confronted by what appears to be a test resting on a standard akin to that described by Justice Stewart in the pornography area when he said: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...” Although it is disappointing perhaps, this does not in itself suggest that the standard be abandoned. Judges have long operated with just such vague criteria and most are competent and comfortable in doing so. One danger, of course, in having such a vague standard is that courts will begin to rely primarily on their feelings as to the correctness of the original judgment in order to decide whether relief is appropriate. Although it is quite proper for a court to take into account whether reopening a judgment would be frivolous, it would be inappropriate for a Rule 60(b) hearing to be turned into a trial on the merits. Despite this concern, one might conclude that on the basis of the inquiry thus far, the extraordinary-circumstances test has not produced much confusion, has not led to an erosion of finality, but, rather, has supported finality by acting as a limitation on Rule 60(b)(6) while providing a necessary escape valve for truly needy claimants.

89. See text accompanying notes 152-54 infra.
92. A representative statement of the lower courts’ view of the policy underlying the extraordinary-circumstances test can be found in Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957): “[T]his rule was not designed to supersede the normal and ordinary channels of relief. Nor was it intended to invest the court with an omnipotence whose boundary is defined only by the court’s conscience. Considerations of judicial administration and of the stability of the law no less than the obligation of doing individual equity...
This conclusion falters, however, upon examination of the rather wide range of situations in which the test has been erroneously invoked and applied. These cases suggest that the problems that have occurred in the lower courts far outweigh the benefits in the narrow range of cases in which the extraordinary-circumstances test has operated to allow relief.

Problems in applying the standard

One of the greatest difficulties with the extraordinary-circumstances test lies in the failure of several lower courts to read Klapprott and Ackermann as suggesting a standard to be applied only when it is necessary to harmonize clause (6) with the other provisions of the rule. Instead, many courts have read the extraordinary-circumstances requirement into the other provisions of the rule, thereby restricting relief even within one year of judgment. In doing so, they have upset the balance between truth and finality nurtured by the Supreme Court and set out so carefully in the rule. The first five clauses of Rule 60(b) enunciate specific categories in which truth demands that an otherwise final judgment be reopened. The only limitation placed by the rulemakers is one of time. Likewise, the Supreme Court was concerned, in Klapprott and Ackermann, with how to protect the rule's limitations and yet interpret clause (6) in such a way as to provide for relief when justice demanded. While it upheld finality for all but the extraordinary case under Rule 60(b)(6), the Court did not attempt to limit the otherwise available avenues of relief. The failure of several lower courts to recognize this and their overly-broad use of the Klapprott standard has resulted in unfair restrictions on parties seeking relief must be balanced and adjusted. An explicit choice of values is represented by the landmark decision in the Ackermann case . . . .


The courts also apply the extraordinary-circumstances standard when the movant presents an “other reason” meriting relief under clause (6), and moves within a year of the judgment in as timely a fashion as possible. In most instances, this added requirement precludes relief. See, e.g., Stradley v. Cortez, 518 F.2d 488 (3d Cir. 1975); Collins v. City of Wichita, 254 F.2d 837 (10th Cir. 1958); DeLong's, Inc. v. Stupp Bros. Bridge & Iron Co., 40 F.R.D. 127 (E.D. Mo. 1965); Von Wedel v. McGrath, 100 F. Supp. 434 (D.N.J. 1951), aff'd per curiam, 194 F.2d 1013 (3d Cir. 1952). But see Kelly v. Greer, 334 F.2d 434 (3d Cir. 1964) (relief granted).
relief. Moreover, as some courts quite properly have not imposed this added requirement, the result has been inconsistency in the administration of justice. Other courts confronted with this conflicting or, at the very least, ambiguous authority have in turn rendered confused opinions in which the bases for their decisions are unclear. A closer look at two examples will illustrate the existing level of confusion.

_Torockio v. Chamberlain Mfg. Co._ involved a motion under Rule 60(b)(1) and (6) for relief from the dismissal of a sex discrimination class action. The dismissal was entered because the plaintiffs failed to file a notice of the right-to-sue letter with the Equal Employment Opportunity Commission prior to commencing the action. The plaintiffs' motion alleged that the required notice had been filed properly. Thus, the court noted that either plaintiffs' attorney had mistaken the law and had not realized that the allegation was required, or the plaintiffs had not told the attorney of their filing.

Despite the fact that the motion was made within one year, the court relied upon the extraordinary-circumstances test, stating that if relief was allowed under Rule 60(b)(1), "all semblance of the finality of judgments would be lost," as it would allow a horizontal appeal for a mistake of law after the time for a direct appeal had lapsed. The court then held that the notice had been intentionally withheld so that there was no excusable neglect. It found further that because the grounds for relief fell within clause (1), clause (6) was not applicable. Finally, after appearing to be leaning toward a denial of relief, the court granted a motion to validate the filing of a notice of appeal _nunc pro tunc_ because the failure to file that notice was excusable and no one would be prejudiced!

While the result in _Torockio_ is undoubtedly justifiable, the reasoning of the court is unnecessarily convoluted. The court appears to have done through the back door what it erroneously felt the rule did not allow through the front. It is this kind of confusion that easily may discourage relief by courts less willing to follow such a circuitous route. Thus, not surprisingly, there is a wide range of cases in which relief has been denied because the motion more properly fell under clauses (1)_-

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96. _Id_. at 87.

97. _Id_. at 87 n.11.
(3) or because it should have been raised in a new trial motion under Rule 59, and in which the courts never mention the extraordinary-circumstances test. Of course the failure of the courts to consider the *Klapprott* rationale may mean that the cases clearly did not present any special circumstances; in most situations, this is undoubtedly true. In some instances, however, the issue may not have been decided simply because the courts or litigants were unable to understand how the standard applied.

On the opposite side of the spectrum, the inherent vagueness of the extraordinary-circumstances test has permitted other courts, in their confusion, to grant relief in situations that, at best, are questionable. A recent Tenth Circuit decision illustrates this point. *Pierce v. Cook & Co.* presented the problem that arises when parties involved in the same auto accident sue in different courts and obtain different results because the law is interpreted and applied inconsistently. In *Pierce*, a federal district court interpreted state law as holding that a shipper was not liable for the torts of an independent contractor. That decision was affirmed by the Tenth Circuit in January 1971. Other persons involved in the accident sued in state court. On appeal, in May, 1974, the state supreme court changed the law and imposed liability. In November, 1974, the federal plaintiffs succeeded in moving to reopen their

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judgment. That action was affirmed by the Tenth Circuit, which characterized the situation as extraordinary: "The federal courts in which plaintiffs were forced to litigate have given them substantially different treatment than that received in state court by another injured in the same accident. The outcome determination principle mandated by Erie v. Tompkins has been violated." 102

The wide-ranging impact of this decision, as well as the questionable validity of its finding of extraordinary circumstances, is well articulated by a dissent.

The majority appears to hold that divergent results from a common vehicular accident are, per se, grounds for relief under Rule 60(b)(6), at least in diversity cases. If my interpretation of the intended impact of the majority ruling is correct then the court has indeed plowed new ground, for no present authority supports such a rule. Federal judgments in common disaster diversity cases can then only be considered as dormant, not final, even though the case be the inverse of the one we here consider. A paid judgment would seem to be recoverable and resultant confusion inevitable. 103

These kinds of problems suggest that the extraordinary-circumstances standard of Klapprott presents great potential for abuse. Before addressing the issue of how to develop a more workable standard, it is important to investigate the cases in which the courts have struggled with the statutory "other reason" prerequisite of Rule 60(b)(6). In this way, a more complete overview of how well the provision has operated can be obtained.

"Other Reason"

The only explicit requirement set out in Rule 60(b)(6) is that the movant must present some "other reason justifying relief." To judge the usefulness of this provision, it is necessary to review the instances in which courts have found it easy to decide whether the "other reason" rationale of clause (6) applies. Following that, areas in which inconsistent court decisions point to uncertainty and inequity in the use of the "other reason" test will be examined.

There appear to be only a few situations that can be identified clearly as presenting "other reasons" requiring relief. 104 In one case the judgment in a patent infringement suit was based on a settlement

102. 518 F.2d at 723.
103. Id. at 725.
agreement with which the patent owner subsequently failed to comply. The court granted relief under Rule 60(b)(6), saying: "The refusal on the part of the appellant to carry out its part of the contract by which the judgment was obtained fully justified the Court in taking appropriate action to restore the parties to their status quo prior to the execution of the agreement."  

In another action that arose out of an auto accident, the plaintiff was granted relief five years after a judgment was entered, again, pursuant to stipulation. The plaintiff reopened the case on the ground that his attorney and former wife acted fraudulently and deceitfully, having obtained a judgment under which the plaintiff had received nothing. The court found that while clause (3) refers to the fraud of an adverse party, there is no specific provision referring to fraud by one's own counsel, so that the case presented an equitable ground for relief under clause (6). On a similar rationale, the fraud of a third-party witness has qualified as an "other reason" under Rule 60(b)(6). The provision also has been deemed applicable when the losing party was not notified of the entry of judgment until the time for an appeal had passed. In these cases the courts clearly have been concerned with the fact that the party never had an effective opportunity to pursue an appeal or to move in a more timely fashion under the other portions of the rule.

All of the above situations present few problems to the courts, as there does not appear to be any conflict with the other, more limited, avenues of relief. The cases truly illustrate other reasons. Conversely, in a wide range of circumstances the courts appear to have had little difficulty in ascertaining that the grounds relied upon actually should have been raised under some other provision, and that no "other rea-


109. The grounds described in the text should not be confused with those in which a lack of notice suggests that due process has been violated, permitting the judgment to be reopened under Rule 60(b)(4). In those cases there is no proper notice of the action and a default results. In the cases cited in note 108 supra, the parties are aware of the action, but not that a judgment has been entered.
sons” were present. For example, movants who claim relief based on a clearly-erroneous judgment have been denied relief because the appropriate vehicle for that challenge is a timely appeal. In other cases, the motion has been denied because the reason alleged, although not more appropriately raised elsewhere, is not one requiring relief from judgment in order to accomplish justice.

The preceding cases demonstrate that clause (6) has served as a useful, perhaps even necessary, tool and that in many instances the courts have decided without difficulty that it has been properly invoked. An even greater number of cases, however, raise questions about its general usefulness. The courts have not always been content to construe the provision narrowly. Many have strained to apply Rule 60(b)(6) in situations seemingly governed by other provisions. Others, appearing to ignore any notion of exclusivity, have granted relief that would have been barred under clauses (1)-(5) without even referring to the extraordinary circumstances discussed earlier. The result has been some questionable and conflicting decisions. Admittedly, the fact that the courts appear to be ignoring apparent limitations or engaging in strained analyses does not necessarily mean that all those decisions are wrong or inequitable. Rather, it illustrates court confusion. That confusion, in turn, may prevent parties with similar cases from receiving similar treatment under the rule, thereby producing inequitable and inconsistent results.

Three areas seem to have produced the greatest difficulties. In the first, the courts have been faced with reconciling clauses (5) and (6). The specific question is not one of timing, as the reasonable-time limitation applies to both clauses; instead, the issue is whether the “other reason” justification can be invoked to circumvent judicially imposed


113. See, e.g., Tribble v. Bruin, 279 F.2d 424 (4th Cir. 1960).

substantive limitations on the fifth clause. It has been held that the 
language allowing relief when "a prior judgment upon which it is based 
has been reversed or otherwise vacated" is applicable only when the 
judgment now being challenged rested or relied primarily on the dis-
carded authority.\textsuperscript{115} The question then is whether clause (6) can pro-
vide relief for similar reasons but in a broader range of situations. In 
at least four cases, the courts have granted relief under clause (6),\textsuperscript{116} 
relying heavily on the apparent injustice of tying a party to a decree 
when the law has changed in the interim. In three of those cases, no 
reference was made to clause (5),\textsuperscript{117} although that provision, with its 
limitations, was at least arguably applicable. Those courts never at-
ttempted to reconcile the overlapping scope of the last two clauses of 
Rule 60(b).

The second issue on which conflicting decisions arise is whether a 
judgment can be amended under Rule 60(b)(6).\textsuperscript{118} Typically, such 
motions are made under Rules 52(b) or 59(e), which are restricted to 
motions made within ten days of judgment. Because of the need to 
state an "other reason" for granting relief, one would expect that a mo-
tion that essentially was a delayed motion for correction would be de-
nied, and a few courts have so held.\textsuperscript{119} Indeed, one court went on to 
find further implied limitations arising from the other clauses of Rule 
60(b). Because the rules do not allow modification even where new 
evidence is discovered if such evidence could have been discovered by 
"due diligence," then they should not permit a judgment to be ques-
tioned because of a purported defect expressly appearing on the face of

\textsuperscript{115} See Polites v. United States, 364 U.S. 426 (1960); Berryhill v. United States, 199 
F.2d 217 (6th Cir. 1952).

\textsuperscript{116} Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), cert. denied, 423 U.S. 1079 
(1976); McGrath v. Potash, 199 F.2d 166 (D.C. Cir. 1952); Griffin v. State Bd. of Educ., 296 

\textsuperscript{117} Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), cert. denied, 423 U.S. 1079 
(1976); McGrath v. Potash, 199 F.2d 166 (D.C. Cir. 1952); Griffin v. State Bd. of Educ., 296 

\textsuperscript{118} See Note, Federal Rule 60(b): Finality of Civil Judgments v. Self-Correction by Dis-
trict Court of Judicial Error of Law, 43 Notre Dame Law. 98 (1967). An analogous problem 
has arisen in interpreting Rules 52(a) and 60(b). See Note, Federal Rules 52(a) and 
60(b)—A Chinese Puzzle, 21 Sw. L.J. 339 (1967).

Motions to amend judgments should not be confused with motions to correct the 
judgment due to clerical error. The latter are governed by Rule 60(a) and have no time restric-
tions. See, e.g., Schwartz v. Pattiz, 41 F.R.D. 456 (E.D. Mo. 1967), aff'd, 386 F.2d 300 (8th 
Cir. 1968).

\textsuperscript{119} See, e.g., Stradley v. Cortez, 518 F.2d 488 (3d Cir. 1975); James Blackstone Memo-
it. Despite this cogent reasoning, other courts have applied Rule 60(b)(6) without ever confronting this problem, simply noting that justice requires that a proper judgment be entered.\textsuperscript{121} The third problem area, the reconciliation of clauses (1) and (6), has posed the greatest difficulty. As noted in the preceding section, this problem was the impetus for the development of the extraordinary-circumstances test.\textsuperscript{122} That standard, however, has not resolved the conflict. Although some courts simply have denied relief on the grounds that the claim was one of neglect and, thus, not an “other reason” under clause (6),\textsuperscript{123} others have strained to describe the case or define the type of neglect or mistake in such a way as to allow the residual provision to apply. Thus, we find cases in which a mistake of law is deemed outside of Rule 60(b)(1)\textsuperscript{124} or in which the gross neglect of counsel coupled with the absence of any neglect on the part of the client is deemed to show an “other reason” warranting relief.\textsuperscript{125} In this last situation the courts completely overlook the general rule that the attorney’s negligence is to be imputed to the client.\textsuperscript{126} In one case the court appears to have ignored any potential limitations that might be inferred from clause (1), stating: “In any event, it is never too late to set aside an unjust judgment.”\textsuperscript{127} Finally, in two cases in which the movant, acting without the advice of counsel, mistakenly failed to move earlier, it was held that the plaintiff’s error should not preclude relief, evidently because an error in judgment by the client alone is not within clause (1).\textsuperscript{128} The results in these last cases are probably justifiable under \textit{Klaprott} and \textit{Ackermann} as they may be viewed as situations in

\begin{itemize}
\item \textsuperscript{120} James Blackstone Memorial Ass’n v. Gulf, M. & O.R.R., 28 F.R.D. 385, 387 (D. Conn. 1961).
\item \textsuperscript{121} See, e.g., Martin v. H.M.B. Constr. Co., 279 F.2d 495 (5th Cir. 1960); District of Columbia v. Stackhouse, 239 F.2d 62 (D.C. Cir. 1956); Caraway v. Sain, 23 F.R.D. 657 (N.D. Fla. 1959). \textit{See also} Davis v. Pitchess, 518 F.2d 141 (9th Cir. 1974).
\item \textsuperscript{122} See text accompanying notes 93-100 supra.
\item \textsuperscript{124} See, e.g., Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3 (D.S.C. 1970).
\item \textsuperscript{126} \textit{See} 7 \textit{MOORE’S FEDERAL PRACTICE} ¶ 60.27[2] (2d ed. 1975); \textit{see} notes 153-58 & accompanying text infra.
\item \textsuperscript{128} United States v. 96 Cases, More or Less, of Fireworks, 244 F. Supp. 272 (N.D. Ohio 1965); Lucas v. City of Juneau, 20 F.R.D. 407 (D. Alas. 1957).
\end{itemize}
which there was no deliberate choice. However, the rationale for these
decisions, that to deny relief "would be a rather harsh penalty for an
error in judgment,"129 is highly questionable given the limited relief the
rulemakers appear to have intended for errors and mistakes in
judgment.

In light of all these cases, it is clear that the "other reason" require-
ment of Rule 60(b)(6) has not been applied uniformly. Like the ex-
traordinary-circumstances test alternatively used in clause (6) cases, it
has produced another layer of confusion for courts and litigants con-
templating relief from judgments.

Summary and Criticism

The starting point for this Article was an inquiry into whether the
fears of some of the critics of Rule 60(b) were well founded. The pre-
ceding discussion of the courts' development and application of the ex-
traordinary-circumstances test and their interpretation of the "other
reason" requisite of clause (6) provides us with some answers. First,
the concern that the discretion conferred on the courts by the rule
would destroy the principle of finality has been proven to be largely
unwarranted. The cases interpreting Rule 60(b)(6) illustrate the extent
to which the courts have been trying to avoid that result. Rulings to
the effect that relief under clause (6) must be exclusive of other provi-
sions or will be permitted only in extraordinary circumstances establish
presumptions for finality. Moreover, the fact that the provision has
been relied upon successfully in only a small number of cases shows
that the use of Rule 60(b)(6) does not represent directly any serious
change in the historic preference of American courts for finality.

Unfortunately, however, the cases uncover a whole new ground
for criticism. The large number of conflicting and confusing130 deci-
sions indicates that the courts often have not been able to deal comfort-
ably with the discretion granted them. The fact that in most instances
they have not abused their discretion does not alone justify the current
situation. The problems the courts have had in interpreting the rule
actually may serve to undermine finality.131 Initially, the confused

129. 244 F. Supp. at 273.
130. In addition to the types of confusion described in the text, Rule 60(b)(6) has been
cited in cases involving stays of execution, see, e.g., Chapin & Chapin, Inc. v. McShane
Contracting Co., 374 F. Supp. 1191 (W.D. Pa. 1974), and attorneys' liens, see, e.g., United
131. See Comment, Federal Rule of Civil Procedure 60(b): Standards for Relief from
Judgments Due to Changes in Law, 43 U. CHI. L. REV. 646, 663 (1976).
state of the law encourages litigation over these issues; such litigation
contradicts the notion that the current rule ensures certainty. Further,
the courts' difficulty in deciding whether relief is warranted often pro-
longs litigation.

One bizarre example of this phenomenon is *Simons v. United
States*.\(^3\) The plaintiff in that case sought to have a 1948 decree natu-
ralizing herself and her deceased husband reopened and annulled twen-
ty-two years later. She claimed that she knowingly made false
statements at the time of her naturalization, that neither she nor her
husband ever intended to reside in the United States, and, in fact, that
they had never done so. Her complaint was dismissed, and the Second
Circuit affirmed. The appellate court noted the reason behind the mo-
ton. It found that the parties had obtained a Mexican divorce in 1964
and the husband had died recently, leaving all of his property to the
furtherance of education and science. Thus, the plaintiff wanted to be
considered a Dutch citizen in the hope that the Netherlands would not
recognize the divorce so that she could claim an elective share of the
estate. With this in mind, the court held, first, that Rule 60(b)(3) was
not applicable because her claim did not rest on the fraud of an adverse
party, and that, second, “it would be reading clause (6) most perversely
to say that it authorizes attack for one's own or a nonadverse party's
fraud twenty-two years after the judgment.”\(^3\)\(^3\)

Although it is comforting to realize that the rule was applied with
proper restraint, that such a tactic was attempted and pursued through
an appeal has unsettling implications. It is likely that the movant's
attorney knew that the odds against success were great. Nonetheless, a
system of relief that even suggests to litigants that it may be worthwhile
to bring such motions should be questioned. Some rethinking should
be done about the problem. The remainder of this Article attempts to
accomplish that task.

**Policies and Solutions**

As it has been throughout this Article, the assumption at the time
of the 1948 amendment of Rule 60(b), was that once a judgment is
entered, finality generally should predominate over the quest for objec-
tive truth.\(^3\)\(^4\) Although finality, thus far, appears to triumph under

\(^3\) See Tehan v. Shott, 382 U.S. 406, 416 (1966); Frankel, *The Search for Truth: An Umpireal

\(^3\) Id. at 1115.

\(^4\) Prior to judgment, the attainment of truth may be the courts' guiding principle.
current practices, it also has been noted that the attempt to encourage courts to exercise their equitable discretion has not been very successful. Perhaps this is because of the apparently unresolvable conflict posed to the courts. Regardless of the reason, change is needed. A more satisfying balance of these competing aims can best be achieved by deciding which aim is to be accorded more weight. Either finality must be firmly embraced, with certain well-defined exceptions, and we must be content to live with the occasional unjust results, or truth must be our mistress despite the degree of uncertainty that will result.

The rationale for continuing to emphasize finality might be seen as four fold: (1) there is no assurance that relitigation will produce any different result;\(^{135}\) (2) if the parties had a full and fair opportunity to litigate, then due-process requirements have been met; (3) judicial economy demands that there be an end to litigation because the system cannot tolerate the burden of constant relitigation; and (4) finality produces the certainty in the law that is necessary to foster public confidence in the judicial system.\(^{136}\) The interesting thing about this rationale is what it assumes about truth. In particular, the first and second reasons appear to rest on the assumption that absolute truth is probably unattainable.\(^{137}\) The notion that the same result may occur upon a reevaluation of the same facts also may reflect a certain cynicism about the adversary system. The concern is not for the ultimate truth of the underlying facts, but for results.\(^{138}\) Moreover, due process does not guarantee that truth will be pursued no matter how long or arduous the process. It merely makes certain that the parties receive at

\(^{135}\) "A good deal can be said for taking the judgment as the point of diminishing returns in the human—and therefore fallible—pursuit of perfect justice." F. James, Civil Procedure § 11.1, at 518 (1965).

\(^{136}\) The Supreme Court aptly described the social need for certainty in a decision involving the binding effect of a prior judgment. It argued that the general rule of a binding conclusive determination "is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." Southern Pac. R.R. v. United States, 168 U.S. 1, 49 (1897). See also Restatement of Judgments § 112 (1942).


least one opportunity to do so. In that sense, the adversary process is
presented as the best means to attempt the search, but without assurance
of success.139

Perhaps this analysis is not so much cynical as it is realistic.140
Nonetheless, it is interesting to note that not all judicial systems141 and
legal writers accept this thesis,142 and persuasive arguments can be
made as to why truth should be pursued at all times despite the cost.
Although these debates form a large part of jurisprudential literature,
this inquiry need not attempt to define the ultimate purpose of the law.
Fortunately, the decision as to whether truth or finality is of greater
value is more easily dealt with in the context of the specific problem at
hand.143

Earlier, the development of Rule 60(b)(6) standards was consid-
ered through the same modes of analysis employed by the courts: the
"extraordinary circumstances" and "other reason" rationales. In pro-
sposing solutions to problems arising under the rule, however, it is more
useful to discuss the cases according to their fact patterns. Based on
practice under the current rule, motions for relief from judgment can
be divided into four types. The first involves default judgments. The
other three involve nondefault judgments in which (1) the movant con-
sciously had chosen not to appeal, (2) attorney negligence prevented an
appeal or a timely Rule 60(b) motion, or (3) a clearly erroneous judg-
ment was entered. Each of these raises slightly different problems and
requires a somewhat different resolution of the truth-finality dilemma.
A discussion of each of these situations follows.

139. Dean Freedman has suggested that truth is only one of the values served in a trial
and, in some cases, may not be the most important interest promoted by the adversary sys-
140. See Murphy, Justice and Judgment, 23 BUFFALO L. REV. 565 (1974).
141. See Stalev, Fundamental Guarantees of Litigants in Civil Proceedings: A Survey of
the Laws of the European People's Democracies, in FUNDAMENTAL GUARANTEES
142. Judge Frankel argues that "we are too much committed to contentiousness as a
good in itself and too little devoted to truth." He suggests that we should: "(1) modify (not
abandon) the adversary ideal, (2) make truth a paramount objective, and (3) impose upon
the contestants a duty to pursue that objective." Frankel, The Search for Truth: An
143. As one commentator notes: "Social observation reveals that in human interactions
persons and groups seek to achieve, within different forums, a wide range of values from
varied bases of power and by the utilization of different strategies. Given these realities,
'justice' can be made intelligible only through a systematic, objective consideration of these
social interactions ... By such a technique, one can discover a broad range of participants
in social conflict, ascertain the strategies being utilized to achieve their objectives, and
identify the diverse values which they seek to realize." Murphy, Justice and Judgment, 23 BUFF-
Default Judgments

The first problem involves a motion for relief from a default judgment. Although there are no particular provisions in the rules regarding these cases, special factors argue for increased flexibility. Of the reasons typically favoring finality, only the last one, the need to provide certainty for the opposing party, seems applicable. Because there never was an adversary proceeding in which the issues were explored fully, reopening the judgment to allow a trial might produce a different result. Reopening should not be too burdensome to the system because this will allow the first, full trial in the courts. Moreover, due process, unless reduced to a matter of pure form, suggests that the party has litigated the issues. Admittedly, a theory of waiver might be invoked to override that concern. Waiver, however, is inappropriate when the only reason justifying this detour from the pursuit of truth is that certainty is lost by allowing the judgment to be reopened.

On the other hand, certainty need not be totally sacrificed. A default judgment should not be reopened without some sense that the trial will produce a different result. Further, because reopening a default judgment forces some duplicative actions on the court and the opposing party, some method should be created to encourage defendants to appear and to prevent abuse in order to protect the plaintiff from undue harm or harassment. The overriding presumption, however, should favor relief because an active search for truth has yet to be undertaken and, therefore, concerns for finality weigh less in the balance than they otherwise might.

Although many federal courts consider the above factors when exercising their broad equitable discretion to grant relief under Rule 60(b)(6), a codification of those principles is needed. Of the seven cases uncovered in which relief from a default judgment was denied, five relied on interpretations of Rule 60(b) or the extraordinary-cir-

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144. Fed. R. Civ. P. 55(c) merely provides that a judgment may be set aside "in accordance with Rule 60(b)." That rule, in turn, sets out no special reasons applicable to default.

145. A default should be distinguished from a judgment entered against the plaintiff for failure to prosecute. In cases of failure to prosecute, although the issues also have not been litigated fully, the need to enforce penalty dismissals suggests that waiver notions would apply and no special relief provisions are necessary. See cases cited in note 44 supra.

cumstances test without openly discussing these broader principles.\textsuperscript{147} In the other two cases, relief was denied because it was not sought within a reasonable time.\textsuperscript{148}

Regardless of the correctness of these decisions, these courts failed to address the special concerns present in a default, as opposed to a nondefault, situation. Clarification is needed as to whether special or additional factors should be considered in reopening a default judgment. Indeed, because of the peculiar nature of the default problem, it may be advisable to incorporate such provisions in Rule 55, the default rule, rather than simply appending them to the already long and complex Rule 60(b). One possible formulation might read as follows.

Rule 55\textsuperscript{(c)} Setting Aside Default. For good cause shown the court may set aside an entry of default. The court may set aside a judgment by default if it finds that the movant has a meritorious defense, that the motion was made within a reasonable time, and that undue prejudice will not result to the opposing party by granting the motion. The judgment also may be set aside in accordance with Rule 60\textsuperscript{(b)}.\textsuperscript{149}

This suggested amendment makes clear that increased flexibility or discretion is vested in the court, as well as what factors should be taken into account in the exercise of that discretion. Those factors, in turn, reflect an accommodation of the various policies discussed above. Petitioners like Klapprott would no longer need to rely on the court's careful construction of Rule 60\textsuperscript{(b)} or on the ability of the court to find extraordinary circumstances meriting relief.

The reference to Rule 60\textsuperscript{(b)} might seem unnecessary, because clause (6) is broader than the proposed formulation. This Article, however, proposes restrictions on clause (6),\textsuperscript{150} which would make the proposed Rule 55\textsuperscript{(c)} the one conferring the broader discretion of the two. The reference to Rule 60\textsuperscript{(b)} is intended to clarify that clause (4), pertaining to void judgments, can be used in place of Rule 55\textsuperscript{(c)}. In that circumstance the balancing test suggested by Rule 55\textsuperscript{(c)} is not needed because the seriousness of the defect in the original judgment predominates over all other factors. Also, in many instances in which the motion is made within one year, it may be simpler to use the more


\textsuperscript{148} Zurini v. United States, 189 F.2d 722 (8th Cir. 1951); United States v. Manos, 56 F.R.D. 655 (S.D. Ohio 1972).

\textsuperscript{149} Additions italicized.

\textsuperscript{150} See text accompanying note 176 infra.
concrete criteria set out in Rule 60(b), and there is no reason to prohibit this use.

Nondefault Judgments

Nondefault judgments present somewhat different concerns when considering the truth-finality dilemma. There seems to be no problem with allowing relief within one year of the judgment. By doing so, finality is postponed for only one year, and the litigants thereby are given one more opportunity to ensure a full adversarial exploration of all the relevant facts. The question is whether there should be a more flexible, less timebound, means of obtaining relief. When considering the policies that any alternative should promote or protect, nondefault judgments cannot all be treated alike. An examination of the types of cases and issues that have occurred under current Rule 60(b)(6) suggests, as noted above, that they fall into three categories: (1) a conscious earlier choice by the movant not to appeal; (2) attorney negligence that prevented an appeal or timely Rule 60(b) motion, and (3) entry of a clearly erroneous judgment.

Party's effective choice

The easiest situations to analyze are those similar to Ackermann. The party or the attorney has chosen not to seek review at an earlier time and now attempts to seek relief from the judgment in order to obtain that review. For purposes of the present discussion it does not matter whether the original decision was made by the attorney or the client or whether it was made because of a mistake of law or fact. The important point is that a conscious choice was made. Once that finding is made, then relief should be denied, even in the infrequent cases when it may be clear that the underlying judgment is erroneous. The need to uphold finality when a conscious choice has been made is most compelling.

Unlike the defaulting movant, the movant here has had a full and fair opportunity to persuade the court as to what the truth is. A decision not to press the case in a more direct and immediate fashion constitutes a waiver of the right to argue that the principle of finality must defer to that of truth. Judicial economy will be served by upholding the judgment, whereas a contrary conclusion might totally subvert it. Not only is multiple and potentially duplicative litigation likely, but also a general policy allowing such conduct might encourage careless

151. See text accompanying notes 152-58 infra.
practices and result in a continual process of relitigation. This would be especially unfair to the initial judgment winner, who would be unable to rely on the judgment. For these policy reasons, the system should adhere to finality. There is no need, therefore, to broaden the existing one-year grace period.

**Attorney negligence**

The next class of problems revealed by a study of the cases involving Rule 60(b)(6) is more difficult to handle. It involves situations in which the failure to move earlier or to appeal was caused by the neglect or mistake of the attorney. Many of these cases also would fall within the preceding category in that a decision was made not to use other existing avenues of relief. At this point, however, the focus is on the attorney’s conduct, and the question is whether the alleged innocence of the client should alter our previous conclusion.

The Supreme Court set forth the general rule on attribution of attorney negligence in *Link v. Wabash Railroad Co.*152 In that case, an action was dismissed for failure to prosecute when the plaintiff’s attorney did not appear for a scheduled pretrial conference and offered no reasonable excuse for his nonappearance. The Supreme Court affirmed, holding:

> There is certainly no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have “notice of all facts, notice of which can be charged upon the attorney.”153

The Court then justified this conclusion by noting that the client’s remedy was a suit for malpractice and that to hold otherwise “would be visiting the sins of plaintiff’s lawyer upon the defendant.”154

This compelling language might seem to answer the question whether Rule 60(b) can relieve an innocent client from the attorney’s negligence. Although several courts have followed *Link*,155 a number

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152. 370 U.S. 626 (1962).
153. *Id.* at 633-34.
154. *Id.* at 634 n.10.
of others have refused to adhere to that decision on motions for relief from judgment by distinguishing\(^{156}\) or ignoring\(^{157}\) it on the assumption that Rule 60(b) is one permissible way of relieving the client from the errors of the attorney. The correctness of these decisions is not in issue here. What is important is the concern they reflect about the innocent client who has been harmed. Justice Black expressed this concern in his dissenting opinion in *Link*:

> The average individual called upon, perhaps for the first time in his life, to select a lawyer to try a lawsuit may happen to choose the best lawyer or he may happen to choose one of the worst. He has a right to rely at least to some extent upon the fact that a lawyer has a license. From this he is also entitled to believe that the lawyer has the ability to look out for his case and that he should leave the lawyer free from constraint in doing so. Surely it cannot be said that there was a duty resting upon Link, a layman plaintiff, to try to supervise the daily professional services of the lawyer he had chosen to represent him. How could he know, even assuming that it is true, that his lawyer was a careless man or that he would have an adverse effect upon the trial judge by failing to appear when ordered? How could he know or why should he be presumed to know that it was his duty to see that the many steps a lawyer needs to take to bring his case to trial had been taken by his lawyer? Why should a client be awakened to his lawyer’s incapacity for the first time by a sudden brutal pronouncement of the court: “Your lawyer has failed to perform his duty in prosecuting your case and we are therefore throwing you out of court on your heels”? So far as this record shows, the plaintiff never received one iota of information of any kind, character or type that should have put him on notice as an ordinary layman that his lawyer was not doing his duty.\(^{158}\)

Although Justice Black’s dissent challenges the entire notion that the client should be burdened by the attorney’s negligence, we need not go so far. For present purposes, two kinds of cases should be distinguished. In the first, the client seeks relief alleging that an erroneous judgment was entered because of the attorney’s neglect or mistake. In the second, the client alleges that a valid Rule 60(b) ground for relief


\(^{158}\) 370 U.S. at 647.
exists but is now barred because of the attorney's failure to move within the one-year limit. In the first situation, *Link* would apply. This result seems reasonable, particularly in light of the one-year grace period for motions for relief from judgment. To hold otherwise would visit an undue hardship on opposing parties, as virtually all losing parties might claim incompetent counsel, and thereby forestall finality.

Rule 60(b), however, does represent a decision by the rulemakers to allow some hardship to be imposed on the opposing party in the interests of justice. Thus, the issue in cases of the second type is whether to apply the remedy liberally, disregarding the general rule imputing the lawyer's negligence to the client for purposes of ruling on the merits of the motion for relief.

A discussion of this second situation must focus on two interrelated issues: (1) can a standard be developed that will sort out appropriate cases warranting relief, and, if so, (2) what is the price of opening judgments under these circumstances? It is clear, of course, that the court should not sacrifice finality simply on an allegation that attorney negligence caused the failure to move in a timely fashion. The court must inquire into whether the client knew or should have known of the attorney's negligence. If so, then it seems perfectly just to adhere to *Link* and deny relief. One such case involved a client who, after hiring an attorney to file a lawsuit, made no attempt to discover what was happening to the case over a five-year period of time. Such a client should not be allowed to make an untimely motion for relief from a judgment dismissing the suit for failure to prosecute simply because the lawyer's neglect caused both the dismissal and the failure to move for relief earlier. In that situation, the individual's reliance on the attorney was unreasonable. His own negligence should bring the case within the same policies and balancing of equities applied when a conscious choice was made not to move in a more direct or timely fashion. Equitable considerations demand that the opposing party not bear the burden of the movant's negligence or mistake.

In most situations the question whether the client should have known of the lawyer's negligence will require a more detailed investigation. All of this, in turn, is time-consuming and burdensome both to the judicial system and the opposing party, who will undoubtedly want to contest that issue, unless the cost of contesting is greater than the cost of settling. Thus, in an effort to be more fair to the allegedly innocent or naive client, not only have the finality and certainty of the judgment

been violated, but also the need has been created for yet another proceeding to test the applicability of the above standard.

The seriousness of these two events should not be minimized. With regard to the former, allowing relief contravenes not just the form of finality, but virtually all of the systemic and equitable reasons favoring finality over truth.\textsuperscript{160} Moreover, if even some of the charges of incompetency currently leveled at the practicing bar are valid,\textsuperscript{161} this exception would not be a minor one. Simultaneously, the creation of a sifting mechanism for meritorious claims of attorney negligence also presents the specter of potentially endless litigation, requiring a trial, a Rule 60(b) hearing to determine if the client can be held at fault for the untimeliness of the motion, and another hearing to determine the merits of the motion. If these are successful, then there may be a new trial and the attendant series of post trial motions. Faced with this possibility, one necessarily must return to the original question, this time perhaps with more skepticism regarding the possibility of reaching a fair solution. Indeed, given these difficulties, a strong argument could be made that it is better simply to face the reality that the adversary system often depends more on the skill of counsel rather than on \textit{"justice"}.\textsuperscript{162} Perhaps the harshness or potential inequity of that fact cannot be mitigated through relief from judgment provisions.

This conclusion would be more acceptable if some effective remedy existed for the innocent client. It is not sufficient merely to state that the client chose the attorney and, therefore, has a responsibility to be vigilant and to supervise the case. As Justice Black rightly expressed,\textsuperscript{163} those expectations simply are unrealistic in the vast majority of cases.

The obvious answer to this dilemma is an action for malpractice against the negligent attorney. A malpractice suit would provide some compensation for the injured client, but would not disturb the finality or certainty of the earlier judgment and, thus, would not place an unfair burden on the winning party in the first action. It is true that reference to the client’s remedy of malpractice is of small comfort ex-

\textsuperscript{160}. See text accompanying notes 135-39 \textit{supra}.


\textsuperscript{163}. See text accompanying note 158 \textit{supra}.
cept in the most extreme cases of negligence. A case, however, in
which the client can demonstrate that but for the attorney's negligence
a timely relief motion would have been granted and the suit likely
would have been won clearly appears to fall within the general scope of
common-law malpractice.

Admittedly, this approach imposes additional costs and burdens
on the allegedly innocent client and on the judicial system that must try
the suit. Thus, as a further or additional remedy for less extreme cases
special rules should be developed to shift the costs to the negligent at-
torney under those Rule 60(b) cases. More concrete criteria for as-
sessing this form of malpractice will reduce the burden on the judicial
system and the aggrieved party in prosecuting these claims. In addi-
tion, neither the opposing party nor the client need suffer unduly.

A possible statutory formulation might be as follows:

When a party has failed to move for relief from a judgment within
the statutory period and there is a strong likelihood that the motion
would have been granted if it had been timely, the court may assess the
costs of the action against and deny fees to the attorney or it may order
the refund of fees paid previously if it finds that the failure to move was
due to the lawyer's negligence and that the client was not contributorily
negligent.

Under this proposed standard, a type of malpractice per se is estab-
lished. This approach would necessitate some type of inquiry into
whether the party presented grounds that would have warranted relief

164. See generally Huszagh & Malloy, Legal Malpractice: A Calculus for Reform, 37
Mont. L. Rev. 279 (1976); Marks & Cathcart, Discipline Within The Legal Profession: Is It
Self-Regulation?, 1974 U. Ill. L.F. 193; Wade, The Attorney's Liability for Negligence, 12

165. Courts shift costs or expenses to the attorney to sanction the improper conduct of
counsel. Under Federal Rules of Civil Procedure 37(a)(4), (b)(2), and (d), fees and expenses
may be charged against a lawyer who advises a client to ignore the legitimate discovery
requests of an opponent. Section 1927 of Title 28 allows the courts to impose all excess
costs on any attorney "who so multiplies the proceedings in any case as to increase costs
unreasonably and vexatiously . . . ." Professor Risinger argues that attorney cost sanctions
are a better way of handling dishonest pleading problems than penalizing a possibly inno-
cent client by striking the pleadings. Risinger, Honesty in Pleading and Its Enforcement:
Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1
(1976).

166. The best remedy also would be one that would operate at the request of the client
alone because of the difficulty of finding an attorney willing to press a lawyer malpractice
suit. But see Stern, Malpractice Is a Lawyer's Problem, Too, 3 Barrister, Spring 1976, at
26, 44. Unfortunately, given the type of negligence involved—the failure to adhere to tim-
ing restrictions in rules for relief from judgments—it is most unlikely that the layperson
would be aware of the problem, much less the remedy. Thus, the remedy must depend on
other lawyers willing to act as watchdogs of the profession. For a solution to this dilemma,
see note 168 infra.
RELIEF FROM FEDERAL JUDGMENTS

from the judgment if it had been presented in a timely fashion, and whether the failure to do so was caused by the neglect of the attorney. Thus, the hearing under the proposed standard would impose some burden on the judicial system. The court's inquiry, however, would be vastly simplified. Unlike the Rule 60(b) situation, the judge need not be concerned with possible prejudice to the opposing party. The hearing would involve only the allegedly injured client and, as the opposing party, his or her attorney from the original action. Further, the court need not consider the impact of its decision on the general stability of judgments, as the original judgment will not be affected. This solution attempts to render justice, even though truth may not have been reached in the main proceeding. Coupled with the availability of a common-law malpractice action, it gives the innocent client two weapons and, thereby, ameliorates the harsh impact of adhering to finality through denial of motions for relief that are untimely because of attorney negligence.

If enacted a statute such as the one proposed should be included as part of Title 28 of the United States Code. That title already includes section 1927, a provision allowing the taxation of costs against an attorney who has engaged in vexatious litigation. The alternative of state legislation presents desirable possibilities, but also suffers from serious defects, not the least of which is the potentially haphazard

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167. Other means of enacting a malpractice device suffer from various defects. Although attaching the proposed procedure to Rule 60(b) might provide the greatest visibility, the Rules Enabling Act may prevent that solution. See Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1970). There are some major differences between this proposal and other costs provisions in the federal rules, see Fed. R. Civ. P. 37(b)(2)(E), 37(c), and 37(d), that could merit its classification as substantive and outside the scope of the Enabling Act. The decision to assess costs is remedial, and thus within the federal courts proper equitable power. See generally Note, The Equitable Remedial Rights Doctrine: Past and Present, 67 HARV. L. REV. 836 (1954). However, the decision to allow recovery for the negligent failure to move in a timely fashion is one to create a remedy, not merely to decide which remedy should apply.

168. State regulation might be superior if the state bar established a malpractice fund to provide relief to clients in the position of those described in the text without the necessity of engaging another lawyer or making more court appearances. That fund might be financed by bar association dues or by imposing a small extra filing fee for all civil cases, thereby spreading the cost among all persons using the legal system. This alternative is attractive for several reasons. It would entail less expense to all concerned and would remove additional litigation from the judicial system. By spreading the cost, it recognizes that lawyers are human and that the primary goal is to compensate the injured client. In cases involving the gross negligence of an attorney, other remedies such as disbarment could be invoked. The possibility of developing this method of relief necessarily must be considered as a general solution to all types of legal malpractice, thus placing it beyond the scope of this discussion.
adoption of such a statute by the states. The penalties imposed on attorneys for negligent practices under Rule 60(b) would vary depending on the state in which the federal court was sitting, not on whether the attorney was practicing before a federal or state court. Insofar as the penalties are meant to encourage more careful attention by the attorney to federal rules of practice, scattered enforcement would undercut this goal and would be antithetical to the notion of a unified federal judicial system.

Finally, there has been a growing trend in the federal courts to more actively regulate the conduct of attorneys appearing before them. While controversial, this movement reflects recognition on the part of the courts that federal judges must exercise more control to guard their own preserve from careless and unskilled lawyering. The statute proposed here falls clearly within this category. This tie to distinct federal interests makes it proper for Congress to act.

The presence of these alternative ways of handling the attorney negligence issue suggests that we need not compromise finality and its benefits in order to achieve justice for the client. Thus, this class of cases can be treated as any other in which judgment relief is sought. If grounds for relief under Rule 60(b) are present and the motion is timely, it may be granted in the interests of justice. If the motion is untimely, relief may be denied in the interests of finality. Other means are and could be available to shift the burdens or costs if the untimeliness is the fault solely of the attorney.

The Direct Confrontation

The most difficult class of relief problems to resolve and the one that results in the most direct confrontation between truth and finality

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is that in which the judgment clearly is erroneous or unjust and all of the preceding avenues of relief are unavailable. The rulemakers relied on the equitable discretion of the courts, and for that purpose clause (6) was included in the rule. However, the different timing restrictions within the rule have caused some serious problems. Thus, the question is how to treat those cases in which it is clear that truth was not reached in the first proceeding, and yet avoid the pitfalls of the present scheme. Should the one-year time limit be applied to all grounds under Rule 60(b), or should that restriction be abolished entirely, leaving the question of timeliness in each case to the court's discretion?

One student commentator argues in favor of greater flexibility "whereby courts refocus attention from the labels applied to grounds for relief in Rule 60(b) to the factors inherent in particular fact situations that call for relief." He notes that the analogous experience in cases of extrinsic fraud or in states having more discretionary relief from judgments provisions indicates that the courts have been properly protective of the goals of finality. This Article has noted in considerable detail that the courts have not abused their discretion when applying the existing equitable loophole of Rule 60(b)(6). Unfortunately, however, the fact that finality may be properly preserved under a more discretionary procedure does not in itself answer the question of which approach is better. Finality is only one aspect of the problem. Almost equally important are the impacts or burdens a discretionary approach places on the courts and the nonmovant. One must consider whether those burdens are justifiable in light of the few cases, in thirty years of practice under the rule, that have granted relief beyond the one-year time period.

Abandonment of an explicit time limitation in all Rule 60(b) cases would force the courts to become involved in much more complex decisions. A good illustration is one proposed rule amendment that would add the following equitable factors to be considered by the court.

[The court may in its discretion determine that relief is justified at any time, upon consideration of the following factors: (1) the extent to which the party has received a full and fair trial of the issues; (2) the degree of the party's own negligence or fault, his diligence in seeking relief, the nature and quality of his claim or defense, and the detriment to the party if relief is denied; (3) the degree of the other party's fault or wrongdoing, and the nature and quality of his claim...]

172. Id. at 568.
173. See text accompanying notes 42-133 supra.
or defense; (4) a preference that decision be on the merits, but with
due regard to the rights of the other party and third persons and the
requirement that judgments be final; (5) the degree to which detri-
ment to the other party or to third persons may be reduced by impos-
tion of just terms on the party seeking relief, including posting of
bond to cover the other party's costs should the moving party fail to
show reasons justifying relief. Relief for fraud upon the court may
be allowed at any time, but the court shall consider the extent to
which the fraud impaired judicial impartiality, the extent to which
the fraud affects the public interest, and the extent to which rights of
third persons may be adversely affected if relief is granted. 174

Although the goal of focusing on the merits of the motion rather than a
label is laudatory, the price of such a complex approach would be ex-
tremely high, because this equitable standard is not limited to situa-
tions in which the judgment is clearly erroneous and neither the
movant nor the attorney is at fault for not seeking relief earlier. In all
cases the court must find that the reason for requesting relief is within
one of the six categories of the rule, and then make a detailed inquiry
into the underlying fairness of granting relief.

It is clear that this suggested approach favors truth over finality,
and places the burden of rebuttal on the party arguing for finality. In
most cases in which a motion for relief is made within a year, it seems
unlikely that the opposing party could demonstrate that delay would
cause prejudice sufficient to deny relief. This would be true even if the
movant was at fault in some way for the error below. Despite the like-
lihood that the party opposing the motion will not succeed, a totally
discretionary relief standard requires a detailed inquiry by the court,
affording the opposing party a full opportunity to persuade the court.

After full consideration, a one-year time limit seems more advan-
tageous than a fully discretionary standard. An explicit timing re-
straint balances the competing interests between truth and finality for
the courts and avoids both the necessity of a difficult and complex de-
termination and the potential inequity of inconsistent treatment of sim-
ilar issues by different courts. 175

The fact that a timing mechanism has some advantages does not
necessarily mean that no equitable exception to it should exist. Al-
though the form of the present Rule 60(b) has caused problems, this by
no means suggests that equitable concerns must be abandoned. One
possible approach would place the “other reason” clause within the

175. The conflicting decisions under Rule 60(b)(6) are discussed at text accompanying
notes 93-103 supra.
one-year time limit, but grant the court an extra measure of discretion in all cases outside of that limit. The court could consider whether relief might be proper in light of factors such as those listed in the proposed amendment set out above. Appending discretionary factors to the time-limit provisions, satisfies all equitable concerns and avoids the confusion surrounding the existing rule.

This approach would place the finality decision ultimately in the hands of the courts. The rule exists merely to help the courts decide the easy cases and to leave the difficult ones to their discretion, giving some guidance on what should be taken into account. Despite the attraction of a solution that mitigates the seemingly arbitrary or harsh impact of time restrictions, the adoption of such a discretionary scheme seems inappropriate and unnecessary, even for these cases.

We must remember that these equitable concerns are pertinent to very few cases. As discussed, default judgments are treated separately; when the party has made an effective choice not to pursue earlier existing alternative means of relief, the theory of waiver should preclude relief; and when attorney negligence is involved, approaches other than relief from the judgment best satisfy notions of justice for all concerned. Thus, the court’s discretionary power would provide relief primarily in those situations in which some new evidence comes to light or some change in circumstances, not discoverable earlier, indicates an inherent problem with the earlier proceeding.

Given this limited class of cases, the wisdom of creating a broad discretionary reservoir of power in the court might properly be questioned. Even equitable considerations might well allow finality to triumph in these cases. The rule already gives the parties an opportunity to discover new evidence or the existence of fraud or mistake and to obtain relief on that basis. To make every unfavorable judgment subject to a possible challenge on the ground that the testimony of some new witness would result in a different outcome, or that some new evidence would produce a different result, would place the court and the

176. The failure to include motions under clauses (4) and (5) within the one-year limit is deliberate. Although arguments might be made that the same considerations favoring finality also apply to these cases, the issues raised under these clauses merit different treatment. Under Rule 60(b)(4), the judgment is alleged to be void. Such a serious defect would outweigh finality concerns. Similarly, clause (5), dealing with judgments that are no longer valid because of changes in the law upon which they were based or because they have been satisfied, also suggests a kind of defect outweighing normal finality concerns. Additionally, neither of these provisions has caused the kinds of problems for the courts that have occurred under clause (6). They are both very specific and therefore do not present the spectre of never-ending litigation produced by the more vague and general equitable clause.
parties on a seemingly endless treadmill of "what if" inquiries. Further, because the ultimate decision in a trial may rest on a complex interplay of factors, the potential for permutations and combinations altering the result is immense. The presence of that spectre is not important because of the ultimate threat it poses to existing judgments. Rather, its importance lies in the wasteful, time-consuming, and costly procedure that results and the consequent sense of uncertainty that it produces. Experience under present Rule 60(b) makes it clear that lawyers will attempt to take advantage of any existing loophole, even if the prognosis for success is slim. Present grants of discretionary power under the rule have produced a procedure for challenge, but few judgments have been altered substantively. Viewed from that perspective, a proposal incorporating a grant of even broader discretionary power seems to have little merit and many potential negative attributes. In contrast, it does not seem at all unfair to deny relief beyond the one-year time period.177

What of the few cases in which other reasons warranting relief are present?178 A closer look at those cases leads to the conclusion that they, too, do not justify the adoption of broad discretionary powers. The same arguments made above can be applied to virtually all of those cases. When the movant is alleging fraud, but not of the type contemplated by clause (3),179 or failure to receive notice in time to appeal180 within thirty days of judgment, it seems reasonable to require that the party discover those defects within a year of judgment. In the situation in which Rule 60(b)(6) is invoked because implicit policy considerations tied to the underlying statutory cause of action181 argue for relief, there is no need to rely on the federal rules for a remedy. Altering an otherwise workable approach for the sake of such specialized considerations allows the tail to wag the dog. If special treatment is required, it can be accomplished through the statutes that create those causes of action. Even the cases in which the movant seeks judgment relief after a settlement has collapsed182 may be handled through means other than Rule 60(b)(6) when more than one year has passed.

177. Cases in which the court is unsure whether truth was reached in the preceding trial also fall within this one-year limitation. If the court is not allowed discretion when it is clear that the judgment is erroneous, then there can be no rationale supporting a broad discretion under less compelling circumstances.
178. See text accompanying notes 104-109 supra.
179. See cases cited in notes 106-107 supra.
180. See cases cited in note 108 supra.
181. See cases cited in note 77 supra.
182. See cases cited in note 105 supra.
One possible alternative is an action to enforce the judgment. In the event that is not possible, clause (5) might be applied on the ground of a change in circumstances, so that "it is no longer equitable that the judgment should have prospective application." Although that provision generally refers to injunction decrees, such an application would be in keeping with its equitable purpose.

There may be other reasons that have not yet appeared before the courts or that were not uncovered during the research for this Article. Nonetheless, it seems highly likely that a thorough sampling of the types of problems that will arise has been achieved. Further, even if some compelling case demanding relief awaits revelation, a conclusion favoring a general one-year time limit for all motions made under Rule 60(b)(1), (2), (3), and (6) still seems warranted. Even the most just rule will produce harsh results at times. The social need for stability of judgments outweighs those rare circumstances in which some individual injustice may result. An equitable treatment of the problem demands a balancing of the needs of all interested parties, as well as those of the judicial system itself. Such an approach, as just demonstrated, favors broadening the current one-year time limit to include cases under Rule 60(b)(6).

Conclusion

Existing practices under Rule 60(b)(6) both reveal problems and suggest solutions. The reservoir of equitable discretion granted the courts under that clause has not resulted in an abandonment of finality and its benefits. Nonetheless, careful consideration of the difficulties the courts face when applying the current rule reveals the need for change. Confused by the structure of the rule itself, the courts have developed and refined the extraordinary-circumstances test in order to give some meaning to the clause without simultaneously allowing it to swallow the other portions of the rule. This development has been beset by interpretative difficulties and has bred uncertainty about the scope of discretion granted under clause (6). Similar problems have arisen with the alternative other-reason test of clause (6). This confusion, in turn, seems to have encouraged litigation in the hope that relief might be granted, and has in several instances manifested itself in confused and conflicting decisions. Rule 60(b)(6) primarily appears to

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183. As court administrative tasks become computerized, it might be possible for computers to send notices to the parties and their attorneys automatically as the one-year period draws to a close. This notice would reduce further the magnitude of possible unfair results, as the number of instances of inadvertent failure to file a timely motion would be decreased.
have produced unnecessarily prolonged litigation and new legal contortions by clever attorneys. Far from assuring that truth is sought and justice protected, this search for the ultimate right at the expense of finality has perverted justice.

Fortunately, alternative relief procedures need not be devised in a vacuum. A close analysis of the case law under the present discretionary provisions provides a sense of what may be needed. There are essentially four types of situations that must be considered in order to decide whether to opt for a broader discretionary provision favoring truth or a more timebound solution supporting finality. They are: default judgments; the deliberate choice not to seek relief earlier; failure to move for relief in a timely manner due to attorney negligence; and clearly-erroneous judgments. An examination of each of these areas and the competing concerns they present suggests that a solution favoring finality is the more equitable one. The problems of default judgments and attorney negligence can be solved through methods other than Rule 60(b), thereby providing relief without confusing the application of that rule. When the party has made an effective choice, the concept of waiver should prevent him from disturbing finality. The fourth situation places truth and finality in direct confrontation. However, an evaluation of the possible impact of a rule favoring a discretionary case-by-case treatment of this problem suggests that the few benefits that might be obtained are far outweighed by the burdens of that solution on the parties and the judicial system as a whole. Given that conclusion, a timebound relief from judgments rule seems most appropriate because it allows some leeway for litigants in this last kind of case, but avoids the potentially horrendous burden broader discretion would produce.

In keeping with the above analysis, three recommendations are in order, with the caveat that they comprise a total scheme and would be fully effective only if adopted entirely. First, Rule 55(c) should be amended to provide special criteria for allowing relief when there never has been an adversarial determination of the merits. Second, the Congress should adopt a statute permitting the courts, after making certain findings, to shift costs, and to deny or refund fees, against attorneys whose negligence has prevented their clients from obtaining relief under Rule 60(b). Third, and finally, Rule 60(b) should be amended to limit motions under clause (6) to the one-year period applicable to

184. The proposed amendment is set out in text accompanying note 149 supra.
185. A proposed statute is set out at text following note 166 supra.
other clauses of the rule. If these recommendations are followed, a great deal of the uncertainty and needless litigation that has occurred under the current rule will be eradicated.