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Equitable Power of a Federal Court to Vacate a Final Judgment for Any Other Reason Justifying Relief--Rule 60b(6)

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Comments

EQUITABLE POWER OF A FEDERAL COURT TO VACATE A FINAL JUDGMENT FOR "ANY OTHER REASON JUSTIFYING RELIEF"—RULE 60b(6)

I. Introduction

A. *Purpose*

Federal Rule 60b[1] became twenty years old in March of this year. Its revision in 1948[2] substantially enlarged the equitable grounds on which a federal court may relieve a party from a final judgment, order, or proceeding.[3] The 1948 revision had as its principal objective the achievement and balancing of two general purposes that are, in part, competing and conflicting: (1) to buttress the finality of judgments, and (2) to provide ample and proper grounds for relief from final judg-

1. Fed. R. Civ. P. 60, Relief from Judgment or Order
(b) *Mistakes; Inadvertence; Excuseable Neglect; Newly Discovered Evidence; Fraud, etc.* 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 excuseable 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 on 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 obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

2. The revisions in Rule 60b were actually promulgated on December 27, 1946, but by the terms of Rule 86b did not become effective until March 19, 1948.

3. Original Rule 60b read as follows: (b) *Mistake; Inadvertence; Surprise; Excuseable Neglect.* On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excuseable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, 28 U.S.C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

ments.[4] The question for 1968 therefore must be: To what extent have the federal courts in their application of Rule 60b accomplished the balancing of the general purposes intended by the revision? It is the purpose of this article to attempt to answer that question.

In so doing, the article focuses upon the major stumbling block to an application of Rule 60b which could achieve a consistent balance between adequate and proper equitable relief from final judgments, and the basic premise of jurisprudence requiring the ultimate finality of judgments, to wit: Clause (6) of Rule 60b which provides relief from final judgment, order, or proceeding for ". . . any other reason justifying relief from the operation of the judgment." The precise function of subsection (6) of Rule 60b, and its relationship to the five specific grounds for relief set out in 60b remains extremely uncertain. Thus, the proper application of Rule 60b in a particular case is often difficult to ascertain, and as a result the case law has to a large degree failed to attain the proper balance of equitable relief and finality of judgments under the Rule.

B. *The Missouri Situation*[5]

Missouri has no single, exclusive and comprehensive state rule of procedure for vacating final judgments comparable to Federal Rule 60b. For an excellent summary and discussion of the various state remedies and their attendant problems, see Knight and Odegard, *Procedure—Setting Aside Final Judgments in Missouri,* 28 Mo. L. Rev. 281 (1963).

Although the federal reporters are replete with decisions applying and interpreting Rule 60b, those from the Eighth Circuit are surprisingly scarce. The relative infrequency of a Rule 60b proceeding in Missouri federal courts is most probably explained by the fact that most 60b proceedings arise as a result of default orders or judgments, and occur most frequently in the large, docket jammed, metropolitan centers on each coast.[6] The simple fact is that the pace of practice in Missouri does not precipitate many default judgments and subsequent Rule 60b motions; and, for the few defaults which do arise, it is likely that the need for a formal 60b motion is obviated in most cases by informal attorney stipulation, or informal notice from the court that a default order is pending in time for the delinquent attorney to take appropriate action and avoid its entry.

II. General Background: The Revisions

Prior to 1948, Rule 60b was deficient on several grounds. Without here investigating all of them,[7] the principal defects were two: (1) the original Rule expressly provided for only one ground of relief, that of mistake, inadvertence,

4. Committee Note of 1946 in 6A Moore, Federal Practice ¶ 60.08(1), at 4008 (2d ed. 1955).

5. Rule 60b, of course, applies only in federal cases and its application is always a question of federal law.

6. The overwhelming majority of cases occur in the Second, Third, Ninth, and District of Columbia Circuits.

7. For a complete analysis see 7 Moore, Federal Practice ¶ 60.17 and 60.18(1), at 91 *et seq.* (2d ed. 1955).

surprise, or excuseable neglect, and (2) as construed, the Rule was not exhaustive, since supplementary relief outside the express provisions of the Rule by procedure equivalent to writs of error Coram Nobis, Coram Vobis, Audita Querela, and Bills of Review, and Bills in the Nature of a Bill of Review was sanctioned.[8] Partly because of this construction, a rule sharply limited in grounds for relief worked fairly well in practice, but the precise relief obtainable in a particular case by the use of these ancillary remedies was obscured in ancient common law lore and mystery, and often failed to afford relief in situations where it was clearly warranted.

The reconstructed Rule expressly abolished the old common law writs and declared Rule 60b to be the complete and exclusive means for equitable relief from a final judgment.[9] To accomplish this end, the new Rule added to the original ground of mistake, inadvertence, surprise, or excuseable neglect, four additional specific grounds:

> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59b;
> (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 on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

These five enumerated grounds are the traditional and common grounds for relief. The Rule provides that a motion for relief under these clauses must be made within a reasonable time, and further, in the interest of finality, a maximum time limit is imposed upon motions under reasons (1), (2), and (3) so that motions based upon any of these grounds must be made ". . . not more than one year after the judgment, order, or proceeding was entered or taken."[10] However, in keeping with the principle of inclusiveness of remedy toward which the revision of Rule 60b was directed, some residual clause was deemed necessary to cover any unforseen contingencies which might fall beyond the purview of the five enumerated grounds for relief. Thus, Rule 60b(6) was added to allow a court to act within the Rule and relieve a party from final judgment for

> (6) any other reason justifying relief from the operation of the judgment.

Relief under this clause, just as in clauses (4) and (5), must be sought by motion made within a reasonable time after the judgment or order was entered or taken, and is not subject to the one year limitation. It is apparent that the intent of the 1948 revision was to amend the Rule to permit various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these

8. *Id.* ¶ 60.16(3), at 76.
9. FED. R. CIV. P. 60b, *supra* note 1.
10. *Ibid.*

provisions,[11] without preserving their uncertainties and historical limitations which worked unjustly in certain situations.[12]

III. General Application of Rule 60b[13]

A. *Procedural Aspects*

1. Default Judgments or Orders

By its terms, Rule 60b is applicable to all final judgments, orders, or proceedings. As a practical matter however, the need to resort to a Rule 60b proceeding rarely arises except when such judgment or order is taken against one by default. The procedure for the entry of defaults is set out in Federal Rule 55. Rule 55c provides "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60b."[14] Thus, final orders and judgments arising as a result of default are expressly brought under the purview of 60b by 55c.[15]

2. Final Orders Only

The language of both Rules 60b and 55 expressly limit the application of 60b to *final* judgments or orders. Interlocutory orders and judgments are, therefore, not subject to the limiting provisions of 60b, but are left within the plenary power of the court that rendered them to afford such relief from their operation as justice requires.[16] This is so because interlocutory order revision has traditionally been an exercise of the trial court's inherent power to correct its findings and conclusions prior to entry of a final judgment.[17] Consequently, failure to establish in a 60b motion that relief is sought from a *final* decree will result in a denial of the requested relief.

3. Not a Substitute for Appeal

As a general proposition, a motion under Rule 60b may not be used as a substitute for appeal.[18] By its terms, the filing of a 60b motion does not suspend

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11. Committee Note of 1946, *supra* note 4.

12. For example see the discussion of *New England Furniture and Carpet Co.* v. *Willcuts* and *New England Furniture and Carpet Co.* v. *United States* in 7 Moore, Federal Practice ¶ 60.14, at 51 (2d ed. 1955); and the discussion of *Wallace* v. *United States* in 7 Moore, Federal Practice ¶ 60.16(3), at 79 (2d ed. 1955).

13. In order to analyze problems arising out of the application of clause (6) of the Rule, it is necessary to put that clause in the context of the entire Rule. However, it is not the purpose of this section to cover the intricacies of this complicated rule completely. This section is intended only as a brief sketch of some of the most basic aspects of the Rule's application. For an exhaustive treatment of the entire Rule see 7 Moore, Federal Practice ¶ 60.18(1) *et seq.*, at 201 *et seq.* (2d ed. 1955).

14. *E.g.* Erick Rios Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir. 1954).

15. Fed. R. Civ. P. 60b, *supra* note 1.

16. Kliaguine v. Jerome, 91 F. Supp. 809 (E.D. N.Y. 1950).

17. School Dist. No. 5 v. Lundgren, 259 F.2d 101 (9th Cir. 1958); United States v. Cato Bros., Inc., 175 F. Supp. 811 (E.D. Va. 1959).

18. *E.g.*, Swam v. United States, 329 F.2d 431 (7th Cir. 1964); Wagner v. United States, 316 F.2d 871 (2nd Cir. 1963); Huddleston v. McComas, 277 F.2d

the running of the period within which one may file an appeal, as does for example, a Rule 59[19] motion.[20] Thus, as long as a party has appeal rights under Rule 73,[21] a Rule 60b motion is inappropriate. Of course, if a party has allowed the period for appeal to run and can satisfy the court that such inaction was justified under the provisions of 60b, then post-appeal-period relief may be had in the district court, and to this limited degree such a proceeding amounts to an alternative to appeal.

There is one situation when a 60b motion is proper if made within the Rule 73 period for appeal. Prior to the 1946-48 general revision of the Federal Rules, the time for appeal was usually three months from the date of entry of a final judgment. Further, on a showing of due diligence, the maximum time for a motion for a new trial on the basis of newly discovered evidence under Rule 59b was appeal time; a rule which recognized that newly discovered evidence might not come to light within the maximum filing period (ten days after judgment) provided for Rule 59b motions. However, the general revision of the rules substantially reduced the appeal period,[22] and eliminated the newly-discovered-evidence exception to the ten day maximum filing period of Rule 59b,[23] and further, in the interest of finality, Rule 6b[24] expressly forbid extension of that time. Accordingly, if the only ground for appeal available to a party had to be newly discovered evidence, and none were found within ten days of judgment, then no motion for a new trial was possible and consequently no grounds for appeal were available.[25] The possible inequity of foreclosing the right to appeal by the ten day rule of 59b was remedied by the inclusion of clause (2) in the revised Rule 60b.[26] The clear thrust of this clause is supplementary only, for if the new evidence is discovered,[27] or by due diligence could have been, in time to move

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677 (6th Cir. 1960); Securities and Exchange Comm. v. Farm and Home Agency, Inc., 270 F.2d 891 (7th Cir. 1959); Providential Development Co. v. United States Steel Co., 236 F.2d 277 (10th Cir. 1956); Gilmore v. Hinman, 191 F.2d 652 (D.C. Cir. 1951).

19. FED. R. CIV. P. 59 sets out the proper procedure for a motion for a new trial.

20. FED. R. CIV. P. 73a(4) provides that the making of certain enumerated motions shall suspend the running of the time for appeal. These include motions made under Rules 50b, 52b, and 59.

21. The maximum time for filing notice of appeal is thirty days in a private action and sixty days in an action for or against the Government. FED. R. CIV. P. 73a.

22. *Ibid.*

23. FED. R. CIV. P. 59, NEW TRIALS; AMENDMENT OF JUDGMENTS
(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

24. FED. R. CIV. P. 6, TIME
(b) *Enlargement.* When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) . . . order the period enlarged . . . (2) . . .; but it may not extend the time for taking any action under Rules . . . , 59b, ...

25. New evidence will not be considered by an appellate court. Creamette Co. v. Merlino, 289 F.2d 569 (9th Cir. 1961).

26. FED. R. CIV. P. 60b, *supra* note 1.

27. The moving party must have been excuseably ignorant of the evidence, which must have been in existence and hidden at the time of the judgment. Ryan

under Rule 59b, then no relief is proper under 60b(2).[28] If evidence comes to light only after the 59b period has elapsed, then the 60b(2) motion must be made within a reasonable time and in no event more than one year after judgment was entered or taken.[29]

It should be remembered that all relief under Rule 60b is discretionary with the trial court.[30] This discretion has been exercised regarding clause (2) relief to require the movant to show, that the new evidence would not be merely cumulative,[31] and that it would probably lead to a judgment in the movant's favor.[32] Subject to these limitations then, clause (2) may operate to provide an exception to the general rule that a 60b motion is not proper within the Rule 73 period for appeal. The fact remains, however, that it is not an alternative to appeal since in the proper clause (2) situation, the moving party must have no meaningful appeal rights available.

4. Who May Make a 60b Motion

Only the parties to the suit have standing to make a Rule 60b motion.[33] This has been construed to include an heir at law under the "legal representative" language of the rule,[34] as well as a trustee in bankruptcy.[35]

B. *Trial Court Discretion*

A Rule 60b motion is addressed to the sound discretion of the trial court.[36] The exercise of this discretion is the most powerful judicial tool available in accomplishing the intended purpose of achieving a desired balance between finality of judgments and comprehensive equitable relief. This doctrine puts the application of Rule 60b almost totally within the ambit of the trial judge, since appellate courts are loath to alter a ruling which is within the trial court's discretion and will do so only for abuse of that discretion and upon a showing that the lower court's decision is clearly erroneous.[37]

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v. U.S. Lines, 303 F.2d 430, (2nd Cir. 1962); Brown v. Penn. R. Co., 282 F.2d 522 (3rd Cir. 1960).

28. *E.g., In re* Petition of Pui Lan Yee, 20 F.R.D. 399 (N.D. Cal. 1957).

29. FED. R. CIV. P. 60b, *supra* note 1.

30. See Part III B, *infra.*

31. Philippine Nat. Bank v. Kennedy, 295 F.2d 544 (D.C. Cir. 1961).

32. Philippine Nat. Bank v. Kennedy, *supra* note 31; White Pine Copper Co. v. Continental Ins. Co., 166 F.Supp. 148 (W.D. Mich. 1958).

33. United States v. 140.80 Acres of Land, 32 F.R.D. 11 (E.D. La. 1963).

34. Ingerton v. First Nat. Bank and Trust Co. of Tulsa, 291 F.2d 662 (10th Cir. 1961).

35. *In re* Casco Chemical Co., 335 F.2d 645 (5th Cir. 1964).

36. Internat'l Nikoh Corp. v. H. K. Porter Co., 374 F.2d 82 (7th Cir. 1967); Hughes v. Holland, 320 F.2d 781 (D.C. Cir. 1963); Fulenwider v. Wheeler, 262 F.2d 97 (5th Cir. 1958); Neville v. Am. Barge Line Co., 218 F.2d 190 (3rd Cir. 1954); Bavouset v. Shaw's of San Francisco, 43 F.R.D. 296 (S.D. Tex. 1967); Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491 (S.D. Tex. 1961); Alopari v. O'Leary, 154 F. Supp. 78 (E.D. Pa. 1957).

37. Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964); Nederlandsche Handel-Maatschappij v. Jay Emm, Inc., 301 F.2d 114 (2nd Cir. 1962); Kolstad v. United States, 262 F.2d 839 (9th Cir. 1959); Erick Rios Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir. 1954); Tozer v. Chas. A. Krause Milling Co., 189 F.2d 242 (3rd Cir. 1951).

Generally, the exercise of the trial judge's discretion in determining whether in a particular case the interest of deciding cases on their merits outweighs the interest in orderly procedure and the finality of judgments is guided by the following factors: the policy of the law favoring the non-disturbance of final judgments;[38] the procedure of Rule 60b is not a substitute for appeal; the Rule should be liberally construed for the purpose of doing substantial justice;[39] whether, although the motion may be within a maximum time as provided by the Rule, the time is reasonable;[40] whether the movant presents a meritorious defense or claim as the case may be;[41] whether any intervening equities make it inequitable to grant relief;[42] and any other relevant factor within the inherent power of a court of equity to consider. Thus, Rule 60b motions are subject to all the vicissitudes of any equitable proceeding making it extremely difficult to predict the outcome of any case even though the grounds for the motion appear to be clearly within the terms of the Rule.

C. *Requirement of A Meritorious Claim or Defense*

In addition to meeting the express provisions of Rule 60b, the courts have uniformly held that the moving party seeking to set aside a default judgment must also show that he has a meritorious claim or defense which can be interposed.[43] The bare wording of 60b does not require such a showing, but it has been universally established as a prerequisite to relief and is apparently left within the sound discretion of the trial court. This judicially imposed element of a valid motion under Rule 60b[44] is founded upon the maxim that the law does not require the doing of a useless act. For, unless a movant has a meritorious claim or defense, a re-opening of the judgment for a trial on the merits would be a futile act imposing an unnecessary burden on the court.[45]

The cases reflect no universally accepted standard as to what satisfies the requirement that a party show a meritorious claim or defense. Roughly, the cases

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38. 6A MOORE, FEDERAL PRACTICE ¶ 60.02, at 4013 (2nd ed. 1955).

39. Hutton v. Fisher, 359 F.2d 913 (3rd Cir. 1966); Patapoff v. Vollstedt's Inc., 267 F.2d 863 (9th Cir. 1959); Erick Rios Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir. 1954); Tozer v. Chas. A. Krause Milling Co., 189 F.2d 242 (3rd Cir. 1951); Chapman v. Henry A. Dreer, Inc., 14 F.R.D. 218 (E.D. Pa. 1953).

40. Perrin v. Aluminum Co. of Am., 197 F.2d 254 (9th Cir. 1959); *In re* Estate of Cremidas, 14 F.R.D. 15 (D. Alaska 1953).

41. See Part III C, *infra.*

42. Erick Rios Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir. 1954); Tozer v. Chas. A. Krause Milling Co., 189 F.2d 242 (3rd Cir. 1951); Stusky v. United States Lines, 31 F.R.D. 188 (E.D. Pa. 1962); *In re* Estate of Cremidas, 14 F.R.D. 15 (D. Alaska 1953).

43. Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655 (7th Cir. 1956); Tozer v. Chas. A. Krause Milling Co., *supra* note 42; Nelson v. Coleman Co., 41 F.R.D. 7 (D. S.C. 1966); Bowles v. Branick, 66 F. Supp. 557 (W.D. Mo. 1946).

44. Nelson v. Coleman Co., *supra* note 43; United States v. Edgewater Dying and Finishing Co., 21 F.R.D. 304 (E.D. Pa. 1957).

45. United States v. $3,216.59 in United States Currency, 41 F.R.D. 433 (D. S.C. 1967).

fall into three categories. An apparent majority insist upon a specific recitation of *facts* in the motion which, if proven, would constitute a meritorious defense.[46] A second approach allows bare unsupported allegations, conclusions, and even denials in the moving party's motion or supporting affidavit.[47] Finally, a few cases have treated oral statements, affidavits or *the court's own assumption* as a sufficient indication of the existence of a meritorious defense.[48] The cases in the latter category reflect the wide latitude permitted trial courts in the exercise of their discretion regarding what constitutes a sufficient showing. The trend appears to be strongly in favor of requiring that facts be shown to support a meritorious claim or defense,[49] and a recent case[50] expressly refused to vacate default since the movant's affidavit contained only allegations and conclusory self-serving statements.

As a purely procedural matter, it should be noted that if there are adequate allegations of a meritorious defense properly verified, no counter showing will be received at the hearing on the motion to refute the allegations on the merits presented by the moving party.[51] The only matter before the court is whether the judgment should be vacated and whether or not the movant proffered a claim or defense on the merits.[52]

IV. Clause 60b(6)

A. *The Problem*

As was pointed out in the introduction, the relationship of 60b(6)[53] to the balance of the Rule is at best uncertain. As a result, a clear and consistent application of the Rule has been greatly hampered, which in turn has frustrated the purposes for which the revised Rule was drafted. The problem arises in the following context: grounds for relief (1),[54] (2),[55] and (3)[56] are historically equita-

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46. Trueblood v. Grayson Shops of Tenn., Inc., 32 F.R.D. 190 (E.D. Va. 1963); Nicholson v. Allied Chemical Corp., 200 F. Supp. 206 (ED. Pa. 1961); Federal Enterprises, Inc. v. Frank Allbritten Motors, Inc., 16 F.R.D. 109 (W.D. Mo. 1954); Bowles v. Branick, 66 F. Supp. 557 (W.D. Mo. 1946).

47. Dalminter v. Jessie Edwards, Inc., 27 F.R.D. 491 (S.D. Tex. 1961); Tozer v. Chas. A. Krause Milling Co., 189 F.2d 242 (3rd Cir. 1951).

48. Alopari v. O'Leary, 154 F. Supp. 78 (E.D. Pa. 1957); Ledwith v. Storkan, 2 F.R.D. 539 (D. Neb. 1942).

49. Nelson v. Coleman Co., 41 F.R.D. 7 (D. S.C. 1966); Smith v. Kincaid, 249 F.2d 243 (6th Cir. 1957).

50. Atlantic Steamers Supply Co. v. Int'l Maritime Supply Co., 268 F. Supp. 1009 (S.D. N.Y. 1967).

51. Not only must there be allegations of facts sufficient to show the existence of a meritorious defense in the motion, see cases cited *supra* note 46, but also a showing of such facts is required at the hearing. Nelson v. Coleman Co., 41 F.R.D. 7 (D. S.C. 1966); Phoenix Mut. Life Ins. Co. v. Reich, 75 F. Supp. 886 (W.D. Pa. 1948).

52. Assmann v. Fleming, 159 F.2d 332 (8th Cir. 1947).

53. Fed. R. Civ. P. 60b(6) any other reason justifying relief from the operation of the judgment.

54. Fed. R. Civ. P. 60b(1) mistake, inadvertence, surprise, or excuseable neglect.

55. Fed. R. Civ. P. 60b(2) newly discovered evidence . . . .

56. Fed. R. Civ. P. 60b(3) fraud . . . .

ble grounds for relief from final judgment, whereas grounds (4)[57] and (5)[58] are historically legal remedies. Clause (6) however, again invokes the pure equity power of the court to grant relief. The Rule imposes a one year maximum time for motions pursuant to the first three equitable grounds, yet allows any "reasonable time" for the filing of motions under clauses (4), (5), and (6). Thus, when a movant is barred by the time limits of the Rule from relief under one of the first three grounds, the relationship of the equity power of clause (6) to grounds (1), (2), and (3) is called into question.

Almost immediately upon its promulgation, two diametrically opposed approaches developed regarding the proper resolution of this question. One approach, viewing clause (6) as a broad reservoir of equitable power held that it was intended not only to cover any areas not encompassed by the five specific grounds for relief, but that it also was intended to provide exceptions to the otherwise strict specificity of the rule, should the equities of a case require.[59] The argument for this position was articulated best by Judge Learned Hand:

> [Petitioner] . . . may not invoke subsections (1), (2), or (3) of Rule 60b because of the . . . time . . . limitation upon them . . . ; nor may he invoke subsections (4) or (5), because the judgment is not within them. If he is to succeed, therefore, he must bring himself within subsection (6); and literally, he may not do so, because there can be no doubt that his ground for relief is "excuseable neglect"; and unless subsection (6) be read as providing an exception to subsection (1), the order on appeal was right. It seems to us that subsection (6) must be so read, not only as to subsection (1), but as to (2) and (3). It is extremely difficult to imagine any equitable grounds for relief that these three subsections do not cover . . . . Subsection (6) is . . . clearly for equitable relief, and, if confined to situations not covered by the first three subsections, would be extremely meagre, even assuming that we could find any scope for it at all. Moreover, if we could, it would be a strange purpose to ascribe to the Rule to say that, although subsection (6) was no more than a kind of receptacle for vestigial equities, it should be without any limit in time, while the other and usual grounds for equitable relief were narrowly limited. We do not believe that was its purpose; we think that it was meant to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2), and (3) do not cover, but those that they do. In short . . . we read the subsection as giving the court a discretionary dispensing power over the limitation imposed by the Rule itself on subsections (1), (2) and (3); . . . .[60]

The other approach was born in a unique 1949 Supreme Court decision. *Klapprott v. United States*,[61] a five to four decision, required five separate opinions, none of which commanded a majority of the court.

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57. FED. R. CIV. P. 60b(4) the judgment is void.
58. FED. R. CIV. P. 60b(5) the judgment has been satisfied, released, or discharged, ...
59. *E.g.*, United States v. Backofen, 176 F.2d 263 (3rd Cir. 1949).
60. United States v. Karahalias, 205 F.2d 331, 333 (2nd Cir. 1953).
61. 335 U.S. 601 (1949).

Klapprott involved a denaturalization proceeding depriving petitioner of his citizenship which had gone by default more than four years prior to the motion for relief under Rule 60b. The trial court found the movant's default to have been the result of *in*excuseable neglect and dismissed. The court of appeals affirmed, one judge dissenting. The facts of the case reveal that the denaturalization proceedings were commenced simultaneously with several criminal proceedings against the petitioner. During the course of these criminal proceedings petitioner was held continuously in federal prisons for six and one half years, four and one half of which were on charges the Government was ultimately unable to sustain. It was during this period that judgment was taken against petitioner by default in the denaturalization proceeding. Before the Supreme Court, the Government contended, *inter alia,* that the one year limitation barred the petitioner on the premise that the petition showed at most nothing more than "excuseable neglect" under 60b(1).[62] In response to this, Mr. Justice Black, speaking for himself and Mr. Justice Douglas, began by assuming without comment the validity of the Government's assertion,[63] but went on to find that the petitioner's allegations

> . . . set up an *extraordinary situation* which cannot fairly or logically be classified as mere "neglect" on his part. The undenied facts . . . reveal far more than a failure to defend the denaturalization charges due to inadvertence, indifference, or careless disregard of consequences. The allegations . . . in the petition tend to support petitioner's argument that he was deprived of any *reasonable* opportunity to make a defense . . . .[64]

On the strength of this finding, Mr. Justice Black concluded that the prayer for relief should not be considered under the "excuseable neglect" provision of 60b(1), but rather under the "any other reason" language of 60b(6) which was not barred by the one year limitation.[65] Thus, by characterizing petitioner's conduct as something other than "neglect," excuseable or otherwise, and therefore not within the ambit of clause (1) at all, the opinion managed to slip past the time limitation problem and vacate the default judgment. Before concluding, Mr. Justice Black opined regarding the scope and purpose of 60b(6) that ". . . 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 default judgments whenever such action is appropriate to accomplish justice."[66] Mr. Justice Burton concurred only in the result, and Justices Rutledge and Murphy concurred in the result, but on the ground that default judgments ought not be permitted under any circumstances in any proceeding such as denaturalization capable of depriving one of his citizenship and stripping him of all constitutional rights. The

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62. *Id.* at 613.
63. ". . . of course, the one year limitation would control if no more than "neglect" was disclosed by the petitioner. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)." Klapprott v. United States, 335 U.S. 601, 613 (1949).
64. Klapprott v. United States, *supra* note 63. (Emphasis added).
65. *Ibid.*
66. *Id.* at 614. (Emphasis added).

dissent of Justices Reed, Jackson, and The Chief Justice, the only opinion in which three members of the Court concurred, found that

> Since the facts alleged amount to a showing of mistake, inadvertence, or excuseable neglect only, and since a definite time limit of one year is imposed on relief based on these grounds, the Rule cannot be said to contemplate a remedy without time limit based on the same facts. Otherwise, the word "other" in clause (6) is rendered meaningless.[67]

Mr. Justice Frankfurter dissented separately on other grounds.

The manifest confusion stemming from the plethora of opinion in *Klapprott*, was further compounded by the Court a year later in another Rule 60b motion for relief from a denaturalization judgment entered by default some four years previously. *Ackermann v. United States*,[68] purported to rely on the *Klapprott* "rule" but distinguished the case on the facts and denied the requested relief by a vote of five to three, Mr. Justice Clark not sitting.[69] The petitioners cited *Klapprott* and claimed they were entitled to equitable relief under clause (6) and were therefore not barred by the four year lapse of time. The *Ackermann* majority found the ratio decidendi of *Klapprott* to be the "extraordinary circumstances" of that case[70] as set out by Mr. Justice Black.[71] The Court went on to point out that the instant petitioner's situation in no way related to Klapprott's.[72] Where Klapprott's imprisonment had denied him of any choice regarding his actions, the present petitioner had made ". . . a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home.[73] His choice was a risk, but calculated and deliberate and such as follows the exercise of free choice."[74] Mr.

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67. *Id.* at 626.

68. 340 U.S. 193 (1950).

69. The *Ackermann* decision is doubly confusing due to changes in the composition of the court. Mr. Justice Rutledge who had concurred in the result reached by Mr. Justice Black, but not with his resolution of the Rule 60b(6) problem, in *Klapprott*, had been succeeded by Mr. Justice Clark who took no part in the case. Mr. Justice Murphy, who had concurred with his brother Rutledge in *Klapprott*, had been succeeded by Mr. Justice Minton who wrote the majority opinion in *Ackermann*. He was joined in that opinion by Mr. Justice Burton who had concurred with the majority in *Klapprott* but expressed no opinion regarding the 60b(6) problem, and by the three *Klapprott* dissenters, Justices Reed, Jackson, and The Chief Justice, who had expressly disagreed with their brother Black's analysis of 60b(6). In the *Ackermann* dissent, Mr. Justice Black, who was joined by Justices Douglas and Frankfurter, took a position which was contradictory of his opinion in *Klapprott* regarding the proper function of Rule 60b(6).

70. Ackermann v. United States, 340 U.S. 193, 199 (1950).

71. Klapprott v. United States, 335 U.S. 613 (1949). *cf.* text accompanying note 64 *supra*.

72. "By no stretch of the imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the *Klapprott* situaiton." Ackermann v. United States, 340 U.S. 193,200 (1950).

73. Ackermann had been informed by a Government attorney that the cost of appeal would require him to sell his home.

74. Ackermann v. United States, 340 U.S. 193, 198 (1950).

Justice Black's dissent contradicted his earlier *Klapprott* opinion which stated clause (6) relief was reserved for situations other than "the five particularly specified"[75] and asserted that ". . . the draftsmen of the Rule did not intend that . . . [the] specific grounds should prevent the granting of similar relief in . . . situations where fairness might require it."[76]

The idea that clause (6) was an all encompassing equity power capable of expanding the specificity of any of the five enumerated grounds for relief was short lived due to its apparent conflict with Mr. Justice Black's "extraordinary circumstances" analysis of the proper application of clause (6) in *Klapprott*.[77] However, the murky waters of the *Klapprott* decision after having been thoroughly muddied by the *Ackermann* opinions, left the federal courts almost completely at sea regarding the scope and purpose of clause (6) of Rule 60b. Virtually all courts pay lip service to the "extraordinary circumstances" doctrine of *Klapprott* as interpreted by *Ackermann*,[78] but are extremely uncertain how to apply it. Do "extraordinary circumstances" warrant using clause (6) as an exception to the specific limitations on clauses (1), (2), and (3)?[79] Or, are clause (6) and the first three clauses mutually exclusive, with the proper resort to clause (6) being only in other extraordinary situations which demand special equity relief?[80]

Logically, the clear thrust of the Rule and the language of clause (6) can only indicate the latter residual clause is intended to deal only with matters not covered in the preceding five clauses. The *Klapprott* dissent specifically so ruled, and indeed many cases have so held.[81] But the "extraordinary circumstances" doctrine continuously beclouds the issue. This is extremely unfortunate since it

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75. Klapprott v. United States, 335 U.S. 601, 614 (1949).

76. Ackermann v. United States, 340 U.S. 193, 202 (1950).

77. Judge Learned Hand, whose opinion in United States v. Karahalias, 205 F.2d 331 (2nd Cir. 1953) articulated this position so well, was forced to retract when confronted with *Klapprott* on rehearing. United States v. Karahalias, *supra* at 335.

78. *E.g.*, Rinieri v. News Syndicate Co., 385 F.2d 818 (2nd Cir. 1967); Boehm v. Office of Alien Property, 344 F.2d 194 (D.C. Cir. 1965); Fed. Dep. Ins. Corp. v. Alker, 30 F.R.D. 527 (E.D. Pa. 1962), aff'd on opinion below 316 F.2d 236 (3rd 1963); Ruddies v. Auburn Spark Plug Co., 261 F. Supp. 648 (S.D. N.Y. 1966); Delong's Inc. v. Stupp Bros. Bridge and Iron Co., 40 F.R.D. 127 (E.D. Mo. 1965); Stevens v. Stoumen, 32 F.R.D. 385 (E.D. Pa. 1963); United States v. 72.71 Acres of Land, 23 F.R.D. 635 (D. Md. 1959); Lucas v. City of Juneau, 20 F.R.D. 407 (D. Alaska 1957).

79. Stevens v. Stoumen, *supra* note 78; Delong's Inc. v. Stupp Bros. Bridge and Iron Co., *supra* note 78; United States v. 96 Cases, More or Less, of Fireworks, 244 F. Supp. 272 (N.D. Ohio W.D. 1965); Lucas v. City of Juneau, *supra* note 78.

80. Rinieri v. News Syndicate Co., 385 F.2d 818 (2nd Cir. 1967); Tobriner v. Chefer, 335 F.2d 281 (D.C. Cir. 1964); Costa v. Chapkines, 316 F.2d 541 (2nd Cir. 1963); Fed. Dep. Ins. Corp. v. Alker, 30 F.R.D. 527 (E.D. Pa. 1962), *aff'd* on opinion below 316 F.2d 236 (3rd Cir. 1963); Caputo v Globe Indemnity Co., 41 F.R.D. 436 (E.D. Pa. 1967); Ruddies v. Auburn Spark Plug Co., 261 F. Supp. 648 (S.D. N.Y. 1966); Davis v. Wadsworth Const. Co., 27 F.R.D. 1 (E.D. Pa. 1961); United States v. 72.71 Acres of Land, 23 F.R.D. 635 (D.Md. 1959); Vaughn v. Petroleum Conversion Corp., 120 F. Supp. 175 (D. Conn. 1953).

81. Cases cited note 80 *supra*.

ought never have arisen in the first place. Mr. Justice Black's *Klapprott* opinion which gave birth to the doctrine is a travesty on clear thinking. In deciding that petitioner Klapprott's conduct could not fairly be classified as "neglect" at all[82] and thus eliminating the time limitation problem of the "excuseable neglect" language of 60b(1), Justice Black applied precisely the test intended to determine whether or not "neglect" of a legal matter ought to be excuseable under 60b(1).[83] The failure to attend to legal business of which one is aware must necessarily be neglect. The term "neglect" as used in the law usually implies fault, and a court of equity will not exercise its powers to aid one truly at fault in a matter. Therefore, when one's inattention to his legal business is due *not* to mere "neglect," but rather to extenuating or extraordinary circumstances, usually beyond one's control, which render such neglect "excuseable," relief may be had under 60b.[84] It must however, by the express language of the Rule, be had pursuant to clause (1) and subject to its limitations. The proper issue in *Klapprott* was not the presence or absence of "neglect" as Mr. Justice Black indicated, for that was clearly present: Klapprott did nothing concerning the default judgment against him for four years.[85] The proper question was: do the circumstances warrant excusing petitioner's neglect, and, if so, does the Rule permit relief? Thus, the obvious becomes clear: Rule 60b relief is an extraordinary remedy, and in *all* situations affords relief only in extraordinary circumstances. Mr. Justice Black's mental gymnastics on behalf of Klapprott were, therefore, ill conceived inasmuch as his "neglect," whether excuseable originally or not, had become *in*excuseable under the express language of the Rule by the lapse of more than a year.

B. *Proper Application of 60b(6)*

If the confusion of opinion and muddled application of clause (6) stemming from the *Klapprott* and *Ackermann* decisions were to be cleared away and the "any other reason" clause applied only in situations and for reasons *other* than those encompassed by the five preceding grounds for relief and never as an exception to the specific terms of those grounds, would it become, as Judge Hand suggested, a "meagre receptacle for vestigial equities" without use or meaningful purpose? Clearly, it would not. Several situations remain which can not fairly be said to be within the purview of the five specific grounds of the Rule. If equitable relief from a final judgment, order, or proceeding is to be had in these situations, then it must flow from the saving provisions of clause (6).

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82. Klapprott v. United States, 335 U.S. 601, 613 (1949).

83. Di Vito v. Fidelity and Deposit Co. of Maryland, 361 F.2d 936 (7th Cir. 1966); Negron v. Peninsular Navigation Corp., 259 F.2d 859 (2d Cir. 1960); Rooks v. American Brass Co., 263 F.2d 166 (6th Cir. 1959); Barber v. Turberville, 218 F.2d 34 (D.C. Cir. 1954); Trueblood v. Grayson Shops of Tenn., Inc., 32 F.R.D. 190 (E.D. Va. 1963); Dalminter v. Jessie Edwards, Inc., 27 F.R.D. 491 (S.D. Tex. 1961); Ledwith v. Storken, 2 F.R.D. 539 (D. Neb. 1942).

84. Cases cited note 83 *supra*.

85. The dissent of Justices Reed, Jackson, and The Chief Justice pointed out that Klapprott's imprisonment had not prevented him from vigorously defending in the criminal proceedings, and that he was continuously consulted by counsel during his incarceration. Klapprott v. United States, 335 U.S. 601, 626 (1949).

Certain situations have been held to be beyond even the saving reach of Rule 60b(6). A clearly erroneous decision at trial may not be asserted as the basis for a clause (6) motion since the remedy must be by appeal.[86] Furthermore, even a favorable post-judgment shift or reversal in the prevailing judicial view which occurs after time for appeal affords no clause (6) grounds for relief.[87] The claimed absence of an impartial trial judge because of alleged stock interest in a corporate litigant has been held not to state a good 60b(6) motion,[88] and error of the clerk of the court is not a proper ground for motion under clause (6),[89] although one case has so held.[90]

On the other hand the "any other reason" clause has been held to be the only possible ground for equitable relief in several situations. For example, relief from final orders entered as the result of stipulations between the parties pursuant to a good faith settlement agreement are nowhere expressly dealt with in the Rule. Accordingly, a court granted such relief under clause (6) after a finding that the agreement to dismiss with prejudice had been entered into in good faith, but that one party subsequently wrongfully refused to perform.[91] In so doing, the court exercised its power to return both parties to the status quo which existed immediately prior to the entry of the order of dismissal. Although as a general rule, the knowledge and conduct of counsel are attributed to the party in Rule 60b proceedings,[92] courts have allowed some parties limited relief under 60b(6) when the conduct of their attorney is grossly improper, and the party himself ought not in all equity suffer for it.[93] Another possible area of clause (6) relief involves the failure on the part of the party procuring the default judgment to notify the party against whom it is sought, or to take any other steps to protect him which may be required under Rule 55b.[94] Courts have held a clause (6) motion by the

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86. Wagner v. United States, 316 F.2d 871 (2nd Cir. 1963); Hartman v. Lauchli, 304 F.2d 431 (8th Cir. 1962); Annat v. Beard, 277 F.2d 554 (5th Cir. 1960).

87. Polities v. United States, 364 U.S. 426 (1960).

88. U.S. Fidelity and Guarantee Co. v. Lawrenson, 334 F.2d 464 (4th Cir. 1964).

89. This problem is covered by FED. R. CIV. P. 60a, CLERICAL MISTAKES. "Clerical mistakes . . . may be corrected by the court at any time on its own initiative or on the motion of any party . . . ."

90. Cavalliotis v. Salomon, 357 F.2d 157 (2nd Cir. 1966).

91. Kelly v. Greer, 334 F.2d 434 (3rd Cir. 1964).

92. Standard Newspapers, Inc. v. King, 375 F.2d 115 (2nd Cir. 1967); Meyers v. Gardner, 361 F.2d 343 (9th Cir. 1966); Dalrymple v. Pittsburg Consolidated Coal Co., 24 F.R.D. 260 (W.D. Pa. 1959); Caputo v. Globe Indemnity Co., 41 F.R.D. 436 (E.D. Pa. 1967).

93. Hutton v. Fisher, 359 F.2d 913 (3rd Cir. 1966); Barber v. Turberville, 218 F.2d 34 (D.C. Cir. 1954); Dyotherm Corp. v. Turbo Machine Co., 39 F.R.D. 370 (E.D. Pa. 1966); Minneapolis Brewing Co. v. Merritt, 143 F. Supp. 146 (D. N.D. 1956).

94. FED. R. CIV. P. 55b(2), ". . . no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, . . . who has appeared therein. . . . If the party against whom the judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment . . . ."

party so defaulted to state a valid ground for relief,[95] even as late as eight years after the entry of default,[96] although such situations might conceivably fit under the "other misconduct of an adverse party" language of clause (3). Finally, a single court has held that mistakes of law by counsel which can be excused or adequately explained may not fit under the "mistake" language of clause (1), and granted relief based upon the "any other reason" language of clause (6).[97]

V. Conclusion

The "any other reason justifying relief from the operation of the judgment" clause of Rule 60b has an important and independent role to play in achieving the dual purposes of the 1948 revision of that Rule. Its proper use should insure the fulfillment of the revising committee's desire for ample grounds for relief from final judgments without unduly infringing upon our legal system's need for ultimate finality in litigation. Rule 60b is well drafted to serve those purposes, and its application by the courts has for the most part promoted them. Any rule of procedure designed to be an all inclusive and exhaustive substitute for traditionally equitable remedies must necessarily give rise to some degree of confusion and uncertainty regarding its application. However, the problems which obscure the application of Rule 60b need not persist. It is only because they arose so soon after its promulgation, and at the Supreme Court level, that they do. The Supreme Court has not addressed itself to this problem since its 1950 decision in *Ackermann v. United States*.[98] It should do so. The lack of clarification from the source of the confusion shrouds Rule 60b in the same cloak of mystery and uncertainty that obscured its common law antecessors, thereby frustrating the very purpose of its existence. This situation has prevailed for nearly twenty years, hopefully it will not persist much longer.

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95. Cavalliotis v. Salomon, 357 F.2d 157 (2nd Cir. 1966); Pierre v. Bernuth, Lembcke Co., 20 F.R.D. 116 (S.D. N.Y. 1956).
96. Pierre v. Bernuth, Lembcke Co., *supra* note 95.
97. Patapoff v. Vollstedt's, Inc., 267 F.2d 863 (9th Cir. 1959).
98. 340 U.S. 193 (1950).