RELIEF FROM FRAUDULENT JUDGMENTS IN THE FEDERAL COURTS: MOTION TO VACATE OR INDEPENDENT ACTION—OPPOSITE SIDES OF THE SAME COIN

I. INTRODUCTION

Traditionally, there has existed a dichotomy with regard to the treatment of the finality of judgments which have been procured by the use of fraud, or where other irregularities argue against unyielding enforcement. On the one hand, considerations of the sanctity of final judgments which allow litigants to pick up their lives, have led to the development of *res judicata* principles. On the other hand, there remains the question of whether a judgment obtained through unfair methods should be enforced.[1] A morass of common law and ancillary remedies were developed in an attempt to strike a balance between these conflicting considerations, but they often proved more confusing than helpful.[2] Federal Rule of Civil Procedure 60(b) [hereinafter referred to as Rule 60(b)] as promulgated, and later amended, addresses this problem by providing five specific grounds for relief: mistake, inadvertance, surprise, or excusable neglect; newly discovered evidence; fraud; void judgment; and, accord and satisfaction or release—as well as a sixth ground of "any other reason justifying relief."[3]

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1. *See infra* notes 152-155 and accompanying text.

2. For a thorough discussion of those remedies see Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 659-682 (1946) [hereinafter cited as Moore and Rogers]. *See also* 7 J. MOORE, J. LUCAS, MOORE'S FEDERAL PRACTICE ¶¶ 60.38-60.15 at 60-83-60-115 (2d ed. 1985) [hereinafter MOORE].

3. Federal Rule of Civil Procedure 60(b) provides in full:

> (b) Mistakes; Inadvertence; Excusable 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 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, discharged, or a prior judgment upon which it has been 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

Although the rule was intended to be "a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies,"[4] problems remain. Most notable are the savings clauses which expand the enumerated grounds for relief: "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 set aside a judgment for fraud upon the court."[5] Although Rule 60(b) does provide a one year time limit to file a motion based on any of the first three specified grounds,[6] that time limit does not apply to independent actions brought under the savings clause.[7] Additionally, the savings clause allowing an independent action is overly broad. Apparently intended to be used as a last ditch remedy, where the rule will no longer apply,[8] the clause is so sweeping in its scope that relief might arguably be sought by an independent action even if a motion under Rule 60(b) would provide a remedy, and was being maintained.[9] This problem is exacerbated by the fact that an independent action seeking relief need not be brought in the court rendering the original judgment.[10] Finally, while subsection (3) provides that fraud, whether intrinsic or extrinsic to the

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defendant not actually personally notified 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 independent action.

FED. R. CIV. P. 60(b).

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

5. *See supra* note 3.

6. *Id.*

7. *See* FED. R. CIV. P. 60(b) advisory committee note (1946 amendment).

If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statute of limitations.

Id.

8. *See, e.g.*, Carter v. Dolce, 741 F.2d 758, 759 (5th Cir. 1984) ("Resort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances") (quoting 11 WRIGHT & MILLER FEDERAL PRACTICE AND PROCEDURE § 2868 at p. 239).

9. *See, e.g.*, Comment, *Rule 60(b) Survey and Proposal for General Reform*, 60 CALIF. L. REV. 531, 543-544 (1972) [hereinafter Comment].

10. FED. R. CIV. P. 60(b) advisory committee note (1946 amendment)

Two types of procedure to obtain relief from judgments are specified in the rules . . . . One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment.

Id.

action, will provide a basis for relief from a judgment,[11] the anachronistic distinctions between these types of fraud remain when an independent action is the mechanism chosen to seek that relief.[12] The majority of courts require extrinsic fraud, or fraud which prevents the question from being fully litigated, as a basis for relief.[13] Although this harsh requirement sacrifices valid claims on the altar of finality of judgments,[14] it is by no means the only problem raised by the question of intrinsic versus extrinsic fraud. The extrinsic fraud requirement is the majority, but not the only rule. There are courts which refuse to follow, or have criticized this requirement, thus creating confusion within the federal circuits[15] and the state court systems.[16] Additionally, it is unclear whether the distinction applies to the question of "fraud upon the court."

The purpose of this Note is to trace the development of Rule 60(b) from its origin to its current form, and to suggest that the rule be amended: First, to abolish the inequitable and often confusing requirement of extrinsic fraud as a basis for relief by abolishing the largely superfluous independent action; and second, to do away with the one year time limit imposed on subsections (1) through (3). Although this Note will, of necessity, touch on some of the other grounds for relief, it will concentrate on the question of fraud in its various forms as a basis for escaping a judgment, particularly under the savings clauses found in the rule.

As an aid to the reader, the question of reform of Rule 60(b) will be considered in the context of a specific factual situation. It is hoped that this hypothetical fact situation will allow the reader to more easily recognize the alternatives now existing under Rule 60(b), and appreciate the benefits of the proposed amendments.

A. *Hypothetical Factual Situation*

Mr. and Mrs. Plaintiff, as holders of a large number of shares of stock in Defendant, Inc., brought a derivative action in federal court against Messrs. Smith and Jones, as directors of the corporation. The action was based on violations of the Securities and Exchange Act of 1934, and Securities and Exchange Commission Rules.[17] Pursuant to that action, a judicially

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11. *See supra* note 3.
12. *See infra* note 51 and accompanying text.
13. *See infra* notes 134-135 and accompanying text.
14. *See infra* notes 62, 64 and accompanying text.
15. *See infra* note 134 and accompanying text.
16. *Id.*
17. Although the factual situation deals with alleged securities fraud, this Note is not intended to treat specific questions of this type of fraud. Nor is the purpose of this Note to discuss derivative stockholder actions under Federal Rule of Civil Procedure 23.1. Rather, this situation was chosen merely as an example of a situation which could lead to problems under Rule 60(b) in the federal courts.

supervised settlement conference was held before Judge Civil, and settlement was reached. Under the terms of that settlement, Smith and Jones agreed to buy 10,000 shares of Defendant, Inc. stock from the Plaintiffs for $125,000.00, or $12.50 per share. This represented a substantial increase over the current trading price of $10.00 per share. Judge Civil held a hearing on the agreement, and after taking testimony from each of the parties, formally entered an order approving the settlement.

Shortly thereafter, the stock price skyrocketed, and the Plaintiffs learned that, at the time of the settlement conference, Smith and Jones had reason to know that the value of the shares of stock would soon be worth much more than the agreed upon price of $12.50 per share, due to acquisitions which Defendant, Inc. was finalizing at the time of the settlement hearing. Both Smith and Jones had testified at the settlement hearing that the going rate of $10.00 per share was a fair price for the stock, and that the offer of $12.50 was based on a desire to bring the pending litigation to an end. This testimony with regard to the value of the shares was uncontested.

Based on this new information, the Plaintiffs realized that they would lose a substantial amount of money if they were forced to abide by Judge Civil's order approving the settlement agreement. Six months after the order approving the settlement was entered, the Plaintiffs filed a motion in Judge Civil's court to vacate the settlement order, based on grounds of "fraud . . . misrepresentation, or other misconduct of an adverse party."[18] The Plaintiff's position is that Smith and Jones, taking advantage of inside information available to them as directors of Defendant, Inc., misled their adversaries as to the true value of the stock by committing perjury at the settlement hearing. Before continuing with the saga of *Plaintiff v. Defendant, Inc.*, and the problems it might pose for Judge Civil and the parties, a review of the rule in question might be helpful.

II. History of Rule 60(b)

A. *1938 Version*

The original version of Rule 60(b), as promulgated by the United States Supreme Court in 1938, is somewhat different from the rule which is in effect today.[19] The original version read:

> (b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of

18. Fed. R. Civ. P. 60(b)(3). *See also supra* note 3.
19. *See supra* note 3.

> a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, USC Title 28, [Section] 118, a judgment obtained against a defendant not actually personally notified.[20]

This version of Rule 60(b) made no reference to "independent actions," nor did it include fraud as a specific ground for relief. In this regard, the Preliminary Draft of May 1936 was much closer to the rule as it stands today. That draft read:

> (b) *Relief Against Accident, Fraud, for Newly Discovered Evidence, etc.* On motion duly made with reasonable diligence and before the time for appeal has expired the court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding upon any of the following grounds: (1) accident, mistake, surprise or inadvertence; (2) fraud, misrepresentation or other misconduct of an adverse party; (3) material evidence newly discovered which the moving party could not by the exercise of reasonable diligence have discovered and produced at the trial. But if the facts constituting any such ground become known to a party or his legal representative within the time allowed him to move for a new trial, his sole means of obtaining such relief upon that ground shall be by motion for a new trial. Nothing herein, however, shall limit the power of a court to entertain an independent action to relieve a party or his legal representative from a judgment, order or other proceeding.[21]

As Professor Moore explains it, the cause for the change was apparently the result of the Committee's desire to base the rule on an already working model.[22] The provisions of Rule 60(a) were based upon "the substance of [Equity Rule 72] dealing with clerical mistakes."[23]

> Relative to matters of substance the Committee, however, did not have an adequate model in either the common law or equity practice, since these were geared to term time.[24] Upon the strong recommendation of its member from California, Mr. Warren Olney, Jr., the Committee substan-

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20. 7 Moore, *supra* note 2, ¶ 60.10[4] at 60-70-60-71. *See also* Moore and Rogers, *supra* note 2 at 632.

21. 7 Moore, *supra* note 2, ¶ 60.10[12] at 60-69.

22. *Id.*

23. Moore and Rogers, *supra* note 2, at 630.

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> At [the] time the term of the court was the critical factor in the district court's power over its final judgments at law and in equity. While the district court had plenary power over such judgments during the term, it was in general without power to reconsider the final judgments at law and in equity after the expiration of the term, unless (1) the proceeding seeking relief was begun within the term, or (2) the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period.

Moore and Rogers, *supra* note 2, at 627.

> tially adopted the California practice in the first two sentences (particularly the first) of Rule 60(b).[25]

The version of Rule 60(b), as adopted by the Supreme Court in 1938, was thus based in large part on California Code of Civil Procedure section 473.[26] Neither the California rule nor the new federal rule provided provision for relief by fraud, "although the deficiency [was] met by decisional emendation."[27] In addition, the 1938 version of Rule 60(b) referred to "actions," where the 1936 draft had used the term "independent actions." This change of language, particularly in view of the fact that the California rule was silent on the issue, created some problems for courts. According to Professor Moore, this reference to "actions" might be construed to mean

> that only *original* actions are saved and that a merely ancillary proceeding such as a bill of review or coram nobis is abolished. But the references in the Committee Note[28] to Judge Dobie and Professor Simkins are to discussions of bills of review, independent actions, and incidentally writs of error coram nobis.[29]

This ambiguity was resolved by the courts in favor of "keep[ing] alive the ancient doctrines surrounding the traditional common law and equitable ancillary remedies in a modern code procedure."[30] Despite the fact that "[a]s construed, [the 1938 version of Rule 60(b)] operated reasonably well,"[31] problems still remained; among them: the rule specified only one

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25. Moore and Rogers *supra* note 2, at 631. *See also* 7 MOORE, *supra* note 2, ¶¶ 60.10[2], 60.10[4] at 60-69-60-71.

26. 7 MOORE, *supra* note 2, ¶¶ 60.10[2], 60.10[4] at 60-69-60-70; Note, *Seeking More Equitable Relief from Fraudulent Judgments: Abolishing the Extrinsic-Intrinsic Distinction*, 12 PAC. L.J. 1013, 1015 (1981) [hereinafter *Abolishing the Distinction*].

California Code of Civil Procedure § 473 provides:

> *Relief from judgment taken by mistake, etc.* The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken.

Moore and Rogers, *supra* note 2, at 631 (quoting the third paragraph of § 473).

27. Moore and Rogers, *supra* note 2, at 632, 644-46. *See also Abolishing the Distinction*, *supra* note 26, at 1016 ("Section 473 has been construed liberally and the [California] courts consistently have held that relief is available on grounds of fraud").

28. Attempting to explain the reference to "actions," the original, 1938, Committee Note to Rule 60(b) stated: "For the independent action to relieve against mistake, etc., see Dobie, *Federal Procedure*, pages 760-765, compare 639; and Simkins, *Federal Practice*, ch. CXXI (pp. 820-830), and ch. CXXII, (pp. 831-834), and compare § 214." FED. R. CIV. P. 60(b) advisory committee note.

29. Moore and Rogers, *supra* note 2, at 633.

30. Moore and Rogers, *supra* note 2, at 682. *See also* 7 MOORE, *supra* note 2, ¶ 60.10[9] at 60-82-60-83.

31. Comment, *supra* note 9, at 536 (quoting 7 MOORE ¶ 60.17, at 91, now found at ¶

ground for relief; the six month period for seeking relief was too short; and, there were questions regarding the meaning of the savings clauses.[32] These, and other deficiencies, caused commentators to suggest reforms,[33] and prompted the Advisory Committee to adopt them.

B. *1946 Amendment*

After the commentary which followed the promulgation of the 1938 version of Rule 60(b), in 1944[34] the Advisory Committee began work on what would become the 1946 amendments. After working through two preliminary drafts,[35] the Committee settled on a version of the rule which was a much more "expansive, liberal approach to procedure."[36] Those amendments, in large part, created the rule as it stands today:[37]

> [S]ubdivision (1) no longer applied only to the movant's own mistake, inadvertence, surprise, or neglect, nor solely to judgments taken 'against him'; the new rule included newly discovered evidence as grounds for relief in subdivision (2); it expressly included fraud as grounds for a motion and abolished the extrinsic-intrinsic distinction in subdivision (3); it added the 'any other reason' clause as subdivision (6); it raised the time limitation under subdivisions (1)-(3) from six months to one year; it made 'fraud upon the court' a ground for relief; it substituted 'an independent action' for 'an action'; and it abolished the ancillary remedies and provided that all relief thereafter was to be by motion or by independent action.[38]

Although the 1946 amendments were certainly needed, and at least with

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60.18[1] n.4 at 60-129).

32. 7 MOORE, *supra* note 2, ¶ 60.18[1] n.4 at 60-129.

33. *See, e.g.*, Moore and Rogers, *supra* note 2. This particular article had a major impact on the committee when it considered the 1946 amendments. Most of the changes suggested by the article, *id.* at 685-93, were incorporated by the Committee. Additionally, the Advisory Committee Notes to the 1946 amendment make reference to the article no less than four times. FED. R. CIV. P. 60(b) advisory committee notes (1946 amendment).

34. *See* 7 MOORE, *supra* note 2, ¶¶ 60.18[3]-60.18[5] at 60-131-60-137.

35. For a discussion of the evolution of the 1946 amendments, *see* 7 MOORE, *supra* note 2, ¶¶ 60.18[2]-60.18[5] at 60-129-60-137.

36. Comment, *supra* note 9, at 538.

37. A later amendment in 1948, "substitute[d] the new statutory reference 'Title 28 U.S.C., § 1655' for former 'Section 57 of the Judicial Code, USC Title 28, § 118.' " 7 MOORE, *supra* note 2, ¶ 60.18[5] at 60-137. Although amendments were suggested by the Advisory Committee in 1955, the 1948 amendments represent the last changes to Rule 60(b). Comment, *supra* note 9, at 531.

38. Comment, *supra* note 9, at 538; 7 MOORE, *supra* note 2, ¶ 60.18[5] at 60-16-60-137. *See also supra* note 3. In addition to the amendments to Rule 60(b), Federal Rule of Civil Procedure 6 was amended in 1946 to exclude 60(b) from the time expansion provisions of that rule: " 'but [the court] may not extend the time for taking any action under Rule . . . 60(b) . . . except to the extent and under conditions stated in [it].' " Comment, *supra* note 9, at 538 n.58.

respect to fraud as a ground for relief, provided "a number of distinct advantages over the common law and equitable remedies,"[39] they do not go far enough. First, there appears to be no principled reason to retain the mechanism of an independent action.[40] This is especially true in view of the fact that the action may be brought in a court other than the one which granted the original judgment,[41] and when one remembers that the harsh extrinsic-intrinsic fraud distinction still applies to independent actions.[42] Second, there is no reason for retaining the one year time limit for subdivisions (1)-(3), while applying a "reasonable time" limit on other motions under the rule.[43]

III. Independent Actions

A. *Requirements*

From the foregoing, it seems that the Plaintiffs in our hypothetical securities fraud case have satisfied the requirements for a Rule 60(b)(3) motion to vacate the settlement order based on the fraud of an adverse party. They have utilized the motion procedure, and have done so six months after the original decision; well within the one year time limit. Should relief be sought more than one year later,[44] or should they file the 60(b)(3) motion in a court other than Judge Civil's,[45] however, they would not be able to take advantage of the motion procedure under Rule 60(b). Instead, they would have to depend upon an independent action to obtain relief. Although the rule specifically provides that the availability of an independent action is not compromised by the adoption of Rule 60(b),[46] several elements must still be proven in order to take advantage of the procedure:

> (1) a judgment which ought not, in equity and good conscience, be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4)

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39. Note, *Attacking Fraudulently Obtained Judgments in the Federal Courts*, 48 Iowa L. Rev. 398, 401 (1963) [hereinafter *Attacking Judgments*]. *See also* Comment, *supra* note 9, at 567 (60(b)(3) allowing "relief from fraud 'whether heretofore denominated intrinsic or extrinsic' was certainly a step towards abolishing the extrinsic-intrinsic distinction.").

40. *But see* 7 Moore, *supra* note 2, ¶ 60.36 at 60-365-60-371 (detailing the basis for independent actions). *Cf.* Comment, *supra* note 9, at 544 ("[i]n view of the third and sixth grounds [fraud and 'any other reason'], it is not apparent why the independent action in equity was still preserved") (quoting Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 Temp. L.Q. 77, 83 (1951)).

41. *See supra* note 10 and accompanying text.

42. *See infra* note 51 and accompanying text.

43. *See supra* note 3.

44. *See supra* note 7. *See also* Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 n.7 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970).

45. *See supra* note 10.

46. *See supra* note 3.

> the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.[47]

Additionally, these are "indispensable elements,"[48] all of which must be satisfied before an independent action may be entertained.

Clearly, Judge Civil's order approving the sale of stock was based on uncontested, but perjurous, testimony, and ought "not in good conscience" be enforced. Secondly, because the wronged party in our hypothetical case is the plaintiffs, rather than defendant, they are not in a position to put forward "a good defense to the alleged cause of action on which the judgment is based." For the purposes of this Note, however, we will assume that they had a strong case in the original derivative suit. They are alleging fraud, thus satisfying the third element of the test. Additionally, we will assume *arguendo* that the Plaintiffs were not guilty of unclean hands, and therefore pass the fourth element. Finally, we assume that the time limit has run for a motion under Rule 60(b), or the Plaintiffs have chosen to file in a court other than Judge Civil's and, therefore, there is no adequate remedy at law.[49] This, however, does not end the inquiry into whether the Plaintiffs may succeed in bringing an independent action. Although Rule 60(b)(3) specifically provides that "fraud (whether heretofore denominated intrinsic or extrinsic)"[50] provides a basis for relief by motion, the distinction still applies when an independent action is utilized.[51]

B. *The Extrinsic-Intrinsic Distinction*

1. *Throckmorton*

The major source of the distinction between intrinsic and extrinsic fraud is the case of *United States v. Throckmorton*.[52] The object of the action in *Throckmorton* was to obtain a decree setting aside a 1853 confirmation of the claim of one Richardson to certain lands in California, allegedly

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47. National Sur. Co. v. State Bank, 120 F. 593, 599 (8th Cir. 1903). *See also* Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985); Southmark Properties v. Charles House Corp., 742 F.2d 862, 872 n.14 (5th Cir. 1984); Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 667-68 (5th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970); Chicago R.I. & P. Ry. v. Callicotte, 267 F. 799, 810 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921); Budge v. Post, 544 F. Supp. 370, 376 n.4 (N.D. Tex. 1982); Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179, 187 (D. Md. 1979). *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS §§ 78-79 (1982).

48. National Sur. Co. v. State Bank, 120 F. at 599.

49. "The proceeding by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of law . . . ." Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947).

50. *See supra* note 3.

51. 7 MOORE, *supra* note 2, ¶ 60.24[1] at 60-206; Comment, *supra* note 9, at 539; *Attacking Judgments*, *supra* note 39, at 404-05; Moore and Rogers, *supra* note 2, at 648-49.

52. 98 U.S. 61 (1878).

held under a Mexican grant.[53] That confirmation, originally "made by the board of commissioners of private land claims in California," was affirmed by the District Court of the United States in 1856,[54] and an appeal to the Supreme Court of the United States was dismissed in 1857.[55] In 1876, more than twenty years after the original decree, the action which was the basis of the Court's opinion was filed.[56] The general ground for relief was fraud, with the specific allegation being that Richardson, after filing with the board, became concerned that he might not have the evidence necessary to back up his claim, and sought to bolster it.[57] In order to do so, Richardson, according to the government,

> made a visit to Mexico, and obtained from Micheltorena, former political chief of California, his signature on or about the first day of July, 1852, to a grant which was falsely and fraudulently antedated, so as to impose on the court the belief that it was made at a time when Micheltorena had power to make such grants in California; and it [was] alleged that in support of this simulated and false document he also procured and filed therewith the depositions of perjured witnesses.[58]

It can thus be seen that the claims of the United States regarding the actions of Richardson in the *Throckmorton*[59] case are not far removed from those being made by Mr. and Mrs. Plaintiff against Messrs. Smith and Jones in our hypothetical case. The *Throckmorton* decision, however, will give them little comfort.

The Court took a circuitous route to arrive at a final decision. After noting that the government was not bound by the statute of limitations,[60] the Court quoted the general rule "that fraud vitiates the most solemn contract, documents, and even judgments."[61] The Court, however, continued, noting:

> There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of law—no longer open to inquiry in the usual and ordinary methods. . . .
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> There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to

53. *Id.* at 62.
54. *Id.*
55. *Id.* at 63.
56. *Id.* at 64.
57. *Id.* at 62.
58. *Id.*
59. Richardson had died in the intervening twenty years. The government brought the action against the new owners who had taken by purchase and conveyance. *Id.* at 64.
60. *Id.*
61. *Id.* at 64-65.

> prevent repeated litigation between the same parties in regard to the subject of controversy; namely, *interest rei publicae, ut sit finis litium,* and *nemo debet bis vexari pro una et eadam causa.*[62]

Having apparently disposed of the claim being made by the government, Justice Miller retreated from his position:

> But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives in his defeat; or where the attorney regularly employed sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.[63]

Despite his reference to this exception, Justice Miller chose to rely on the doctrine of finality of judgments to decide the case: "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it [is] founded on a fraudulent instrument, or perjured evidence, or for any other matter which was actually presented and considered in the judgment assailed."[64] The decision then goes on to pronounce the general rule:

> [T]he acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.[65]

Finding that the complained of fraud did not fall within the extrinsic category, the Court affirmed "the decree of the Circuit Court sustaining a demurrer to the bill."[66] In short, while the Court found that fraud vitiates judicial proceedings, it drew the line at those fraudulent acts which actually take place in court, specifically finding that perjured testimony and other fraudulent evidence introduced in court would not relieve from a judgment.

The rationale for this distinction is, as one commentator has put it,

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62. *Id.* at 65.
63. *Id.* at 65-66 (citations omitted).
64. *Id.* at 66.
65. *Id.* at 68.
66. *Id.* at 71.

based on the "Anglo-American tradition [that] every person is entitled to his or her day in court. But, when a final decision has been reached, that should be the end of it."[67] Put another way, the Court "feared endless litigation as being worse than the occasional miscarriage of justice."[68] This is apparently because "the ability to cross-examine witnesses during the trial proceeding is said to afford an opportunity for the opposing party to detect any perjury."[69]

This rationale seems simplistic at best; it fails to take into consideration those situations where the complaining party was unaware of the alleged perjury, and thus had no opportunity or inclination to vigorously cross-examine. At worst, it is unreasonably harsh, especially in view of the fact that the modern version of Rule 60(b) abolishes the distinction if a motion is brought within one year. The problems with the *Throckmorton* rule, however, do not end with its harshness. For nearly a century there has been a serious question as to whether *Throckmorton* is still in effect.

2. *Marshall*

Thirteen years after the *Throckmorton* decision, the Court again addressed the question of whether forged documents may be the basis for relief from a judgment. In *Marshall v. Holmes*,[70] the Court was faced with a situation wherein the petitioner, Mrs. Marshall, alleged that several judgments entered against her had been obtained by the use of a forged letter introduced into evidence in each of the state court actions.[71] The Court, in a narrow holding, allowed Mrs. Marshall to remove her cause of action to federal court on the basis of diversity jurisdiction.[72] As one commentator has noted, however, "[t]his narrow holding was forgotten by later courts, which looked instead to the Court's dictum:"[73]

> While as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have

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67. *Abolishing the Distinction*, *supra* note 26, at 1025 (quoting M. GREEN, BASIC CIVIL PROCEDURE 227 (2d ed. 1979)).

68. *Attacking Judgments*, *supra* note 38, at 406. *See, e.g.*, American Bakeries Co. v. Vining, 80 F.2d 932, 933 (5th Cir. 1935)(Commenting on the harshness of the *Throckmorton* rule as "shocking to the judicial sensibility," but noting that "the law does not guarantee correctness of judicial fact-finding, but, on condition of diligence, a fair and full trial only.").

69. *Abolishing the Distinction*, *supra* note 26, at 1026.

70. 141 U.S. 589 (1891).

71. *Id.* at 595.

72. *Id.* at 600-01.

73. Comment, *supra* note 9, at 545.

> availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."[74]

There can be no doubt that the alleged fraud in *Throckmorton*, or in our hypothetical fact situation, is virtually on all fours with that found in *Marshall*. All three cases involve forged documents and/or perjury which was introduced at trial. Yet, the first Mr. Justice Harlan announced in dicta that this type of fraud *would* serve to give relief from a judgment.[75] Justice Miller had held exactly the opposite in *Throckmorton*. To further complicate matters, the *Marshall* Court, at the end of the above quoted dicta, cited *Throckmorton* as authority for the statement.[76]

It is difficult to rationalize these two cases. Is it enough to say that the language of *Throckmorton* was the holding of the court, while that of *Marshall* was mere dicta? Is it easier to rationalize these inconsistencies by saying that the *Throckmorton* case was over twenty years old at the time of the Supreme Court decision,[77] where Mrs. Marshall had brought her action a little over a year after the judgments were entered against her?[78] If these distinctions are valid, as they certainly seem to be, was it the intention of *Marshall* to overrule *Throckmorton sub silentio*? If so, why the approving citation to *Throckmorton*? And why, after nearly a century, hasn't the Court made a specific pronouncement on the issue?

Even when given the chance to dispel the confusion, the Supreme Court declined. In *Graver v. Faurot*,[79] the Seventh Circuit Court of Appeals, finding it impossible to either reconcile the two cases, or choose between them, certified the question to the Supreme Court.[80] After pointing out that the sixth section of the Judiciary Act did not permit the circuit court to certify the entire case to the Supreme Court,[81] the Supreme Court found that it was without power to deal with the case as certified, and dismissed it.[82] Although the Court pointed out that "some hesitation in decision may temporarily result until it is finally determined whether [the Seventh Circuit's assumption that the Supreme Court had applied a general rule of law differently in two cases was] justified, and, if justified, the anomaly is cor-

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74. Marshall v. Holmes, 141 U.S. at 596. Notice the similarities between the requirements announced in *Marshall* and those elements required to support an independent action as enunciated in *Nat'l Sur. Co.*, *supra* note 47 and accompanying text.

75. Marshall v. Holmes, 141 U.S. at 596.

76. *Id.*

77. *See supra* note 56 and accompanying text.

78. Comment, *supra* note 9, at 545.

79. 162 U.S. 435 (1896).

80. *Id.* at 436.

81. *Id.* at 437.

82. *Id.* at 438.

rected,"[83] the Court nonetheless felt "such determination ought not to be attempted save where the point must be disposed of on a record after final decree."[84] To say the least, the Court's prediction that some "hesitation would result" before the question was resolved has proved to be a major understatement. *Graver* was heard in 1896, and the question still remains. If anything, later pronouncements by the Court, which have been incorporated into the body of Rule 60(b), have served to muddy the waters still more.[85]

3. *Fraud Upon the Court*

The third savings clause of Rule 60(b)[86] provides that "[t]his rule does not limit the power of the court to . . . set aside a judgment for fraud upon the court."[87] Although not falling within the specific provisions of an independent action, the term "fraud upon the court" is related to the intrinsic-extrinsic distinction. This is because the 1946 amendment, while making "fraud upon the court" a specific ground for relief, did not define the term, or how it was to be applied. Rather, the Advisory Committee note directs the reader to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[88] as an illustration of what constitutes fraud upon the court.[89]

a. Hazel. The *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* case involved "the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it . . . to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate."[90] The case revolved around a 1926 patent application which had been pending in Hartford's favor.[91] The Patent Office was strongly opposed to the issuance of the patent, and, to help secure it, "certain officials and attorneys of Hartford determined to have published in a trade journal an article from an ostensibly disinterested expert which would describe the . . . device as a remarkable advance in the art of fashioning glass by machine."[92] The Hartford officials wrote the article, and persuaded "one William P. Clarke, widely known as National President of the

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83. *Id.*

84. *Id.*

85. *See infra* notes 87-128 and accompanying text.

86. The first savings clause deals with independent actions; the second, (which is of little import for the purposes of this Note) with the power of the court to grant relief to parties not personally notified under 28 U.S.C. § 1655. *See supra* note 3.

87. *See supra* note 3.

88. 322 U.S. 238 (1944), *overruled in part by*, Standard Oil Co. v. United States, 429 U.S. 17 (1976).

89. FED. R. CIV. P. 60(b) advisory committee note (1946 amendment).

90. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 239. It was the requirement of the appellate court mandate with which *Standard Oil*, *supra* note 87, dealt.

91. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 240.

92. *Id.*

Flint Glass Workers Union" to sign it, and thus claim it as his own.[93] The article was subsequently published and introduced in support of the pending patent application.[94] The patent was issued in 1928, and six months later Hartford sued Hazel for infringement.[95]

The district court, without referring to the spurious article, dismissed Hartford's infringement action for lack of evidence.[96] On appeal, however, Hartford's attorneys, including one who had played a part in the preparation and publication of the article, directed the court's attention to the piece.[97] "Quoting copiously from the article," the circuit court reversed, and directed the district court to enter a judgment in favor of Hartford.[98] Although Hazel apparently had heard rumors at the time of trial that the Clarke article was not genuine, it wasn't until after the 1932 reversal by the appellate court that the firm began to seriously pursue Clarke.[99] So, however, did Hartford. In a cloak-and-dagger exercise worthy of the best spy fiction, Hartford succeeded in reaching Clarke, and buying his silence.[100] Unable to convince Clarke to sign an affidavit that the article was not the product of his own work, Hazel paid Hartford $1,000,000 and agreed to enter into licensing agreements.[101] Not until 1941, after "correspondence files, expense accounts and testimony" were introduced at a 1939 anti-trust action brought against Hartford, was Hazel able to verify the truth of the rumored fraud.[102]

The Third Circuit denied Hazel's 1941 petition for relief on the grounds that

> first . . . the fraud was not newly discovered; second, that the spurious publication, though quoted in the 1932 opinion, was not the primary basis of the . . . decision; and, third, that in any event it lacked the power to set aside the decree . . . because of the expiration of the term during which the 1932 decision had been rendered.[103]

Mr. Justice Black, writing for the Court, reversed the Third Circuit decision, saying:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.

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93. *Id.*
94. *Id.*
95. *Id.* at 241.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 241-42.
100. *Id.* at 242-43. Clarke demanded $10,000 from Hartford for his silence, but apparently settled for $8,000. *Id.* at 243.
101. *Id.* at 243.
102. *Id.*
103. *Id.* at 243-44.

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.[104]

Mr. Justice Black's language in *Hazel* is the basis for the term "fraud upon the court." The Justice was apparently unconcerned by whether Hazel had exercised real diligence in uncovering the fraud,[105] despite the fact that the company apparently knew of it at the time of trial, or whether Hartford's actions had greatly swayed the appellate judges in 1932.[106] Justice Black was satisfied that the fraud committed by Hartford concerned "issues of great moment to the public in a patent suit."[107] Because of this satisfaction, Justice Black did not attempt an intrinsic-extrinsic analysis under *Throckmorton*, despite having cited to the case in his opinion in *Hazel*.[108] Mr. Justice Roberts in dissent, however, felt that *Throckmorton* was relevant to the analysis:

> Where the authenticity of a document relied on as part of a litigant's case is material to adjudication, as was the grant in the *Throckmorton* case, and there was opportunity to investigate this matter, fraud in the preparation of the document is not extrinsic but intrinsic and will not support review. Any fraud connected with the preparation of the Clarke article in this case was extrinsic, and, subject to other relevant rules, would support a bill of review.[109]

b. Defining Fraud Upon the Court. Because there was no mention of the intrinsic-extrinsic distinction in the majority opinion of *Hazel*, and because Rule 60(b) specifically lists "fraud upon the court" as a ground for relief in the savings clauses, many believe that fraud upon the court is a wholly separate species of fraud. As one commentator put it: "Since the Court did not attempt to determine if the fraud was intrinsic or extrinsic, it is reasonable to assume that this distinction is not controlling in situations involving 'fraud upon the court,' and that relief is available regardless of the classification of fraud."[110] Other commentators, however, feel that *Hazel* applies only to those situations involving extrinsic fraud.[111] In fact, it has been pointed out that "[c]ourts have long used 'fraud upon the court' synonymously with 'extrinsic fraud' rather than as a term of art, which [R]ule 60(b)

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104. *Id.* at 245-46.
105. *Id.* at 246.
106. *Id.* at 246-47.
107. *Id.* at 246.
108. *Id.* at 244.
109. *Id.* at 261 n.18 (Roberts, J., dissenting).
110. *Attacking Judgments*, *supra* note 39, at 403.
111. Comment, *supra* note 9, at 554 n.166.

presumably intended."[112]

If fraud upon the court *is* a totally separate species of fraud from that contemplated by subdivision (3) of Rule 60(b), what is the distinction? Professor Moore defines it as being:

> that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct. Fraud *inter partes*, without more, should not be fraud upon the court, but redress should be left to a motion under 60(b)(3) or to the independent action.[113]

As a general definition, then, fraud upon the court can be termed a breakdown of the judicial function which normally would guarantee a fair and impartial forum for the parties to air their differences. Specific examples include:

> [B]ribery or other corruption of the court, or a member of the court participating in the decision; employment of counsel to "influence" the court, even though it is not shown that the court was influenced. Bribery or other corruption of the jury, as distinguished from mere misconduct or the exercise of an improper influence, should also be treated as a fraud upon the court, for when the jury is used it is an integral part of the judicial machinery and the integrity of the court's judgment depends in part upon the integrity of the jury. And, while less obvious, an abnegation by the judge of his judicial function, although no actual fraud was perpetrated, may well be a 'legal' fraud by him upon the judicial institution.[114]

It is thus considered more serious where the court, through its officers, becomes involved in fraud, than those situations where the parties are attempting to defraud one another, and the legal system is merely the device being used at the moment. Professor Moore views the participation by attorneys in preparation and subsequent publication of the Clarke article in *Hazel*, as a major factor in the finding of fraud upon the court.[115] Later courts have also looked to whether attorneys participated in the alleged fraud as an important factor in whether relief should be granted.[116] For other courts,

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112. *Id.* at 554 and authorities cited in n.165.

113. 7 MOORE, *supra* note 2, ¶ 60.33 at 60-360-60-362. *See also* Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972); Budge v. Post, 544 F. Supp. 370, 377 (N.D. Tex. 1982); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 641 (N.D. Cal. 1978), *aff'd* 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 426 (1981); Armour & Co. v. Nard, 56 F.R.D. 610, 612 n.4 (N.D. Iowa 1972).

114. 7 MOORE, *supra* note 2, ¶ 60.33 at 60-357-60-358.

115. *Id.* at 60-359.

116. *See, e.g.*, Brown v. McCormick, 608 F.2d 410, 414 (10th Cir. 1979); H. K. Porter Co.

however, it has been the existence of a well-planned scheme to introduce false or fraudulent evidence at trial, which was the primary consideration in whether relief should be granted; even if an officer of the court was not a participant in the scheme.[117]

In terms of the intrinsic-extrinsic question, it should not matter whether the fraud in question was presented in court after substantial planning, or whether the wrongdoer conceived and perpetrated the fraud with relative spontaneity. In each case the end result is that fraudulent evidence is used by the court in reaching a decision, thus injuring one party. According to *Throckmorton*, "the court will not set aside a judgment . . . for any matter which was actually presented and considered in the judgment assailed."[118] This is because such fraud is intrinsic rather than extrinsic.[119] It is therefore difficult to rationalize those cases where relief has been granted because of the existence of a grand scheme to present such evidence.

It would appear that the courts are telling those who contemplate the commission of fraud that they are safe from review in an independent action if the fraud is haphazard, but that there is a penalty if they take the time to plan thoroughly. Justice Robert's argument, describing the fraud in *Hazel* as extrinsic, because the article was prepared outside of court,[120] is also an unsatisfactory answer. The document characterized as intrinsic in *Throckmorton* was also prepared outside of court before it was introduced into evidence.[121] Unless perjury is committed on the spur of the moment, fraudulent evidence which is presented in court must always be planned and prepared outside the courtroom. Regardless of the details regarding the scope of the scheme, this type of fraud still would appear to be intrinsic, and not a basis for relief, if fraud upon the court *does* fall within the intrinsic-extrinsic distinction.

It is somewhat easier to view participation in fraud by an attorney as being outside the intrinsic-extrinsic rule. To be sure, fraud by an attorney is specifically referred to in *Throckmorton* as being one of those situations in which relief will be granted in an independent action in equity.[122] It is fraud committed against a party by his *own* attorney, however, which is contem-

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v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); Fiske v. Buder, 125 F.2d 841, 849 (8th Cir. 1942); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 642 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981).

117. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977); Chicago R.I. & P. Ry. v. Callicotte, 267 F. 799, 809-10 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921); Dankese Eng'g, Inc. v. Ionics, Inc., 89 F.R.D. 154, 158 (D. Mass. 1981).

118. United States v. Throckmorton, 98 U.S. at 66.

119. *Id.* at 68.

120. *See supra* note 109.

121. *See supra* note 58.

122. *See supra* note 62 and accompanying text.

plated by the *Throckmorton* dicta.[123] The fraud found in *Hazel*, where the attorneys prepare and present fraudulent evidence to *aid* their own client, is not contemplated by *Throckmorton*.

Participation in the fraud by the attorneys may explain the position taken by Justice Black in *Hazel*, but if true, it does not explain why the distinction was not specifically drawn in that case. Nor does it explain why *Throckmorton* was cited by the majority opinion. As Professor Moore indicates, without reference to the participation of the attorneys, there is little to distinguish the fraud in *Hazel* from that of *Throckmorton*.[124] Certainly the distinction specifically suggested by Justice Black, that the stakes were high because a patent was involved, is difficult to accept. It would appear that the *Throckmorton* situation, where title to land was claimed by both a private citizen and the United States Government, would more closely approximate "an issue of great moment to the public."[125] Putting that aside, a situation where the smooth workings of a court are thwarted by its officers certainly ought not be one in which the intrinsic-extrinsic distinction can dictate whether a party may seek relief.

As it stands, however, even defining fraud upon the court narrowly, as only embracing those situations where the fraud was not directly committed by one of the parties to the action,[126] does not clear up the question of whether fraud upon the court is subject to the intrinsic-extrinsic distinction. Justice Robert's dissent in *Hazel* makes clear that virtually anything may be made to look like actionable, extrinsic fraud.[127] The ability to manipulate the characterization, however, does not solve the puzzle of why the *Hazel* majority cited to both *Throckmorton*, and *Marshall* with approval.[128] That question still remains, making it impossible to conclusively determine if, or how, the intrinsic-extrinsic dichotomy relates to fraud upon the court.

IV. Intrinsic vs. Extrinsic—The Problem Addressed

As previously pointed out, should the Plaintiffs in our hypothetical securities fraud case seek relief from a fraudulent judgment by way of a *motion* under Rule 60(b)(3), they will find few procedural problems. If, however, they are forced by circumstances to bring an independent action, or should the actions of Messrs. Smith and Jones constitute fraud upon the court, the situation is different.

It should be noted that in one respect—that of time limitations on bringing the action—the Plaintiffs will find themselves in a more advantageous position if they act under the savings clauses, as opposed to subsec-

123. *Id.*
124. 7 Moore, *supra* note 2, ¶ 60.33 at 60-358-60-359.
125. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 246.
126. *Abolishing the Distinction*, *supra* note 26, at 1033.
127. *See supra* note 109 and accompanying text.
128. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 244, 246.

tion (3) of Rule 60(b). This is because an independent action is only subject to those strictures of time imposed by the doctrine of laches, or a statute of limitations.[129] A party complaining of fraud upon the court is not even forced to deal with these restraints, "[s]ince . . . the power of a defrauded court to grant relief is a sweeping plenary power that is not subject to any rigid time limitations as is a motion under 60(b)(3) . . . or to laches of a party."[130] Aside from the aspect of the time for bringing the action, however, the Plaintiffs will be forced to deal with some problems.

First and foremost is the question of whether the extrinsic-collateral fraud requirement of *Throckmorton* is still viable; if it is not, most, if not all, of the problems disappear. As previously noted, the *Marshall* case, decided thirteen years after *Throckmorton*, contained dicta which was exactly counter to the position of the *Throckmorton* rule, which held that perjured testimony will not form the basis for relief from a judgment.[131] As one cynical commentator has put it:

> The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of two cases, one of which holds that false evidence is a ground for reversal, the other that it is not, both of which have been followed, and neither of which has ever been overruled.[132]

Numerous cases have also pointed out that *Throckmorton* and *Marshall* seem inconsistent.[133] Most federal courts follow the *Throckmorton* doctrine,[134] many of them pointing out that cases subsequent to *Marshall* cite *Throckmorton* with approval.[135] There is, however, the notable excep-

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129. *See supra* note 7.

130. 7 MOORE, *supra* note 2, ¶ 60.33 at 60-356.

131. *See supra* notes 70-85 and accompanying text.

132. Note, *Fraud as a Basis for Setting Aside a Judgment*, 21 COLUM. L. REV. 268, 268-69 (1921).

133. *See, e.g.*, M. W. Zack Metal v. International Navigation Corp., 675 F.2d 525, 531-32 (2d Cir.) (Cardamone, J., concurring in part and dissenting in part), *cert. denied*, 459 U.S. 1037 (1982); Griffith v. Bank of New York, 147 F.2d 899, 901 (2d Cir.), *cert. denied*, 325 U.S. 874 (1945); Park v. Park, 123 F.2d 370, 372 (5th Cir. 1941); Publicker v. Shallcross, 106 F.2d 949, 950-951 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940); American Bakeries Co. v. Vining, 80 F.2d 932, 933 (5th Cir. 1935); Chicago R.I. & P. Ry. v. Callicotte, 267 F. 799, 806 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921); Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179, 185-86 (D. Md. 1979); *In re* de Manati', 357 F. Supp. 1253, 1261 (D.P.R. 1972); Shammas v. Shammas, 9 N.J. 321, ___, 88 A.2d 204, 208 (1952)(opinion by then New Jersey, now United States Supreme Court, Justice Brennan).

134. *See generally* Comment, *supra* note 9, at 546 and citations at n.112. Most state courts also follow the doctrine of *Throckmorton*, *id.*, with the notable exceptions of New Jersey and Wisconsin. *Id.*

135. *See, e.g.*, Chicago R.I. & P. Ry. v. Callicotte, 267 F. 799, 806 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921); Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179, 185 (D. Md. 1979) (citing *Hazel-Atlas*, *supra* notes 87-124 and accompanying text), *In re* de Manati', 357 F. Supp. 1253, 1260-61 n.8 (D.P.R. 1972). *But see* M. W. Zack Metal v. International Navigation

tion of the Third Circuit.

In *Publicker v. Shallcross*,[136] Judge Clark dealt with a situation where the appellant admittedly perjured himself as to his true financial position in order to settle "an $850,000 claim of the receivers against him for one cent on the dollar."[137] Despite his admissions, the appellant cited *Throckmorton* to support his argument that the court could not vacate the order which had authorized the compromise.[138] Judge Clark disagreed, however, holding that *Throckmorton* was authority for the proposition that relief from fraud can be granted even after the expiration of the term in which the original order was entered.[139] Moreover, the *Publicker* court held that although distinguishable from the instant case, the holding of *Throckmorton*, with regard to the requirement that extrinsic fraud form the basis for relief, was no longer the law in view of the *Marshall* decision.[140]

Despite the position taken by the Third Circuit, however, the requirement of extrinsic fraud as a predicate to relief persists in most federal courts; and, although inapplicable to motions under Rule 60(b), the Plaintiffs in our hypothetical case must deal with it if they are forced to bring an independent action. Unfortunately, it would take a long reach to characterize the alleged perjury of Messrs. Smith and Jones as extrinsic.[141] Under the rationale of *Throckmorton*,[142] Smith and Jones are not guilty of keeping the Plaintiffs away from court, as there was a hearing held before Judge Civil; they did not make a false promise of compromise, despite the fact that the order in question stems from a settlement agreement—the settlement was actually reached; the Plaintiffs were not kept in ignorance of the suit—in fact they brought it; nor is this a situation where the attorneys for the Plaintiffs sold them out. Rather, this is a situation involving at most perjury, which the Plaintiffs had a full and fair opportunity to discover and cross examine.[143] The fact that they were unaware of the perjury at the time of the hearing is not sufficient to form the basis for relief under *Throckmorton*.[144] Thus, it doesn't appear the Plaintiffs will be able to make the argument necessary to support an independent action based on extrinsic

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Corp., 675 F.2d 525, 531-32 (2d Cir.)(Cardamone, J., concurring in part and dissenting in part, and concluding later decisions *abandon* the *Throckmorton* rule), *cert. denied*, 459 U.S. 1037 (1982). *Accord* Griffith v. Bank of New York, 147 F.2d 899, 901 (2d Cir.), *cert. denied*, 325 U.S. 874 (1945).

136. 106 F.2d 949 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940).

137. *Id.* at 949.

138. *Id.*

139. *Id.* at 950.

140. *Id.* at 950-52. *See also* Schum v. Bailey, 578 F.2d 493, 506 (3d Cir. 1978)(questioning the vitality of *Throckmorton*).

141. For just such a reach, see the dissent of Mr. Justice Roberts in *Hazel*, *supra* notes 109, 127 and accompanying text.

142. *See supra* note 63 and accompanying text.

143. *See supra* note 64, 69 and accompanying text.

144. *See supra* note 65 and accompanying text.

fraud.

The Plaintiffs might argue that the actions of Smith and Jones constituted fraud upon the court. Even if the extrinsic requirement is not applicable to this doctrine, there would still be the problem of proving participation in the fraud by the attorneys representing Smith and/or Jones, or more tenuously, a grand scheme on the part of the defendants to defraud Judge Civil's court.[145] Under the facts as we know them, this will probably prove impossible.

Where does that leave the Plaintiffs? At first blush, it might appear that they would still have an action for fraud under the federal security statutes.[146] There is, however, recent authority holding that

> [t]he securities laws were designed to handle transactions in markets, in which the parties might have too little incentive to reveal information and might find it too easy to tell lies and half-truths. They do not apply expressly to misstatements in the course of litigation, and they were not designed to regulate the conduct of trials. To the contrary, § 3(a)(10) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(10), exempts from ordinary registration procedures securities issued in an exchange transaction approved by a court.[147]

It might be argued that an action could still be maintained under the state laws, in that it has been held that an action under the federal security statutes is distinct from an action in state court.[148] For the purposes of this Note, however, we will assume that the Plaintiffs are barred by the statute of limitations from bringing an action in state court.

Nor can the Plaintiffs bring a civil action for fraud against Smith and Jones because of the recent holding by the United States Supreme Court that witnesses are absolutely immune from civil liability for their testimony.[149] All of this brings us back to the question of where the Plaintiffs stand if they are forced to bring an independent action, rather than a motion under Rule 60(b). The answer is simple. The Plaintiffs will be without an effective method to remedy the failure of Smith and Jones to reveal the fact that stock prices of Defendant, Inc., were on the rise. If this seems harsh, that is exactly the way the *Throckmorton* rule has been characterized.[150] The thesis of this Note is that this harshness is really unnecessary,

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145. *See supra* notes 113-128 and accompanying text.

146. *See, e.g.*, 17 C.F.R. § 240.10b-5 (1983); 15 U.S.C. § 78j (1982).

147. Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 833 (7th Cir. 1985).

148. *See, e.g.*, Burch v. Stringham & Follett, 727 FED. SEC. L. REP. (CCH) ¶¶ 92,601, 92,602 (10th Cir. 1977); Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); Abramson v. Pennwood Investment Corp., 392 F.2d 759, 762 (2d Cir. 1968). *See also* 69 YALE L.J. 606 (1960).

149. Briscoe v. LaHue, 460 U.S. 325 (1983).

150. *See, e.g.*, Publicker v. Shallcross, 106 F.2d 949, 952 (3d Cir. 1939)(harsh), *cert. denied*, 308 U.S. 624 (1940); American Bakeries Co. v. Vining, 80 F.2d 932, 933 (5th Cir. 1935)(shocking to the judicial sensibility); Shammas v. Shammas, 9 N.J. 321, ___, 88 A.2d 204,

and could be remedied if the rule were amended.

V. Proposed Amendments to Rule 60(b)

A. *Abolishing the Independent Action and the Intrinsic-Extrinsic Distinction*

It is well settled that Rule 60(b) is not to be considered a substitute for an appeal.[151] Rather,

> [t]he purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment. The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of *all* the facts.[152]

Moreover, the rule is to be applied liberally so as to do substantial justice.[153] This has been construed to mean that

> [a]lthough the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause . . . . This is not to say that final judgments should be lightly reopened. The desirability of order and predictability in the judicial process calls for the exercise of caution in such matters . . . . But there can be little doubt that Rule 60(b) vests in the district court's power "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[154]

The Third Circuit put it more succinctly and eloquently in rejecting the intrinsic-extrinsic distinction: "We believe truth is more important than the trouble it takes to get it."[155] Although the *Throckmorton* court made a simi-

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209 (1952)(unjust and inequitable). *See also Attacking Judgments*, *supra* note 39, at 408 (shadowy, uncertain and somewhat arbitrary).

151. *See, e.g.*, House v. Secretary of Health & Human Services, 688 F.2d 7, 9 (2d Cir. 1982); Brown v. McCormick, 608 F.2d 410, 413 (10th Cir. 1979).

152. Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). *See also* Rosebud Sioux Tribe v. A. & P. Steel, Inc., 733 F.2d 509, 515 (8th Cir.)(Rule intended to " 'prevent the judgment from becoming a vehicle of injustice' "), cert. denied, 105 S. Ct. 565 (1984); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981); Rodriguez v. Marks Bros. Pickle Co., 102 F.R.D. 104, 106 (E.D. Wis. 1984); *In re* Hankins, 367 F. Supp. 1370, 1374 (N.D. Mass. 1973).

153. *See, e.g.*, Rosebud Sioux Tribe v. A. & P. Steel, Inc., 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 105 S. Ct. 565 (1984); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981); Rodriguez v. Marks Bros. Pickle Co., 102 F.R.D. 104, 106 (E.D. Wis. 1984).

154. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981)(quoting Klaprott v. United States, 335 U.S. 601, 614-15 (1949), other citations omitted).

155. Publicker v. Shallcross, 106 F.2d 949, 952 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940).

lar statement,[156] the final holding and rationale of that case differs in that the emphasis was placed on the finality of judgments rather than justice.

This fear of incessant litigation, that " '[i]t is for the public interest and policy to make an end to litigation, or . . . that suits may not be immortal, while men are mortal,' "[157] has proven to be unjustified by those jurisdictions which have refused to abide by the *Throckmorton* rule.[158] By way of example, since at least 1870, Wisconsin has failed to follow the intrinsic-extrinsic distinction where perjury material to the judgment was involved, and the aggrieved party was not guilty of negligence or other fault.[159] Yet, despite this rejection of what has become the majority position, commentators have been quick to point out that Wisconsin has been far from deluged with cases seeking relief from intrinsic fraud.[160] Although it is true that the federal system as a whole could probably expect somewhat more cases in this area, if for no other reason than these courts serve a broader constituency than a single state, it is logical to assume that the federal courts located in any one state would find themselves no more overburdened with these claims than are the Wisconsin courts. This is especially true when one considers that, as a prerequisite to relief by motion under Rule 60(b), courts require clear and convincing evidence of the alleged fraud.[161] Nor should merely establishing perjury or other falsified evidence be enough to obtain relief. Under the Wisconsin system, the fraud must be a material factor in the judgment, and the complaining party must be free from negligence or other fault in order to obtain relief.[162]

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156. *See supra* note 61 and accompanying text.

157. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 425 (1923)(quoting Mr. Justice Story in Ocean Insurance Co. v. Fields, 2 Story 59; 18 Fed. Cas. 532).

158. *See supra* note 134.

159. Comment, *supra* note 9, at 551-52 (citing Stowell v. Eldred, 26 Wis. 504 (1870)).

160. *See, e.g., Abolishing the Distinction*, *supra* note 26, at 1027. *See also* Comment, *supra* note 9, at 552 (citing only nine cases between 1914-1972); *Attacking Judgments*, *supra* note 39, at 408 (finding seven cases between 1917-1932).

161. *See, e.g.*, Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 832 (7th Cir. 1985); Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947); Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179, 197 (D. Md. 1979); Armour & Co. v. Nard, 56 F.R.D. 610, 612 (N.D. Iowa 1972).

162. *See supra* note 159 and accompanying text. New Jersey, the other state which does not follow the intrinsic-extrinsic distinction, agrees with this position. As Justice Brennan put it:

> [A] court may not set aside a final judgment merely because some testimony is perjured. All perjury is an affront to the dignity of the court and to the integrity of the judicial process, but the law is not without effective means to punish the perpetrator of the crime . . . . Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been willfully and purposely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is

Much of the basis for disallowing relief from intrinsic fraud, or fraud which occurred *in* court, is the result of the courts' reasoning that the aggrieved party has already had an opportunity to expose the fraud by way of cross-examination.[163] Yet, the basis for Rule 60(b),[164] if not the *Throckmorton* rationale[165] itself, is the suspicion that perhaps the complaining party really did not have that chance to litigate. If there is no reason to suspect fraud, there is no incentive to expose it. Despite this, one commentator has pointed out that "the central question whether the party was really prevented from having a fair trial never seems to be discussed in the [independent action] cases [dealing with the intrinsic-extrinsic distinction], and the arguments for retaining the distinction often seem to argue as well for denying all relief, regardless of the distinction."[166]

Despite this lack of attention by the courts, it is well settled that an independent action may not be the vehicle to relitigate issues which the complaining party had an opportunity to litigate in the original action.[167] Yet, according to the Advisory Committee, a motion under Rule 60(b) is a "motion in the court *and in the action* in which the judgment was rendered."[168] The complaining party therefore *has* an opportunity to litigate the fraud in the original action merely by bringing a motion. Further, it is true that " 'a judgment is res judicata not only as to all matters litigated and decided by it, but to all relevant issues which could have been raised and litigated in the suit.' "[169] Under this reasoning, an independent action should never be allowed so long as the avenue for relief by motion is open. Funneling all requests for relief through the court which granted the judgment has the twin virtues of allowing the court which actually observed the

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in all the circumstances not a bar to relief.

Shammas v. Shammas, 9 N.J. 321, ____, 88 A.2d 204, 208-209 (1952). *Accord* Comment, *supra* note 9, at 552-53 (listing factors to consider before allowing a final judgment to be disturbed).

It should be pointed out that although Justice Brennan did not consider incessant litigation to be a problem, he seemingly based this position on an assumption that the party guilty of the fraud will not attempt to set aside the judgment. Shammas v. Shammas, 9 N.J. at _, 88 A.2d at 210. This observation is self evident when one assumes that the fraud allowed the guilty party to *prevail* in the original action. It does not follow, however, that the losing party will not seek to escape the effects of that fraud.

163. *See supra* notes 64, 69 and accompanying text.

164. *See supra* note 152 and accompanying text.

165. *See supra* notes 63-64 and accompanying text.

166. Comment, *supra* note 9, at 549.

167. Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1552 (11th Cir. 1985); Carter v. Dolce, 741 F.2d 758, 759-60 (5th Cir. 1984); M. W. Zack Metal v. International Navigation Corp., 675 F.2d 525, 529 (2d Cir.), *cert. denied*, 459 U.S. 1037 (1982); Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 668 (5th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 n.2 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); American Bakeries Co. v. Vining, 80 F.2d 932, 933 (5th Cir. 1935); Budge v. Post, 544 F. Supp. 370, 381 (N.D. Tex. 1982).

168. *See supra* note 10 (emphasis added).

169. *In re* de Manati', 357 F. Supp. 1253, 1260 (D.P.R. 1972) (and cited authorities).

alleged fraud to pass on it after its discovery, thus removing another articulated basis for denying relief for intrinsic fraud under an independent action,[170] and removing the opportunity for extending the litigation through numerous independent actions[171] by simplifying the procedure for seeking relief.

There is recent support for the proposition that the rule, standing alone, should be the sole means for relief.[172] Additionally, many commentators have advocated abolishing the intrinsic-extrinsic distinction for independent actions.[173] Arguably, the Advisory Committee saw the wisdom of these arguments by abolishing the distinction under subsection (3) in 1946.[174] Without the intrinsic-extrinsic distinction, there is only one principled reason for retaining the independent action or an action for fraud upon the court: affording an avenue for relief after the time has expired for bringing a motion under the rule.

B. *Abolishing the One Year Time Limit*

In 1946 the Advisory Committee saw the wisdom of allowing more time to bring a motion under Rule 60(b) and expanded the maximum time from six months to one year.[175] There had been no real reason for the original time limit, other than the fact that the California Code of Civil Procedure section 473, the model for the 1938 Draft, contained the six month limit.[176] It is the position of this Note that under the rule as it now stands, there is no reason for any maximum time limit.

Rule 60(b) contains six enumerated bases for relief, and three additional grounds found in the savings clauses.[177] The time limitation for six of

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170. Comment, *supra* note 9, at 550.

171. *See, e.g.*, Carter v. Dolce, 741 F.2d 758 (5th Cir. 1984)(*pro se* plaintiff had brought some 178 suits). *But see* Locklin v. Switzer Bros., 335 F.2d 331, 334 (7th Cir. 1964)(describing the methods of relief—including independent actions—as alternative, rather than cumulative, and citing Heiser v. Woodruff, 327 U.S. 726 (1946) as support). *See also* Newcomer v. Newcomer, No. 6-169/85-1559, slip op. (Iowa Ct. App. Oct. 22, 1986). In that case the petitioner filed both a motion to modify a property division of a divorce decree (which motion was treated by the parties as a motion to vacate under Iowa Rule of Civil Procedure 252), *id.* at 2-3, and the present action stating four counts of fraud. *Id.* at 3. The court stated that the "question on appeal is whether the plaintiff can simultaneously maintain two separate and independent suits against the same defendant arising out of the same facts and requesting the same remedy." *Id.* at 2. The court found that by choosing to attempt to vacate the property division, the plaintiff was "precluded from bringing a further independent equitable action." *Id.* at 9.

172. *See, e.g.*, Metlyn Realty Co. v. Esmark, Inc., 763 F.2d 826, 833 (7th Cir. 1985); Werner v. Carbo, 731 F.2d 204, 207 (4th Cir. 1984).

173. *See, e.g.*, *Abolishing the Distinction*, *supra* note 26; Comment, *supra* note 9; *Attacking Judgments*, *supra* note 39.

174. *See supra* note 38 and accompanying text.

175. *Id.*

176. *See supra* notes 25-26 and accompanying text.

177. *See supra* note 3.

these nine total bases is "within a reasonable time."[178] The 1946 limitation of "not more than one year after the judgment, order, or proceeding was entered or taken," applies only to subsections (1) through (3).[179] Because two of those bases not covered by the one year limit—an independent action seeking relief from fraud, and an action seeking relief from fraud upon the court—are arguably grounds for relief already covered in subsection (3), it is difficult to see why the time limit should extend to only one of three forms of fraud treated by the rule. This is particularly true in view of the fact that granting a request for relief is, in any case, discretionary.[180] There is authority for bypassing the specific time limitations found in the rule as well. At least one court has granted relief sought under a motion brought after the expiration of the time limit specified by the rule.[181] Since that decision, courts have held that the procedures of motion and independent action are interchangeable if no prejudice results,[182] allowing motions to be treated as independent actions and vice versa.[183] Because the procedures are merely opposite sides of the same coin, there is no need to retain a specific time limit for one, while allowing equitable considerations to control the other.[184] Under Rule 60(b) as it stands today, those equitable considerations are all that are required to do justice for the parties. Should the court feel a party has brought the motion after too long a time, or should it feel there was evidence of negligence or lack of diligence on the part of the moving party, it may decline to entertain the motion. If, on the other hand, the court is of the opinion that there were valid reasons for the delay, it may hear the motion, thus giving the party a forum in which to seek relief. Requiring a motion to be brought within a specific time frame, particularly with respect to fraud, seems to argue that the losing party should immediately seek to discover wrong-doing on the part of the winner. If a party doesn't suspect fraud during the trial, however, there is no reason for an adverse judgment to trigger that suspicion. If, at a later time, the losing party finds that fraud was in fact committed, a strict time provision should not be a barrier to relief by motion under the rule.

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178. *Id.*

179. *Id. See also supra* note 38 and accompanying text.

180. "The court *may* relieve a party . . . ." *Supra* note 3 (emphasis added). *See also* E. F. Hutton & Co. v. Berns, 757 F.2d 215, 217 (8th Cir. 1985); Brown v. McCormick, 608 F.2d 410, 413 (10th Cir. 1979); H. K. Porter, Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1119 (6th Cir. 1976); Conerly v. Flower, 410 F.2d 941, 944 (8th Cir. 1969); Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947); Fiske v. Buder, 125 F.2d 841, 844 (8th Cir. 1942).

181. Fiske v. Buder, 125 F.2d 841 (8th Cir. 1942).

182. H. K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976).

183. *See, e.g.*, Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 n.7 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970).

184. *See supra* note 7.

VI. Conclusion

Rule 60(b) has, as its purpose, a noble cause. It attempts to strike a balance between the finality of judgments and the desire of the courts to do justice.[185] But in an attempt to straddle the common law and ancillary remedies by abolishing them and instituting an independent action in their place,[186] the Advisory Committee has perpetuated the confusion which has prevailed since the *Marshall* decision.[187] Additionally, the incorporation of fraud upon the court as a separate remedy, without giving it meaning or defining its use in terms of the intrinsic-extrinsic distinction, has created more problems than it solved.[188]

These problems are the result of distinguishing between intrinsic and extrinsic fraud in an independent action, but not in a motion, and creating two separate time frames to handle what is essentially the same problem. Recognizing the intrinsic-extrinsic distinction for what it is—a solution for which there is no real problem—and abolishing it by doing away with the independent action and its separate time requirements, will do no injustice to those parties who have secured a judgment through the use of fraud. In fact, it may even ease their burden of defending multiple independent actions.[189] On the other hand, abolishing the distinction would greatly simplify the procedure for those seeking a forum in which relief could be granted.

In our hypothetical fact situation we have seen that the Plaintiffs would find themselves faced with insurmountable questions and problems under the savings clauses which they would not encounter under subsection (3). Yet, there is absolutely no difference between the claims they will make under these procedures. The alleged fraud is the same, whether it comes to their attention six months or two years after Judge Civil entered his order. Therefore, there is no reason to differentiate between the procedures which must be followed as a predicate to relief. Rule 60(b) itself provides that "[o]n motion and upon such terms as are just"[190] the court may interfere with the finality of a judgment. The factors to be examined when a court decides whether to grant relief under a motion are well settled.[191] It is much

185. *See supra* notes 152-155 and accompanying text.
186. *See supra* note 3.
187. *See supra* notes 70-85 and accompanying text.
188. *See supra* notes 87-128 and accompanying text.
189. *See, e.g.*, Carter v. Dolce, *supra* note 171.
190. *See supra* note 3.
191. Those factors are:

(1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether—if the judgment was a default or a dismissal in which there was no consideration of the merits—the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether—if the judgment was

better that the court which tried the original action be the one to determine whether, under all the circumstances, relief is warranted. Funneling all relief through a motion under the rule, without specific time restrictions, will allow this to happen.

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rendered after a trial on the merits—the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. These factors are to be considered in the light of the great desirability of preserving the principle of the finality of judgments.

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981) (citing United States v. Gould, 301 F.2d 353, 355-56 (5th Cir. 1962) as quoting 7 MOORE'S FEDERAL PRACTICE ¶ 60.19 at 237-39).