1952

FEDERAL RULE 60(b): RELIEF FROM CIVIL JUDGMENTS

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylj/vol61/iss1/2

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Finally, legitimate claimants may be unable to recover on policies issued on the basis of fraudulent statements by soliciting agents.

Despite its shortcomings, industrial insurance serves useful functions. Its low face value policies, maintained by small, frequent premium payments makes available to low-income groups life insurance they might not otherwise buy. Industrial insurance enables them to build savings and provide survivors with immediate cash to pay the expenses of last illness and burial. And it has educated large segments of the population to the importance of life insurance protection.

Vigorous competition can reform industrial insurance. Although group and Savings Bank life insurance furnish better coverage at lower cost, their competitive impact is weakened by relative unavailability to low-income earners. Competition among industrial insurers themselves is a more promising spur to reform. Elimination of the major high cost factors, modification of the sound health clause, and increased insurers' responsibility for the acts of agents would make industrial insurance more appealing to purchasers. Lowered selling, collection, and handling costs should more than balance the cost of additional claimants' recoveries. An insurer instituting these reforms should gain a competitive advantage. Survival of insurers who did not follow suit would then depend solely on prospective policyholders' inertia or imperfect knowledge of the improved coverage. If, however, insurers themselves do not undertake reform, comprehensive legislative control may prove essential.
NOTES

FEDERAL RULE 60(b):
RELIEF FROM CIVIL JUDGMENTS

Courts long have attempted to reconcile the need for correction of unjust judgments with the aims of finality in litigation. Traditionally, a court could reopen and modify judgments only during the term in which they were rendered. But courts were loath to permit unjust judgments to stand even though the term had expired. To fill the need for post-term relief, a host of confusing remedial devices haphazardly grew up. In time, their use pre-

1. For excellent treatment, see Moore & Rogers, Federal Relief from Civil Judgments, 55 Yale L. J. 623 (1946) (hereinafter cited as Moore & Rogers) to appear as adapted in 6 Moore, Federal Practice c. 60 (2d ed. 1952). For developments leading to Amendments to the Federal Rules, see Drafts of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States, Notes following Rules 6 and 60 (May 1944); (May 1945); (June 1946). For federal practice problems, consult 8 Cyclic Fed. Proc. c. 37 (2d ed. 1943); 2 Moore, Federal Practice c. 6 (2d ed. 1948); 3 id. c. 60 (1938). And see Commentary, Effect of Rule 60(b) on Other Methods of Relief from Judgment, 4 Fed. Rules Serv. 942 (1941); Comment, Temporal Aspects of the Finality of Judgments, 17 U. of CHI. L. Rev. 664 (1950); Freeman, Judgments (5th ed. 1925); Black, Judgments (1891).

2. E.g., United States v. Mayer, 235 U.S. 55 (1914) (criminal action); Bronson v. Schulten, 104 U.S. 410 (1881) (civil action); 3 Moore, Federal Practice 125 (1938); 8 Cyclic Fed. Proc. § 3588 (1943); 1 Freeman, Judgments § 196 (5th ed. 1925); Black, Judgments §§ 305-306 (1891).

3. The remedial devices fell generally into four categories:


(2) Independent actions for relief, based on extrinsic fraud, mistake, and accident. See Moore & Rogers, at 653 et seq.; 8 Cyclic Fed. Proc. §§ 3617-3619; Freeman, Judgments c. XXI; Black, Judgments c. XV. See also note 4 infra.

(3) Inherent power of the court to modify judgments, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (fraud on the court); United States v. Swift & Co., 286 U.S. 106, 114 (1932) (permanent injunction). In some cases the power was not limited to predictable categories. 1 Freeman, Judgments § 199. For the full extent to which an "inherent power" theory may nullify limitations on time and subject matter, see Vermont holdings, Comment, 17 U. of CHI. L. Rev. 664, 666 n. 9 (1950).

(4) Power to disregard void judgments, e.g., Pennoyer v. Neff, 95 U.S. 714 (1877); or to vacate them, e.g., Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949). See Note, 59 Yale L. J. 345 (1950).

For other devices used in the states to circumvent limitations of the term or statutes, see Note, 17 U. of CHI. L. Rev. supra, at 665-8, nn. 8-18).

This haphazard development created considerable confusion. 3 Moore, Federal Practice c. 60.02 (1939). The devices were "shrouded in ancient lore and mystery". Report of the Advisory Committee on Rules for Civil Procedure, Note following Rule 60(b) (1946). Additional difficulties were created by their origin in a dual procedural system (law and equity). See Moore & Rogers, at 638, 654 et seq. "[O]ld precedents ...
sented a twofold inadequacy. Correction of an unjust judgment was frequently left to the chance of litigating before a court that could manipulate an elusive doctrine. And, in some cases, the arsenal of remedies was simply too scant to furnish even flexible courts with a rationale for relief. But presented such a baffling surface of conflict and seeming inconsistency that no one could say with certainty, for example, just what matters could be reached or raised by bill of review, writ of error coram nobis, or the like.” 8 C.C. Fed. Proc. §3584. See also Klapprott v. United States, 335 U.S. 601, 614 (1949).

4. For a classic example, see conflicting holdings on whether relief for “intrinsic” fraud may be granted by independent action. Compare the majority rule of United States v. Throckmorton, 98 U.S. 61 (1878) and Dowdy v. Hawfield, 189 F.2d 637 (D.C. Cir. 1950) (relief denied where fraud “intrinsic”), with Marshall v. Holmes, 141 U.S. 589 (1891) and Publicker v. Shallcross, 106 F.2d 949 (3d Cir. 1939), cert. denied, 303 U.S. 264 (1939) (relief granted for “intrinsic” fraud). Even if the fraud must be “extrinsic” to warrant relief, the ambiguity of the “intrinsic-extrinsic” distinction readily permits manipulation. E.g., Chicago etc. Ry. v. Callicotte, 267 Fed. 799 (8th Cir. 1920), cert. denied, 255 U.S. 570 (1921) (relief granted for normally “intrinsic” fraud because of “additional facts”), 21 Col. L. Rev. 268 (1921). And see recent California cases discussed in Moore & Rogers, at 651 n. 80.

5. Even if “these remedies are expanded by judicial construction . . . there will still be situations, because of the historical growth of the old remedies, where relief will not be afforded, although these are as meritorious as situations where relief is granted.” Moore & Rogers, at 687. See Wallace v. United States, 142 F.2d 240 (2d Cir. 1944); and compare New England Furniture & Carpet Co. v. Willeuts, 55 F.2d 583 (D. Minn. 1931) (relief granted) with its companion case New England Furniture & Carpet Co. v. United States, 2 F. Supp. 648 (D. Minn. 1931) (relief denied). Relief may be blocked by the technicality that the remedy was an independent action not permitted against the United States in absence of special statutory authorization. E.g., Zegura v. United States, 104 F.2d 998 (9th Cir. 1939) (bill of review); Gherwal v. United States, 46 F.2d 993 (9th Cir. 1931) (independent action in equity); Avery v. United States, 12 Wall 304 (U.S. 1870) (audita querela).


Provisions for modification of judgments after expiration of appeal time werecentered in Fed. R. Civ. P. 60 (b): “(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court . . . may relieve a party . . . from a judgment, order or proceeding taken against him through his mistake, inadvertence, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment . . . . 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 . . . .” (emphasis added).
courts quickly sought to finesse this new time limit and the narrowness of the stated grounds for relief. Rule 6(b), giving the courts general power to enlarge time limitations prescribed by the Rules,8 was interpreted to permit a court to waive the specific six month time limit of 60(b).9 Other courts exercised "inherent power" to control judgments where the "term" had not expired10 or where 60(b) did not provide for relief in some traditionally remediable circumstances.11 However, most courts refrained from these interpretive quirks as means of circumventing 60(b)'s limitations. Rather they read into the Rules the nebulous writs that had traditionally provided post-term relief.12 In any event, constant attempts to short-circuit

8. Fed. R. Civ. P. 6 (b), prior to its amendment in 1946, read: "(b) When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for causes shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect. . . ."

9. Schram v. O'Connor, 2 F.R.D. 192 (E.D. Mich. 1941). Contra: majority rule of Wallace v. United States, 142 F.2d 240, 244 (2d Cir. 1944), cert. denied, 323 U.S. 712 (1944) ("The terms of Rule 60 (b) are so emphatic as to preclude the importation of an exception via Rule 6 (b).""). Nevertheless, Schram was given strong support by the use of 6 (b) to extend specific time limits of Rules other than 60 (b). E.g., Leishman v. Ass. Wholesale Electric Co., 318 U.S. 203 (1943) (amendment of findings, Rule 52 (b)); Mutual Benefit Health & Accident Ass'n v. Snyder, 109 F.2d 469 (6th Cir. 1940) (filing record and docketing appeal, Rule 73 (g)). And it was recognized that Rule 6 (b) lent itself to this interpretation. Report of the Advisory Committee on Rules for Civil Procedure, Note following Rule 6 (b) (1946). But the interpretation was considered undesirable since it cast in doubt the finality of every specified time limit in the Rules. Ibid.

10. Cf. Hill v. Hawes, 320 U.S. 520 (1943); Boaz v. Mutual Life Insurance Co. of N.Y., 146 F.2d 321 (8th Cir. 1944); Bucy v. Nevada Construction Co., 125 F.2d 213 (9th Cir. 1942). See 2 Moore, FEDERAL PRACTICE c. 6.09 (2d ed. 1948). While these cases did not fall under 60 (b), their rationale was available to circumvent the six month limit. Resort to the "continued existence" of the term as a source of power over judgments was directly at war with the attempt of Rule 6 (c) to abrogate the effect of the term. See ibid.


12. Courts generally followed Wallace v. United States, 142 F.2d 240 (2d. Cir. 1944) in holding that the first saving clause of Rule 60(b), supra note 7, preserved the substance of the traditional writs, e.g., United States v. Certain Lands in Town of Highlands, 82 F. Supp. 432 (S.D.N.Y. 1946) (bill of review); Oliver v. City of Shattuck, 157 F.2d 150 (10th Cir. 1946) (audita querela); McGinn v. United States, 2 F.R.D. 562 (D. Mass. 1942) (coram nobis and coram vobis). But this broad interpretation of the saving clauses was controversial, Preliminary Draft of Proposed Amendments etc., Note following Rule 60(b), (May 1944), although the independent action "in equity" was clearly preserved by the wording of the saving clause.
NOTES

old Rule 60(b) were symptoms of its inadequate scope and over-stringent
time limitations.\(^{13}\)

A new solution emerged in 1948 when Amendments to the Federal Rules
became effective.\(^{14}\) Under the Amended Rules, all methods of relief from
judgments after appeal time has expired are centered in a revised Rule
60(b).\(^ {15}\) The ancient remedies are abolished, but an independent action
"in equity"\(^ {16}\) and a proceeding to relieve from fraud on the court are re-
tained.\(^ {17}\) In place of the old remedies, the grounds for relief are restated

---

\(^{13}\) For additional inadequacies of old Rule 60(b) see Moore & Rogers, at 689-91.

\(^{14}\) Amendments to Rules of Civil Procedure for the District Courts of the United
States (promulgated December 27, 1946, effective March 19, 1948).

\(^{15}\) FED. R. CIV. P. 60(b) now reads:

"(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 pro-
ceeding 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), misrepresent-
ation, or other misconduct of an adverse party; (4) the judgment is void; (5) the
judgment has been satisfied, released, or discharged, or a prior judgment upon
which it is based has been reversed or otherwise vacated, or it is no longer
equitable that the judgment should have prospective application; or (6) any
other reason justifying relief from the operation of the judgment. The motion
shall be made within a reasonable time, and for reasons (1), (2), and (3)
not more than one year after the judgment, order, or proceeding was entered or
taken. A motion under this subdivision (b) does not affect the finality of a
judgment or suspend its operation. This rule does not limit the power of a
court to entertain an independent action to relieve a party from a judgment,
order, or proceeding, or to grant relief to a defendant not actually personally
notified as provided by Section 57 of the Judicial Code, USC, Title 28, § 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 relief from a judgment
shall be by motion as prescribed in these rules or by an independent action."

\(^{16}\) The action provides for relief from extrinsic fraud, see note 4 supra, and accident
or mistake, see note 3 supra.

\(^{17}\) See, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)
(misrepresentation of evidence), cited by the Advisory Committee as an example of
fraud on the court. See also Root Refining Co. v. Universal Oil Products Co., 169
F.2d 514 (3d Cir. 1948), cert. denied, 335 U.S. 912 (1949) (counsel employed solely
to "influence" court).

The distinction between fraud on the court and the fraud relieved from by
the independent action is ambiguous. See Moore & Rogers, at 692 n.266. Cases under
the Amended Rule have not distinguished the two types. E.g., Dowdy v. Hawfield, 159
F.2d 637 (D.C. Cir. 1950); Hadden v. Rumsey Products, 96 F. Supp. 983 (W.D.N.Y.
1951) (suppression of defense). Insofar as fraud in either case must be "extrinsic" to
warrant relief, e.g., Dowdy v. Hawfield, supra; Independence Lead Mines Co. v. Kings-
bury, 175 F.2d 983, 987 (9th Cir. 1949), the distinction between the independent action
and fraud on the court means little, although it may have significance as to what court
may grant relief. See note 20 infra. But where relief is granted for fraud on the
and broadened. Relief is provided in 60(b)(1) for excusable neglect, inadvertence, surprise, and mistake; in 60(b)(2) for newly discovered evidence; and in 60(b)(3) for fraud. Motions under 60(b)(1), (2), and (3) must be made in a reasonable time within one year of judgment.

court without reference to the “intrinsic-extrinsic” categories, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra, fraud on the court may become a means to avoid the “extrinsic” limitation imposed by the independent action. See notes 3 and 4 supra; Moore & Rogers, at 679-81.

18. Relief has been granted where: a consent order was based on erroneous representations of law by OPA officials, Fleming v. Huebsch Laundry, 159 F.2d 581 (7th Cir. 1947); counsel consented to an order without authority, In re Gsand, 153 F.2d 1001 (3d Cir. 1946); service was sufficient to give court jurisdiction, but defendant did not in fact have knowledge of the pending action, e.g., Tozer v. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951); defendant erroneously believed that a co-defendant had arranged for his representation by counsel, Standard Grate Bar Co. v. Defense Plant Corp., 3 F.R.D. 371 (M.D. Pa. 1944); counsel neglected to appear because of full time participation in another case, United States (for the use of Kantor Bros. Inc.) v. Mutual Construction Corp., 3 F.R.D. 227 (E.D. Pa. 1943); dismissal for lack of prosecution was due to oversight of counsel’s clerk, Weller v. Socony Vacuum Oil Co., 2 F.R.D. 158 (S.D.N.Y. 1941); error of counsel resulted in filing answer one day late, Wolfsohn v. Raab, 11 F.R.D. 254 (E.D. Pa. 1951); impoverished party, attempting to proceed without counsel, filed answer that did not comply with the Rules, Woods v. Severson, 9 F.R.D. 84 (D. Neb. 1948); failure to plead a previous judgment against plaintiff as res judicata where plaintiff was one of several hundred parties in the previous suit, Berrios v. Baejjer, 6 Fed. Rules Serv. 60 b. 24, Case 1 (D. Puerto Rico 1942).


19. E.g., Block v. Thousandfriend, 170 F.2d 428 (2d Cir. 1948) (judgment on rent control order set aside where order administratively reversed). Relief has been denied where: lack of due diligence in discovering the evidence, Greenspahn v. Joseph Seagram & Sons Inc., 185 F.2d 616 (2d Cir. 1951); evidence known at the time of trial, Di Silvestro v. United States Veteran’s Administration, 9 F.R.D. 54 (E.D.N.Y. 1949); the new evidence could not have changed result, Union Bleachery v. United States, 176 F.2d 12 (4th Cir. 1949); Baruch v. Beech Aircraft Corp., 172 F.2d 445 (10th Cir. 1949).

20. 60(b)(3) expressly provides for relief from fraud regardless of the “intrinsic”-“extrinsic” categories. Thus the primary use of the action for fraud on the court or the independent action for fraud will now arise where the one year limit on 60(b)(3) has expired; or the independent action may be used where the moving party does not wish to apply to the same court that rendered the judgment, e.g., Hadden v. Rumsey Products, 96 F. Supp. 988 (W.D.N.Y. 1951). Relief by motion under 60(b)(3) can only be obtained from the court that rendered the judgment involved. United States ex rel. Aigner v. Shaughnessy, 175 F.2d 211, 212 (2d Cir. 1949).

21. Motions must be made within a reasonable time even though the stated limit has not expired, e.g., Willard C. Beach Air Brush Co. v. General Motors Corp., 88 F. Supp.
NOTES

60(b)(4) permits relief from a void judgment;22 and 60(b)(5) provides for relief based on changed circumstances subsequent to judgment.23 These grounds are subject to a "reasonable time" limitation.24

60(b)(6) is an unprecedented addition to the Rules.25 This is a catch-all clause to permit correction "for any other reason justifying relief from the operation of the judgment." Motions under 60(b)(6) are subject only to a "reasonable time" requirement. Ackerman v. U. S.26 and Klapprott v. U. S.27 are the Supreme Court's only interpretations of 60(b)(6). In both cases petitioner sought relief from a denaturalization judgment entered approximately four years prior to his motion.28 In treating these motions under

849 (D.N.J. 1950). For general interpretation of the reasonable time limitation see p. 86 and notes 49, 50 infra. Rule 6(b), as amended, cannot be used to extend the time limit in Rule 60(b). Fed. R. Civ. P. 6(b) (1948).

22. E.g., French Renovating Co. v. Ray Renovating Co., 170 F.2d 945 (6th Cir. 1949). And see note 3 supra.

23. E.g., Grand Union Co. v. Lippner, 167 F.2d 958 (2d Cir. 1948) (bankruptcy proceeding injunction modified); Block v. Thouandfriend, 170 F.2d 428 (2d Cir. 1948), supra note 19; Tobin v. Alma Mills, 92 F. Supp. 728 (W.D.S.C. 1950) (relief from ten year old statutory injunction); Pierce Oil Corp. v. United States, 9 F.R.D. 619 (E.D. Va. 1949) (relief granted where judgment on which discontinuance based was reversed).

24. See p. 86 and notes 49, 50 infra. Traditionally, a void judgment could be set aside at any time. See 1 Freeman, Judgments §322. Thus the application of a "reasonable time" limitation is anomalous here. However, in respect to relief based on post-judgment events, the "reasonable time" limit generally governed in the past since this relief was equitable and subject to the doctrine of laches. See Moore & Rogers, at 643 n.64, 667, 668, n.162.

25. 60(b)(6) is a clean break with the past not to be hamstrung by traditional limitations. See Klapprott v. United States, 335 U.S. 601, 615 (1949). And at least one commentator regards the clause as a "dramatic change" in the correction of judgments. Comment, 17 U. of Cmty. L. Rev. 654, 670 (1950). But insofar as 60(b)(6), coupled with the remainder of 60(b), insures that every conceivable ground for relief is covered, see note 31 infra, it simply restates the court's previous plenary power, see note 2 supra, and extends its application beyond the term. However, 60(b)(6) will expand previous relief where used to grant relief in situations never covered by the old post-term remedies, or where, in effect, it extends the time limits of these remedies. Moreover, 60(b)(6), as well as the rest of 60(b), provides unprecedented facility in administration.


28. In Ackermann, interned petitioner had defended but had not appealed. He alleged mental distress, poverty, and reliance on the misleading advice of his naturalization custodian who told him not to appeal and that he would be released after the war. Ackermann v. United States, 340 U.S. 193, 203-4 (1950). A co-defendant successfully appealed. Kelkar v. United States, 144 F.2d 866 (5th Cir. 1944). But the facts in the co-defendant's case were clearly distinguishable from Ackerman's situation. See United States v. Ackerman, 53 F. Supp. 611 (W.D. Texas 1943), 178 F.2d. 933, 925 (5th Cir. 1949).

In Klapprott, petitioner alleged failure to defend due to poverty, illness, incarceration, and preoccupation with defense of other actions; that he had attempted to procure
60(b)(6), the Court enunciated the principle that 60(b)(6) and other clauses of 60(b) are mutually exclusive. Consequently, petitioners were required to demonstrate "more than" the excusable neglect which might have accorded relief under 60(b)(1) had the motions been made within a year. Apparently, this was the only reasonable reading of 60(b)(6). It was in accord with both the intent of the draftsmen and the wording of the clause.

Moreover, other portions of Rule 60(b) dictated this interpretation. The one year limit on 60(b)(1), (2), and (3) would be meaningless were 60(b)(6) applicable to situations falling under these clauses. But the Court's principle that 60(b)(6) and other clauses of 60(b) are mutually exclusive has not been adhered to in practice. Court interpretations counsel by a letter which government agents had taken from him; and that other counsel had promised to defend for him, but had not. His failure to request relief sooner allegedly was due to his imprisonment and defense in other proceedings. Klapprott v. United States, 335 U.S. 601, 604-6 (1949).

29. "(T)he one year limitation of 60(b)(1) would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b). . . . In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts . . . to enable them to vacate judgments. . . ." Klapprott v. United States, 335 U.S. 601, 614-5 (1949) (emphasis added). The concurring opinion agreed "substantially"; id. at 619-20; as did Justice Reed, id. at 625-6, and Justice Frankfurter, id. at 630-1, in separate dissenting opinions. Thus, while split on other aspects of the case, seven of the eight participating members of the Court agreed to the majority reading of 60(b)(6).

In Ackermann, the principle was not enunciated explicitly. But the opinion noted that "extraordinary circumstances" were necessary to qualify for relief under 60(b)(6). It cited in full that part of Klapprott which asserted that Klapprott's situation could not be "fairly or logically classified as mere 'neglect' on his part." 340 U.S. 193, 199-200 (1950). Apparently, the Court resubscribed to the mutual exclusiveness of 60(b)(6) and 60(b)(1).

30. Klapprott's allegations demonstrated "more than" excusable neglect. The case was remanded for findings, 336 U.S. 942 (1949), but Klapprott failed to prove his allegations. 9 F.R.D. 282 (D. N.J. 1949). Ackermann's motion under 60(b)(6) was denied. The Court found that he had "no right" to rely on the custodian's advice, and that his decision to forego appeal was a calculated risk. Ackermann v. United States, 340 U.S. 193, 197-8 (1950). Klapprott was distinguished on its facts, id. at 199-200.

31. Although no Committee Notes were appended to Rule 60(b)(6), the proponents of 60(b) in its final form, Moore & Rogers, at 693 n.272, commented that since the Rule was intended to be comprehensive, some provision was necessary to cope with situations not specifically enumerated. Thus 60(b)(6) was intended to be a "general residual clause . . . to cover unforeseen contingencies." Id. at 692.

32. Fed. R. Civ. P. 60(b)(6), supra note 15. As Justice Reed pointed out: the word "other" in 60(b)(6) would be meaningless if any different interpretation were accorded the clause. See Klapprott v. United States, 335 U.S. 601, 626 (1949) (dissenting opinion).

33. If 60(b)(6) is applied to situations normally falling under 60(b)(1), (2), and (3), these clauses are superfluous. The one year time limit of these clauses could be disregarded merely by granting relief under 60(b)(6). See id. 626 (1949) (dissenting opinion).
of the excusable neglect provisions in 60(b)(1) have been so broad that, when read together with 60(b)(2) through (5), apparently few fact situations remain to call 60(b)(6) into play. Nevertheless, courts immediately resorted to 60(b)(6) as a mandate "to accomplish justice." In many situations they ignored entirely the mutual exclusiveness of 60(b)(6) and other clauses of 60(b). On other occasions, even where the principle was

34. For the broad federal decisions under 60(b)(1) and unamended 60(b), see note 18 supra. However, because of the recency of the Rules, the picture provided by the federal decisions is necessarily incomplete.

Since the provisions of 60(b)(1) (and unamended 60(b)) were taken almost verbatim from CALIFORNIA CODE OF CIVIL PRACTICE § 473 (Deering 1937), California practice has been considered substantially adopted by the Rule. Fiske v. Buder, 125 F.2d 841, 844-45 (8th Cir. 1942); United States v. Mutual Construction Corp., 3 F.R.D. 227, 228 (E.D. Pa. 1943); Ledwith v. Storkan, 2 F.R.D. 559, 542 (D. Neb. 1942). See also Moore & Rogers, at 631-2. And the long history of the excusable neglect provisions in California demonstrates its meaning as known to the draftsmen of Rule 60(b). In California, §473 has been used to grant relief in many situations similar to those that have thus far arisen under the Rules. See 3 Moore, FEDERAL PRACTICE 320 et seq. (1938). But it has also been applied to situations undealt with by federal courts where failure to take appropriate action was due to extreme hardship or impossibility. E.g., Plax v. Plax, 184 Cal. 263, 193 Pac. 242 (1920) (illiteracy and ignorance of English language); Patterson v. Keeney, 165 Cal. 465, 132 Pac. 1043 (1913) (movant arrested while ill in bed, hospitalized as prisoner, served with summons immediately taken from him and not returned during his imprisonment until after default judgment); Burns v. Scoofy, 98 Cal. 271, 33 Pac. 86 (1893) (counsel's preoccupation over murder of brother); Fulweiler v. Hug's Back Consolidated Mining Co., 83 Cal. 126, 23 Pac. 65 (1890) (unforeseeable delay in travel); Hicks v. Sanders, 40 Cal. App. 2d 211, 104 F.2d 549 (1940) (attorney on vacation, movant hospitalized); Stone v. McWilliams, 43 Cal. App. 490 (1919) (blindness, old age, and illiteracy); Baylor v. Solstein, 2 Cal. Unrep. 846, 16 Pac. 893 (1888) (death of counsel). Readings of similar provisions in other states uniformly buttress the California decisions. 1 FREEMAN, JUDGMENTS §§ 241 et seq. Since 60(b)(1) thus covers situations ranging from simple oversights to the physical impossibility of defense, it is difficult to imagine what circumstances might be sufficiently "extraordinary" to constitute "more than" excusable neglect.


36. E.g., Nelms v. Baltimore & Ohio R. Co., 11 F.R.D. 441 (N.D. Ohio 1951); Weilhacker v. United States, 99 F. Supp. 109 (S.D. N.Y. 1951); Fleming v. Mante, 10 F.R.D. 391 (N.D. Ohio 1950); United States v. Miller, 9 F.R.D. 505 (N.D. Pa. 1949). But cf. Woods v. Severson, 9 F.R.D. 84 (D. Neb. 1948) (60(b)(6) disregarded where relief could be granted under 60(b)(1)). In some cases courts granted relief under 60(b)(6) simultaneously with other clauses of 60(b), e.g., Tozer v. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951) (60(b)(1)); Grand Union Equipment Co. v. Lippper, 167 F.2d 958 (2d Cir. 1948) (60(b)(5)); Block v. Thousandfriend, 170 F.2d 428 (2d Cir. 1948) (60(b)(2) and (5)); Tobin v. Alma Mills, 92 F. Supp. 723 (W.D.S.C. 1950) (60(b)(5)). Of course, if relief is given under 60(b)(6) and on another ground under some other clause, the principle is not in fact ignored. However, if this were true in the above situations, the courts gave no indication of it. But see Pierce Oil Corp. v. United States, 9 F.R.D. 619 (E.D. Va. 1949).
announced, it was given only lip service. Consequently, almost every grant of relief under 60(b)(6) could have fallen under 60(b)(1) or other clauses of 60(b).

The effect of the cases under 60(b)(6) establishes the clause as a way of circumventing the one year time limit in 60(b)(1), (2), and (3). Insofar as relief within one year of judgment is incorrectly categorized under 60(b)(6), no immediate violence is done to the one year limit. But these decisions establish precedent fact situations under 60(b)(6) for future use of the clause in similar cases arising later than one year from judgment. Moreover, 60(b)(6) has already been used to circumvent directly the one year limit.

37. E.g., Klapprott v. United States, 335 U.S. 601 (1949), first announcing the principle of mutual exclusion. Yet every reason cited to establish petitioner's conduct as "more than" excusable neglect has itself been a ground for relief under "excusable neglect" provisions. Compare Klapprott v. United States, supra, with cases cited note 34 supra. Indeed, if the Court had followed its own rationale and examined prior decisions, it would have discovered one factually on all fours with the Klapprott case. Patterson v. Keeney, 165 Cal. 465, 132 Pac. 1043 (1913), supra note 34.


39. See note 21 supra and text.


41. See note 40 supra. For an excellent example of the use of factual precedent to circumvent the limit, see United States v. Backofen, 176 F.2d 263 (3d Cir. 1949), relying solely on the factual similarity of United States v. Klapprott, 335 U.S. 601 (1949), to grant relief.

42. See e.g., Klapprott v. United States, 335 U.S. 601 (1949); United States v. Backofen, 176 F.2d 263 (3d Cir. 1949); Nelms v. Baltimore & Ohio R. Co., 11 F.R.D. 441 (N.D. Ohio 1951); Fleming v. Mante, 10 F.R.D. 391 (N.D. Ohio 1950) and discussion in note 38 supra.

43. See note 37 supra, 45 infra.
The difficulty with the Amended Rule is its failure to provide sufficient and clear-cut grounds for relief later than one year from judgment. 60(b) (6) does afford a way to avoid the one year limit of 60(b) (1), (2), and (3). But it is not a desirable method for generally providing relief after one year. The chance for relief is once more too dependent upon the flexibility of a court. And the decisions distending the clause are a travesty on clear thought. True, a one year time limit on 60(b) (6) would clear up the confusion by eliminating the opportunity to distort the clause. But the misuse of 60(b) (6) to circumvent time limitations simply demonstrates traditional judicial ingenuity in grappling with inadequate means for remedying injustice. A one year limit on 60(b) (6) would merely shift the problem by forcing courts to distort other parts of Rule 60(b).

44. Relief under 60(b) (6) in evasion of the one year limit of 60(b) (1), (2), and (3) will depend upon the chance of litigating before a court that is willing either to indulge in the word juggling of the Klapprott case, see note 37 supra and note 45 infra, or to ignore entirely the exclusiveness of 60(b) (6) with other clauses, see note 35 supra.

45. E.g., Klapprott v. United States 335 U.S. 601 (1949). The Court concluded that petitioner showed "more than" excusable neglect since his conduct was not "neglect" at all, i.e., petitioner was deprived of any reasonable opportunity to defend. Id. at 613-614. But "mere neglect" is not in itself a ground for relief under 60(b) (1) or similar provisions, since the "neglect" must be "excusable," c.f., Ledwith v Storham, 2 F.R.D. 539 (D. Neb. 1942); Gorman v. California Transit Co., 199 Cal. 246, 248 Pac. 923 (1926). In determining what makes the "neglect" "excusable", the courts have consistently adopted the test of whether petitioner's conduct was reasonable. See c.f., Hughes v. Wright, 64 Cal. App. 2d 897, 901, 149 P.2d 392, 395 (1944) (movant must show a situation where he is "unexpectedly placed, to his injury without any fault or negligence of his own which ordinary prudence could not have guarded against.") But this is precisely the standard adopted in Klapprott to show "more than" excusable neglect. Thus, if the Klapprott standard were to be used, 60(b) (6) would completely swallow up 60(b) (1) and its one year time limitation. Since Klapprott, reasonably read, intended to keep 60(b) (1) and (6) apart, the Klapprott standard defeats the rule of the case.

46. "Piercing the veneer of phrases, the decisions disclose that federal courts have always exercised broad discretion to right obvious injustices ... even if technicalities must be twisted to do so. ..." 8 Cyclopedia Fed. Proc. § 3584. And see Moore & Rogers, at 688; pp. 76-9 supra; note 3 supra.

47. 60(b)(4) and (5) are only applicable in limited situations that do not overlap with any other clauses of 60(b), see notes 15, 22, 23 supra, and thus are not generally available for post-year relief. But see Block v. Thouandriend, 170 F.2d 428 (2d Cir. 1948), note 19 supra, for a possible use of 60(b) (5) to circumvent the one year limit for relief for newly discovered evidence. The independent action, see notes 3, 4, 16 supra, might be stretched to cover a wide range of situations similar to those comprehended by 60(b) (1), and (3); but it is restricted by a requirement that the fraud accident or mistake relieved from be "extrinsic," see sources cited note 3 supra, and discussion note 4 supra. Insofar as fraud alone is concerned, it is possible that an action for fraud on the court may circumvent this "extrinsic" requirement. See note 17 supra. However, as long as the "intrinsic-extrinsic" distinction limits the independent action, its use for post-year relief will remain a question of confusion and chance. For, "at times it is a journey into futility to attempt a distinction between extrinsic and intrinsic matter." Moore & Rogers, at 658. And see notes 3, 4 supra.