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Federal Rule 52(a) and 60(b) - A Chinese Puzzle

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The act is couched in such broad terms that failure to allege a violation of a specifically enumerated safety standard should not defeat the plaintiff's case if the manufacturer's design has created an unreasonable risk of death or injury. This is buttressed by the fact that specific standards in force one year may be modified or deleted in later years. And, apparently, through judicial interpretation of existing common law or by legislation, a state may impose more stringent safety requirements than those demanded by the act.

Yet the defendant manufacturer certainly will argue that compliance with all enumerated standards creates an inference of an absence of negligence in design. Support for this position can be found in the necessity for uniformity in standards of application. In such a vast industry it would be impractical, if not impossible, to allow the courts to set the standards for automobile safety. The automobile industry would find itself in an impossible position.[50] Therefore, in deference to uniformity in standards of application, compliance with the act by the manufacturer should be given substantial weight in litigation arising out of automobile accidents.

Frederick W. Burnett, Jr.

Federal Rules 52(a) and 60(b) — A Chinese Puzzle

The 1956 case of *Lim Kwock Soon v. Brownell*,[1] having recently returned to haunt the Fifth Circuit, provides a basis for an analysis of rules 52(a) and 60(b), Federal Rules of Civil Procedure. The case itself, involving perjured evidence of Chinese aliens who claimed to be natural-born American citizens, originated in the district court sitting without a jury. That court held that the applicants had not discharged their burden of proof and denied them citizenship.[2] The Fifth Circuit, professing ad-

[50] It is no industry secret that new car styles and designs are "irrevocably" decided almost two years before the model will go on sale to the public. This important time period is known in the automotive industry as "lead time." For example, in the first week of January, 1967, the major automotive companies notified the National Traffic Safety Agency Administrator, Dr. William Haddon Jr., that they would be unable to meet several of the requirements. The companies insist that not enough lead time remained to make modifications on 1968 models before their introduction. A spokesman for one company insists that if the Safety Agency refuses to modify at least five of the requirements, his company will be forced to halt production on its 1968 models. For a discussion of these and other problems now confronting the newborn agency, see, Wall Street Journal, Sept. 6, 1966, p. 1, col. 6 (Southwest ed.); Time, Jan. 13, 1967, p. 63.

[1] 143 F. Supp. 388 (S.D. Tex. 1956). This was a suit for a declaratory judgment brought by the two aliens.

[2] The district court stated that "the evidence shows strong indications of fraud." 143 F. Supp. at 390.

herence to rule 52(a), reversed and remanded with instructions to enter judgment declaring the plaintiffs United States citizens.[3] Eight years later the Government filed in the district court a motion that the judgment be vacated based on a stipulation in which the plaintiffs admitted perjury in the original action.[4] Doubting his authority to set the judgment aside, the district judge declined to entertain the motion.[5] Thereupon a motion was filed with the Fifth Circuit asking leave to reopen the case. The Fifth Circuit vacated the prior judgment and authorized the district court, pursuant to rule 60(b), to entertain such rulings, orders, and judgments necessary to correct the "fraud perpetrated upon the courts."[6]

I. "CLEARLY ERRONEOUS" STANDARD OF RULE 52(a)

The fear of arbitrary action by appellate courts resulted in the seventh amendment to the Constitution which insulates jury findings of fact from review by appellate courts except as provided by common law.[7] Since this amendment is inapplicable to judge-made findings of fact, Congress and the courts developed the rules applicable to such findings.[8] By statute the reviewability of such findings in a case at law was governed by the restrictions applicable to jury-made findings.[9] A case in equity, theoretically, could be tried de novo upon review;[10] however, courts developed a principle which limited this broad review—if credibility were involved, the reviewing court would reverse judge-made findings only when they were

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[3] Lim Kwock Soon v. Brownell, 253 F.2d 809 (5th Cir. 1958). In its opinion the Fifth Circuit ignored the district court's belief that the evidence was fraudulent.

[4] Sworn statements were submitted by the aliens and their alleged father admitting to the perjury.

[5] Lim Kwock Soon v. Brownell, 253 F. Supp. 963, 965 (S.D. Tex. 1966). The court stated: "I entertain serious doubt that I have any authority to set aside or alter in any way the Judgment entered July 28, 1958, on order of the Court of Appeals, except on further order of that court."

[6] Lim Kwock Soon v. Brownell, 369 F.2d 808, 809 (5th Cir. 1966).

> On a further uncontested motion of the United States, IT IS ORDERED that the judgment entered in this cause upon the opinion of this Court in Lim Kwock Soon and Lim Kwock Min v. Herbert Brownell, Jr., Attorney General of the United States of America 5th Cir. 1958, 253 F.2d 809, be vacated and that the United States District Court for the Southern District of Texas be authorized and empowered, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to enter such ruling, orders and judgments as to it may appear appropriate to correct the fraud perpetrated upon the courts herein by the plaintiffs and appellants, Lim Kwock Soon and Lim Kwock Min.

[7] U.S. CONST. amend. VII. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[8] Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937). This Article points out well the struggle that developed in the nineteenth century over the review of findings of fact by a judge.

[9] 13 Stat. 501 (1865), 28 U.S.C. §§ 773, 875 (1964). This statute provided that: "The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." These statutes have now been superceded by FED. R. CIV. P. 52(a).

[10] Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 193-207 (1937).

clearly erroneous.[11] When Federal Rule of Civil Procedure 52(a) was adopted, the equity standard of "clearly erroneous" was made applicable to cases in both law and equity.[12] Rule 52(a) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *United States v. United States Gypsum*,[13] a case involving oral evidence, the Supreme Court held that the findings of fact of a trial judge, while not conclusive, can be set aside "when although there is evidence to support [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[14] The *Gypsum* case interprets rule 52(a) as creating a presumption in favor of the correctness of a trial court's findings which cannot be lightly overcome.[15] One of the many cases interpreting the *Gypsum* rule is *Nee v. Linwood Sec. Co.*,[16] holding that there must be more than a difference of personal judgment before the court of appeals should find the trial court to be "clearly erroneous."[17] Other cases have buttressed this *Linwood* view, stating that on close questions the trial court is not limited to deciding the issues correctly.[18]

Concerning the application of rule 52(a) to oral and written evidence, a divergence has developed. This has been caused by the "due regard"[19] clause of rule 52(a). The question is whether this clause is the reason for the clearly erroneous standard or is only an additional factor for the appel-

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[11] Lilienthal v. McCormick, 117 Fed. 89, 95 (9th Cir. 1902); Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co., 104 Fed. 243, 244 (8th Cir. 1900).

[12] 5 MOORE, FEDERAL PRACTICE § 52.03 (2d ed. 1966) (hereinafter cited as MOORE).

[13] 333 U.S. 364 (1948).

[14] *Id.* at 395.

[15] 5 MOORE § 52.03(1) n.25. See also Continental Cas. Co. v. Stokes, 249 F.2d 152, 154 (5th Cir. 1957) (per curiam); Lew Wah Fook v. Brownell, 218 F.2d 924 (9th Cir. 1955); Imperial Assur. Co. v. Joseph Supornick & Son, 184 F.2d 930, 933 (8th Cir. 1950); United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945).

[16] 174 F.2d 434 (8th Cir. 1949).

[17] *Id.* at 437.

> That the trial court could have viewed the facts differently, or that we might perhaps have done so, if we had been the initial trier thereof, does not alone entitle us to reverse. Under Rule 52(a) and its interpretation in the United States Gypsum Co. case, there must exist a stronger basis for overthrowing a finding of fact than a mere difference in personal judgment. Such evidentiary weight and such convictional certainty must be present that the appellate court does not feel able to escape the view that the trial court has failed to make a sound survey of or to accord the proper effect to all the cogent facts, giving due regard, of course, to the trial court's appraisal of witness credibility where that factor is involved.

See also Nee v. Main Street Bank, 174 F.2d 425 (8th Cir. 1949). *Main Street Bank* was decided at the same time as *Linwood* on similar facts; however, the decision in the two cases was opposite.

[18] 2B BARRON & HOLTZOFF, FEDERAL PRACTICE § 1133 (Wright ed. 1961) (hereinafter referred to as BARRON & HOLTZOFF). United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); United States v. Singer Mfg. Co., 374 U.S. 174, 201 (1963) (Harlan, J., dissenting); Hays v. Morgan, 221 F.2d 481 (5th Cir. 1955); Shepherd v. Mahannah, 220 F.2d 737 (5th Cir. 1955); Wald v. Eagle Indem. Co., 178 F.2d 91, 93 (5th Cir. 1949).

[19] The "due regard" clause provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

late court to consider in applying this standard. When the evidence is oral, the trial judge, by his opportunity to observe witnesses, is in a better position to determine their credibility than the appellate court which has before it only the written record. Whether the case be a highly controverted one with many witnesses and extending over a long period of time or a short trial with only one of the parties presenting testimony, the trial court determines the credibility of testimony.[20]

However, when the findings are based on written evidence, the appellate court is in the same position as the lower court, for it has the same evidence before it as did the trial court and the factor of witness demeanor is not involved.[21] Applying the above rationale, Judge Frank in *Orvis v. Higgins*[22] held that an appellate court could disregard a trial court's finding when the evidence is written. The Frank view assumes that the "due regard" clause is the reason for the clearly erroneous standard. If the evidence is oral, rule 52(a) applies; and the party attacking the finding of the trial court must overcome the presumption of verity. When the evidence is written, no presumption of verity exists. Opposed to the Frank view is the so-called Clark view[23] which assumes that the "due regard" clause is only an additional factor for the appellate court to consider in applying the clearly erroneous standard. Under the Clark view, rule 52(a) applies, be the evidence oral or written; and the reviewing court can reject the trial court's findings only if it feels that the trial court has misinterpreted the evidence.[24]

A majority of the courts of appeals,[25] including the Fifth Circuit,[26]

[20] The United States Court of Appeals for the District of Columbia Circuit in Wynne v. Boone, 191 F.2d 220, 222 (D.C. Cir. 1951) explained the reason the trial court should determine credibility.

> He [the witness] may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.

[21] 5 MOORE § 52.04; see cases cited n.2.

[22] 180 F.2d 537 (2d Cir. 1950).

[23] Heim v. Universal Pictures Co., 154 F.2d 480, 490 (2d Cir. 1946) (Clark, J., concurring).

[24] Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962), 41 TEXAS L. REV. 935 (1963). In this case, after a thorough review of rule 52(a), the Ninth Circuit adopted the Clark view.

[25] The following are cases supporting the Frank rationale: *First Circuit:* Fleming v. Palmer, 123 F.2d 749 (1st Cir. 1941); *Second Circuit:* Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965); *Fifth Circuit:* Frazier v. Alabama Motor Club, Inc., 349 F.2d 456 (5th Cir. 1965); *Sixth Circuit:* Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954); *Seventh Circuit:* Arnolt Corp. v. Stansen Corp., 189 F.2d 5 (7th Cir. 1951); *Eighth Circuit:* State Farm Mut. Auto Ins. Co. v. Bonacci, 111 F.2d 412 (8th Cir. 1940); *Ninth Circuit:* Brinker-Johnson Co. v. Barnes, 272 F.2d 250 (9th Cir. 1959); *Tenth Circuit:* Bowles v. Beatrice Creamery Co., 146 F.2d 774 (10th Cir. 1946); *District of Columbia Circuit:* Dollar v. Land, 184 F.2d 245 (D.C. Cir. 1950).

However, within the individual circuits there is conflict. The following cases support the Clark rationale: *First Circuit:* Texas Co. v. R. O'Brien & Co., 242 F.2d 526 (1st Cir. 1957);

adhere to the Frank view. Therefore, rule 52(a), as interpreted by most courts, means:

1. The appellate court can set aside the trial court's findings of fact, only if it has a definite and firm conviction that a mistake was committed.

2. Credibility of witnesses is to be decided only by the trial court, the court which heard and observed the witnesses.

3. When the evidence is written, the appellate court has broader powers to review the trial court's findings.

Rule 52(a) and the Lim Kwock Soon Case[27] The Fifth Circuit in 1958 treated the *Lim Kwock Soon* case as if it were before it on trial de novo. There was no application of the clearly erroneous standard, but rather a substitution by the Fifth Circuit of its own findings for that of the trial court.[28] The abuse of rule 52(a) is particularly apparent, for the case hinged on credibility of testimony. Without hearing or observing the witnesses testify, the Fifth Circuit disregarded the trial court's rejection of the plaintiff's story and found it credible. Regarding the written evidence, the court relied on the Frank view which allows the appellate court a broad scope of review.[29] Had the Fifth Circuit followed the proper interpretation of rule 52(a) in *Lim Kwock Soon*, it could have avoided the problems under rule 60(b).

II. Review of Judgments Under Rule 60(b)

Before the adoption of rule 60(b),[30] relief from final judgments was

Fifth Circuit: National Sur. Corp. v. Wells, 287 F.2d 102 (5th Cir. 1961); *Sixth Circuit:* United States v. Allinger, 275 F.2d 421 (6th Cir. 1960); *Ninth Circuit:* Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962).

The Supreme Court has never given an authoritative statement of its view. In *Gypsum* and Duberstein v. Commissioner, 363 U.S. 278 (1960) the Supreme Court seemed to indicate it would follow the Clark view. But in United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966), Justice Fortas stated as dicta: "Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) . . . plays only a restricted role here. This was essentially a 'paper case.' It did not unfold by the testimony of 'live' witnesses."

[26] Frazier v. Alabama Motor Club, Inc., 349 F.2d 456, 458 (5th Cir. 1965).

> The defendants here argue at the outset that the decision of the lower court was based upon findings of fact which may not be set aside 'unless clearly erroneous' under Rule 52(a) of the Fed. Rules Civ. Proc., 28 U.S.C.A. . . . . The findings of fact were based solely on the undisputed testimony contained in the deposition of one T. Chalmer Bryant . . . there was no issue of credibility. . . . Absent any issue of credibility we are in as good a position as was the trial court to evaluate the testimony, draw the inference of which the testimony is reasonably susceptible, and decide the critical issue raised.

See also Merry Mfg. Co. v. Burns Tool Co., 335 F.2d 239 (5th Cir. 1964).

[27] Lim Kwock Soon v. Brownell, 253 F.2d 809 (5th Cir. 1958).

[28] The Fifth Circuit, for example, disregarded the trial court's finding that the evidence was fraudulent.

[29] The Fifth Circuit treated a letter that was introduced into evidence as if it were trying the case de novo, for it even examined the handwriting of the letter.

[30] Fed R. Civ. P. 60(b).

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud,

provided, (1) by a series of common law writs which the Advisory Committee on Rules of Civil Procedure characterized as "shrouded in ancient lore and mystery,"[31] and (2) by independent action.[32] Rule 60(b) attempted to clear away the shroud and to simplify the procedure for relief by abolishing the writs,[33] but it expressly saves the independent action.[34] While the rule lists several provisions for relief, discussed here will be only those which relate to setting aside judgments obtained by fraud.

Procedure Before the adoption of the federal rules, it was well-established that a district court lacked authority to disturb an appellate mandate unless leave of the appellate court were obtained.[35] In 1940, in *Home Indem. Co. v. O'Brien*,[36] the Sixth Circuit held that the district court could not, by entertaining a motion under rule 60(b), disturb the appellate mandate. However, this opinion is not universally shared, for in *Perlman*

> 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: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court.

[31] 3 BARRON & HOLTZOFF § 1331.

[32] The independent action is an action brought with the express purpose of setting aside a judgment. There has been no attempt to set out specifically the substantive bases of the independent action, but the courts use past judicial decisions which are based upon equitable considerations. 7 MOORE § 60.37(1). Among the bases which have been allowed for independent action are these: *Fraud:* Johnson v. Waters, 111 U.S. 640, 667 (1884); *Accident:* National Sur. Co. v. State Bank, 120 Fed. 593 (8th Cir. 1903); *Mistake:* West Va. Oil & Gas Co. v. George E. Bruce Lumber Co., 213 F.2d 702 (5th Cir. 1954); *Newly Discovered Evidence:* Pickford v. Talbott, 225 U.S. 651 (1912) (However, it must be shown that there are manifestly unconscionable circumstances which demand relief.)

[33] FED. R. CIV. P. 60(b): "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. . . ."

[34] It is clear rule 60(b) has not preempted this field, for rule 60(b) expressly states: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court." See 7 MOORE §§ 60.36, 60.37; Marshall v. Holmes, 141 U.S. 589 (1891); United States v. Throckmorton, 98 U.S. 61 (1878); Marine Ins. Co. v. Hodgson, 2 U.S. 557 (1813) (dictum).

[35] Geuder Paeschke & Frey Co. v. Clark, 288 F.2d 1 (7th Cir. 1961); Butcher & Sherrerd v. Welsh, 206 F.2d 259 (3d Cir. 1953); Miller v. United States, 117 F.2d 256 (7th Cir.), *cert. denied*, 313 U.S. 591 (1940); Albion-Idaho Land Co. v. Adams, 58 F. Supp. 579 (S.D. Idaho 1945).

[36] 112 F.2d 387, 388 (6th Cir. 1940):

> [I]t is the view of this court, that the District Judge was without power to alter a judgment affirmed by us and that it was his duty, upon the receipt of the mandate, to proceed with the execution of the judgment, and no more; that this limitation upon the authority of the District Judge to alter the judgment in defiance of the express command of the mandate, is established by a long line of federal cases . . . . It being further the view of this court that the rule established . . . has not been modified by Rule 60 of the Rules of Civil Procedure.

See also Baruch v. Beech Aircraft Corp., 172 F.2d 445 (10th Cir. 1949).

v. 322 West Seventy-Second St. Co.[37] the Second Circuit stated that "Federal Rules of Civil Procedure, rule 60(b), does not require a preliminary petition in the appellate court for permission to reopen in the district court."[38] Although the *O'Brien* view has prevailed, there was in 1955 an unsuccessful attempt to amend rule 60(b) by incorporating the *Perlman* view.[39] If the proposed amendment had been adopted, it would have clarified and expedited motions under rule 60(b).[40] Since it was not adopted, there still is confusion regarding this aspect of rule 60(b). The rule is directed toward the district court, but because of the *O'Brien* principle, the district court has no jurisdiction until appellate leave has been obtained.[41] In *Smith v. Pollin*,[42] the court of appeals for the District of Columbia outlined a compromise:

> We are of opinion, therefore, that, when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant would then make a motion in this court for a remand of the case in order that the District Court may grant the motion for new trial.[43]

Though this case dealt with a motion based on newly-discovered evidence while appeal was pending, the procedure is also applicable to completed appeals and to motions under rule 60(b) based upon grounds other than newly-discovered evidence. However, it is easy to see the inadequacy of the *Smith v. Pollin* method. While not directly interfering with the appellate court's mandate, the district court makes a decision and then awaits leave to set it in motion.

If *O'Brien* were followed in *Lim Kwock Soon*,[44] the district judge was

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[37] 127 F.2d 716 (2d Cir. 1942). See Clark's dissent in S.C. Johnson & Son, Inc. v. Johnson, 175 F.2d 176 (2d Cir. 1949).

[38] 127 F.2d 716, 719 (2d Cir. 1942).

[39] The Advisory Committee on Rules of Civil Procedure in 1955 proposed the following addition to rule 60(b): "Such motion does not require leave from an appellate court, though the judgment has been affirmed or settled upon appeal to that court." The Committee characterized the *O'Brien* view as "useless and delaying formalism." 7 MOORE § 60.30(2) n.25.

[40] However, Moore has attacked the proposed amendment. See 7 MOORE, § 60.30(2) n.25:

> Certainly in many cases a requirement of leave from the appellate court is not a useless and delaying formalism. . . . If an application to the appellate court is required, as in the past, the appellate court can screen out attacks that are clearly without merit. . . . We believe that the present practice does not impose barren requirements, nor unwarranted hurdles since the moving party is seeking relief from a final judgment after the case has been before at least one appellate court. The Committee's proposed amendment, we believe, unncessarily undermines the finality of judgments.

[41] If there has been an appeal, the requirement of requesting appellate leave creates a pitfall; for rule 60(b) itself speaks in terms of a motion to the *district* court.

[42] 194 F.2d 349, 350 (D.C. Cir. 1952); *accord*, Creamette Co. v. Merlino, 289 F.2d 569 (9th Cir. 1961); Grecar v. Grecar, 288 F.2d 466 (9th Cir. 1961).

[43] 194 F.2d 349, 350 (D.C. Cir. 1952).

[44] Lim Kwock Soon v. Brownell, 253 F. Supp. 963 (S.D. Tex. 1966).

entirely correct in dismissing the motion. However, if *Smith v. Pollin* were followed, the question is more difficult, for under that case the district court cannot grant the motion but can merely indicate that it would grant the motion if appellate leave is obtained. If the motion in *Lim Kwock Soon* had been made for the purpose of setting aside the judgment, the district court was correct in refusing to act, but if the motion were filed only for the purpose of having the district court indicate it would grant the motion if leave were granted, the district court was incorrect. The motion in *Lim Kwock Soon* asked for a setting aside of its former judgment;[45] thus, the district court was correct in refusing to act.

Scope of Rule 60(b) The first provision which relates to fraud is rule 60(b)(3).[46] A motion based upon this ground must be brought within a reasonable time, not later than one year after the judgment was entered.[47] The second provision is rule 60(b)(6) which provides relief for "any other reason justifying relief from the operation of the judgment." The only time limitation for the motion based on rule 60(b)(6) is that it must be brought within a reasonable time.[48] However, rule 60(b)(6) does not include the fraud mentioned in rule 60(b)(3) according to *Klapprott v. United States*:[49] "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified [60(b)(3) being one of the five], vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[50] Nevertheless, the Second Circuit case of *United States v. Karahalias*,[51] although reaffirming the *Klapprott* rule, held that relief can be

[45] The Government asked for the following relief:

> It is further stipulated that a judgment be entered as follows:
> 1. That plaintiffs Lim Kwock Soon and Lim Kwock Min are not nationals and citizens of the United States;
> 2. That said plaintiffs are entitled to no relief by the petition filed herein; and
> 3. That the petition be, and the same is, hereby dismissed with prejudice.

Id. at 964.

[46] FED. R. CIV. P. 60(b):

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

See text accompanying notes 72 and 73 *infra* for the distinction between intrinsic and extrinsic fraud.

[47] FED. R. CIV. P. 60(b): "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."

[48] FED. R. CIV. P. 60(b): "The motion shall be made within a reasonable time." Laches is a possible defense to a rule 60(b)(6) motion.

[49] 335 U.S. 601 (1949).

[50] *Id.* at 614-15. Professor Moore has succinctly stated: "It is important to note, however, that clause (6) contains two very important internal qualifications of its application: first, the motion must be based upon *some reason other than those stated in clauses (1)-(5)*; and second, the other reason urged for relief must be such as to *justify* relief." 7 MOORE § 60.27(1). See also Federal Deposit Ins. Corp. v. Alker, 30 F.R.D. 527, 532 (E.D. Pa. 1962); Davis v. Wadsworth Const. Co., 27 F.R.D. 1 (E.D. Pa. 1961).

[51] 205 F.2d 331 (2d Cir. 1953).

granted under rule 60(b)(6) when the court feels that the particular matter involved goes beyond the strict provisions of rules 60(b)(1)-(5).[52] Several courts have held that to go beyond the strict provisions of rules 60(b)(1)-(5) requires the showing of gross unfairness or inequitable action.[53]

The third ground is for "fraud upon the court."[54] It has been held that when fraud is practiced upon it a court has inherent power to give relief from a judgment.[55] *Throckmorton v. United States*[56] held that perjured testimony or forged documents did not justify relief upon this ground.[57]

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*[58] the plaintiff in a patent infringement suit used as evidence a magazine article, attributed to an outside party, which actually had been written by one of the plaintiff's attorneys. After the judgment had become final, the defendant discovered the fraud. The defendant then filed a motion to have the judgment set aside as a fraud upon the court. Mr. Justice Black, in holding that such perjury constituted "fraud upon the court" stated that there is "a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."[59] He said that when the occasion had demanded relief, courts had used their power to relieve parties of inequitable judgments.[60] Particularly stressed by Mr. Justice Black was the effect of the attorney's action upon the "integrity of the judicial process."[61]

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[52] In *Karahalias* the court simply evaded the one-year limitation by holding that the type of action involved went beyond the grounds specified in neglect. A like result could be reached in the case of fraud by a court's finding that the particular action involved went beyond rule 60(b)(3).

[53] Bros, Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594 (5th Cir. 1963). This case shows the attempt of courts to escape the one-year limitation of rule 60(b) and to give relief under the "any other reason" clause. The court stated: "While the circumstances reflected by all of these papers bear many of the earmarks of a mere plea for reopening for newly discovered evidence under (2) or fraud under (3), it is something more." *Id.* at 609. See also L. P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964).

[54] FED. R. CIV. P. 60(b). "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.*" (Emphasis added.)

[55] Not only district courts but also appellate courts possess the power to act when a fraud is committed on the court. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). See also Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575 (1946); Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3d Cir. 1948), *cert. denied sub nom,* Universal Oil Prods. Co. v. William Whitman Co., 335 U.S. 912 (1949).

[56] 98 U.S. 61 (1878).

[57] *Id.* at 66. "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

[58] 322 U.S. 238 (1944). See also Dausuel v. Dausuel, 195 F.2d 774 (D.C. Cir. 1952); Dowdy v. Hawfield, 189 F.2d 637 (D.C. Cir. 1951).

[59] Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 244 (1944).

[60] *Id.* at 246.

[61] *Id.* at 247. The court states that the magazine article really amounted to a "brief in behalf of Hartford, prepared by Hartford's agents, *attorneys,* and collaborators." (Emphasis added.)

Hazel-Atlas sets a vigorous standard, for the fraud involved must involve more than mere injury to the litigant.[62] The harm must compromise the administration of justice by the court.[63]

If *Throckmorton* had been followed, no relief could have been granted in *Hazel-Atlas*, as the fraud was perjury during the trial. Professor Moore[64] believes that "fraud upon the court" should embrace fraud that "defiles the court itself,"[65] or is perpetrated by officers of the court, or interferes with the judicial machinery to such an extent that the court is prevented from adjudicating other cases.[66] Professor Moore's definition appears at first glance to be more stringent than the rule of *Hazel-Atlas*, but as he points out, *Hazel-Atlas* falls within his definition, for the fraud committed in that case involved an officer of the court.[67]

The fourth method of relief is an independent action,[68] which is not dependent on rule 60(b).[69] The *Throckmorton*[70] case stated the principles

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[62] *Id.* at 246. Justice Black stated:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always await upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

[63] *Ibid.*

[64] 7 MOORE § 60.33. Professor Moore states:

> 'Fraud upon the court' should, we believe, embrace only that species of fraud which does, or attempts to, defile 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.

The case of Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798 (2d Cir. 1960) used Moore's definition as a test to determine if there had been fraud upon the court.

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

> While he [an attorney] should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary, his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

In Hawkins v. Lindsley, 327 F.2d 356 (2d Cir. 1964), relief was denied because no attorney was involved.

[68] Rule 60(b) specifically saves the independent action. See Note, 48 IOWA L. REV. 398, 404 (1963).

[69] Oliver v. City of Shattuck, 157 F.2d 150 (10th Cir. 1946). 3 BARRON & HOLTZOFF § 1331; 7 MOORE §§ 60.36-.37(1). In comparing rule 60(b) with the independent action, Moore states:

> There are, undoubtedly, some procedural differences between the 60(b) motion and the independent action. But the essential difference does not lie in pure procedure. It is this. The independent action affords relief where the 60(b) motion does not afford a plain, adequate and complete remedy; and, what is perhaps more important, it affords relief, when warranted by established equitable principles, although relief by motion under 60(b) is not obtainable because the time for making a motion has run.

Id. § 60.38(3).

[70] 98 U.S. 61 (1878).

that govern such independent action based upon fraud. Intrinsic fraud, which involves fraud in the manner in which the decree of the court is rendered and which covers questions of the validity of deeds and perjured testimony, does not justify relief by independent action.[71] Extrinsic fraud, fraud practiced upon the party seeking relief so that he is prevented from presenting fully his case to the court, does justify relief.[72] However, the Supreme Court muddied the waters in this area by its decision in *Marshall v. Holmes*.[73] There the Court appeared to indicate that intrinsic as well as extrinsic fraud would justify relief from a judgment.[74]

III. Conclusion

Lim Kwock Soon presents a novel problem, for the stipulation submitted by the Government is conclusive proof of perjury,[75] which is a type of fraud. But should the judgment be set aside on this ground alone? If the motion to set aside this judgment has been brought within one year of the judgment, relief could be granted under rule 69(b)(3); however, it has been eight years since the entry of the judgment.[76] Likewise, absent a showing of other circumstances besides the perjury, rule 60(b)(6) would be foreclosed because the "any other reason" provision excludes the grounds of rule 60(b)(3).[77] The provision for independent action is inapplicable because perjury constitutes only intrinsic fraud,[78] generally considered insufficient to set aside a judgment. If there had been any basis for setting aside this judgment, it would rest in the inherent power of a court to set aside a judgment for fraud upon the court, which is expressly saved by rule 60(b).[79]

However, perjury does not constitute fraud upon the court in and of

[71] *Id.* at 66. "[T]he doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

[72] *Ibid.* "Some fraud practised directly upon the party seeking relief against the judgment or decree, [so] that the party has been prevented from presenting all of his case to the court."

[73] 141 U.S. 589 (1891).

[74] *Id.* at 596.

> While, as a general rule, a defence 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 is to be against conscience to execute a judgment, and of which the injured party could not have availed himself on 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 application to a court of chancery.'

[75] The two aliens in this stipulation expressly stated that they perjured themselves upon the trial of the case.

[76] See note 48 *supra*.

[77] See notes 49-53 *supra*.

[78] See notes 72-73 *supra*.

[79] See note 55 *supra*.