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Civil Procedure--The Availability of Relief from a Final Judgement for Reason of Judicial Mistake of Law under Rule 60(b)(1) of the Federal Rules of Civil Procedure

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RECENT DEVELOPMENT

CIVIL PROCEDURE—THE AVAILABILITY OF RELIEF FROM A FINAL JUDGMENT FOR REASON OF JUDICIAL MISTAKE OF LAW UNDER RULE 60(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE—*Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980).

I. INTRODUCTION

The availability of relief from a final judgment for reason of judicial mistake of law under rule 60(b)(1) of the Federal Rules of Civil Procedure[1] currently receives three different views among the circuit courts of appeal.[2] The Tenth Circuit recently had an opportunity in

1. Rule 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, corum vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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

2. The most conservative view simply does not recognize rule 60(b)(1) as a means of obtaining relief from a final judgment for reason of judicial mistake. Under this view, relief from a mistake of law by the court is available only through a rule 59(e) motion to amend a judgment or by way of timely appeal. This view is articulated by the Seventh Circuit Court of Appeals, in Swam v. United States, 327 F.2d 431 (7th Cir. 1964), where in discussing the plaintiff's allegations of judicial mistake of law as ground for its rule 60(b)(1) motion the court said:

> These averments do not constitute the kind of mistake or inadvertence that comes within the ambit of rule 60(b). If plaintiff believed the district court was mistaken as a matter of law in dismissing the original complaint, he should have appealed within sixty days after the dismissal or he might have filed a timely motion under rule 59 to vacate the judgment of dismissal and for leave to amend his complaint.

Security Mutual Casualty Co. v. Century Casualty Co.,[3] to further establish its interpretation of rule 60(b)(1).[4]

In *Security Mutual*, the United States District Court for the District of Colorado had been directed by the Tenth Circuit to determine the amount of Security Mutual's liability to Century in accordance with the terms of the reinsurance agreement between the parties.[5] Instead, the district court entered judgment in favor of Century but mistakenly dismissed the action without determining the amount of Security Mutual's liability to Century.[6] One hundred and five days after the judgment was entered Century filed a rule 60(b)(1) motion for relief.

The district court applied the conservative view of rule 60(b)(1), joining those jurisdictions whose definition of "mistake" does not include judicial mistake for purposes of the rule.[7] The conservative view maintains that, other than through appeal, only a rule 59(e) motion to

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Id. at 433. *Accord*, Silk v. Sandoval, 435 F.2d 1266, 1268 (1st Cir. 1971).

A more moderate view of rule 60(b)(1) allows the court to relieve a party from a final judgment upon a motion made before the time for appeal has expired. This appeal time limitation is designed to prevent the use of rule 60(b)(1) as a substitute for timely appeal or as an extention of the effective time for review of a judicial error. This moderate view of rule 60(b)(1) is advocated by Professor Moore: "[W]hy should not the trial court have the power to correct its own judicial error under 60(b)(1) within a reasonable time—which as we subsequently point out, should not exceed the time for appeal . . . ?" 7 J. MOORE'S FEDERAL PRACTICE ¶ 60.22 [3], at 259-60 (2d ed. 1979). The majority of federal jurisdictions, including the Second, Third, Fourth, Sixth, Eighth, Ninth and D.C. Circuits, employ the moderate view to some degree. *Compare* Fox v. Brewer, 620 F.2d 177, 180 (8th Cir. 1980) (relief available from an inadvertent judicial mistake upon a motion made within the time for appeal) *with* International Controls v. Vesco, 556 F.2d 665, 670 (2d Cir. 1977) (relief available from a substantive mistake by the court upon a motion made prior to the expiration of the time for appeal).

The Fifth Circuit applies a liberal view of rule 60(b)(1), allowing relief from a final judgment for a substantive or fundamental misconception of law upon a motion made within a reasonable time.

> We think that neither the rule itself nor our decisions inflexibly required that in this case the Rule 60 motion raising a post-judgment change in decisional law had to be filed before the time allowable for appeal had run. . . . It [rule 60(b)] makes no mention of the period for noticing appeal or of whether notice of appeal has been filed. Instead it sets up an outside time limit of one year . . . and prescribes a "reasonable time" standard which by its nature invites flexible application in varying situations.

Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976).

3. 621 F.2d 1062 (10th Cir. 1980).

4. The Tenth Circuit had previously rejected the conservative view of rule 60(b)(1), in Rocky Mountain Tool & Machine Co. v. Tecon, 371 F.2d 589, 597 (10th Cir. 1966), by refusing to apply the ten day limitation prescribed in rule 59(e) to a rule 60(b)(1) motion for relief from a mistake of judicial oversight.

5. 531 F.2d 974, 979 (10th Cir. 1976).

6. "[C]onstruing the mandates as barring a hearing to determine Security Mutual's liability to Century was error." 621 F.2d 1062, 1067 (10th Cir. 1980).

7. The First and Seventh Circuits apply the conservative view of rule 60(b)(1). *See* note 2 *supra*.

amend a judgment[8] can be used to correct a mistake of law by the court.[9] Since a rule 59(e) motion must be made within ten days of the judgment, relief from a judicial mistake under the conservative view is available only upon motion made within ten days. Therefore, the district court considered Century's 60(b)(1) motion as a rule 59(e) motion to amend the judgment and denied the motion as untimely.[10]

Even if the moderate view of rule 60(b)(1) had been employed, Century's motion for relief would have been denied as untimely. The moderate view permits a rule 60(b)(1) motion for judicial mistake.[11] Jurisdictions that follow the moderate view allow the trial court to consider a rule 60(b)(1) motion for relief from a judicial oversight beyond the ten day limitation in rule 59(e). Where the mistake constitutes a "fundamental misconception of law",[12] however, as opposed to mere judicial oversight, the motion must be made within the thirty or sixty day period for timely appeal.[13] In *Security Mutual*, the mistake re-

8. FED. R. CIV. P. 59(e) provides that: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

9. A contrary view, that "mistake" means any type of judicial error, makes relief under the rule for error of law as extensive as that available under Rule 59(e). . . . [T]he argument is advanced that a broad construction of "mistake" beneficially extends the ten-day limit for motions under Rule 59(e). Calling this a benefit loses sight of the complementary interest in speedy disposition and finality, clearly intended by Rule 59. . . . We see no purpose for this broad construction of Rule 60(b)(1) overlapping Rule 59(e).

Silk v. Sandoval, 435 F.2d 1266, 1268 (1st Cir. 1971). *Accord*, Swam v. United States, 327 F.2d 431 (7th Cir. 1964).

10. 621 F.2d at 1067.

11. Cases illustrative of the moderate view application of rule 60(b)(1) include: Fox v. Brewer, 620 F.2d 177, 180 (8th Cir. 1980) (relief available from an inadvertant judicial mistake upon a motion made within the time for appeal); Compton v. Alton Steamship Co., 608 F.2d 96, 104 (4th Cir. 1979) (relief may be had from a mistake of law by the court if raised within the time allowed for appeal); International Controls Corp. v. Vesco, 556 F.2d 665, 670 (2d Cir. 1977) (relief available from a mistake by the court upon a motion made before the time for appeal has run); D.C. Fed'n of Civic Ass'ns v. Volpe, 520 F.2d 451, 453 (D.C. Cir. 1975) (court may correct a judicial mistake upon a motion filed within the time for appeal); Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357 (9th Cir. 1966) (relief available for a judicial mistake upon a motion made prior to the expiration of the time for appeal); Sleek v. J.C. Penny Co., 292 F.2d 256, 258 (3d Cir. 1961) (the court may re-examine its ruling pursuant to rule 60(b) within the period of appealability); Allen v. Clinchfield R.R., 325 F. Supp. 1305, 1307 (E.D. Tenn. 1971) (relief allowed from a judicial mistake beyond the ten-day limitation of rule 59(e)).

12. "Fundamental misconception of law" is a term that has been used to distinguish an inadvertent judicial oversight, such as the omission of damages, from application of incorrect substantive law. It has been suggested that a more lenient time limit be applied to mistakes of judicial oversight. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2858 (1973).

13. FED. R. APP. P. 4(a)(1) provides in part:

In a civil case in which appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.

sulted from the court's fundamental misconception of law.[14] Under the moderate view Century's motion would have been timely if made no later than thirty days after the March 31, entry of judgment.

On appeal, the Tenth Circuit adopted the Fifth Circuit's liberal view of rule 60(b)(1). Under the liberal view "mistake" includes judicial errors, and the timeliness of a motion is always determined by application of a reasonableness standard with a one year limitation being the only absolute deadline. This means that the court may relieve a party from a final judgment for reason of a fundamental judicial error even if the thirty or sixty day period for timely appeal has expired.[15]

The Tenth Circuit, in considering Century's rule 60(b)(1) motion after the time for appeal had expired, joins the Fifth Circuit in rejecting the view of many commentators,[16] and federal jurisdictions,[17] that allowance of such relief after expiration of the deadline for appeal destroys judicial finality and makes rule 60(b)(1) a substitute for timely appeal. The Tenth Circuit also rejected the view that relief is not available for a fundamental misconception of law after the time for appeal has expired.[18] This note reviews rule 60(b)(1) as previously applied by district courts in the Tenth Circuit and discusses the Tenth Circuit's more liberal approach to the timeliness of rule 60(b)(1) motions.

II. PREVIOUS APPLICATION OF RULE 60(b)(1) WITHIN THE TENTH CIRCUIT

The Tenth Circuit's approach to rule 60(b)(1) prior to *Security Mutual*, is articulated by the District Court for the Western District of Oklahoma in *Stewart Securities Corp. v. Guaranty Trust Co.*.[19] In that

14. *See* note 6 *supra* and accompanying text.

15. Discussing the effect of a construction which would permit relief beyond time for appeal in those cases where the motion otherwise meets the reasonableness test, the Fifth Circuit Court of Appeals concedes that:

> Permitting a party to make a Rule 60(b) motion after the time for appeal has run will indirectly extend the time in which to seek review since the ruling on the motion can be appealed. However, cases as the present will be unusual. More significantly, allowing the district court to consider the motion may be more efficient in the long run.

Lairsey v. Advance Abrasives Co., 542 F.2d 928, 931 (5th Cir. 1976) (citation omitted).

16. *See, e.g.*, 7 J. MOORE'S FEDERAL PRACTICE ¶ 60.22[4] at 268 (2d ed. 1979). "A reasonable time for relief from an error of law by the court should not exceed the time for an appeal." *Id.*

17. Only the Fifth Circuit has allowed relief from a fundamental misconception of law by the court upon a motion made after the time for appeal has expired. Neither the conservative nor the moderate view of rule 60(b)(1) allows such relief. *See* note 2 *supra*.

18. Stewart Securities Corp. v. Guaranty Trust Co., 71 F.R.D. 32 (W.D. Okla. 1976).

19. *Id.*

case, Stewart Securities brought a diversity action against Guaranty Trust for misfeasance in office. Guaranty Trust filed a motion to dismiss for lack of subject matter jurisdiction and the court sustained the motion on the basis of an inapplicable case.[20] Stewart Securities did not appeal, but discovered the error when the Tenth Circuit found jurisdiction based on apparently identical facts, in *Southwestern Bank & Trust Co. v. Metcalf State Bank*,[21] after which Stewart Securities sought relief pursuant to rule 60(b)(1).

In denying Stewart Security's motion, the district court succinctly stated its construction of the rule:

> Rule 60(b)(1) can be used to correct a judicial mistake. Though there is some dispute as to whether this encompasses a fundamental judicial misconception of the law as well as the inadvertent judicial oversight . . . it is well settled that relief may not be granted under Rule 60(b)(1) where the error involved is a fundamental misconception of the law and the appeal time has run.[22]

The application of incorrect law by the court was a fundamental judicial misconception of the law.[23] Under this view the motion must be made within the time for appeal to be considered as having been made within a reasonable time. Stewart Securities' motion, not having been made within the time for appeal, was manifestly untimely and further consideration of justifiable delay or reasonableness was neither necessary nor available. This reflects the view that while rule 60(b)(1) should provide relief from judicial mistakes, it should not be available as a substitute for timely appeal.

III THE APPLICATION OF RULE 60(b)(1) IN *SECURITY MUTUAL*.

A. *The Facts*

In *Security Mutual*,[24] Century Casualty Company defended an in-

20. The district court in *Stewart Securities* sustained a rule 12(b) motion to dismiss for lack of subject matter jurisdiction on the basis of Princess Lida v. Thompson, 305 U.S. 456 (1939). *Princiss Lida* deals with the problem which arises when two in rem actions are pending, and an interference issue surfaces. In *Stewart Securities*, Guaranty Trust had brought a prior in rem action which was no longer pending and therefore *Princess Lida* was not applicable. *See* Southwest Bank & Tr. Co. v. Metcalf St. Bank, 525 F.2d 140,143 (10th Cir. 1975).

21. 525 F.2d 140 (10th Cir. 1975).

22. 71 F.R.D. 32, 33-34 (W.D. Okla. 1976) (citation omitted).

23. "The court in Southwest Bank & Tr. Co., etc. v. Metcalf St. Bank . . . did not purport to change the existing law. It merely announced the existing law. Thus, this is not a case of fundamental judicial error not appealed from." 71 F.R.D. 32, 34 n.1 (W.D. Okla. 1976).

24. 621 F.2d 1062 (10th Cir. 1980).

sured, and subsequently claimed reimbursement under its reinsurance treaty with Security Mutual.[25] Security Mutual brought a declaratory action seeking determination of its liability to Century and Century counterclaimed, alleging an antitrust violation.[26] The district court found that Century had failed to give timely notice and that notice was a condition precedent to Security Mutual's obligation to reimburse.[27]

In reversing the district court, the Tenth Circuit Court of Appeals held that notice was not a condition precedent and that Security Mutual's liability should be determined by the terms of the treaty.[28] The district court construed this mandate to allow Security Mutual to present evidence of damages caused by failure of the notice covenant and Century petitioned for a writ of mandamus to prohibit further hearings relating to the breach. Granting the writ, the court of appeals reasserted that its original mandate, calling for liability to be determined by the terms of the treaty, was intended as a conclusive statement of the rights of the parties.[29]

The district court, on March 31, 1977, issued an order directing entry of judgment and on that same day the clerk entered a judgment stating that it is "ORDERED AND ADJUDGED that judgment is entered in favor of the Defendant, Century Casualty Company and against Plaintiff, Security Mutual Casualty Company, and the Compliant and action herein are dismissed, each party to bear its own costs."[30] On April 8th, Security Mutual filed a rule 56 motion for summary judgment against Century's counterclaim. The district court, on April 11th, denied the motion on the ground of mootness, noting that the clerk had dismissed the entire case pursuant to court order. Century filed a rule 60(b) motion for relief on July 14th. The motion was denied and Century appealed.

B. *Application of the Fifth Circuit Approach to the Timeliness of Rule 60(b)(1) Motions*

Under the moderate view a rule 60(b)(1) motion for relief from a judgment for reason of a fundamental mistake of law that is filed after the thirty or sixty day deadline for appeal has run is inherently un-

25. *Id.* at 1063.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 1064.
30. *Id.*

timely. Therefore, in order to grant Century's motion under the moderate view it would have been necessary for the court to determine that the mistake constituted a mere judicial oversight. Instead the Tenth Circuit court of appeals concluded that "the judgment entered was the one intended by [the judge]. The question is thus not one of amendment to correct judicial oversight or omission, but of amendment to correct judicial error."[31] Having determined that the mistake constituted more than mere judicial oversight the moderate view would apply the thirty day limitation and dismiss the motion.

Instead, the court of appeals cited *Lairsey v. Advance Abrasives Co.*,[32] a Fifth Circuit case allowing relief from a fundamental misconception of law upon a rule 60(b)(1) motion made beyond the time for appeal.[33]

The court, following the Fifth Circuit rationale, indicated that relief is available from a fundamental misconception of law upon timely motion. The court stated "[s]uch relief must . . . be sought . . . 'within a reasonable time . . . not more than one year after the judgment'."[34] In discussing what constituted reasonable time the court again cited *Lairsey*, where the Fifth Circuit quoted Professors Wright and Miller in articulating a test for reasonableness:

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.[35]

This two step determination of reasonableness was then applied in *Security Mutual* by the Tenth Circuit. In considering whether the party opposing the motion had been prejudiced by the delay in seeking relief, the court found that "no prejudice [was] shown to Security Mutual by the delay until filing of the Rule 60 motion on July 14."[36] The court, however, could find no justification for the failure to take appropriate action in less than the ninety-four day period between the district court's April 11th statement, that the entire action had been dismissed, and Century's July 14th 60(b)(1) motion.

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31. *Id.* at 1067.
32. 542 F.2d 928 (5th Cir. 1976).
33. 621 F.2d at 1067.
34. *Id.*
35. 542 F.2d at 930.
36. 621 F.2d at 1067.

> In Century's favor there are the factors that our mandates created confusion and were misread.
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> . . . .
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> . . . Considering all the circumstances and the absence of any showing of reasons for the delay after the April 11 order until July 14 when the motion under Rule 60 was filed, we cannot hold that the motion was timely within the constraints of the Rule.[37]

The district court's finding that Century's motion was untimely and its denial of relief were, for these reasons, affirmed.

C. *The Reasoning Behind the Liberal View of Rule 60(b)(1)*

Critics of the liberal view assert that the availability of relief beyond the thirty or sixty day time for appeal makes rule 60(b)(1) a substitute for timely appeal. This view, however, applies an artificial and inflexible limitation that summarily prevents relief for equitable purposes when rule 60(b)(1) is not being used as a substitute for appeal. In *Lairsey*, for example, where the fundamental mistake of law involved a change in decisional law,[38] and no basis for appeal existed until the thirty day time for appeal had expired, a rule 60(b)(1) motion could not be considered a substitute for timely appeal. The availability of relief from such a mistake could not offend the policy against allowing parties to purposely choose rule 60(b)(1) as an alternative method of appeal in order to extend the time within which the motion must be made.

The two step "reasonable time" test, requiring that: 1) the delay not prejudice the party opposing the motion; and 2) the moving party show good reason for failing to take appropriate action sooner, adequately prevents the use of rule 60(b)(1) as a substitute for appeal while making its equitable application available. The adequacy of protection provided by this test is illustrated by its application in *Security Mutual*. On two occasions the court of appeals had directed the district court to determine the amount of Security Mutual's liability to Century. Therefore it would be unreasonable to expect Century to recognize that the district court judgment of March 31st dismissed the entire action without determining Security Mutual's liability. Security Mutual's motion for a summary judgement dismissal of Century's counterclaim makes it

37. *Id.* at 1067-68.

38. In *Lairsey*, the district court applied a negligence basis for the liability of the defendant manufacturer. Five months later the Supreme Court of Georgia ruled that Georgia allowed actions under a strict liability theory. 542 F.2d at 929.

apparent that even they did not believe that the entire action had been disposed of. So long as it as impractical for Century to become aware of any ground for relief, their delay in seeking that relief should not be considered as a rejection of appeal as a method of relief in favor of the extended period available through rule 60(b)(1). Nevertheless, even where rule 60(b)(1) relief is available beyond the time for appeal, the motion must be made within a reasonable time after discovery of the mistake becomes practical. Century's ninety-four day delay in filing its rule 60(b)(1) motion is repugnant to the policy against extending the time available for appeal. The reasonable time test adequately prevented the use of rule 60(b)(1) for this purpose and left available the opportunity to provide relief had it been sought within a reasonable time.

The concern for judicial finality is adequately served through a liberal application of rule 60(b)(1). The Fifth Circuit in *Lairsey*, addressing the question of judicial finality stated:

> Of course, there is an important interest in finality of litigation. But Rule 60 itself addresses the issue by placing an outside limit of one year on motions. Presumably it was the rulemakers' belief that beyond that point the system's need for finality would prevail, while within that period through the 'reasonable time' criterion, the interest of finality would be considered in conjunction with the practical abilities of litigants to become aware of possible grounds for 60(b) relief.[39]

Circumstances may arise where relief from a fundamental misconception of law after the deadline for appeal has expired under rule 60(b)(1) will not offend the twin policies sought to be protected. Those policies are intended to promote finality and preclude the use of rule 60(b)(1) motions as a substitute for appeal. Where those policies are not offended, relief under rule 60(b)(1) should be as available as it is for other non-offensive mistakes.

IV. CONCLUSION

The Tenth Circuit Court of Appeals, in considering Century's motion for relief from a final judgment for reason of judicial misconception of law, adopts the Fifth Circuit's liberal view of rule 60(b)(1) as applied in *Lairsey*. Under this view, relief may be had from a judicial mistake whether it is merely a judicial oversight or a fundamental mis-

39. *Id.* at 931.

conception of law. The motion must be made within a reasonable time and not more than one year after the entry of judgment.

The policy against the use of rule 60(b)(1) as a substitute for timely appeal has not been abandoned under the liberal view. Only the application of the thirty or sixty day time for appeal limitation has been discarded. The moving party's justification for delay beyond the time for appeal will depend on the practical abilities of the litigants to become aware of possible grounds for rule 60(b)(1) relief. This requirement adequately prevents the selection of rule 60(b)(1) as an extended method of appeal while allowing the court to relieve a worthy party from an erroneous judgment.

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