

Raining on the Litigation Parade: Is It Time to Stop Litigant Abuse of the Fraud on the Court Doctrine?

By HOLLEE S. TEMPLE*

IN 1995, AFTER YEARS of legal wrangling over the proper division of a \$140 million trust, litigation in the Pennsylvania court system seemed to draw to a close. The Superior Court of Pennsylvania had interpreted an ambiguous phrase in the trust document and approved the trial court's division plan, and the Supreme Court of Pennsylvania had refused to consider further arguments.¹

Fast forward to 2005. Though a decade had passed since final judgment in the case, a group of trust beneficiaries who disagreed with the Superior Court's decision convinced the Pennsylvania courts to reconsider the very same trust division issue.² To overcome the obvious bar of *res judicata*, the litigants alleged that beneficiaries who received a larger share of the trust assets under the trial court's plan had fraudulently procured the earlier decisions.³

According to the litigants, the beneficiaries had duped the courts into interpreting the pivotal phrase in the trust, a phrase the litigants felt was clear on its face.⁴ Never mind that the appellate court had

* Lecturer in Law, West Virginia University College of Law. J.D., Duke University School of Law. M.S.J./B.S.J., Northwestern University, Medill School of Journalism. Thanks to the Arthur B. Hodges Fund for supporting this research. My research assistants, Ryan Vandegrift and Joshua Rogers, greatly improved this piece. Also, I truly appreciate the insights provided by Professors Lisa Eichhorn and Grace Wigal.

1. As an associate at a large law firm from 1999–2003, I joined a team of lawyers representing some of the beneficiaries who were defending the 1995 judgment. All information contained in this Article was gleaned from publicly available documents, including published opinions and press reports.

2. See *In re* Deed of Trust of McCargo, Nos. 374 WDA 2003 & 375 WDA 2003 (Pa. Super. Ct. Dec. 23, 2003); Brief for Appellants, *In re* Deed of Trust of McCargo, 844 A.2d 1293 (Pa. Super. Ct. 2003) (No. 377 WDA 2003).

3. *McCargo*, Nos. 374 WDA 2003 & 375 WDA 2003.

4. *Id.* The litigants also alleged conflicts of interest and nondisclosure of documents, but those allegations were deemed to be meritless by the Superior Court of Pennsylvania. *Id.* at 18–19.

previously found the phrase in question to be "utterly ambiguous."⁵ Never mind that both the trial and appellate courts explicitly stated that their decisions were based upon a plain language reading of the decedent's estate planning documents.⁶ And never mind that both courts had already ruled on the argument that the litigants were bringing in the new proceedings.⁷ Nevertheless, the litigants found a sympathetic ear in a new trial court judge, and the case came full circle, with the originally successful litigants defending a judgment that had been disposed of by all levels of Pennsylvania's court system years before.

Cases attacking final judgments involve "the clash of two important principles[—]that litigation must come to an end, and that justice should be accorded in a particular case."⁸ While the fraud on the court doctrine was intended to safeguard the judicial system,⁹ misuse by litigants is weakening the integrity of final court decisions. Because cases involving fraud on the court are not subject to standard time limitations, the doctrine is particularly attractive to disappointed litigants looking for the proverbial second (or third, or fourth) bite at the apple.¹⁰ Further, in the win-at-any-cost era of litigation, the doctrine is complicated by procedural uncertainty, caused by plaintiffs shopping for sympathetic courts in new arenas to reconsider their claims.

Courts rarely reopen judgments. Nevertheless, because many of the challenged judgments are decades old, the cases demand substantial investments of time and money from both courts and defendants. While courts rightly want to afford litigants the opportunity to investigate claims of fraud, the very filing of a fraud-based claim begets an intensive research effort, as litigants must backtrack through warehouses of court files to re-create the scene of the alleged fraudulent

5. See *In re Deed of Trust of Grant McCargo*, 652 A.2d 1330, 1334 (Pa. Super. Ct. 1994).

6. See *id.* at 1335; see also *In re Deed of Trust of McCargo*, No. 2714 of 1948 (Pa. C.P. Alleg. Cty. 1998).

7. *McCargo*, Nos. 374 WDA 2003 & 375 WDA 2003, at 6–7.

8. *Brown v. Brown*, 432 So. 2d 704, 707 (Fla. Dist. Ct. App. 1983) (citations omitted), *overruled on other grounds by DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984).

9. See Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 707 (1998).

10. For recent examples of cases in which the "fraud on the court" doctrine is implicated, see *Dixon v. Comm'r*, No. 00-70858, 2003 U.S. App. LEXIS 4831 (9th Cir. Jan. 17, 2003); *McCargo*, Nos. 374 WDA 2003 & 375 WDA 2003; Brief for Appellants, *In re Deed of Trust of McCargo*, 844 A.2d 1293 (Pa. Super. Ct. 2003) (No. 377 WDA 2003).

activity.¹¹ In addition, because both federal and state courts typically require proof of fraud by “clear and convincing evidence,”¹² each allegation requires an individualized case-by-case analysis, often dragging on for years before the litigation parade finally draws to a close. Furthermore, parties defending their judgments must invest substantial time early in the litigation process researching the history of the fraud-based claim. As a result, the typical safeguards against frivolous litigation—Rule 12(b)(6)¹³ and Rule 11¹⁴ motions for sanctions—do not ameliorate the damage to defendants whose judgments are under attack on the basis of fraud on the court.¹⁵

This Article examines the current status of the fraud on the court doctrine¹⁶ in both the federal and state courts. Specifically, the Article argues that modern-day litigants have, at times, misused the doctrine, which is intended to be applied only in a very narrow set of circumstances, to inject life into time-barred claims.¹⁷ In fact, a number of claims have passed through several stages of litigation before finally being unmasked and thrown out by the courts. This practice poses a great threat to the principle of finality in judgments and exposes both opposing parties and the courts to unacceptable expenses.

Part I explores the provisions of Rule 60¹⁸ of the Federal Rules of Civil Procedure, which lay out the circumstances in which a judgment may be reopened. Rule 60, which encompasses the fraud on the court doctrine, has served as a model for many states in drafting their own rules of civil procedure regarding reopening judgments. Part I estab-

11. See e.g., *Harless v. Pen Coal Corp.*, No. 3:01-0470 (S.D. W. Va. 2001); *McCargo*, Nos. 374 WDA 2003 & 375 WDA 2003; Brief for Appellants, *In re Deed of Trust of McCargo*, 844 A.2d 1293 (Pa. Super. Ct. 2003) (No. 377 WDA 2003).

12. See 12 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 60.21[4][h] (3d ed. 2004).

13. FED. R. CIV. P. 12(b)(6).

14. FED. R. CIV. P. 11.

15. Rule 12(b)(6) motions provide a defense for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). Rule 11 motions for sanctions expose attorneys to both monetary and nonmonetary punishment for filing frivolous actions. FED. R. CIV. P. 11.

16. Both practitioners and courts seem to use the phrases “fraud on the court” and “fraud upon the court” interchangeably.

17. The most extensive treatment of the fraud on the court doctrine appears in Moore's Federal Practice treatise. See 12 MOORE, *supra* note 12, § 60.21[4]. For some additional recent writings on the topic, see generally Anderson & Holober, *supra* note 9; John T. Kolinski, *Fraud on the Court as a Basis for Dismissal with Prejudice or Default: An Old Remedy Has New Teeth*, FLA. B.J., Feb. 2004, at 16, 17.

18. FED. R. CIV. P. 60.

lishes that only a few highly particularized forms of fraud properly fall under the fraud on the court doctrine.

Part II reveals that the doctrine has been repeatedly misused in numerous federal and state cases arising under Rule 60 or related state statutes. Additionally, Part II describes problems associated with misuse of the fraud on the court doctrine. Specifically, the practice disturbs the finality of judgments and subjects opposing litigants to potentially massive expense, even if the claim is eventually disposed of. Finally, Part III considers whether screening mechanisms, improved education of trial court judges, or modification of the doctrine would help courts to more efficiently resolve fraud on the court claims.

I. The Fraud on the Court Doctrine Provides a Narrow Allowance for Reopening Judgments

To protect finality of judgments, both courts and legislatures develop practices and rules to preclude litigants from repeating efforts to obtain relief; in civil cases, the doctrines of *res judicata* and collateral estoppel “mark that concept.”¹⁹ Yet the legal system must balance its interest in finality with its concern for fairness, as there are specific instances in which reconsideration of judgments and orders may be warranted.²⁰ When litigants allege that a judgment has been obtained by fraud on the court, the court must carefully balance these potentially competing interests.

A. The Development of Fraud on the Court Under the Federal Rules

Before adoption of the Federal Rules of Civil Procedure,²¹ litigants could choose from a variety of procedures to seek relief from final judgments. The Supreme Court’s Advisory Committee (“Committee”) considered the problems associated with those various procedures as it formulated Rule 60.²² In particular, the Committee noted that because district courts were generally without power to reconsider judgments after their terms had expired, many had circumvented those time limits by establishing local rules that extended the

19. See JUDITH RESNIK, *PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES* 79 (2004).

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

21. FED. R. CIV. P.

22. See 12 MOORE, *supra* note 12, § 60 app. 101.

time period for applications for relief.²³ The Committee wanted the new rule to both remedy this problem and simplify the procedures available for seeking relief.

Drawing on section 473 of the California Code of Civil Procedure as its source for the new Rule 60,²⁴ the Committee crafted a rule providing time limits for relief from judgments on the specified grounds of mistake, inadvertence, surprise, or excusable neglect.²⁵ The original text left unclear whether Rule 60 preserved certain ancillary common law and equitable remedies.²⁶ As a result, the Rule was amended in 1946 to incorporate the substance of those remedies into stated grounds for relief, and then to abolish them.²⁷

The 1946 amendments added “intrinsic or extrinsic” fraud and “misrepresentation or other misconduct of an adverse party” as specified grounds for relief²⁸ and also added the deadline-free provision for setting aside judgments for “fraud on the court.”²⁹ While the intent behind the amendment was to clarify the procedure for fraud-based claims, Professor Moore noted the potential for confusion even before the Rule was adopted.³⁰ In a 1946 Yale Law Journal article critiquing the proposed rules, Moore noted the difficulty associated with distinguishing the types of fraud that fell within the one-year time limit from claims for fraud upon the court.³¹ Moore stated:

Since courts exist to do justice, any fraud in the presentation of a case to the court could plausibly be said to be fraud upon the court, whether it be accomplished through the bribery of a member of the court or jury, by the use of false or perjured testimony, by concealing or suppressing testimony, by reference in a brief to supposedly impartial authorities when these are known to be otherwise, or by resorting to any sharp practice that hinders the fair presentation of a claim or defense.³²

23. See 12 *id.*

24. See 12 *id.* § 60 app. 102 (citing CAL. CODE CIV. PROC. § 473 (Deering, 1937)).

25. See 12 *id.*

26. Those remedies included *audita querela*, *coram nobis* (or *vobis*), bill of review and bill in the nature of a bill or review. See 12 *id.* § 60 app. 104. They are discussed thoroughly at 12 MOORE, *supra* note 12, §§ 60 app. 104–08.

27. See 12 *id.* § 60 app. 104.

28. 12 *id.* § 60 app. 11[2] (quoting FED. R. CIV. P. 60(b) (1946)).

29. See 12 *id.* § 60 app. 11[2], 109.

30. See 12 *id.* § 60 app. 11; James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623 (1946).

31. Moore & Rogers, *supra* note 30, at 691–92.

32. *Id.* at 692 n.266. In his critique, Moore foreshadowed the problems that would later arise as litigants attempted to characterize their fraud-based claims. *Id.* He noted that while the Committee cited the landmark United States Supreme Court case of *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (discussed in detail *infra* Part I.C.) as an example of “fraud

In sum, while the 1946 amendments transformed the pre-Rules practice from a hodgepodge of options into a unified process, the amendments also added a potentially confusing distinction between different types of fraud.³³ Other than the addition of a statutory reference in a 1948 amendment and a 1987 amendment to eliminate gender specific language, the Rule remains in its 1946 form.³⁴

B. Relief from Judgment Under Federal Rule 60(b) of the Federal Rules of Civil Procedure

1. Means for Relief from Judgment Under Federal Rule 60(b)

The intent of the new Rule 60(b), entitled "Relief from Judgment or Order," was to substitute "either a simple motions procedure or an independent action" for the various procedures that litigants had used to obtain relief from judgments.³⁵ The new rule retained independent actions to set aside judgments under extraordinary circumstances and created an exception for fraud upon the court.³⁶ Neither an independent action, nor an action based upon fraud on the court, is subject to

upon the court," Moore found it difficult to distinguish that case, in which an article by a bogus expert influenced the appellate court's decision, from "any other type of fraud that interferes with the administration of justice." *Id.*

33. See 12 MOORE, *supra* note 12, § 60 app. 100[1].

34. See 12 *id.* § 60 app. 109[5]–[6].

35. 12 *id.* § 60.21[1] (citing FED. R. CIV. P. 60(b) advisory committee's note of 1946).

36. FED. R. CIV. P. 60(b). Specifically, the rule provides:

(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 a party's 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, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

the one-year statute of limitations applied to some of the other Rule 60(b) motions.³⁷ In sum, a motion under Rule 60(b), a motion to set aside a judgment for fraud on the court, and an independent action in equity provide the only “recognized means” outside of a timely appeal for relief from a final judgment or order.³⁸

Rule 60(b) provides several grounds for relieving parties of final judgments, orders, or proceedings after the standard time limits for seeking a post-trial motion or appeal have elapsed.³⁹ Rule 60, which contains six numbered clauses for setting aside otherwise final judgments, strives to achieve the delicate balance between finality and justice.⁴⁰ It draws distinctions between categories of misconduct and sets forth varying rules and time limits depending upon the nature of that misconduct.⁴¹ For example, parties alleging misrepresentation, misconduct, or fraud by an adverse party have one year from judgment to request relief.⁴² Conversely, Rule 60(b) provides that parties alleging that a judgment against them was based on a prior judgment that has been reversed or otherwise vacated must file within a reasonable time.⁴³

Even if a case does not fit into one of the numbered provisions of Rule 60(b) (1)–(5), a court may grant relief under Rule 60(b) (6), the deadline-free “catch-all” provision that provides relief for “any other reason justifying relief from the operation of the judgment.”⁴⁴ The

37. See 12 MOORE, *supra* note 12, § 60.21[4][g]. In addition, Rule 60(b)(6) offers relief from judgment for “any other reason justifying relief from the operation of the judgment.” FED. R. CIV. P. 60(b)(6).

38. See 12 MOORE, *supra* note 12, § 60.40. The fraud on the court exception and the independent action provision are sometimes referred to as the “savings clauses” of Rule 60(b).

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

40. *Id.*

41. *Id.*

42. *Id.* Both intrinsic and extrinsic fraud are encompassed. See 47 AM. JUR. 2D *Judgments* § 832 (1995). Intrinsic fraud typically refers to fraud between the parties, dealing with issues in the case, considered and ruled upon by the court in the original action, such as perjured testimony or forged instruments. See *Fourth Circuit Review*, 40 WASH. & LEE L. REV. 459, 554–55 n.4 (1983). Extrinsic fraud typically refers to “fraud on the court,” such as fraud present in obtaining a judgment that denies the opposing party a fair hearing on the merits. See *id.*

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44. FED. R. CIV. P. 60(b)(6).

“catch-all” provision was not designed to provide a court with “unfettered discretion to set aside a judgment in all cases.”⁴⁵ Instead, the provision is intended to apply only when the reason justifying relief is not established in one of the more specific clauses of Rule 60(b).⁴⁶ In theory, this means that if the reason for relief could be considered under one of the more specific clauses of Rule 60(b)(1)–(5), the claim should not succeed under the deadline-free Rule 60(b)(6).⁴⁷

While Rule 60(b) lists several specific grounds for relief, the Rule does not define the substantive law for vacating judgments.⁴⁸ Thus, “although the relief provided by the Rule may ultimately result in an award of some kind or financial gain through the opportunity to relitigate,”⁴⁹ the actual Rule 60(b) is purely a means to litigation, offering little in terms of substantive guidance for the practitioner considering such a claim.

2. The Scope of Fraud on the Court Under Rule 60(b)

The Federal Rules of Civil Procedure attempt to distinguish fraud of an adverse party—a ground for relief under Rule 60(b)(3)—from fraud on the court. A Rule 60(b)(3) motion alleging fraud of an adverse party would typically be filed in the court in which the judgment was rendered, and the motion must be made within one year from the date judgment was entered.⁵⁰ However, in what has become known as one of two “savings clauses” of Rule 60(b), the Rule expressly excludes from its purview and time restrictions the inherent power of a court to set aside a judgment procured through fraud on the court.⁵¹

A fraud on the court claim hinges on the conduct’s effect on the judicial process—the fraud alleged must involve injury to more than a single litigant and must seriously affect the integrity of the adjudication process.⁵² Examples include bribery of a judge, jury tampering, or hiring an attorney whose sole value to the case is the attorney’s intimate or criminal relationship with the judge.⁵³ These types of claims are distinguishable from fraud between parties, which, even if

45. 12 MOORE, *supra* note 12, § 60.48[1].

46. *See* 12 *id.*

47. *See* 12 *id.*

48. *See* 12 *id.* § 60.20.

49. 12 *id.*

50. *See* 12 *id.* § 60.81[1][a].

51. *See* 12 *id.* § 60.40; *see also* Deborah Roy, Note, *The Sixth Circuit’s Unprecedented Re-opening of Demjanjuk v. Petrovsky*, 42 CLEV. ST. L. REV. 737, 748 (1994).

52. *See* 12 MOORE, *supra* note 12, § 60.21[4][a].

53. *See* 12 *id.*

involving perjury, do not constitute fraud on the court.⁵⁴ As Professor Moore notes, “[i]f fraud on the court were to be given a broad interpretation that encompassed virtually all forms of fraudulent misconduct between the parties, judgments would never be final and the time limitations of Rule 60(b) would be meaningless.”⁵⁵ In practice, even “fairly despicable conduct” should not fit within the definition of fraud on the court.⁵⁶ Examples of conduct that has not qualified as fraud on the court include false answers to discovery requests and failures to disclose, which have been treated rather as affirmative perjury by an ordinary witness.⁵⁷

No formal requirements guide litigants in asserting fraud on the court claims.⁵⁸ Other than requiring notice and an opportunity to be heard, the United States Supreme Court has left the courts with the power to devise their own appropriate procedures.⁵⁹ This lack of procedural certainty has created inconsistencies, although a few patterns do emerge. For instance, while no time limit or laches applies to fraud on the court claims, courts in practice will consider the delays involved.⁶⁰ The longer the delays, the more difficult it is to set aside the judgment.⁶¹ Also, fraud on the court claims typically must be established by clear and convincing evidence.⁶²

3. Subtle Distinctions Between Types of Fraud Make the Fraud on the Court Doctrine an Attractive Nuisance

Because Rule 60(b)(3) distinguishes misrepresentation, misconduct, or fraud of an adverse party from fraud on the court,⁶³ the terminology litigants use in framing their claims has become increasingly important.⁶⁴ The substance of a Rule 60(b) motion is supposed to control over its form or label.⁶⁵ Professor Moore notes that “a label on a motion may never be used to make a mockery of the time limits within Rule 60(b) itself.”⁶⁶ For instance, Moore asserts that Rule

54. See 12 *id.* § 60.21[4][c].

55. 12 *id.*

56. 12 *id.*

57. See 12 *id.*

58. See 12 *id.* § 60.21[4][f].

59. See 12 *id.*

60. See 12 *id.* § 60.21[4][g].

61. See 12 *id.*

62. See 12 *id.* § 60.21[4][h].

63. See *supra* notes 41–43 and accompanying text.

64. See 12 MOORE, *supra* note 12, § 60.64.

65. See 12 *id.* § 60.64.

66. 12 *id.*

60(b)(1) motions may not be disguised as Rule 60(b)(6) motions to avoid time limits.⁶⁷ These guidelines, however, have not deterred some litigants from attempting to cast their motions under one of the deadline-free provisions of Rule 60, regardless of the substance of the claims.⁶⁸ Thus, while Moore asserts that nomenclature is not important and that the label a party attaches to its motion should not control whether the party receives relief,⁶⁹ Rule 60(b)'s terminology has perplexed both litigants and courts, and "faulty labeling" has at times enabled parties to litigate for years before courts rectify the problem.⁷⁰

Thus, even though a court should not consider a complaint that simply restates claims made in a previously dismissed suit as a motion for relief, some courts struggle to separate legitimate Rule 60(b) motions from impermissible attempts to re-litigate.⁷¹ In a sense, the "savings clauses" provided in Rule 60 have become an attractive nuisance of sorts for disappointed litigants.⁷²

4. Rule 60 Limits the Scope of Independent Actions

Through its "savings clauses," Rule 60(b) also preserved the so-called "independent actions," yet another method available for setting aside certain judgments.⁷³ According to Professor Moore, indepen-

67. See 12 *id.* § 60.64 n.9 (citing *Cotto v. United States*, 993 F.2d 274, 277 (1st Cir. 1993)).

68. See *supra* text accompanying notes 8–10.

69. See 12 MOORE, *supra* note 12, § 60.64.

70. See, e.g., *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1175 (10th Cir. 2000).

71. Conversely, some courts will construe a Rule 60(b) motion as if it were a deadline-free independent action. See 12 MOORE, *supra* note 12, § 60.64 n.6 (citing *Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995)).

72. See generally *Roy*, *supra* note 51, at 752.

73. See 12 MOORE, *supra* note 12, § 60.80; see also *Roy*, *supra* note 51, at 748. While fraud is the most common ground for maintaining an independent action, independent actions are not appropriate for all types of fraud claims. See 12 MOORE, *supra* note 12, § 60.81[b]. For instance, even though the distinction between intrinsic and extrinsic fraud was explicitly eliminated in Rule 60(b), most courts continue to observe the distinction in independent actions, allowing only claims for judgments procured by extrinsic fraud. See 12 *id.* Prior to the adoption of the federal rules, the general rule was that relief through an independent action for fraud could only be given for extrinsic fraud. See *United States v. Throckmorton*, 98 U.S. 61 (1878). Extrinsic fraud has been defined as "fraud that actually prevented an issue from being joined or a party from making a valid claim or defense." See 12 MOORE, *supra* note 12, § 60.81[b] (quoting *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1358 (4th Cir. 1982)). For instance, conspiring with an opponent to the detriment of a client constitutes extrinsic fraud. See 12 *id.* § 60.81[b][i] n.5 (citing *Bizzell v. Hemingway*, 548 F.2d 505, 507 (4th Cir. 1977) ("Equitable relief has long been granted where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells

dent actions are “usually reserved for situations that do not meet the requirements” for a motion under the numbered paragraphs of Rule 60(b).⁷⁴ Typically, litigants resort to independent actions for one of three reasons: (1) the fraud alleged is not chargeable to an adverse party; (2) the parties seek relief from a court other than the rendering court; or (3) the one-year time limit has expired.⁷⁵

Laches applies to independent actions, barring relief when the litigant has prejudiced the opposing party because he has not exercised due diligence.⁷⁶ Unlike Rule 60(b) motions, however, independent actions, such as fraud on the court claims, are not limited by the one-year statute of limitations under Rule 60(b).⁷⁷ In addition, independent actions need not be brought in the court that rendered the judgment in question.⁷⁸ That said, the historical remedy of an independent action is extremely limited, and federal courts are instructed to set aside the judgments of another court only “with great reluctance.”⁷⁹ Nonetheless, the lack of any firm time limitation and the ability to bring claims in a different court make independent actions, such as fraud on the court, an attractive nuisance for unscrupulous litigants whose Rule 60(b)(3) claims are procedurally barred. As such, courts have treated independent actions and fraud on the court claims in the same manner.⁸⁰

out his client’s interest to the other side.”)). Nevertheless, most courts refuse to permit equitable relief for intrinsic fraud, which has been defined as fraud involving issues already “presented and considered in the judgment assailed.” *Fourth Circuit Review*, *supra* note 42, at 554–55 n.4. See also 12 MOORE, *supra* note 12, § 60.81[b][ii]. Intrinsic fraud focuses on the concept that “the truth of testimony and evidence was the very purpose of the litigation process,” and therefore a judgment should not be reopened merely because one party failed to prepare for trial, or inadequately cross-examined a witness. 12 *id.* at § 60.81[b][ii]. Thus, in most cases, perjury at trial, or in discovery proceedings, or in presentation of false documents in evidence may not serve as the basis of an independent action in equity. See 12 *id.* However, these subtle distinctions in terminology have proven to be problematic, and so as a practical matter, many courts simply try to measure whether the parties seeking relief previously enjoyed a full and fair opportunity to litigate their claims. See 12 *id.*

74. See 12 MOORE, *supra* note 12, § 60.81[1][a].

75. See 12 *id.*

76. See 12 *id.* § 60.83 n.5 (citing *Lockwood v. Bowles*, 46 F.R.D. 625, 629 (D.C. 1969)).

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

78. See 12 MOORE, *supra* note 12, § 60.21[2].

79. 12 *id.*

80. See *infra*, text accompanying notes 81–109.

C. The Supreme Court Sets the Parameters of the Fraud on the Court Doctrine: *Hazel-Atlas* and *Beggerly*

In addition to drawing on Rule 60(b), litigants invoking the fraud on the court doctrine in federal courts often rely on *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*⁸¹ In *Hazel-Atlas*, the United States Supreme Court laid out a litmus test that embodies many Rule 60 concepts.⁸² In fact, most of the principles used in analyzing fraud on the court claims today are derived from *Hazel-Atlas*, the first in a long line of opinions holding that courts possess an inherent power to reverse judgments in cases of after-discovered fraud.⁸³

Nine years after the *Hazel-Atlas* Company was found liable for patent infringement, the company learned that fraudulent activities by Hartford-Empire and their attorneys had influenced both the United States Patent Office and the Third Circuit Court of Appeals.⁸⁴ Though the statute of limitations had expired, *Hazel-Atlas* sought to overturn the Third Circuit's decision, claiming that Hartford had fraudulently procured the decision holding *Hazel-Atlas* liable for patent infringement.⁸⁵

Specifically, *Hazel-Atlas* discovered that after Hartford's patent application for a glass-fashioning machine encountered opposition from the Patent Office, Hartford officials and attorneys prepared a spurious article that called the device a "remarkable advance" and had the article published in a trade journal under the alleged authorship of a disinterested expert.⁸⁶ Hartford's application for the patent was subsequently granted, and Hartford then brought suit against *Hazel-Atlas* for patent infringement.⁸⁷

Hazel-Atlas contended that the bogus article was used to influence the Third Circuit and argued that after the lower court had found no infringement, one of the attorneys who helped publish the bogus article drew it to the appellate court's attention, to great ef-

81. 322 U.S. 238 (1944) (*overruled on other grounds* by *Standard Oil Co. v. United States*, 429 U.S. 17 (1976)).

82. *Id.*

83. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE CIVIL* § 2870 (2d ed. 1995); *see also* Sheldon R. Shapiro, Annotation, *Construction and Application of Provision of Rule 60(b) of Federal Rules of Civil Procedure: That Rule Does Not Limit Power of Federal District Court to Set Aside Judgment for "Fraud Upon the Court,"* 19 A.L.R. FED. 761, 764 (1974).

84. *Hazel-Atlas*, 322 U.S. at 239.

85. *Id.*

86. *Id.* at 240.

87. *Id.* at 241.

fect.⁸⁸ As the Supreme Court noted, the Third Circuit quoted copiously from the article to prove the patent's revolutionary elements and ultimately held that Hazel-Atlas had infringed the patent.⁸⁹

The Supreme Court held that because the judgment was not merely the result of perjured testimony, but of a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals," it could not be upheld.⁹⁰ The Court further noted that Hartford's conduct, which it described as tampering with justice, involved more than an injury to a single litigant.⁹¹ As such, the Court remanded the case with directions to reinstate the district court's finding that the patent had not been infringed, a judgment that was twelve years old when the Supreme Court issued its opinion.⁹²

In the years since *Hazel-Atlas*, "the federal courts have struggled with the definition of 'fraud on the court' in the context of Rule 60(b)."⁹³ In fact, in *United States v. Beggerly*,⁹⁴ the United States Supreme Court recently conceded that, with respect to independent actions, Rule 60(b)'s "precise contours are somewhat unclear."⁹⁵ Nevertheless, federal courts have generally agreed that "because the equitable doctrine utilized in *Hazel-Atlas* allows courts to overturn settled judgments and orders at any time," the doctrine should be narrowly construed and confined to the most egregious cases.⁹⁶

In 1998, the United States Supreme Court reiterated that only judgments that would result in a "grave miscarriage of justice" should satisfy the requirements of an independent action for relief.⁹⁷ In *United States v. Beggerly*,⁹⁸ landowners sued to set aside a twelve-year-old property agreement.⁹⁹ The landowners had originally signed a contract to sell the land at issue to the federal government, but the government backed out when its lawyers said the land, which was part of

88. *Id.*

89. *Id.*

90. *Id.* at 245, 250.

91. *Id.* at 246 ("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.")

92. *Id.* at 251.

93. *P'ship Placements, Inc. v. Landmark Ins. Co.*, 722 A.2d 837, 844 (D.C. 1998).

94. 524 U.S. 38 (1998).

95. *Id.* at 45.

96. *P'ship Placements, Inc.*, 722 A.2d at 844.

97. *Beggerly*, 524 U.S. at 47.

98. 524 U.S. 38 (1998).

99. *Id.* at 39.

the Louisiana Purchase of 1803, had never been privately owned.¹⁰⁰ The initial lawsuit ended with a 1982 property settlement in which the family received cash, and the government obtained the land.¹⁰¹

Despite the settlement, the landowners continued to research their claim of title, hiring a genealogical record specialist to conduct research at the National Archives.¹⁰² After the genealogist discovered evidence of private ownership to support the landowners' claim, the property owners asked a federal judge to set aside the settlement, requesting compensation for the government's twelve-year "taking" of the property.¹⁰³ While the United States District Court for the Southern District of Mississippi granted the government's motion to dismiss, the Fifth Circuit Court of Appeals reversed, directing the district court to reopen the judgment and quiet title in favor of the landowners.¹⁰⁴ The appellate court held that because the government had told the landowners and the district court that there was no evidence of private ownership, and therefore the landowners' inability to prove their title was caused by the government's failure to produce documents, equity required the court to correct the injustice under these "extraordinary and unusual circumstances."¹⁰⁵ The court of appeals concluded that under these facts, the property owners had met Rule 60(b)'s requirements for an independent action.¹⁰⁶

The United States Supreme Court, however, disagreed, and in 1998 held that the landowners' claim could not be re-litigated as an independent action for relief from judgment under Rule 60(b).¹⁰⁷ The Court held that litigants must not be allowed to subvert the one-year statute of limitations for Rule 60 actions through the independent action savings clause, clarifying that such actions "should be available only to prevent a grave miscarriage of justice."¹⁰⁸ The Court held that:

If relief may be obtained through an independent action in a case such as this, where the most that may be charged against the Government is a failure to furnish relevant information that would at

100. *Id.* at 40; *see also* Richard Carelli, *Dispute over Horn Island Property Not a Federal Case, Justices Say*, DAILY REC. (Balt.), June 9, 1998, at 2C, available at LEXIS, News Library, Daily Record File.

101. *Beggerly*, 524 U.S. at 39.

102. *Id.* at 40-41.

103. *Id.* at 41; *see also* Carelli, *supra* note 100, at 2C.

104. *See* *Beggerly v. United States*, 114 F.3d 484 (5th Cir. 1997).

105. *Id.* at 488.

106. *Id.* at 487.

107. *Beggerly*, 524 U.S. at 47.

108. *Id.*

best form the basis for a Rule 60(b)(3) motion, the strict one-year time limit on such motions would be set at naught.¹⁰⁹

D. Fraud on the Court Faces Similar Obstacles in State Systems

Litigants in state courts also invoke the fraud on the court doctrine.¹¹⁰ While many states have adopted rules of civil procedure modeled on Rule 60(b), the same “catch-all” loophole that opens the door to misuse in the federal system appears in most state courts rules as well.¹¹¹ A few states operate without any procedural rules relating to the doctrine, turning instead to inherent authority and equitable doctrines to sort out fraud-based claims.¹¹² Regardless of the procedural framework, state case law demonstrates that, as in the federal courts, state courts also face cases in which litigants are turning to the doctrine for an extra “bite at the apple.”¹¹³

While the evidence in each fraud-based claim must be individually assessed, the general judicial approaches to the doctrine can be

109. *Id.* at 46.

110. For example, Florida courts have:

[S]truggled to define the situations in which an independent action will be allowed, and the differences between fraud contestable within one year of the entry of final judgment by motion under [Florida Rule of Civil Procedure] 1.540(b)(3) and the types of fraud which can be a basis for an independent action after one year.

C. Timothy Gray, Comment, *Rule 1.540(b), Florida Rules of Civil Procedure: In Search of An Equitable Standard for Relief from Fraud*, 12 FLA. ST. U. L. REV. 851, 852 (1985).

111. The state rules of civil procedure pertaining to reopening judgments on the ground of fraud on the court are: ALA. R. CIV. P. 60(b)(3); ALASKA R. CIV. P. 60(b)(3); ARIZ. R. CIV. P. 60(c)(3); ARK. R. CIV. P. 60(c)(4); COLO. R. CIV. P. 60(b)(2); DEL. R. CIV. P. 60(b)(3); FLA. R. CIV. P. 1.540(b)(3); HAW. R. CIV. P. 60(b)(3); IDAHO R. CIV. P. 60(b)(3); IND. R. CIV. P. 60(B)(3); IOWA R. CIV. P. 1.1012(2); KAN. R. CIV. P. 60-260(b)(3); KY. R. CIV. P. 60.02(d); LA. CODE CIV. PROC. ANN. art. 2004 (West 2004); ME. R. CIV. P. 60(b)(3); MD. R. CIV. P. 2-535(b); MASS. R. CIV. P. 60(b)(3); MICH. R. CIV. P. 2.612(C)(1)(c); MINN. R. CIV. P. 60.02(c); MISS. R. CIV. P. 60(b)(1); MO. R. CIV. P. 74.06(b)(2); MONT. R. CIV. P. 60(b)(3); NEV. R. CIV. P. 60(b)(3); N.J. R. CIV. P. 4:50-1(c); N.M. R. CIV. P. 1-060(B)(3); N.C. R. CIV. P. 60(b)(3); N.D. R. CIV. P. 60(b)(iii); OHIO R. CIV. P. 60(B)(3); OR. R. CIV. P. 71(B)(1)(c); R.I. R. CIV. P. 60(b)(3); S.C. R. CIV. P. 60(b)(3); S.D. R. CIV. P. 15-6-60(b)(3); TENN. R. CIV. P. 60.02(2); UTAH R. CIV. P. 60(b)(3); VT. R. CIV. P. 60(b)(3); WASH. R. CIV. P. 60(b)(4); W. VA. R. CIV. P. 60(b)(3); Wis. R. CIV. P. 806.07(1)(c); WYO. R. CIV. P. 60(b)(3).

112. California, Connecticut, Georgia, Illinois, Nebraska, New Hampshire, New York, Oklahoma, Pennsylvania, Texas, and Virginia do not have specific rules of civil procedure relating to reopening judgments on the basis of fraud.

113. *See, e.g., Van Sickle v. Van Sickle*, Doc. No. 970339639S, 1999 Conn. Super. LEXIS 1718, at *5 (Conn. Super. Ct. 1999), where the court disallowed a reopening of a separation agreement on the basis of fraud. Fraud also becomes an issue in arbitration proceedings, as many statutes allow for reopening of arbitration awards on the basis of fraud. *See, e.g., Pocket Change Kahunaville, Inc. v. Kahunaville of Eastwood Mall, Inc.*, Doc. No. 19852-NC, 2003 Del. Ch. LEXIS 28 (Del. Ch. 2003).

gleaned from recent state court cases and treatises.¹¹⁴ Generally, state courts, as their federal counterparts, perceive fraud on the court as a unique brand of deception, distinguishable from misrepresentation, misconduct, or fraud on an adverse party.¹¹⁵ The fraud must typically defile the court itself or be perpetrated by an officer of the court "so that the judicial machinery cannot perform" in its usual impartial manner.¹¹⁶

To define the specific circumstances that rise to the level of "fraud on the court," a host of state courts have turned to the Restatement of Judgments ("Restatement").¹¹⁷ The Restatement attempts to describe the circumstances in which judgments can be avoided, yet concedes that it is especially difficult to establish criteria "that cannot so easily be met as to create open opportunity for relitigation, but which are not so demanding that plain cases of fraud cannot be remedied."¹¹⁸ The Restatement notes that the fraud-based doctrines have not been consistently applied: "It is . . . clear that there is discord in the underlying judicial attitudes toward relief on the basis of fraud, [with] some courts being more responsive than others."¹¹⁹ That being said, the Restatement suggests that the critical considerations are whether the claim of fraud is "well substantiated," and whether the victim in the original action had pursued "reasonable precautions" against deception.¹²⁰

With that caveat, the Restatement goes on to provide a framework for litigants considering fraud on the court claims. To succeed, the Restatement suggests that a litigant must show that the judgment in question resulted from corruption of, or duress upon, the court, or upon the losing attorney.¹²¹ Further, a party seeking relief must have: (1) acted with due diligence; (2) asserted the claim with such particularity as to indicate that it is well founded and may be proved by clear and convincing evidence; and (3) when the claim is based on falsity of evidence, show that he has made a reasonable effort in the original action to ascertain the truth of the matter.¹²²

114. See Jonathan M. Stern, *Untangling a Tangled Web Without Trial: Using the Court's Inherent Powers and Rules to Deny a Perjuring Litigant His Day in Court*, 66 J. AIR L. & COM. 1251, 1255-56 (2001).

115. See Anderson & Holober, *supra* note 9, at 699-700.

116. 47 AM. JUR. 2D *Judgments* § 887 (1995).

117. See RESTATEMENT (SECOND) OF JUDGMENTS § 70 (1982).

118. *Id.* § 70 cmt. c.

119. *Id.*

120. *Id.*

121. *Id.* § 70(1)(a).

122. *Id.* § 70(2).

Comments to the Restatement also suggest that a party alleging fraud on the court must satisfy four specific elements to obtain relief.¹²³ First, the party must demonstrate that the fabrication or concealment was a material basis for the judgment and not merely relevant to a peripheral issue.¹²⁴ Second, the litigant must show that he adequately pursued means for discovering the truth.¹²⁵ Third, he must demonstrate that he showed diligence after judgment in discovering the fraud as soon as could reasonably be expected.¹²⁶ And finally, *before being allowed to present his case*, the party seeking relief must demonstrate that he has a substantial case to present, one that offers clear and convincing proof that the evidence underlying the judgment was indeed fabricated or concealed.¹²⁷ According to the Restatement, this “heavy burden of proof is an important measure of protection against attacks on honestly procured judgments.”¹²⁸

II. Litigant Abuse of the Fraud on the Court Doctrine

Because the fraud on the court doctrine contains so much subtlety and is particularly susceptible to litigant abuse, it is crucial that courts approach fraud on the court claims with a keen eye. This Part reveals, however, that some litigant abuse is passing through both state and federal trial courts. Even though appellate courts are catching these abuses and dismissing the cases accordingly, these journeys through the courts are costly and must be put to an end earlier. This Part shows that many trial court judges have allowed extensive post-judgment litigation in improperly reopened cases to the great detriment of both the finality of judgments and the pocketbooks of litigants who have been forced to contest the frivolous claims.

A. Courts’ Struggles with Fraud on the Court: Federal Cases

The parameters set by the Supreme Court in *Hazel-Atlas* and *Beggerly* seem strict and clear. Nonetheless, litigants in federal courts continue to turn to Rule 60(b) in attempts to reopen final judgments, even when their circumstances clearly do not rise to the *Hazel-Atlas* level.

123. *Id.* § 70 cmt. d.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

Despite the recent guidance from the United States Supreme Court, some federal courts continue to grapple with Rule 60 and the fraud on the court doctrine.

For instance, in 2000, the Tenth Circuit Court of Appeals disposed of a litigant's attempts to reopen a judgment in a case that the court called "precisely the sort of repetitive litigation that the doctrine of *res judicata* aims to prevent."¹²⁹ The appeal, which included a Rule 60(b) claim, emerged from a "procedural morass" of six court orders involving a bankrupt real estate agent dissatisfied with her creditor's decision to sell a parcel of real estate.¹³⁰ After the bankruptcy court dismissed the plaintiff's motion to reject the real estate contract, extensive litigation ensued.¹³¹

The plaintiff filed a separate action in federal district court, this time alleging fraud and breach of fiduciary duty under Rule 60(b).¹³² The district court rejected the plaintiff's Rule 60(b) claim, holding that the plaintiff failed to allege any affirmative misrepresentations or a duty by the purchaser to disclose and added that she had failed to show how she or the bankruptcy estate suffered harm.¹³³ After the fraud defense failed in federal court, the plaintiff returned to bankruptcy court, this time alleging fraud arising out of conduct in connection with the property sale.¹³⁴ The court rejected the claim, holding that the fraud provision of Rule 60(b)(3) had not been invoked in time and finding the plaintiff's Rule 60(b)(6) claim to be inapplicable.¹³⁵ Finally, the Tenth Circuit Court of Appeals held that *res judicata* applied and found no basis for a fraud exception or 60(b) claim.¹³⁶ "Nearly eight years after the initial bankruptcy proceedings in this case," the court held, "it is high time for this matter to come to an end."¹³⁷

129. See *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1175 (10th Cir. 2000).

130. See *id.* at 1165. The Tenth Circuit described the extensive procedural history as follows: *In re Plotner*, No. 92-17405-LN (Bankr. W.D. Okla. June 16, 1994) ("Plotner I"); *Plotner v. AT&T*, 172 B.R. 337 (W.D. Okla. 1994) ("Plotner I Appeal"); *Plotner v. AT&T Corp.*, No. CIV-95-50-R (W.D. Okla. July 30, 1996); ("Plotner II"); *Plotner v. AT&T Corp.*, No. 96-6212, 1997 WL 234787 (10th Cir. May 7, 1997) ("Plotner II Appeal"); *Plotner v. AT&T Corp.* (*In re Plotner*), No. 92-17405-TS, Adv. No. 96-1220-TS (Bankr.W.D. Okla. Aug. 6, 1997 ("Plotner III"); *Plotner v. AT&T Corp.*, No. CIV-97-1832-M (W.D. Okla. Mar 17, 1999) ("Plotner III Appeal"). *Id.* at 1165-67.

131. See *id.*

132. See *id.* at 1165-66.

133. See *id.* at 1166.

134. See *id.*

135. See *id.*

136. See *id.* at 1174.

137. *Id.* at 1175.

Similarly, the Sixth Circuit Court of Appeals disposed of a fraud-based claim in 2002 that began “as a wrongful death action, but detoured into a procedural thicket.”¹³⁸ After a mother failed in her diversity suit against her deceased son’s hospital and physicians, she retained new counsel, and together they “embarked upon a number of steps designed to reinvigorate the wrongful death suit that had been dismissed.”¹³⁹ One of those paths included the filing of a Rule 60(b) claim.¹⁴⁰ While the Rule 60(b)(6) catch-all was intended for exceptional or extraordinary circumstances not covered by the first five numbered clauses of Rule 60(b), the district court, without explicitly considering those sections, decided that the exception applied, and that the order in question could be amended so that “substantial justice w[ould] be served.”¹⁴¹ On appeal, however, the Sixth Circuit held that claims of attorney error and strategic miscalculation did not meet the Rule’s stringent requirements and therefore reversed the district court.¹⁴² The court explained:

[R]elief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. This is especially true in an application of subsection (6) of Rule 60(b), which applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. This is because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b). Consequently, courts must apply Rule 60(b)(6) relief only in unusual and extreme situations where principles of equity *mandate* relief.¹⁴³

In another recent example, the United States District Court for the Southern District of West Virginia is considering an action in which heirs of a landowner seek to undo a 150-year chain of title to valuable land and mineral rights in southern West Virginia.¹⁴⁴ The plaintiffs’, heirs of a landowner, claim that a group of oil and gas companies have wrongfully mined and drilled wells on the property in question—property that they believe was obtained through fraudulent means.¹⁴⁵

138. *McCurry ex. rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 588 (6th Cir. 2002).

139. *Id.* at 590.

140. *Id.* at 591.

141. *Id.* (internal quotations omitted).

142. *Id.* at 598.

143. *Id.* at 592 (quoting *Blue Diamond Coal v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001)).

144. Fourth Amended Complaint at 6, *Harless v. Pen Coal Corp.*, No. 3:01-0470 (S.D. W. Va. 2004).

145. *See id.* ¶ 62, 63, 74, 75.

In their pleadings, the plaintiffs claim their ancestor acquired the land by adverse possession from 1857 to 1886, when he constructed a log house on the property and paid taxes on it.¹⁴⁶ In the 1870s, the ancestor lost title to the land via an ejectment action in which the heirs claim that land speculators committed fraud upon the district court.¹⁴⁷ The heirs argued that the attorney for the landowner was mired in conflicts of interest with land speculators and did not raise proper defenses.¹⁴⁸ According to the plaintiffs, the effect of this "fraud upon the Court and parties was to rob and steal large amounts of valuable land and the minerals contained thereon."¹⁴⁹ To overcome the time-lapse issue, the plaintiffs asserted that the fraud perpetuated on the court in the 1874 ejectment action was not discovered by the heirs until the defendants began to mine the property in 2000 (despite the recorded chain of title).¹⁵⁰

The defendants have argued that the action was filed more than a century too late and noted how the passage of time has harmed their ability to obtain evidence that would refute the allegations of fraud.¹⁵¹ In addition to citing their concerns over the numerous property transactions that have relied upon the judgment at issue, the defendants highlighted the difficulties (including the hiring of genealogists¹⁵²) associated with litigating a century-old case:

[T]he evidentiary prejudice to the [defendants], well over a century after the alleged fraud, is staggering. Had the plaintiffs' predecessors made inquiry and taken action in the 1870s or 1880s, many of the persons alleged to have been involved in a conspiracy to defraud would have been alive to explain their actions and to be subjected to scrutiny and questioning. Fuller documentation would have existed. Memories would have been comparatively fresh. None of this is the case today.¹⁵³

Nonetheless, the district court rejected the defendants' motion to dismiss, and the lawsuit proceeded to the summary judgment

146. *See id.* ¶ 53.

147. *See id.* ¶ 62.

148. *See id.* ¶ 65, 66, 76, 90, 94.

149. *Id.* ¶ 104.

150. *See id.* ¶ 128.

151. *Harless v. Pen Coal Corp.*, No. 3:01-0470, slip op. at 6 (S.D. W. Va. 2001).

152. Interview with Howard M. Persinger, Jr., Attorney for Defendant Pocahontas Land Corp. (June 24, 2004) (notes on file with author).

153. Memorandum of Law of Columbia Natural Resources, Inc. and Columbia Gas Transmission Corp. in Support of Their Motion for Summary Judgment at 24, *Harless v. Pen Coal Corp.*, No. 3:01-0470 (S.D. W. Va. 2004) (on file with author).

phase.¹⁵⁴ In seeking summary judgment, the defendants noted the “enormous costs imposed by this litigation.”¹⁵⁵

B. Courts’ Struggles with Fraud on the Court: State Cases

Similar to federal courts, state courts also have struggled to properly apply the doctrine.¹⁵⁶ Furthermore, the equitable case-by-case analysis adopted by most state courts makes it difficult to predict the outcome in any individual matter. For instance, while older appellate decisions upholding dismissals with prejudice for fraud on the court were outnumbered by decisions reversing such dismissals as too severe, several recent Florida decisions show an increased willingness to dismiss with prejudice¹⁵⁷—a result that many practitioners consider to be “the ultimate sanction.”¹⁵⁸ An experienced Florida lawyer recently explained some of the struggles inherent in representing clients whose judgments have been challenged on the basis of fraud:

What precisely is fraud on the court? When is conduct sufficiently egregious to distinguish it from arguable forgetfulness or misunderstanding? How much bad conduct is enough? Does one terrible and indisputable lie about a fact central to the case suffice? What about a whole series of lies What if the misconduct is entirely procedural, . . . [like] obstruct[ing] discovery by failing to comply with court orders? There are no simple answers to these questions, nor can there be. Each case must be assessed and adjudicated according to its own unique facts.¹⁵⁹

Several recent state court matters further illustrate the courts’ struggles with the doctrine, particularly when faced with unsubstantiated allegations of fraud. For example, the Pennsylvania case described in the opening paragraphs of this Article demonstrates how

154. Harless v. Pen Coal Corp., No. 3:01-0470, slip op. at 6–7 (S.D. W. Va. 2001).

155. Memorandum of Law of Columbia Natural Resources, Inc. and Columbia Gas Transmission Corp. in Support of Their Motion for Summary Judgment at 2, Harless v. Pen Coal Corp., No. 3:01-0470 (S.D. W. Va. 2004) (on file with author). In June 2004, the United States District Court for the Southern District of West Virginia (Huntington Division) held that the allegations of lawyer misconduct did not rise to the level of “fraud upon the court.” Memorandum Opinion and Order, filed Aug. 3, 2004, at 9 (on file with author).

156. For example, Florida courts have “struggled to define the situations in which an independent action will be allowed, and the differences between fraud contestable within one year of the entry of final judgment by motion under [Florida Rule of Civil Procedure] 1.540(b)(3) and the types of fraud which can be a basis for an independent action after one year.” Gray, *supra* note 110, at 852.

157. See Destafano v. State Farm Mut. Auto. Ins. Co., 28 Fla. L. Weekly D1077 (Fla. Dist. Ct. App. 2003); Long v. Swofford, 805 So. 2d 882 (Fla. Dist. Ct. App. 2001).

158. Kolinski, *supra* note 17, at 17.

159. *Id.* at 16.

ambiguous drafting, coupled with mere allegations of fraud can thrust a judgment back into litigation.¹⁶⁰ There, the previously unsuccessful litigants convinced a trial court judge to investigate rather weak allegations of fraud, and three seemingly final judgments subsequently fell under attack.¹⁶¹

As in many cases in which fraud on the court is alleged, the Pennsylvania case dates back many decades.¹⁶² The controversy stemmed from a 1929 deed of trust with an unclear distribution scheme. In 1992, the settlor's heirs filed a Petition for Declaratory Judgment to clarify the meaning of the ambiguous phrase.¹⁶³ After extensive briefing and argument, the trial court determined that the trust should be divided into eight shares, and in 1994, the Superior Court of Pennsylvania upheld the trial court's decision.¹⁶⁴

In 1998, several beneficiaries launched a new effort to re-litigate the trust's meaning.¹⁶⁵ To avoid the bar of *res judicata*, they contended that fraud had been perpetrated on the lower court.¹⁶⁶ The lower court dismissed the case, finding the fraud claims to be groundless.¹⁶⁷ Nevertheless, in 2000, when the Trustee presented a Petition for Distribution to divide the trust into eight separate shares, the same group of beneficiaries filed objections.¹⁶⁸ Once again anticipating the defense of *res judicata*, the litigants made the same allegations of fraud that had been dismissed in 1998.¹⁶⁹

In this third round of litigation, a new judge referred the case to a master who allowed an amended pleading. The beneficiaries then filed a 285-paragraph document that repeated the terms "fraud,"

160. See *supra* notes 2–5 and accompanying text.

161. See *In re Deed of Trust of Grant McCargo*, Nos. 374, 375, 377 WDA 2003, at 7–10 (Pa. Super Ct. Dec. 23, 2003).

162. See Torsten Ove, *Heirs to Fortune Are at Odds over Control of the Wealth Grease Baron Leaves; Slippery Legal Slope*, PITTSBURGH POST-GAZETTE, July 30, 2000, at A-8, available at LEXIS, News Library, Pittsburgh Post-Gazette file.

163. See *In re Deed of Trust of Grant McCargo*, 652 A.2d 1330, 1331 (Pa. Super. Ct. 1994).

164. See *id.* at 1338.

165. See *In re Deed of Trust of Grant McCargo*, Nos. 374, 375, 377 WDA 2003, at 5–6 (Pa. Super Ct. Dec. 23, 2003).

166. See *id.*

167. See *id.*

168. See *id.* at 7.

169. See *id.*

“fraudulent,” and “scheme to defraud” throughout.¹⁷⁰ The master later rendered a second report that allowed discovery to proceed.¹⁷¹

The case then went back to the Superior Court of Pennsylvania, which ultimately rejected the attempt to overcome *res judicata*, holding that none of the allegations constituted the type of fraud necessary to reopen the judgment.¹⁷² The court held that no litigant had fooled any court into “adopting a flawed interpretation of the Trust language” and rejected an argument that it should reopen its prior decisions on the basis that the court was uninformed regarding previous orders.¹⁷³ Further, the superior court rejected the claimants’ attempt to analogize their case to *Hazel-Atlas*.¹⁷⁴ The court held that unlike in *Hazel-Atlas*, where the Court did indeed rely on manufactured evidence, there was not even an allegation of manufactured evidence in this case—merely proof that the courts had considered and resolved a question of law.¹⁷⁵

Other state courts have been grappling with fraud-related issues in a variety of contexts, from estate litigation to tort claims to contested arbitration awards. For example, in Massachusetts, after a motorist had settled a property damage claim with the Commonwealth, he brought a further claim for personal injuries received in the same accident.¹⁷⁶ To overcome the bar against multiple claims under the State Tort Claims Act, the motorist alleged fraud, as the Massachusetts statute specifically provided that settlements procured by fraud would not be subject to the statutory bar.¹⁷⁷ The motorist’s fraud-based claim rested on the premise that he had advised the Commonwealth that he wanted only to settle his property damage claim and would pursue his personal injury action after settling the property matter.¹⁷⁸ The court held that because the claimant had not alleged that the Commonwealth calculated to mislead him, his allegations did not support a case based on fraud.¹⁷⁹ The court noted that the affidavit did not contain any references to what the Commonwealth had represented and stated that the Commonwealth’s settlement letter specifically stated

170. See Brief for Appellants, *In re Deed of Trust of Grant McCargo*, No. 377 WDA 2003, at 8 (Pa. Super Ct. Dec. 23, 2003).

171. See *id.* at 9.

172. *Id.* at 21.

173. *Id.* at 17–18.

174. *Id.* at 19–21.

175. *Id.*

176. See *Knight v. Commonwealth*, 709 N.E.2d 436, 437 (Mass. App. Ct. 1999).

177. See MASS. GEN. LAWS ch. 258, § 5 (2004).

178. *Knight*, 709 N.E.2d at 438.

179. *Id.*

that the settlement would constitute a complete bar to further action.¹⁸⁰ Thus, the court denied the fraud-based claim.¹⁸¹

In Florida, shareholders brought a motion to set aside an arbitration award for another shareholder who had been defamed by statements regarding substance abuse and domestic violence.¹⁸² After the circuit court entered the arbitration award in a final judgment, the group moved to set aside the judgment on the ground of fraud, arguing that the state's arbitration statute requires courts to vacate arbitration awards that are procured by "corruption, fraud or other undue means."¹⁸³ The shareholders alleged that the sole shareholder had committed perjury when he told the arbitration board that he was not violent and did not have a drinking problem.¹⁸⁴ They submitted an affidavit from the sole shareholder's ex-girlfriend, alleging that she was physically assaulted by the shareholder and that she had witnessed his abuse of alcohol and other illegal substances.¹⁸⁵ The court held that the evidence in the affidavit could have been discovered by due diligence before the arbitration hearing and therefore was not permitted.¹⁸⁶ The court further held that the evidence did not suffice to establish fraud in obtaining the arbitration award.¹⁸⁷ The court reasoned that a claim of fraud should not result in "an opportunity to obtain a second bite of the apple" to correct deficiencies of proof at arbitration.¹⁸⁸

III. A Mechanism for Change

The federal and state cases discussed above demonstrate that litigants have been misusing the fraud on the court doctrine, but there are no easy fixes. While the Restatement suggests that courts should not even consider reopening judgments unless litigants can show that they have "substantial" cases to present, courts cannot seem to agree upon what qualifies as "substantial."¹⁸⁹ As a result, the "savings clauses" in Rule 60(b) and their state law analogs tempt litigants to

180. *Id.*

181. *Id.*

182. *See Davenport v. Dimitrijevic*, 857 So. 2d 957, 959 (Fla. Dist. Ct. App. 2003).

183. FLA. STAT. ch. 682.13(1)(a) (2003).

184. *Davenport*, 857 So. 2d at 960.

185. *Id.* at 960-61.

186. *Id.* at 962.

187. *Id.* at 962-63.

188. *Id.* at 962.

189. RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. d (1982). This section suggests that a substantial case would offer "clear and convincing proof that the evidence underlying the judgment was indeed fabricated or concealed." *Id.*

shoot for the moon, regardless of the strength of their claims, and some courts have not adequately screened their insubstantial, frivolous lawsuits.

Thus, it appears that both federal and state courts could benefit from an improved process for dealing with fraud-based claims; courts may even need specific mechanisms that require litigants to allege outcome-determinative facts. The mechanisms could take many forms, and as with any procedural change, each of the potential solutions possesses benefits and challenges.¹⁹⁰ That being said, by drawing analogies to existing procedures, a few possibilities come to light that could ameliorate some of the common problems associated with the doctrine.

A. Modification of Rule 60(b) and the Parallel State Rules of Civil Procedure

An explicit, fraud-specific sanctions provision for Rule 60—with teeth—could deter litigants and attorneys who might otherwise consider filing a frivolous claim. A new subsection of Rule 60 (and the corresponding state court rules) could be modeled on amended Rule 11 of the Federal Rules of Civil Procedure, which authorizes sanctions for litigants who file papers with the court for an improper purpose, or whose allegations lack evidentiary support.¹⁹¹ The new rule could specify that unless the litigant can provide facts that, if true, rise to the level necessary to show a “fraud on the court,” the filing would be deemed to be frivolous, and sanctions could be imposed.¹⁹²

190. These suggestions are general, and an entire article could be devoted to developing each one. Rather than to exhaustively analyze each proposal, my goals are to stimulate discussion and to demonstrate that any one (or combination of) these options might be an improvement over the existing procedures.

191. FED. R. CIV. P. 11. Rule 11(b) of the Federal Rules of Civil Procedure provides, *inter alia*, that litigants must certify to the court that any paper filed with the court is not being presented for any improper purpose, and that the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. *Id.* at 11(b). If a litigant violates this test, sanctions may be imposed. *Id.* at R. 11(c). As part of the judiciary’s 1993 reform of many of the Federal Rules of Civil Procedure, Rule 11 was substantially amended. A major change was that the imposition of sanctions by the court for violation of the Rule was changed from mandatory to discretionary. *Id.*

192. The modified rule could also incorporate aspects of Rule 9 of the Federal Rules of Civil Procedure, which requires fraud to be plead with specificity, but has not been strictly enforced. *See* 5A ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 1301.1 (3d ed. 2004). Specifically, Rule 9(b) of the Federal Rules of Civil Procedure provides: “(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”

Of course, the suggestion to modify any procedural rule begets numerous questions.¹⁹³ In this case, many of the same issues and questions raised in the debate over the 1993 amendments to Rule 11 would apply. For example, drafters would need to consider whether the sanctions provision should be mandatory (as in the pre-1993 Rule 11) or discretionary.¹⁹⁴ Also, drafters would need to consider whether deterrence or compensation for defendants who are wrongly drawn into re-litigation would be the primary goal of the rule.¹⁹⁵ In the case of Rule 11, the Rule states that a sanction should be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."¹⁹⁶ Here, while deterrence would clearly be a goal, drafters would need to consider whether compensation is an equally important goal, especially given the extraordinary cost associated with evidence collection in decades-old matters.

Because the amendments to Rule 11 are still relatively new, the debate over whether the amended rule is achieving its deterrent purpose continues, and its impact on litigants is not conclusive.¹⁹⁷ Still, some positive benefits have already been noted. Judges have found creative ways to serve the amended Rule's deterrent purpose, such as requiring offending attorneys to attend continuing legal education courses or pay fines to fund scholarships for such classes.¹⁹⁸ Courts also have issued reprimands and admonitions as sanctions.¹⁹⁹ These punishments may deter both current violators and future litigants.

FED. R. CIV. P. 9(b). However, because of the costs associated with researching decades-old claims, the current Rule 9(b) is an ineffective deterrent for specious fraud on the court claims, and a modified rule would have to take the particular problems associated with the doctrine into account.

193. A complete analysis of the pros and cons and wording of any proposed change is beyond the scope of this piece; my purpose here is to suggest that there are viable mechanisms for improving the current state of the doctrine.

194. Former Rule 11(b) stated that if a pleading, motion, or other paper were signed in violation of the Rule, the court "upon motion or upon its own initiative, shall impose" an appropriate sanction upon the violator. FED. R. CIV. P. 11(b)(1) (1992) (amended 1993). A decision on whether to set aside a judgment under Rule 60(b) is currently discretionary. See 12 MOORE, *supra* note 12, § 60.22.

195. STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 11-12 (1989). This report was the compilation of findings and recommendations of the Third Circuit Task Force on Federal Rule of Civil Procedure 11. *Id.*

196. FED. R. CIV. P. 11(c)(2).

197. It has been difficult to determine the effect of Rule 11 because a court's written ruling does not necessarily convey its impact on sanctioned litigants. See Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1039-40 (1999).

198. See *id.* at 1040.

199. See *id.* at 1041.

Of course, the success of any rule modification would depend largely on judicial enforcement.²⁰⁰ As such, drafters of a new Rule 60 would benefit from analogizing to procedures that have been effectively enforced. One successful model is the Private Securities Litigation Reform Act of 1995 (“PSLRA”),²⁰¹ which, among other things, requires specificity in pleading securities fraud.²⁰² To overcome concerns that federal courts were not effectively applying Federal Rule 9(b) (which requires specificity in pleading) to prevent frivolous filings in the securities fraud area, Congress amended the Securities Exchange Act of 1934 to include unique pleading requirements for private litigants alleging securities fraud.²⁰³ If a complaint asserts that a defendant made misleading statements under the securities law, the PSLRA requires that “the complaint shall specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading.”²⁰⁴ Similarly, litigants alleging fraud on the court could be required to specify which specific facts could support their allegations and also how those allegations could result in a finding of outcome-determinative fraud. By combining a sanctions provision with a true requirement for specificity in pleading, courts would more easily weed out frivolous claims, and litigants would be deterred from filing bogus complaints as a result of successful judicial enforcement of a modified rule.

B. Improved Education of Trial Court Judges

The cases and commentaries cited above demonstrate that courts have not consistently applied the fraud on the court doctrine. There are multiple reasons for the jurists’ struggles. Three of the most common problems associated with adjudicating these cases include: (1) the myriad ways in which litigants raise the doctrine (e.g., litigants do not always frame their claims as Rule 60(b) actions or as independent

200. Some courts are showing an increased willingness to “hand out real pain” to litigants who are perceived to be abusing the legal system. See Albert B. Crenshaw, *Fairy Tales Won't Put the Tax Court to Sleep*, WASH. POST, June 27, 2004, at F5. In June 2004, the Tax Court added a \$20,000 penalty to the more than \$300,000 in taxes and penalties already assessed against a Florida software engineer by the IRS. See *id.* In the same month, a federal court in Nevada held famed tax evader and author Irwin Schiff, who had counseled readers that paying taxes is voluntary, liable for more than \$2 million in taxes and penalties in a case involving unpaid taxes for 1979 to 1985. See *id.*

201. Public Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

202. See *id.*

203. See 5A WRIGHT & MILLER, *supra* note 192, § 1301.1.

204. 15 U.S.C. § 78u-4(b)(1) (2000).

actions, but sometimes raise the issue through an equitable claim, or as an exception to the doctrine of *res judicata*); (2) the issues inherent in evaluating decades-old evidence; and, (3) the relative infrequency of legitimate fraud on the court claims.²⁰⁵ Despite these difficulties, trial court judges are the first line of defense against misuse of the doctrine. While it may be easy to sympathize with litigants who include allegations of unconscionable fraud in their filings, trial court judges must remain vigilant. Education about misuse of the doctrine, particularly in jurisdictions where no procedural rules exist, could help judges in identifying and extinguishing specious claims early in the litigation process. This education initiative, when coupled with the improved filing requirements suggested above, could help judges in making fair decisions more efficiently.

As noted above, substance should trump form when it comes to Rule 60(b) motions, but in order for the Rule's time limits to have meaning, courts must carefully examine that substance. For instance, if a motion is essentially based on a claim of mistake within the one-year time limit of Rule 60(b)(1), courts must stop litigants from asserting the "catch-all" provision of Rule 60(b)(6).²⁰⁶ More than just semantics, this terminology issue has real consequence for litigants, and therefore courts must carefully wade through pleadings to determine whether an attorney has properly labeled the claim.

Of course, some courts have done so with little trouble. For example, in *Cotto v. United States*,²⁰⁷ family members of an injured minor tried to revive a Federal Tort Claims Act action sixteen months after the district court had dismissed the case.²⁰⁸ The court rejected their Rule 60(b) claims, holding that the motion should have been labeled as a Rule 60(b)(1) claim for excusable neglect, rather than as a 60(b)(6) "catch-all" motion.²⁰⁹ The court held that the "plaintiffs' attempt to garb their motion in the raiment of clause (6) runs aground on the bedrock principle that clause (6) may not be used as a vehicle for circumventing clauses (1) through (5)."²¹⁰

205. While this Article demonstrates that there is certainly a critical mass of these types of cases, discussions with practitioners indicate that fraud on the court claims are not an everyday occurrence. This may be one reason why some judges struggle when confronted with the doctrine.

206. See 12 MOORE, *supra* note 12, § 60.64.

207. 993 F.2d 274 (1st Cir. 1993).

208. *Id.* at 277.

209. *Id.* at 278.

210. *Id.*

Similarly, the First Circuit also cut through an improper Rule 60(b)(6) claim when a teamsters union invoked the rule in an effort to undo a judgment.²¹¹ The union had filed a complaint for vacation pay allegedly owed to its members, but after the defendants sought summary judgment and the union failed to respond, the United States District Court for the District of Massachusetts granted the motion.²¹² More than a year later, the union filed a Rule 60(b)(6) motion to vacate the judgment.²¹³

In analyzing the union's claim, the First Circuit Court of Appeals stated that the court need not consider a movant's "bald assertions, unsubstantiated conclusions, periphrastic circumlocutions, or hyperbolic rodomontade," and instead stripped the motion to its six core allegations.²¹⁴ The court noted that the motion did not reflect that the claim would be winnable, holding that as a precondition to relief under Rule 60(b), the movant must give the trial court reason to believe that vacating the judgment will "not be an empty exercise."²¹⁵ While the union argued that the very filing of a Rule 60(b)(6) claim is "tantamount to a party's representation that a winnable claim or defense exists," the court disagreed, noting that the union's approach "smacks of locking the barn door well after the horse has galloped into the sunset."²¹⁶ The court held that the claimant need not establish an ironclad claim or defense that would guarantee success at trial, but found that the movant must at least establish a potentially meritorious claim or defense.²¹⁷ The court held that such a showing requires "more than an unsubstantiated boast," and it dismissed the union's claim.²¹⁸

On the other hand, when litigants do penetrate the trial court layer of protection in fraud on the court cases, the wasting of judicial and litigant resources is typically extensive. For instance, in the Pennsylvania estate litigation case discussed above, if the trial court or master had required the objectors to concisely allege specific facts that could lead to a finding of outcome-determinative fraud, the litigants and court system might have been spared years of litigation and ex-

211. See *Teamsters Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17 (1st Cir. 1992).

212. *Id.* at 18.

213. *Id.*

214. *Id.*

215. *Id.* at 20 (citing *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990)).

216. *Id.*

217. *Id.* at 21.

218. *Id.*

pense.²¹⁹ The case demonstrates the need for early and vigilant decision-making at the trial court level.

C. An Actual Screening System

Many of the federal courts considering Rule 60(b) actions have adopted the position that claimants must show that they have meritorious claims or defenses as a precondition for relief.²²⁰ “The frequently quoted standard is that the moving party must make allegations that, *if established at trial*, would constitute a valid claim or defense.”²²¹ For example, the First Circuit has clarified that the meritorious claim or defense requirement “guards the gateway to Rule 60(b) relief.”²²²

Nevertheless, the cases above demonstrate that gaps in that gateway exist and that the legal system may need to institute some sort of process to ensure that specious claims do not find the holes in the fence. A screening process or panel could take many forms, but one possibility would be to model the system on the screening process adopted by the Prisoner Litigation Reform Act.²²³ Designed to discourage frivolous prisoner lawsuits, this law devised a screening process for prisoner claims against the government.²²⁴ The legislation requires courts to review any complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.²²⁵ After screening the pleading, before docketing or as soon as practicable after docketing, the court must dismiss the complaint if it is frivolous, malicious, or fails to state a claim upon which relief may be granted, or if it seeks monetary relief from an immune defendant.²²⁶ The legislation currently applies only in federal actions, but its provisions may be instructive in remedying problems engendered by an interminable string of lawsuits.²²⁷

A similar system for fraud on the court claims might bolster confidence in the finality of judgments and discourage disappointed litigants from attempting to reopen fairly-won decisions. Litigants

219. See *supra* notes 2–5, 153–66 and accompanying text.

220. See 12 MOORE, *supra* note 12, § 60.24.

221. *Id.*

222. *Teamsters Union, Local No. 59*, 953 F.2d at 20.

223. See 28 U.S.C. § 1915–1915A (2000).

224. See *id.* § 1915A.

225. See *id.* § 1915A(a).

226. See *id.* § 1915A(b). These provisions have consistently passed constitutional muster. See, e.g., *Singleton v. Smith*, 241 F.3d 534, 538–39 (6th Cir. 2001).

227. See *Parks v. State*, 789 N.E.2d 40, 49–50 (Ind. Ct. App. 2003).

attempting to reopen judgments could be required to file a document with the rendering court or screening panel describing the exact nature of the fraud alleged, and the court would dismiss the complaint if it failed to identify facts that could lead to a finding of outcome-determinative fraud.

However, legislators must consider whether creating such a system might backfire and actually encourage disgruntled litigants to take a "second bite at the apple" simply because the procedure has been narrowly defined. Because these claims are much less numerous than in the prisoner example, such a drastic and administratively-complicated step may not be necessary. Instead, the goal may be better achieved through one of the alternatives discussed above.

In addition, some of the same criticisms made to the proposed changes to Rule 11 could apply to a screening mechanism for fraud on the court claims. For example, some critics argued that the amended rule would produce excessive satellite litigation, with litigants testing and applying the rule's new features.²²⁸ Nevertheless, just as Rule 11 struck a reasonable balance between the many competing interests of litigants seeking sanctions,²²⁹ drafters could also find a screening mechanism for fraud on the court claims that achieves the required balancing of interests.

Conclusion

Finality of judgment matters. Without it, litigants will lose faith that the legal system can effectively resolve their problems. While courts must certainly overturn fraudulently procured judgments in some instances, the cases discussed above demonstrate that litigants in both the federal and state court systems are misusing the fraud on the court doctrine. As such, legislators and judges should consider whether improvements to the rules of procedure, education of trial court judges, an actual screening system, or a combination of solutions would effectively combat this problem. Whatever the remedy, something must be done to put an end to the litigation parade.

228. See *Developments in the Law-Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1639-40 (1994). These fears appear to have been misguided, as sanctions litigation appeared to decline after the new rule was implemented. See Laura Duncan, *Sanctions Litigation Declining*, 81 A.B.A. J. 12, Mar. 1995, at 12.

229. Hirt, *supra* note 197, at 1051.

