

Winter 1985

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### Recommended Citation

C. T. Gray, *Rule 1.540(b), Florida Rules of Civil Procedure: In Search of an Equitable Standard of Relief from Fraud*, 12 Fla. St. U. L. Rev. 851 (1985) .

<https://ir.law.fsu.edu/lr/vol12/iss4/5>

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# RULE 1.540(b), FLORIDA RULES OF CIVIL PROCEDURE: IN SEARCH OF AN EQUITABLE STANDARD FOR RELIEF FROM FRAUD

C. TIMOTHY GRAY

## I. INTRODUCTION

Rule 1.540(b) of the Florida Rules of Civil Procedure,<sup>1</sup> like Federal Rule of Civil Procedure 60(b),<sup>2</sup> allows for relief from judgments which for a variety of reasons should not continue to maintain their vitality. The rules establish various grounds for relief by motion in the original trial court. In addition to the grounds for relief under the motion procedure, Rule 1.540(b) provides for relief through an independent action: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding or to set aside

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1. FLA. R. CIV. P. 1.540(b) reads:

**Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, 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 or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment or decree is void; (5) the judgment or decree has been satisfied, released or discharged or a prior judgment or decree upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree 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, decree, order or proceeding or to set aside a judgment or decree 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 or decree shall be by motion as prescribed in these rules or by an independent action.

2. FLA. R. CIV. P. 1.540(b) and FED. R. CIV. P. 60(b) are virtually identical, except the federal rule contains an additional provision which can be raised by motion at any time: "(6) any other reason justifying relief from the operation of the judgment." Also, the saving clause of the federal rule contains additional language. The entire sentence reads:

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, USC, § 1655, or to set aside a judgment for fraud upon the court.*"

(Emphasis added.)

a judgment or decree for fraud upon the court.”<sup>3</sup>

This sentence (the “saving clause”)<sup>4</sup> has been the subject of various interpretations by the Florida courts. The 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 Rule 1.540(b)(3) and the types of fraud which can be a basis for an independent action after one year. The most recent treatment has been by the Florida Supreme Court in *DeClaire v. Yohanan*.<sup>5</sup> This comment analyzes the current interpretation of the Florida saving clause in light of past applications and the jurisprudence surrounding the parallel federal rule.

This analysis begins by establishing operative definitions of the types of fraud that have been considered by courts in construing the rule. Next is a review of the history and development of Federal Rule 60(b), which was the basis of Florida Rule 1.540(b). Because of the Florida rule’s foundation in the federal rule, the treatment by federal courts of the federal rule has a persuasive impact on the interpretation of the Florida rule by Florida courts.<sup>6</sup> This comment therefore assumes that federal interpretations have authoritative value in the interpretation of the Florida rule.

The treatment of the Florida rule in a series of Florida district court of appeal cases is reviewed, with emphasis on two recent decisions.<sup>7</sup> These two cases provided the framework for the Florida Supreme Court’s most recent attempt, in *DeClaire*, to define those unique situations in which a judgment could be set aside more than one year after the entry of a final judgment. This comment undertakes a critical review of *DeClaire*, which held that an independent action could only be maintained when the circumstances of the case demonstrated “extrinsic fraud.” In reaching this conclusion, the court eliminated any distinction between two separate bases for relief from a judgment under the saving clause: “extrinsic fraud” and “fraud upon the court.” The analysis suggests that the

3. FLA. R. CIV. P. 1.540(b).

4. See Barns & Mattis, *1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 296 (1963).

5. 453 So. 2d 375 (Fla. 1984).

6. See Willis, *Post-Judgment Relief Under Rule 1.38*, 40 FLA. B.J. 1042 (1966). In commenting on the predecessor to Rule 1.540, Judge Willis suggested that “our Rule 1.38(b) is taken from Rule 60(b) of the federal rules and cases digested under this rule certainly would be very persuasive and perhaps controlling in a Florida court.” *Id.* at 1045.

7. *Brown v. Brown*, 432 So. 2d 704 (Fla. 3d DCA 1983); *Yohanan v. deClaire*, 421 So. 2d 551 (Fla. 4th DCA 1982), *rev’d*, 453 So. 2d 375 (Fla. 1984).

precedent used by the court to support its interpretation of the rule does not demarcate "intrinsic fraud" and "extrinsic fraud" as clearly as the court implied.

Finally, this comment concludes that the Florida Supreme Court could have achieved its goal of protecting the finality of judgments by an application of equitable considerations that other courts have used when confronted with actions to open a judgment tainted with fraud. It suggests that the court refine its interpretation of the language of the Rule 1.540(b) "saving clause" and restore the distinction between extrinsic fraud and fraud upon the court. It also suggests that the court consider adoption of equitable standards rather than relying upon definitions of extrinsic fraud and intrinsic fraud, which have not been consistently applied by the courts.

## II. THE TYPES OF FRAUD

In examining the current state of the law in Florida as to what circumstances will permit invocation of the saving clause to relieve a party from a judgment obtained with the assistance of fraud, it is important to classify the definitions applied to the types of fraud with which the courts have had to deal. In both the Florida and federal rules, one type of fraud is specifically referenced. That fraud is "fraud upon the court." In *Moore's Federal Practice*, Professors Moore and Lucas offer the following definition:

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct. Fraud *inter partes*, without more, should not be a fraud upon the court, but redress should be left to a motion under 60(b)(3) or to the independent action.<sup>8</sup>

Examples of fraud upon the court are "bribery or other corruption of the court, or a member of the court participating in the decision; [or] employment of counsel to 'influence' the court, even though it

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8. 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 60.33, at 360-62 (2d ed. 1983) (footnotes omitted) [hereinafter cited as *MOORE'S*]. *But cf.* *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971) (reviewing various definitions of "fraud upon the court" and questioning *Moore's*).

is not shown that the court was influenced.”<sup>9</sup>

These definitions and examples of fraud upon the court clearly differ from the definition of extrinsic fraud which will support an independent action. In 1946, the Florida Supreme Court characterized extrinsic fraud as

prevention of an unsuccessful party from presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plaintiff; fraudulent representation of a party without his consent and connivance in his defeat; and so on.<sup>10</sup>

In *DeClaire*, the court summarized its view: “In other words, extrinsic fraud occurs where a defendant has somehow been prevented from participating in a cause.”<sup>11</sup>

In contrast to fraud upon the court and extrinsic fraud is the definition of intrinsic fraud. The Florida Supreme Court in *DeClaire* distinguished it as follows: “Intrinsic fraud, on the other hand, applies to fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried.”<sup>12</sup> The classic example of intrinsic fraud is perjury, as the testimony of the perjured witness was subjected to the scrutiny of the fact finder, and the determination of the fact finder is considered conclusive as to the testimony.<sup>13</sup>

### III. FEDERAL RULE 60(b): ITS HISTORY AND DEVELOPMENT

#### A. *Bases for Relief*

The purpose of Federal Rule 60(b) and Florida Rule 1.540(b) is to establish procedures for providing extraordinary relief from

9. 7 MOORE's, *supra* note 8, ¶ 60.33, at 357; see *Root Ref. Co. v. Universal Oil Prods. Co.*, 169 F.2d 514 (3d Cir. 1948) (appeals court mandate set aside because of bribery of a member of the appeals court in earlier appeal between the parties), *cert. denied*, 335 U.S. 912 (1949); cf. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (forged article used to secure patent was referred to in appellate proceedings to support patentee's case of infringement and constituted fraud upon the court). *Hazel-Atlas* is the leading case on the concept of fraud upon the court. The Committee Note on the 1946 amendments to FED. R. CIV. P. 60(b) cites *Hazel-Atlas* as an example of fraud upon the court.

10. *Fair v. Tampa Elec. Co.*, 27 So. 2d 514, 515 (1946) (relying on illustrations given in *United States v. Throckmorton*, 98 U.S. 61 (1878)).

11. *DeClaire*, 453 So. 2d at 377. See *infra* notes 24-27 and accompanying text regarding *Throckmorton*, which states the universally employed definition of extrinsic fraud.

12. *DeClaire*, 453 So. 2d at 377.

13. *Id.* at 377, 380.

judgments, decrees, or orders after the time has passed for filing the usual post-trial motions in the original trial court or for seeking an appeal.<sup>14</sup> The rule allows a party against whom a judgment has been entered to file motions in the trial court issuing the judgment for a variety of reasons that may have caused an incorrect determination in the original proceeding. Also, under limited circumstances, an independent action, equitable in nature, can be brought to attack a judgment.<sup>15</sup> However, the ability to reopen judgments under these rules runs headlong into the public policy favoring the termination of litigation. "The problem of whether and under what circumstances a final judgment should be assailable involves the clash of two important principles—that litigation must come to an end, . . . and that justice should be accorded in a particular case . . . ."<sup>16</sup>

Prior to the adoption of the federal rule, courts maintained the power to relieve a party from judgments and decrees through a variety of ancillary common law writs and equitable actions.<sup>17</sup> The current version of the federal rule "expressly abolishes these ancillary remedies."<sup>18</sup> Under these ancillary remedies, courts could grant relief for a variety of reasons. Fraud perpetrated in obtaining a judgment was a major basis for these ancillary remedies.<sup>19</sup>

Under the federal rule, the power of the court to grant relief for the reasons embodied in the ancillary remedies was either expressly enumerated in one of the categories available by motion or retained in the independent action by way of the saving clause.<sup>20</sup> The 1946 Committee Note to Federal Rule 60(b) comments that there are two methods of relief available under the rule:

Two types of procedure to obtain relief from judgments are speci-

14. See 7 MOORE's, *supra* note 8, ¶¶ 60.09-.37; 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2851-2852 (1973); Barns & Mattis, *supra* note 4; see generally Moore & Rogers, *Federal Relief from Civil Judgments*, 55 *YALE L.J.* 623 (1946). Because of the language and history of the Florida rule, principles that can be drawn from the federal rule by implication also apply to the Florida rule.

15. See *supra* note 1 for the full text of the Florida rule and *supra* note 2 for additional language contained in the federal rule.

16. *Brown*, 432 So. 2d at 707 (citations omitted).

17. See 7 MOORE's, *supra* note 8, ¶¶ 60.12-.15; Moore & Rogers, *supra* note 14, at 653-82; Willis, *supra* note 6.

18. C. WRIGHT & A. MILLER, *supra* note 14, § 2851. See *supra* notes 1 and 2 for language of the rule.

19. See 7 MOORE's, *supra* note 8, ¶¶ 60.12-.15.

20. See *DeClaire*, 453 So. 2d at 377-78 (interpreting Florida rule as following the federal rule).

fied in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment.<sup>21</sup>

As part of the dual method for relief, the power of the courts to entertain an independent action was only restricted by the equitable limitations that existed prior to the adoption of the rules. "There can be no doubt, then, that the first saving clause preserved the equitable power of a federal court to entertain an *independent* action to enjoin the enforcement of, or otherwise give relief from, a judgment on whatever basis chancery would afford relief."<sup>22</sup>

#### B. *Pre-Federal Rule 60(b): United States v. Throckmorton*

The general rule that was followed prior to the adoption of the federal rules was that relief through an independent action for fraud could only be given for what constituted extrinsic fraud.<sup>23</sup> This rule was initially laid down in the case of *United States v. Throckmorton*.<sup>24</sup> In *Throckmorton*, the federal government was challenging the issuance of a California land patent that had been granted some twenty years earlier. A forged document was used by the patentee to convince a tribunal in the original confirmation proceedings that the patentee was the rightful holder of the patent.<sup>25</sup> In holding that the judgment could not be set aside, the United States Supreme Court set forth the criteria upon which courts have relied<sup>26</sup> in allowing an independent action to be brought for extrinsic fraud:

21. See Committee Note reproduced at 6A MOORE'S, *supra* note 8, ¶ 60.01[8].

22. 7 *id.* ¶ 60.12 (emphasis in original). Moore and Lucas refer to each separate clause in the federal rule as being a separate "saving clause." *Id.* ¶¶ 60.31-33. For the purposes of this comment, the entire sentence in both the Florida and federal rules is referred to as the "saving clause."

23. See Comment, *Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud*, 23 CALIF. L. REV. 79, 80 (1935); Note, *Injunctions Against the Enforcement of Judgments Obtained by Perjury*, 22 HARV. L. REV. 600, 601 (1909).

24. 98 U.S. 61 (1878).

25. *Id.* at 62-64.

26. See, e.g., *Cuthill v. Ortman-Miller Mach. Co.*, 216 F.2d 336, 338 (7th Cir. 1954); *Chicago R.I. & P. Ry. v. Callicote*, 267 F. 799, 803 (4th Cir.), *cert. denied*, 255 U.S. 570 (1920); *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 86 F.R.D. 131, 138-39 (E.D. Va. 1980), *aff'd*, 675 F.2d 1349 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983); *Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 156 So. 893, 897-98 (Fla. 1934).

[T]here is an admitted exception to this general rule [that judgments are final] in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from the court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.<sup>27</sup>

While *Throckmorton* has been followed for the general rule that a judgment can be reopened by independent action only for extrinsic fraud, it has not been uniformly held that the requirement that the fraud be extrinsic is the "single limitation"<sup>28</sup> on the court's equitable power to grant relief from judgment.<sup>29</sup> Indeed, the weight of authority in federal case law supports the idea that there is a distinction between an independent action to set aside a judgment for extrinsic fraud and an action for relief for fraud upon the court.

### C. Cases Under and Commentaries on Federal Rule 60(b)

A recent example of a court drawing and applying a distinction between an independent action for fraud and relief for fraud upon the court is *Great Coastal Express Inc. v. International Brotherhood of Teamsters*.<sup>30</sup> In that case, the United States Court of Appeals for the Fourth Circuit analyzed the facts in light of the federal district court's ruling that "such facts did not constitute fraud on the court . . . or support an independent action for relief."<sup>31</sup> The appeals court concluded that the particular instance of perjury in the trial court was not sufficient to constitute fraud upon the court.<sup>32</sup> The court, relying on the "doctrine [that] fraud must

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27. *Throckmorton*, 98 U.S. at 65-66.

28. *Brown*, 432 So. 2d at 708.

29. See *infra* notes 134-62 and accompanying text.

30. 675 F.2d 1349 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983).

31. *Id.* at 1351.

32. *Id.* at 1356, and generally at 1355-57.



be 'extrinsic' to justify relief,"<sup>33</sup> also held that the perjury did not support an independent action in equity for relief.<sup>34</sup>

Some federal cases, however, have failed to explicitly recognize the distinction between fraud that would support an independent action and an action for relief for fraud upon the court.<sup>35</sup> On the other hand, virtually all commentators have recognized that the saving clause of Rule 60(b) retains separate powers to entertain an independent action for fraud and to grant relief for fraud upon the court. Professors Wright and Miller, after reviewing cases giving various definitions to the phrase "fraud upon the court," point the following out:

Perhaps the principal contribution of all of these attempts to define "fraud upon the court" and to distinguish it from mere "fraud" is as a reminder that there is a distinction. Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b). The remedy for most cases of fraud must continue to be by motion under Rule 60(b)(3) or by an independent action, subject to the procedural limitations applicable to those remedies.<sup>36</sup>

Another foundation for the proposition that the saving clause contains separate and distinct powers to relieve a party from a fraudulently obtained judgment is the history of Federal Rule 60(b). When Federal Rule 60(b) was first promulgated in 1938, the saving clause read as follows:

This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or

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33. *Id.* at 1358; see also *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972).

34. *Great Coastal Express*, 675 F.2d at 1358.

35. See *Keys v. Dunbar*, 405 F.2d 955 (9th Cir.), *cert. denied*, 396 U.S. 880 (1969); *Dowdy v. Hawfield*, 189 F.2d 637 (D.C. Cir. 1951).

36. C. WRIGHT & A. MILLER, *supra* note 14, § 2870, at 253 (footnotes omitted) (emphasis added); see also 7 MOORE's, *supra* note 8, ¶ 60.33; Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 42 (1978); Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CALIF. L. REV. 531, 542, 553 (1972) [hereinafter cited as Comment, *Proposal for General Reform*]; Comment, *Attacking Fraudulently Obtained Judgments in the Federal Courts*, 48 IOWA L. REV. 398 (1963); Comment, *Seeking More Equitable Relief from Fraudulent Judgments: Abolishing the Extrinsic-Intrinsic Distinction*, 12 PAC. L.J. 1013 (1981) [hereinafter cited as Comment, *Seeking More Equitable Relief*]; Comment, *Relief from Unfairly Obtained Verdicts in Federal Courts*, 30 S.C.L. REV. 781, 783 (1979) [hereinafter cited as Comment, *Unfairly Obtained Verdicts*]; *Rule 60(b): Fraud on the Court*, 40 WASH. & LEE L. REV. 554, 555-56 (1983).

(2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.<sup>37</sup>

The language reserving to the courts the power to set aside a judgment for fraud upon the court was not added until the rule was amended in 1946.<sup>38</sup> After reviewing other changes in the rule allowing relief from fraud, the Committee Note to the 1946 version states:

The amendment . . . mak[es] fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. . . . And the rule does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause.<sup>39</sup>

In light of the history of Federal Rule 60(b), the conclusion can easily be drawn that the powers to (1) "entertain an independent action to relieve a party from a judgment, order, or proceeding," or (2) "set aside a judgment for fraud upon the court," are clearly separate powers that were retained in the federal courts in the development and adoption of the rule.

#### IV. DIFFERENCES BETWEEN FRAUD UPON THE COURT AND EXTRINSIC FRAUD SUSTAINING AN INDEPENDENT ACTION

Thus it is clear that the federal rule contemplates at least two different grounds for allowing relief from a judgment tainted by some form of fraud. Indeed, the difference in these grounds transcends mere verbiage. There are important differences between the application of the saving clause in an independent action for relief from fraud, and the setting aside of a judgment for fraud upon the court. Two of these differences are explored here: (1) the application of the equitable doctrine of laches, and (2) the extent to which a court can act on its own accord to set aside a judgment obtained by fraud upon the court.

##### A. *Laches*

Laches is a doctrine that prevents a person from invoking the

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37. See 6A MOORE's, *supra* note 8, ¶ 60.01[5].

38. *Id.* ¶ 60.01[7].

39. *Id.* ¶ 60.01[8] (citations omitted).

equitable powers of the court for relief when that person has been negligent in asserting his claim or when the circumstances are such that it would be unjust for the claim to be asserted against the adverse party.<sup>40</sup>

*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*<sup>41</sup> is the leading case in the interpretation of the concept of fraud upon the court. The case was referenced specifically in the Committee Note to the 1946 amendments to Federal Rule 60(b).<sup>42</sup> In *Hazel-Atlas*, a fraudulent article was used by the patentee Hartford-Empire to secure a government patent on a new industrial process. In earlier litigation between the parties, Hartford-Empire referenced the spurious article in its brief, supporting a claim that Hazel-Atlas had infringed on its patent. The Third Circuit, "[q]uoting copiously from the article," agreed with Hartford-Empire that Hazel-Atlas had infringed on its patent.<sup>43</sup> Ten years after the Third Circuit had acknowledged Hartford-Empire's infringement claim and 15 years after the inception of the fraudulent article, facts of the article's forgery came to light in federal antitrust actions against Hartford-Empire.<sup>44</sup> Although Hazel-Atlas had made an effort to ferret out the true facts concerning the forged article in the original case,<sup>45</sup> the Supreme Court, in dealing with the issue of whether Hazel-Atlas had been diligent in uncovering the fraud, noted that

tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants.<sup>46</sup>

Professor Moore and Professors Wright and Miller employ the language above as support for the concept that relief for fraud upon the court is not barred by the limitation of laches.<sup>47</sup> Several

40. See BLACK'S LAW DICTIONARY 787 (5th ed. 1979). See generally R. ARMSTRONG & W. DONAHUE, FLORIDA CHANCERY JURISPRUDENCE 40-42 (1927).

41. 322 U.S. 238 (1944).

42. See 6A MOORE'S, *supra* note 8, ¶ 60.01[8].

43. *Hazel-Atlas*, 322 U.S. at 241.

44. *Id.* at 243.

45. *Id.* at 242-43.

46. *Id.* at 246.

47. See 7 MOORE'S, *supra* note 8, ¶ 60.33, at 355-56; C. WRIGHT & A. MILLER, *supra* note 14, § 2870, at 249-51.

federal cases acknowledge that a true showing of fraud upon the court would not be barred by the doctrine of laches.<sup>48</sup>

In contrast, where a party brings an independent action based upon extrinsic fraud, laches can prevent the assertion of the wrong by the aggrieved party. "[T]he power of a defrauded court to grant relief is a sweeping plenary power that is not subject to any rigid time limitation as is a motion under [Rule] 60(b)(3) . . . or to laches of a party, which normally precludes relief in an independent action . . . ." <sup>49</sup>

An excellent summary of the time limitations for bringing an action for fraud under the various provisions of Rule 60 was given by a federal district court in *Lockwood v. Bowles*.<sup>50</sup> The plaintiffs in that case asserted that a decree denying kinship, and hence a share in an estate, entered fourteen years earlier was procured by fraud:

Perhaps recognizing that relief for fraud was barred by the one year limitation period of Rule 60(b)(3) and that relief in an independent action was barred by the doctrine of laches and by the nature of the fraud alleged, defendants' primary argument has been that they are entitled to relief for "fraud upon the court" under Rule 60(b). There is no time limitation which would bar this court from granting such relief. Neither the one-year limitation period nor the doctrine of laches bars the granting of relief for fraud upon the court. A court may "at any time set aside a judgment for after-discovered fraud upon the court."<sup>51</sup>

The court found that the alleged fraudulent testimony of a physician in the original proceeding was only intrinsic fraud which did not meet the requirements for bringing an independent action, or constitute a fraud upon the court.<sup>52</sup> Thus the action could not be

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48. *Toscano v. Commissioner*, 441 F.2d 930, 936-37 (9th Cir. 1971); *Root Ref. Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 522 (3d Cir. 1948); *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 86 F.R.D. 131, 137 (E.D. Va. 1980).

49. 7 MOORE's, *supra* note 8, ¶ 60.33, at 356. Professor Moore, in discussing that an independent action for extrinsic fraud continued to be allowed under the saving clause, noted that "the time limitation upon such an action for relief from a federal judgment normally is laches." *Id.* ¶ 60.33, at 350 (footnote omitted). See also *Carr v. District of Columbia*, 543 F.2d 917, 926 n.76 (D.C. Cir. 1976); *In re Casco Chem. Co.*, 335 F.2d 645, 652 (5th Cir. 1964); *C. WRIGHT & A. MILLER, supra* note 14, § 2868, at 241 (doctrine of laches applicable to independent action); cf. *King v. Dekle*, 43 So. 586 (Fla. 1907) (laches a bar to bill in equity to set aside judgment).

50. 46 F.R.D. 625 (D.D.C. 1969).

51. *Id.* at 631 (footnotes omitted) (quoting *Dausuel v. Dausuel*, 195 F.2d 774, 775 (D.C. Cir. 1952)).

52. *Lockwood*, 46 F.R.D. at 633.

brought after the one-year limitation had expired. The court also noted that even if an independent action could be sustained, laches would bar it.<sup>53</sup>

### B. Court Action Sua Sponte

In setting aside a judgment for fraud upon the court, a court can act without an independent action being brought by a party to correct the injustice perpetrated on the legal institution. For example, in *Martina Theater Corp. v. Schine Chain Theaters, Inc.*,<sup>54</sup> the Second Circuit said that if a proper case of fraud on the court had been presented, a "defrauded district court would have been empowered to take action *sua sponte* to expunge the judgment."<sup>55</sup> By contrast, for extrinsic fraud, a court may not act on its own accord, but must wait for the aggrieved party to institute an independent action that is equitable in nature.<sup>56</sup>

The Florida rule has also received a similar, although nonjudicial interpretation. One article on Florida Rule 1.38(b), the predecessor of the current Rule 1.540(b), noted, "'Fraud upon the court' may be established by an independent action, by motion or otherwise. The exercise of the power is not dependent on any particular procedural steps being taken to establish it. *The court may act sua sponte.*"<sup>57</sup>

A conclusion to be drawn from these authorities is that the phrase "to set aside a judgment for fraud upon the court," at least under the federal rule, contemplates additional powers and procedures beyond the ability of a court to entertain an independent action.

## V. FLORIDA RULE 1.540(b): APPELLATE COURT INTERPRETATIONS

The latest and highest interpretation of the saving clause of

53. *Id.* at 630.

54. 278 F.2d 798 (2d Cir. 1960).

55. *Id.* at 801; *see also* *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946) (federal courts have inherent power to investigate whether a judgment was obtained by fraud); *United States v. ITT*, 349 F. Supp. 22, 28 (D. Conn. 1972) (court can consider fraud claim without intervention of nonparties), *aff'd sub nom.* *Nader v. United States*, 410 U.S. 919 (1973).

56. 7 MOORE's, *supra* note 8, ¶ 60.33, at 357 n.44 ("[I]f the 'fraud' were not upon the court and no party or third person with a legal interest desired to have the judgment set aside, a justiciable case or controversy would not be presented and for this and practical considerations the court should not intermeddle with the judgment.").

57. *Barns & Mattis*, *supra* note 4, at 293 (emphasis added).

Florida Rule 1.540(b) is in the case of *DeClaire v. Yohanan*.<sup>58</sup> The Florida Supreme Court was forced to decide two primary issues related to Rule 1.540: (1) the interpretation of the language of the rule; and (2) the substantive issues underlying the language. The case came to the Florida Supreme Court from the Fourth District Court of Appeal<sup>59</sup> and was reviewed under the court's conflict jurisdiction.<sup>60</sup> This case raised the substantive issues, while a case from the Third District Court of Appeal, *Brown v. Brown*,<sup>61</sup> although not directly before the court for review, lurked in the interpretive shadows of the language of Rule 1.540(b). In the *Brown* decision, the Third District evaluated prior Florida appellate cases. *Brown* and the appellate cases it reviewed illustrate the development of the interpretation of the saving clause in Florida.

#### A. *Brown v. Brown*

The issue confronting the supreme court in interpreting the language of the rule was whether an independent action could be maintained by a party only for fraud upon the court or whether an independent action could be brought for other reasons as well. This issue was never specifically identified in *DeClaire* but was nevertheless addressed at least sub silentio by its rejection of *Brown*. The supreme court noted that the *Brown* decision raised "a major public policy question relating to how final judgments may be attacked and set aside."<sup>62</sup>

In *Brown*, the Third District undertook a thorough analysis of Federal Rule 60(b) in order to determine what it considered to be the proper reading of Florida Rule 1.540(b).<sup>63</sup> The district court conducted this analysis because it concluded that, in light of the

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58. 453 So. 2d 375 (Fla. 1984).

59. *Yohanan v. deClaire*, 421 So. 2d 551 (Fla. 4th DCA 1982), *rev'd*, 453 So. 2d 375 (Fla. 1984).

60. *DeClaire*, 453 So. 2d at 376. The supreme court exercised jurisdiction pursuant to FLA. CONST. art. V, § 3(b)(3), which allows the court to "review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." The cases that the supreme court found in conflict with the Fourth District in *DeClaire* were *Truitt v. Truitt*, 383 So. 2d 276 (Fla. 5th DCA 1980); *Erhardt v. Erhardt*, 362 So. 2d 70 (Fla. 2d DCA 1978), *cert. denied*, 368 So. 2d 1366 (Fla. 1979); *August v. August*, 350 So. 2d 794 (Fla. 3d DCA 1977); and *Kimbrough v. McCranie*, 325 So. 2d 70 (Fla. 1st DCA 1976).

61. 432 So. 2d 704 (Fla. 3d DCA 1983). *Brown* was overruled by the supreme court in *DeClaire*, 453 So. 2d at 381.

62. See *DeClaire*, 453 So. 2d at 380; see also *infra* notes 112-20 and accompanying text.

63. See *supra* notes 14-39 and accompanying text for an analysis similar to that undertaken in *Brown*.

history of the adoption of the Florida rule, interpretations of Rule 60(b) by federal courts were persuasive in reading the Florida rule. This conclusion was supported by considerable precedent.<sup>64</sup> In fact, the supreme court in *DeClaire* noted that the Florida rule is "modeled on Federal Rule of Civil Procedure 60 . . . [and] is '[s]ubstantially the same as Federal Rule 60.'"<sup>65</sup>

On the basis of its analysis of the federal rule, the Third District concluded that the Florida rule was derived from its federal counterpart.<sup>66</sup> It also concluded that the purpose explained and precedent cited in the "federal cases which have construed Rule 60(b) leave no doubt as to its meaning—any extrinsic fraud, not merely 'fraud upon the court,' is a basis for an independent action under the rule."<sup>67</sup>

The history of the federal rule and its influence on the Florida rule lent ample support, in the *Brown* decision, to the proposition that fraud as the basis of an independent action and relief for fraud upon the court are separate powers retained in the saving clause of Rule 1.540(b). The district court went one step further and conducted a linguistic analysis of the saving clause. It concluded that the phrase "or to set aside a judgment or decree for fraud upon the court" is disjunctive of the other powers retained. Its position was based upon "well-accepted rules of construction" and upon the intervening clause in the federal rule.<sup>68</sup>

With all of the support it could muster, the Third District in *Brown* boldly stated that "our reading of Rule 1.540(b) is that it permits an independent action to be [brought] upon allegations of extrinsic fraud or an independent action to set aside the judgment upon allegations of fraud upon the court."<sup>69</sup> This holding by the

64. *Brown*, 432 So. 2d at 706-07.

65. *DeClaire*, 453 So. 2d at 377 (quoting *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So. 2d 598, 631 (Fla. 1966)). See also *Brown*, 432 So. 2d at 706-07, and cases cited therein for the proposition that interpretations of the Florida rule should generally conform with the federal rule.

66. See cases discussed in *Brown*, 432 So. 2d at 706-07.

67. *Id.* at 708.

68. *Id.* at 710-11.

69. *Id.* at 714 (emphasis in original). While the conclusion of the *Brown* court appears to be correct to the extent that it finds separate powers in the saving clause for entertaining an independent action for extrinsic fraud and setting aside a judgment for fraud upon the court, it may still tend to misread the rule. The Third District apparently reads the rule to allow a court to entertain an independent action to relieve a party (1) from a judgment, decree, order, or proceeding, or (2) to set aside a judgment or decree for fraud upon the court. This view of the Third District's reading is drawn from the court's understanding that the rule

preserves two distinct and separate powers of a court over an independent ac-

court was bold because of a line of district court of appeal cases, including its own,<sup>70</sup> that had created what the Third District titled "The Mischief of *Alexander*."<sup>71</sup>

### B. *Mischievous Alexander*

The Third District in *Brown* examined the case of *Alexander v. First National Bank*<sup>72</sup> and the "[d]escendants of *Alexander* [which] abound throughout the state."<sup>73</sup> The court criticized *Alexander* and its progeny for the implied, and in one case explicit,<sup>74</sup> holding that the saving clause of Rule 1.540(b) only provides relief for fraud upon the court and not for other types of fraud. The language of *Alexander* that created the "mischief" of which the Third District was so critical reads as follows:

Perhaps as a means of protecting the integrity of the court system, the [Florida] Supreme Court preserved one historic method of attacking a final judgment. The rule preserves:

". . . an independent action to relieve a party from a judgment . . . or to set aside a judgment . . . for fraud upon the court."

The appellants' counterclaim clearly did not entitle them to relief from the final judgment . . . on any of the numbered grounds specified in Rule 1.540(b), RCP. As demonstrated above, such relief is dependent on a post-judgment motion *in the original ac-*

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tion—the first being the power to entertain an independent action "to relieve a party from a judgment, decree, order or proceeding," and the second, the power to entertain an independent action "to set aside a judgment for fraud upon the court."

*Id.* at 710. A more correct reading might be that a court's power to set aside a judgment for fraud upon the court is not limited to an independent action, and that all of the clauses of the federal rule, and hence the Florida rule, should be read disjunctively. See 7 MOORE'S, *supra* note 8, ¶ 60.33, at 351 ("The third saving clause states that the Rule does not limit the power of a court 'to set aside a judgment for fraud upon the court.'"). See also *supra* notes 54-57 and accompanying text for the proposition that an independent action is not necessary to set aside a judgment for fraud upon the court.

70. See *August v. August*, 350 So. 2d 794 (Fla. 3d DCA 1977); *Sottile v. Gaines Constr. Co.*, 281 So. 2d 558 (Fla. 3d DCA 1973), *cert. denied*, 289 So. 2d 737 (Fla. 1974). In *Brown*, 432 So. 2d at 715, the Third District Court "recede[d] from dicta" in these cases "that fraud upon the court is the exclusive ground upon which an independent action . . . may be based."

71. *Brown*, 432 So. 2d at 711.

72. 275 So. 2d 272 (Fla. 4th DCA 1973).

73. *Brown*, 432 So. 2d at 712.

74. *Erhardt v. Erhardt*, 362 So. 2d 70 (Fla. 2d DCA 1978), *cert. denied*, 368 So. 2d 1366 (Fla. 1979).



tion. Appellants did not avail themselves of this procedure. The only other procedural means available to them for relief from judgment (aside from an appeal) was an independent action grounded on "fraud upon the court". The question before us, therefore, narrows to this. Did the appellants' counterclaim, as *an independent action*, sufficiently allege facts showing that a fraud on the court had occurred in the prior action?<sup>75</sup>

*Brown* rejected the creative abbreviation given the saving clause by the Fourth District and the reading of but "one historic method" for attacking a judgment under the saving clause. The problem that the *Brown* court found with *Alexander* was the following:

By distinguishing only between "fraud upon the court" and all other fraud, whether extrinsic or intrinsic, the [Fourth District] arrives at the conclusion, totally unsubstantiated by the derivation, history, purpose and language of Rule 1.540(b), that (1) the exclusive means for attacking a judgment on a ground other than for fraud upon the court is by "motion filed in the same proceeding in which the questioned judgment was entered," and (2) the exclusive ground for an independent action attacking the judgment is "for fraud upon the court."<sup>76</sup>

Indeed *Brown* did not argue with the result reached in *Alexander* or the cases that had followed it. In fact the Third District made it clear that the results of each of those cases could be accommodated under its reading of the rule that an independent action could be brought for extrinsic fraud, not just for fraud upon the court.<sup>77</sup>

### C. Erhardt v. Erhardt

Another case that *Brown* criticized is *Erhardt v. Erhardt*.<sup>78</sup> While not specifically citing *Alexander* or its offspring, the Second District clearly stated in *Erhardt* that it saw only fraud upon the court as providing relief under the rule's saving clause:

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75. *Alexander*, 275 So. 2d at 273-74 (emphasis and editing of Rule 1.540(b) in original).

76. *Brown*, 432 So. 2d at 712.

77. *Id.* at 712-13. The court felt that the circumstances raised in the cases constituted intrinsic fraud and hence did not qualify for an independent action after the one-year period for a motion had expired.

78. 362 So. 2d 70 (Fla. 2d DCA 1978), *cert. denied*, 368 So. 2d 1366 (Fla. 1979).

Appellee contends that even though the trial court did not find that appellant had committed fraud upon the court he could still be granted relief under the last sentence of Rule 1.540(b). Appellee argues that this final sentence empowers a trial court to entertain petitions for relief seeking either (1) “[relief] from a judgment, decree, order, or proceeding” or (2) “to set aside a judgment or decree for fraud upon the court.” In other words appellee views the two portions of the final sentence disjunctively and finds two separate grounds for relief, one of which requires a showing of fraud and one of which does not. We reject this reasoning. We read the final sentence to provide only one basis for relief and that requires a showing of fraud upon the court.<sup>79</sup>

#### D. “Blurring” a Distinction

The conflict created by the decisions in *Brown*, *Alexander*, and *Erhardt* may be more semantic than real. The holding of *Brown* was that an independent action could be brought both for extrinsic fraud and for fraud upon the court.<sup>80</sup> The problem the *Brown* court saw with *Alexander* and the others was a “failure to distinguish intrinsic from extrinsic fraud and to distinguish fraud upon the court (a very special type of extrinsic fraud) from all other extrinsic fraud. . . . The blurring of any distinction . . . is, as we have already said, a misreading of the rule.”<sup>81</sup> However, the specific results reached in *Alexander* and its lineage could have been reached under the *Brown* holding. The impact of *Alexander* and the cases following it is that extrinsic fraud is lumped together with fraud upon the court. The problem with this “blurring of any distinction” stems from the fact that there are differences in the application of these separate concepts of the saving clause, such as lack of a limitation for laches and the ability of a court to act sua sponte when confronted with fraud upon the court.<sup>82</sup>

It is significant to note that, prior to the supreme court’s decision in *DeClaire*, there was at least a genesis of acceptance growing for the Third District’s position in *Brown*. The Second District Court of Appeal, the court that in *Erhardt* specifically read only one ground for relief in the rule’s saving clause, later endorsed

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79. *Id.* at 71 (emphasis in original). *Brown* did not quibble with the holding of *Erhardt*, only with its interpretation of the language of the rule. *Brown*, 432 So. 2d at 713.

80. *Brown*, 432 So. 2d at 714.

81. *Id.* at 712-13.

82. See *supra* notes 40-57 and accompanying text.

*Brown's* reading of separate powers in the saving clause:

[W]e agree with Judge Pearson's analysis in *Brown* where he concluded that the last sentence of rule 1.540(b) must be read in the disjunctive and refers to both the general power of a court to entertain an independent action to relieve a party from a judgment *and* the power of a court to set aside a judgment for fraud upon the court.<sup>83</sup>

Thus, in *Westcott v. Wescott*, the Second District receded from its "dicta in *Erhardt* that there is only one basis for relief under the final sentence of rule 1.540(b), to wit, fraud upon the court."<sup>84</sup>

In a recent Fifth District Court of Appeal case, an ex-spouse was seeking to have a property conveyance that was part of a divorce decree set aside under the motion procedure allowed by Rule 1.540(b)(3), but in a court different from the one rendering the original judgment. The majority refused to allow a motion in a different court, but Judge Sharp stated in dissent, "I agree with the view expressed by our sister court in *Brown v. Brown* . . . that would allow an independent suit in this case [for extrinsic fraud]."<sup>85</sup>

## VI. THE FLORIDA SUPREME COURT'S INTERPRETATION OF THE SAVING CLAUSE OF RULE 1.540(b)

In *DeClaire*, the Florida Supreme Court accepted jurisdiction over the Fourth District Court of Appeal case as being in conflict with *Erhardt* and other appellate court cases that had their foundation in *Alexander*.

### A. Lower Court Decisions in *DeClaire*

In 1980, Donna deClaire Yohanan petitioned the Circuit Court for Palm Beach County to set aside a 1977 divorce decree which incorporated a property agreement with her former husband, George F. deClaire. Yohanan's petition was filed pursuant to Rule 1.540(b) and claimed that deClaire had misled the court by filing a fraudulent financial affidavit in the original dissolution proceed-

83. *Wescott v. Wescott*, 444 So. 2d 495, 496 (Fla. 2d DCA 1984) (emphasis in original).

84. *Id.* at 498 n.2.

85. *Cobourn v. Cobourn*, 436 So. 2d 284, 286 (Fla. 5th DCA 1983) (Sharp, J., dissenting) (citation omitted). The majority held that relief within the one-year period allowed by Rule 1.540(b)(3) could only be granted by the trial court rendering the initial judgment.

ings, constituting a fraud upon the court.<sup>86</sup> The affidavit was filed in the original proceeding in accordance with Rule 1.611 of the Florida Rules of Civil Procedure.<sup>87</sup>

The trial court agreed with Yohanán that deClaire had indeed misrepresented his financial circumstances in the divorce proceeding three years earlier. However, the court denied Yohanán's petition to have the 1977 divorce decree and attendant property settlement set aside.<sup>88</sup> The basis for this denial was that Yohanán knew or should have known of her former husband's true net worth, and that information could or should have been brought to the trial court's attention. The court reached this conclusion because Yohanán had previously co-signed financial statements presented to a bank for the purpose of obtaining a loan.<sup>89</sup> In addition, the trial court held that Yohanán did not "timely contest the property settlement agreement within one year."<sup>90</sup>

On appeal, the Fourth District Court first confronted the issue of whether deClaire's action of filing a false financial affidavit constituted fraud on the court.<sup>91</sup> The court felt that, unless deClaire's action could be categorized as "fraud upon the court," Yohanán's independent action would be "untimely."<sup>92</sup> The court quoted from its own much-cited opinion in *Alexander*<sup>93</sup> to explain the position that the concept of "fraud upon the court" should be narrowly

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86. *DeClaire*, 421 So. 2d at 552.

87. The pertinent part of FLA. R. Civ. P. 1.611(a) reads as follows:

**Financial Statement.** Every application for temporary alimony, child support, attorneys' fees or suit money shall be accompanied by an affidavit specifying the party's financial circumstances. . . . If no application for a temporary award is made, the parties shall make and serve the affidavits at least 10 days before the trial if permanent alimony, child support, attorneys' fees or suit money is sought.

88. *DeClaire*, 421 So. 2d at 552. In fact the district court noted "[deClaire] underestimated his net income by approximately \$1,775 per month and financial statements submitted to various banks demonstrated a much greater net worth than that shown by [his] financial affidavit." *Id.*

89. *DeClaire*, 453 So. 2d at 376. The difference between the financial statements Yohanán signed for the loans and the net worth sworn to in the divorce proceeding was approximately \$500,000. *DeClaire*, 421 So. 2d at 552.

90. *DeClaire*, 421 So. 2d at 552. The trial court found that "changed circumstances justified an increase in the child support award" and granted Yohanán costs and fees. George deClaire cross-appealed the increase in child support and the award of costs to Yohanán. The district court upheld the trial court on these two points. *Id.* at 552-53. The action between deClaire and Yohanán was subject to additional appellate proceedings, which are not relevant to the issues of this comment. See *Yohanán v. deClaire*, 435 So. 2d 913 (Fla. 4th DCA 1983).

91. *DeClaire*, 421 So. 2d at 553.

92. *Id.*

93. See *supra* notes 72-75 and accompanying text.

construed so that it will not be used to usurp the policy favoring the finality of judgments.<sup>94</sup> The court then went on to state that "the public policy favoring the termination of litigation must yield in the present case to the public policy favoring the filing of accurate financial affidavits in dissolution actions."<sup>95</sup>

The Fourth District Court concluded that Rule 1.611 was designed to benefit the administration of justice by requiring parties to file information with a trial court in order to expedite divorce proceedings.<sup>96</sup> It reasoned that deClaire's "fraudulent affidavit constituted fraud upon the court because a trial court cannot properly determine what to award the parties or whether to approve a property settlement agreement without a true understanding of the parties' financial condition."<sup>97</sup> The district court sought to implement an enforcement mechanism for Rule 1.611 by holding that

when a trial court determines a financial affidavit required by Rule 1.611 has been filed fraudulently, . . . the offending party has committed fraud on the court and the one year time limit in Florida Rule of Civil Procedure 1.540(b) will not bar an independent action to set aside a final judgment of dissolution.<sup>98</sup>

The district court reversed the trial court and remanded with instructions to vacate the property settlement agreement and conduct further proceedings.<sup>99</sup>

### *B. The DeClaire Interpretation of the Saving Clause—Only One Basis for Relief*

*DeClaire* gave the Florida Supreme Court the opportunity to rid the law of the "Mischief of *Alexander*." Its decision could have restored to the saving clause an interpretation that recognized two separate powers retained by the courts: one, to entertain an inde-

94. *DeClaire*, 421 So. 2d at 553.

95. *Id.*

96. See *supra* note 87 for text of rule.

97. *DeClaire*, 421 So. 2d at 553. The Fourth District Court used Rule 1.611 to support the setting aside of the *property settlement*. However Rule 1.611 does not refer to property settlements, only to "temporary [or permanent] alimony, child support, attorneys' fees or suit money." See *supra* note 87 for text of Rule 1.611(a). Where a property settlement is joined with another of these elements in a dissolution proceeding, it would seem that the policy behind the rule should continue to have vitality.

98. *DeClaire*, 421 So. 2d at 553.

99. *Id.*

pendent action to relieve a party from a judgment, order, or proceeding; and two, to set aside a judgment for fraud upon the court. An analysis of the supreme court's opinion reveals that the interpretation of language of the saving clause continues to be unsettled.

The court began its review of the Fourth District's holding in *deClaire* by setting forth historical definitions of extrinsic and intrinsic fraud.<sup>100</sup> The court fell into the same trap as the *Alexander* line of cases, that is, the "failure to distinguish intrinsic from extrinsic fraud and to distinguish fraud upon the court (a very special type of extrinsic fraud) from all other extrinsic fraud."<sup>101</sup> The supreme court said, "At the outset we must distinguish between extrinsic fraud and intrinsic fraud because only extrinsic fraud may constitute fraud on the court."<sup>102</sup> While its definitions of intrinsic fraud and extrinsic fraud comport with recognized definitions, the court failed to label fraud upon the court as a unique species of fraud and continued the "blurring of any distinction"<sup>103</sup> between extrinsic fraud and fraud upon the court.

In one part of the opinion, the court apparently wanted to delineate clearly the time limits controlling when actions for relief from judgments could be brought. In this effort to assist practitioners and the courts, the supreme court set forth categories to provide "a better understanding, [of] the circumstances under which a judgment may be challenged." After listing the circumstances under which a judgment may be reopened in one year, the court provided that there would be no time limitation under Rule 1.540(b) or an independent action in several situations, including "[e]xtrinsic fraud which prevents a party from having an opportunity to present his case in court."<sup>104</sup>

The court, however, continued to baffle a reader who might be persuaded that extrinsic fraud and fraud upon the court are different, saying, "The rule does not change the existing definitions of intrinsic and extrinsic fraud or change the type of conduct which constitutes fraud upon the court."<sup>105</sup> The court gave no examples of what conduct it considered fraud upon the court, except the definitions of extrinsic fraud it had quoted earlier.

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100. *DeClaire*, 453 So. 2d at 376-77.

101. *Brown*, 432 So. 2d at 712.

102. *DeClaire*, 453 So. 2d at 376-77.

103. *Brown*, 432 So. 2d at 713.

104. *DeClaire*, 453 So. 2d at 378-79.

105. *Id.* at 379.

### C. *Intrinsic Fraud—Not a Basis for Relief*

The substantive holding of the *DeClaire* decision also requires comment, as it too has left some questions unanswered. Because the court continued the general rule that only extrinsic fraud, also called "fraud upon the court," qualifies for an independent action, it continued to rely on labels for when an independent action can be brought.

After tracing the development of the Florida rule, the court reaffirmed that only extrinsic fraud/fraud upon the court could qualify for an independent action after the one year period allowed in Rule 1.540(b)(3) had passed.<sup>106</sup> Scrutinizing the fraudulent affidavit of deClaire in light of Rule 1.540(b) and the definitions that it had given, the court reasoned that the affidavits "were part of the record in this case. The issue of [deClaire's] net worth was, therefore, a matter before the court for resolution and could have been tried."<sup>107</sup> The court expressed concern that if deClaire's actions were allowed to be considered fraud upon the court,

[i]t would permit any final judgment to be attacked at any time if a party could allege that an intentional misrepresentation was made by affidavit, deposition, or testimony presented in the case. By so expanding the definition of fraud upon the courts, we would also be substantially expanding the grounds on which final judgments may be attacked.<sup>108</sup>

The issue perceived by the supreme court was that the approach used by the Fourth District would expand the avenues by which final judgments could be brought under review via the saving clause. The court's concern for protecting the finality of judgments was expressed by the ruling that factual matters that could have been attacked in the original trial proceedings must be contested under Rule 1.540(b)(3) within one year of the entry of final judgment. The following interpretation of the rule was clearly set forth in *DeClaire*:

When an issue is before a court for resolution, and the complaining party could have addressed the issue in the proceeding,

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106. *Id.* at 378-79. Because the Florida court has given "extrinsic fraud" and "fraud upon the court" interchangeable definitions, the term extrinsic fraud will be used herein as defined by the federal courts.

107. *Id.* at 380.

108. *Id.*

such as attacking the false testimony or misrepresentation through cross examination and other evidence, then the improper conduct, even though it may be perjury, is *intrinsic fraud* and an attack on a final judgment based on such fraud must be made within one year of the entry of the judgment.<sup>109</sup>

#### D. *The Court's Treatment of Brown*

The supreme court's treatment of *Brown* adds to the bewilderment of one attempting to decipher the saving clause of Rule 1.540(b). The cases which the court found conflicting with the Fourth District's decision in *deClaire* were the same cases that *Brown* had criticized for their implicit and explicit readings that the saving clause only allowed a court to set aside a judgment for fraud upon the court.<sup>110</sup> The supreme court analyzed the cases that were in conflict with *deClaire* mainly in light of the holdings of the cases; that is, an independent action cannot be brought for relief from intrinsic fraud after the one-year limitation for filing motions in the original proceeding under Rule 1.540(b)(3) has expired.<sup>111</sup>

The court then reviewed the *Brown* decision and concluded that "the Third District did not fully agree with the reasoning of the decisions in the [conflicting] cases."<sup>112</sup> It then noted the *Brown* court's legal position "that rule 1.540(b) 'permits an independent action to be relieved from a judgment upon allegations of extrinsic fraud or an independent action to set aside the judgment upon allegations of fraud upon the court.'"<sup>113</sup> The court cast the result reached in *Brown* as, "although the wife's allegations did not show fraud upon the court, the allegations did establish extrinsic fraud which would allow relief outside the one-year limitations period."<sup>114</sup> However, the *Brown* court expressly did not argue with the results reached in the cases which the supreme court found in conflict with *deClaire*. In fact, it found their results very supportable under the theory that only extrinsic fraud, and not intrinsic

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109. *Id.* (emphasis added).

110. See *supra* note 60 for the conflicting cases. The court did not find conflict with *Alexander*, as it was a Fourth District case and had in fact been cited approvingly in *deClaire*, 421 So. 2d at 551. See the *Brown* treatment of the conflicting cases and *Alexander*, 432 So. 2d at 711-14.

111. *DeClaire*, 453 So. 2d at 378-79.

112. *Id.* at 379-80.

113. *Id.* at 380 (quoting *Brown*, 432 So. 2d at 714 (emphasis in original)).

114. *DeClaire*, 453 So. 2d at 380.



fraud, will support an independent action.<sup>115</sup> *Brown* only divined in the saving clause dual powers of a court to relieve an unjust judgment.

The most opaque part of the supreme court's treatment of *Brown* came when it concluded that "[t]he *Brown* decision and the Fourth District's [*deClaire*] decision . . . raise a major public policy question relating to how final judgments may be attacked and set aside."<sup>116</sup> The court felt that to allow *Brown* and the Fourth District's reading of the saving clause to stand would substantially broaden the grounds upon which a judgment could be attacked and therefore would not accord judgments the finality that they deserve.<sup>117</sup>

The court then quashed the Fourth District's decision and "also disapprove[d] the Third District's decision in *Brown to the extent that it conflicts with our decision in the instant case.*"<sup>118</sup> The court reasonably explained the public policy issue it perceived: according judgments finality when the factual matters were tried and determined. However, the public policy problem that the court perceived to be raised by *Brown*, and hence the extent of the conflict between *Brown* and the supreme court's decision in *DeClaire*, are completely unelucidated.

A comparison of the substantive holdings in *DeClaire* and *Brown* reveals no real conflict between the two cases. The rule of *DeClaire* is that an independent action will only be available for extrinsic fraud. Yet the court found that the filing of the false financial affidavits by *deClaire* in the original divorce proceeding constituted "intrinsic fraud and . . . there was no fraud on the court in this case."<sup>119</sup>

The view expressed by *DeClaire* appears to be no more restrictive than the holding of *Brown*. *Brown* clearly supported the position that only extrinsic fraud, in addition to fraud upon the court, would allow an independent action.<sup>120</sup> This position, coupled with

115. *Brown*, 432 So. 2d at 711-14.

116. *DeClaire*, 453 So. 2d at 380.

117. *Id.*

118. *Id.* at 381 (emphasis added).

119. *Id.* at 380.

120. *Brown*, 432 So. 2d at 711-12. The court distinguished this from "intrinsic fraud which historically would not support an action attacking the judgment, and which therefore could only be considered when contained in a timely-made *motion* under the rule." *Id.* at 712 (footnotes omitted) (*emphasis in original*). Some of the footnotes of *Brown* may have given the supreme court some uneasiness. In one of the footnotes appended to the above quotation, the *Brown* court pointed out that the intrinsic-extrinsic distinction has been

*Brown's* agreement with the holdings reached in the conflicting cases that were impliedly upheld by the supreme court in *DeClaire*, leads to the conclusion that there is no real substantive disagreement as to what conduct allows an independent action to be brought after the one-year limitation.

Although the theoretical conflict between *Brown* and *DeClaire* is undefined, and there is no apparent substantive conflict between the cases, the conclusion must be drawn that the supreme court has blended the terms "extrinsic fraud" and "fraud upon the court" and the terms are now to be used interchangeably in Florida. Because fraud upon the court, as the term has been developed in federal case law, "is typically confined to the most egregious cases,"<sup>121</sup> one can only hope that such a situation will not confront the Florida court. However, the failure of the Florida Supreme Court to distinguish the type of fraud that can be raised by independent action from that deemed to be fraud upon the court leaves a question as to whether the supreme court will recognize the substantive and procedural distinctions<sup>122</sup> when the separate frauds are raised to assail a judgment.

#### *E. Other Equitable Grounds for Setting Aside Judgments Under the Saving Clause*

Despite the arguably imprecise reading of the language of the saving clause, the court's ruling that an independent action is only available for extrinsic fraud is easily discerned. However, the rationale that the court used in arriving at this ruling should be

dropped under the (b)(3) portion of the Florida rule allowing for a motion within one year. It further noted that "Professor Moore is of the view that the intrinsic-extrinsic distinction should not even apply to the independent action." *Id.* at 712 n.5. Footnote 4, however, seems to most clearly express the Third District's position:

As we have said, the final sentence of the first paragraph of Rule 1.540(b) was intended to preserve all former powers of the court. Since, because of the doctrine of finality, courts were not previously empowered to interfere with judgments alleged to have been procured through intrinsic fraud, they are not empowered to do so under the saving clause of the rule.

*Id.* at 712 n.4.

This interpretation may itself be too restrictive. See *infra* notes 134-47 and accompanying text for the proposition that intrinsic fraud was recognized as a ground for relief by an independent action. See also *infra* notes 123-33 and accompanying text for the proposition that grounds other than fraud were recognized as being available for relief by an independent action.

121. *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982).

122. See generally 7 MOORE's, *supra* note 8, ¶ 60.33; C. WRIGHT & A. MILLER, *supra* note 14, § 2870.

examined.

First, the court ventured a cursory analysis of the ancillary legal writs and equitable bills that were specifically abolished by the rule.<sup>123</sup> The court then asserted that “[p]rior to the adoption of rule 1.540(b), none of the stated grounds for a motion to set aside a judgment, with the exception of extrinsic fraud presented in an action in equity, could be used as the basis for seeking relief from a judgment.”<sup>124</sup> This statement by the court fails to recognize that some of the grounds now available by motion were in fact cognizable in independent equity actions. One commentator, writing prior to the institution of the current rule, stated:

[A] bill in equity will lie to relieve against a judgment at law on any ground which clearly proves it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud, *accident or mistake* without fault on his part or that of his agents.<sup>125</sup>

The court thus diverged from prior federal case law that acknowledges that an independent action can be brought under the companion federal rule to correct a mistake. In *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*,<sup>126</sup> the Fifth Circuit was faced with deciding whether a “compromise agreement and a judgment based thereon” containing descriptions to property different from what the parties thought they were originally agreeing to could be corrected.<sup>127</sup> The court found that the mistake was not a clerical mistake under Rule 60(a), and since over a year had passed, the action could not be considered under Rule 60(b)(1).<sup>128</sup> Relying on the United States Supreme Court decision in *Wisconsin v. Michigan*,<sup>129</sup> the court held

123. *DeClaire*, 453 So. 2d at 377-78. This comment too will refrain from an in-depth analysis of this part of the rule. See 7 MOORE'S, *supra* note 8, ¶¶ 60.12-.16, for a complete analysis, and Willis, *supra* note 6, for some thoughts on these remedies in Florida practice. See also *Bankers Mortgage Co. v. United States*, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970).

124. *DeClaire*, 453 So. 2d at 378.

125. 1 R. WHITEHOUSE, EQUITY PRACTICE, STATE AND FEDERAL § 152 (1915) (emphasis added) (footnote omitted).

126. 213 F.2d 702 (5th Cir. 1954).

127. *Id.* at 703.

128. *Id.* at 705-06.

129. 295 U.S. 455 (1935).

that a court of equity has the jurisdiction and the right in an independent proceeding to protect a litigant from the effects, so far as equitably possible, of a judgment entered by mutual mistake of the parties, where it is shown that the party seeking relief is free from fault or negligence.<sup>130</sup>

If, as the Florida Supreme Court says, "[t]he Florida rule was not intended to restrict the existing [equitable] remedies,"<sup>131</sup> can an independent action be brought for mistake or accident, which were once recognized grounds in Florida?<sup>132</sup> Or, can an independent action only be brought for "[e]xtrinsic fraud which prevents a party from having an opportunity to present his case in court"?<sup>133</sup> The plain language of the case would seem to indicate the latter proposition. However, the court, in a proper case, may want to liberalize its narrow reading of the saving clause in order to recognize all of the grounds that qualified in equity for an independent action.

#### VII. THE COURT'S INTRINSIC-EXTRINSIC FRAUD DISTINCTION—AN UNNECESSARY DICHOTOMY

Given the Florida Supreme Court's blurring of any distinction between extrinsic fraud and fraud upon the court, a final consideration remains: the continuing distinction between intrinsic and extrinsic fraud, with only the latter qualifying for relief by independent action under the saving clause. The public policy that the court wants to enforce by maintaining this distinction is to give, within reasonable limitations, repose to judgments. The court apparently feels that categorizing the type of fraud perpetrated on a defendant in an original proceeding is the desirable method for granting finality to judgments:

"Fraud on the court" is a somewhat elusive concept. . . . If it is given a broad application so as to comprehend any type of mis-

130. *West Virginia Oil & Gas*, 213 F.2d at 707; see also 7 MOORE's, *supra* note 8, ¶¶ 60.36-37[2] and cases cited therein; C. WRIGHT & A. MILLER, *supra* note 14, § 2868, at 239-40.

131. *DeClaire*, 453 So. 2d at 377.

132. See *Alabama Hotel Co. v. L.J. Mott Iron Works*, 98 So. 825, 826 (Fla. 1924); see also R. ARMSTRONG & W. DONAHUE, *supra* note 40, at 371, 373 (decrees obtained by fraud, mistake, or surprise are impeachable by original bill).

133. *DeClaire*, 453 So. 2d at 379; cf. *Mills v. Mills*, 339 So. 2d 681, 684 (Fla. 1st DCA 1976) (relief for mistake must be raised by motion within one year); *Wilder v. Wilder*, 251 So. 2d 311, 314 (Fla. 4th DCA 1971).

representation by a witness or party which induced an incorrect factual determination by the trier of fact, judgments would be subject to frequent attack by independent actions, and the time for such attacks would be limited only by laches. The policy of the law which favors the termination of litigation suggests that such a broad application of the concept is unwarranted. So too does the policy of Rule 1.540(b), RCP, which promotes non-appellate attacks on a final judgment by motion in the original action—not by independent actions.<sup>134</sup>

The rationale adopted by the court in construing the saving clause as only allowing an independent action for extrinsic fraud is certainly the majority rule among the states,<sup>135</sup> and has support in Florida precedent.<sup>136</sup> It is not, however, the universal rule. There is a line of authority which takes the position that intrinsic fraud can support an independent action and that other tests can be employed to protect the sanctity of a judgment.

#### A. Federal Decisions Rejecting the Distinction

The federal line of authority begins with *Marshall v. Holmes*,<sup>137</sup> thirteen years after the Supreme Court rendered the *Throckmorton* decision. In *Marshall* the Court held that a federal court could review a state judgment tainted by fraud when proper jurisdictional requirements were met.<sup>138</sup> The fraud alleged in that case, "false testimony and forged documents," was clearly intrinsic fraud.<sup>139</sup> The Court avoided the language of *Throckmorton* and the type of fraud it apparently required and instead chose to rely on a court's inherent power to seek equity:

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

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134. *DeClaire*, 453 So. 2d at 379 (quoting *Alexander*, 275 So. 2d at 274).

135. See generally 7 MOORE's, *supra* note 8, ¶ 60.37[1].

136. See, e.g., *Hamilton v. Flowers*, 183 So. 811, 816 (Fla. 1938); *Wescott v. Wescott*, 444 So. 2d 495, 497-98 (Fla. 2d DCA 1984); *MacFadden v. Muckerman*, 116 So. 2d 448, 449 (Fla. 3d DCA 1959).

137. 141 U.S. 589 (1891).

138. *Id.* at 600-01.

139. *Id.* at 590.

the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."<sup>140</sup>

The decision in *Throckmorton* is relegated to a "see also" reference.<sup>141</sup>

In light of this conflict between *Throckmorton* and *Marshall*, one federal circuit court of appeals sought reconciliation from the United States Supreme Court, but was thwarted when the Court refrained from addressing the conflict because of technical considerations relating to the Court's power to consider a certified question.<sup>142</sup> While "the federal cases generally adhere, at least in statement," to *Throckmorton*,<sup>143</sup> there is some federal authority following *Marshall* and rejecting "the harsh rule" of *Throckmorton*.<sup>144</sup>

### B. State Cases Rejecting the Distinction

State courts too have chosen not to follow *Throckmorton* blindly, and have instead opted for the equity-based approach of *Marshall*. By 1909, Wisconsin had rejected *Throckmorton* as "perhaps not broad enough to cover all cases which might arise where a court of equity would enjoin the enforcement of a judgment."<sup>145</sup> The leading state case which interpreted a saving clause virtually identical to the Florida and federal saving clauses to allow an independent action for intrinsic fraud is the New Jersey case of *Shammas v. Shammas*.<sup>146</sup> After pointing out the ambiguity of the federal rule, Justice William Brennan, then a member of the New Jersey Supreme Court, wrote: "[U]pon principle, we hold that relief for fraud upon the court may be allowed under our rule whether the

140. *Id.* at 596 (quoting *Marine Ins. Co. v. Hodgson*, 11 U.S. (7 Cranch) 332, 336 (1813)).

141. *Marshall*, 141 U.S. at 596.

142. *Graver v. Faurot*, 162 U.S. 435 (1896).

143. 7 MOORE's, *supra* note 8, ¶ 60.37[1], at 379-80.

144. *Publicker v. Shallcross*, 106 F.2d 949, 952 (3d Cir. 1939). See cases cited at 7 MOORE's, *supra* note 8, ¶ 60.37[1], at 377 n.23; see also *Woodrum v. Southern Ry. Co.*, 571 F. Supp. 352, 357 (M.D. Ga. 1983) ("persuasive authority counsels against reviving this [intrinsic-extrinsic] distinction in the independent action procedure"). But see *Williams v. Board of Regents*, 90 F.R.D. 140 (M.D. Ga. 1981).

145. *Boring v. Ott*, 119 N.W. 865, 867 (Wis. 1909).

146. 88 A.2d 204 (N.J. 1952). The language of the New Jersey rule is set forth *id.* at 207.

fraud charged is denominated intrinsic or extrinsic."<sup>147</sup>

### C. *The Commentators' Rejection*

Legal commentators also agree that the distinction between intrinsic and extrinsic fraud should be abolished for an independent action under the saving clause. "[A]t times it is a journey into futility to attempt a distinction between extrinsic and intrinsic matter . . . [and] little is to be gained by a rigid classification of fraud into intrinsic and extrinsic categories."<sup>148</sup> The distinction between intrinsic and extrinsic fraud for an independent action "is most unfortunate . . . . The distinction rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions now that it has been abolished for motions."<sup>149</sup>

## VIII. AN ALTERNATIVE FOR THE PROTECTION OF JUDGMENTS—PRECEDENT FOR AN EQUITABLE STANDARD

The certainty of judgments that the principles of *res judicata* require is protected in the cases and by the commentators cited above, but not by resort to technical labels. Instead, they focus on the plaintiff in the independent action, judging whether the person has a right to invoke the equitable power of the court to reopen a judgment. One standard that a complainant must meet was offered by Justice Brennan in *Shammas*:

Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been willfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use dili-

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147. *Id.* at 208.

148. 7 MOORE's, *supra* note 8, ¶ 60.37[1], at 377-78.

149. C. WRIGHT & A. MILLER, *supra* note 14, § 2868, at 240-41 (footnotes omitted). See also Comment, *supra* note 23; Comment, *Proposal for General Reform*, *supra* note 36; Comment, *Seeking More Equitable Relief*, *supra* note 36; Comment, *Unfairly Obtained Verdicts*, *supra* note 36.

gence is in all the circumstances not a bar to relief.<sup>150</sup>

One commentator has recently suggested that the following equitable standard be added to California's rule pertaining to relief from judgments:

The distinction between extrinsic and intrinsic fraud is abolished and has no effect on the grant or denial of relief in an independent action. Instead, the following equitable factors should be considered: the existence of a meritorious defense, diligence in the seeking of relief, the existence of the party's own negligence and fault, and such other factors as the court may deem appropriate.<sup>151</sup>

Indeed, one court that specifically rejected the intrinsic-extrinsic distinction denied relief on the basis of standards that foreshadowed those suggested by Justice Brennan and the California commentator.<sup>152</sup>

The cases and commentaries which reject reliance on the intrinsic-extrinsic distinction consider instead the conduct of the defrauded plaintiff and the entirety of the circumstances at the time when the independent action is brought. These considerations are the bases and limitations for granting relief, not "highly technical distinctions such as that between extrinsic and intrinsic fraud."<sup>153</sup> Professors Moore and Lucas reason that the results reached in specific cases may not differ under the two standards:

We believe, however, that the result which would be reached under our proposed [equitable] formulation of the rule is not, on the whole, very different than courts now reach under the *Throckmorton* rule when it is wisely and liberally applied; that on the whole the results being reached under *Throckmorton* are sound and warranted in the interest of finality; but that in the close, borderline case our proposed formulation would insure a just result reached with less indirection than, and occasionally not achieved at all, under the present orthodox doctrine.<sup>154</sup>

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150. *Shammas*, 88 A.2d at 208-09.

151. Comment, *Seeking More Equitable Relief*, *supra* note 36, at 1037; see also 7 MOORE'S, *supra* note 8, ¶ 60.37[1], at 377-79; Comment, *Proposal for General Reform*, *supra* note 36, at 570.

152. See *Boring*, 119 N.W. at 867-70.

153. Nelson, *Bill of Review: The Requirement of Extrinsic Fraud*, 30 BAYLOR L. REV. 539, 548 (1978).

154. 7 MOORE'S, *supra* note 8, ¶ 60.37[1], at 380.



While Florida has reaffirmed its dedication to the "orthodox doctrine," the view that seeks to eliminate the distinction is not without recent converts in other states. In *Compton v. Compton*,<sup>155</sup> a case very similar to *DeClaire*, the plaintiff in an independent action sought to set aside a property settlement agreement entered into with her husband at the time of divorce. The plaintiff claimed that the husband had fraudulently withheld information concerning community property and that, on the basis of the information given, she entered into an agreement which resulted in a division to her detriment. In examining the property agreement and divorce decree, the Idaho court found that the agreement was evidence in the divorce proceeding and made a part of the divorce decree.<sup>156</sup> These factual circumstances would appear to meet the Florida Supreme Court's concept of the type of fraud which precludes subsequent independent action:

"[I]f a judgment was obtained upon false testimony or a fraudulent instrument and the parties were heard, the evidence submitted to and received consideration by the court, then it may be said that the matter has been actually tried, or was so in issue that it might have been tried and the parties are estopped to set up an intrinsic or direct fraud to vitiate the judgment, because the judgment is the highest evidence and cannot be contradicted by the parties to it."<sup>157</sup>

*Compton* began its analysis of the issues by stating, "While the distinction between extrinsic and intrinsic fraud may be easy to state and understand in the abstract, it has proved extremely difficult of application to actual cases."<sup>158</sup> The Idaho court felt that "the distinction between intrinsic and extrinsic fraud is simply another way of phrasing the question, and is of limited utility in actually resolving it. . . . Invoking oversimplified definitional concepts does not materially aid in accomplishing this task."<sup>159</sup> After reaching this legal conclusion, the court considered the facts of the wife's allegations to determine if they could support an indepen-

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155. 612 P.2d 1175 (Idaho 1980).

156. *Id.* at 1180.

157. *DeClaire*, 453 So. 2d at 377 (quoting *Johnson v. Wells*, 73 So. 188, 191 (Fla. 1916)).

158. *Compton*, 612 P.2d at 1181.

159. *Id.* at 1182; see also *St. Pierre v. Edmonds*, 645 P.2d 615, 619 (Utah 1982) ("extrinsic-intrinsic distinction fails to provide a rational basis for the harsh legal consequences which flow from it").

dent action.<sup>160</sup> Employing an equitable test similar to those noted above, the court concluded that the plaintiff “fail[ed] to act on information she possesse[d],” and this and other circumstances did not warrant allowing the plaintiff to bring her independent action for fraud.<sup>161</sup> Thus the Idaho Supreme Court shunned reliance on technical definitions, scrutinizing instead the equity of the party’s attempt to invoke the remedial powers of the court. The court found equity wanting on the wife’s part and held that the finality of the prior divorce decree should be maintained.<sup>162</sup>

### IX. FLORIDA PRECEDENT FOR AN EQUITABLE STANDARD

Why then did the Florida Supreme Court choose to continue to use the intrinsic-extrinsic fraud distinction to categorize the actions of parties who may have used less than scrupulous means to tilt the results of justice in their favor? The *Compton* case clearly points out that the interest of finality can be served while eschewing reliance on the definitional distinction. In addition, a minority of cases and a large body of commentary have shown that “[t]he perpetuation of this extrinsic-intrinsic distinction has led the federal courts into a thicket of inconsistency, because the distinction is unnecessary, often irrational, and potentially productive of injustices not outweighed by the interests of finality.”<sup>163</sup> The Florida Supreme Court at least brushed this “thicket of inconsistency” in *DeClaire* by its reliance on two prior supreme court cases which appear actually to apply an equity-based standard.

#### A. Johnson v. Wells

The court in *DeClaire* employed *Johnson v. Wells*<sup>164</sup> as authority for the proposition that “[p]rior to the adoption of [Rule] 1.540(b), only what was defined as ‘extrinsic fraud’ could, in reality, form the basis for relief from a judgment.”<sup>165</sup> In *Johnson*, former business partners submitted their dispute to arbitration. At the arbitration proceeding, a “book of accounts was submitted to the arbitrators as *evidence* of the transactions of the partnership, and as containing the record of the accounts and moneys due and

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160. *Compton*, 612 P.2d at 1183.

161. *Id.*

162. *Id.* at 1183-84.

163. Comment, *Proposal for General Reform*, *supra* note 36, at 542.

164. 73 So. 188 (Fla. 1916).

165. *DeClaire*, 453 So. 2d at 377.

owing.”<sup>166</sup> Upon the basis of the evidence, the arbitrators awarded a judgment to the defendant. Citing *Throckmorton*, the *Johnson* court was “mindful of the decisions of this country supporting the rule that a judgment will not be set aside by a court of equity because it was founded on perjured testimony or a *fraudulent instrument*, nor for any other matter that was actually presented and considered in the judgment assailed.”<sup>167</sup> The court continued, “But we think that the circumstances of this case as disclosed by the bill differentiate it from those cases in which the rule was applied.”<sup>168</sup> The court then listed what those circumstances were: the books were kept exclusively by the defendant; the plaintiff was unaware of the fraudulent entries, having been deceived by his partner; and the fraud was not discovered until after the arbitration proceeding.<sup>169</sup> The court’s analysis of the fraudulent records concluded:

So far as the case made by the bill is concerned, it is one in which the defendant made up and presented to the arbitrators a wholly fictitious statement, and one known by him to be such, and without which he would have had no claim against the complainant; that this statement and the consideration of it by the arbitrators was made possible only by complainant’s ignorance of the false entries in the books of account and his confidence in the other’s honesty and fairness, and on this the defendant, Johnson, acted to his own advantage.<sup>170</sup>

The court upheld the plaintiff’s right to bring the action to set aside the arbitration for fraud<sup>171</sup> and was of the opinion that “the fraud as alleged in the bill of complaint was sufficient to vitiate the award.”<sup>172</sup>

There are several problems with the *DeClaire* court’s reliance on *Johnson*: (1) the *Johnson* court never explicitly adopted the *Throckmorton* rule; (2) the *Johnson* court never satisfactorily explained how the partnership records differed from “perjured testi-

166. *Johnson*, 73 So. at 189 (emphasis added).

167. *Id.* at 191 (emphasis added).

168. *Id.*

169. *Id.* Although the court noted that the plaintiff in the action to have the award set aside had been sick and unable to attend the arbitration proceedings, it did not refer to this as a reason to allow him to bring the action. This situation, of course, would not constitute extrinsic fraud because the opposing party did not seek to secure his nonattendance.

170. *Id.* at 192.

171. *Id.*

172. *Id.* at 191.

mony or a fraudulent instrument,"<sup>173</sup> saying only that the "circumstances" were different from the *Throckmorton* rule; (3) the ledgers in *Johnson* seem to have been "issues in the case that have been tried or could have been tried";<sup>174</sup> (4) these "circumstances" do not appear to differ substantively from the facts and circumstances of *DeClaire* as described by the Fourth District Court.<sup>175</sup>

While upholding the plaintiff's right to bring his complaint to set aside the arbitration award, the *Johnson* court ultimately rejected the complaint under the following reasoning:

We have carefully examined the evidence, but have failed to find the slightest proof of the essential allegations of the bill on which the complainant's equity rests. There is evidence that the books of account contained many errors, that the books appear to have been inaccurately kept, but there is nothing whatever to show that the complainant never had access to the books during the existence of the copartnership, that he had no opportunity to discover the errors which he claimed to exist, that his belief in his partner's honesty disarmed suspicion, that he had no opportunity to examine the books before they were submitted to the arbitrators, nor that all the evidence submitted by the complainant at the hearing could not have been submitted to the arbitrators, nor that he did not have the fullest opportunity to present to the arbitrators every issue which he seeks to have tried in this proceeding. Nor is there any evidence that the defendant did not present his claims to the arbitrators in good faith and upon the full state of facts as he believed them to exist.<sup>176</sup>

This language closely resembles an application of equitable standards for determining the plaintiff's rights to remedy as other courts have employed them and as commentators have recommended. The proposed equitable tests and the *Johnson* decision focus on the plaintiff's actions and the evidence of fraud in light of the totality of the circumstances.

#### B. *Fair v. Tampa Electric Co.*

Another problem with the court's reverent adherence to the historical custom that only extrinsic fraud could be subjected to later review was raised by the other main case cited as authority, *Fair v.*

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173. *Id.*

174. *DeClaire*, 453 So. 2d at 377.

175. *See deClaire*, 421 So. 2d at 552-53.

176. *Johnson*, 73 So. at 192.

*Tampa Electric Co.*<sup>177</sup> In *Fair*, the court acknowledged the rule of *Throckmorton*<sup>178</sup> but determined that the analysis should not end there. In a negligence action against the utility, a material witness committed perjury in the original action, with the attorney for the plaintiff allegedly suborning the perjury. The procedural question was whether the court had jurisdiction to entertain a "motion for stay of execution and vacation of judgment,"<sup>179</sup> after the "term" of the court had expired.<sup>180</sup> The court concluded that, because of statutory enactments extending a court's control over its judgments, the trial court had jurisdiction to hear the motion. In light of an earlier holding that reached a similar conclusion in a case presenting extrinsic fraud,<sup>181</sup> the court held that it would not "extend and recognize [the intrinsic-extrinsic fraud] distinction where motions for stays are made under the statute."<sup>182</sup>

It may be assumed that the court's holding is now embodied in Rule 1.540(b)(3), which allows relief by motion for any type of fraud within one year. However, the philosophy for eliminating the distinction between intrinsic and extrinsic fraud is stated in *Fair*:

For the purposes of such a motion under this act we are unable to discern any material difference between [extrinsic fraud] and inducing a witness to give false testimony. From a moral standpoint the latter seems more reprehensible, and from a practical standpoint probably more difficult to uncover.

. . . [I]n arriving at our conclusion we do not think that logic or reason prevents our holding that the circuit judge was warranted in halting the enforcement of a judgment which he was convinced, upon abundant testimony, was founded on testimony perjured, on perjury suborned by counsel for the plaintiff. He knew that the defendant in the case and the court itself had been deceived.

We are unwilling to subscribe to a rule that if a lawyer stealthily fabricates testimony the judge of the court must stand by, powerless to halt the enforcement of the judgment based upon

177. 27 So. 2d 514 (Fla. 1946).

178. *Id.* at 515.

179. *Id.* at 514.

180. *Id.* at 516. The expiration of a court's "term" was historically the limitation on a court's power to reconsider a judgment. After that time a judgment became absolutely final, passing beyond the court's control except to the extent it was subject to an independent action. See discussion of the "terms of the court" concept in *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 275-77 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). See also *Ramagli Realty Co. v. Craver*, 121 So. 2d 648, 653-54 (Fla. 1960).

181. *Kellerman v. Commercial Credit Co.*, 189 So. 689 (Fla. 1939).

182. *Fair*, 27 So. 2d at 516.

falsehood, simply because by the passage of time the period for filing motion for new trial has elapsed and the term of court has ended.<sup>183</sup>

Thus, a thorough and critical examination of the cases upon which the Florida Supreme Court relied to support its holding in *DeClaire* reveals a lack of conceptual support for the intrinsic-extrinsic fraud distinction. *Fair* enunciated the philosophy for eliminating the distinctions between intrinsic fraud and extrinsic fraud in the motion procedure of Rule 1.540(b)(3). Although *Johnson* gave lip service to the *Throckmorton* rule, the *Johnson* court allowed an independent action to open a judgment which was assisted by what was seemingly intrinsic fraud. It then applied a series of equitable considerations to find that the plaintiff in the independent equitable action was negligent in not being aware of the fraud that was being perpetrated on him by his business partner. It is difficult to understand why, in light of these cases, the court chose to maintain the "troublesome distinction between intrinsic and extrinsic fraud"<sup>184</sup> for independent actions under the saving clause.

#### X. THE EQUITABLE STANDARD AND *DeClaire*

An application of an equitable standard could have provided the same protection for the judgment in *DeClaire* that the supreme court sought through technical definitional distinctions. An examination of Yohanan's arguments in *DeClaire* and the circumstances surrounding the situation reveals that, even under an equitable test, her request for relief from the divorce decree was tenuous.

The supreme court noted that the divorce proceeding between Yohanan and deClaire was a highly contested dissolution with considerable discovery among the parties both before and after the entry of final judgment.<sup>185</sup> With the wide-ranging devices available under today's discovery rules, it seems that the information contained in deClaire's financial affidavit could have been verified. Perhaps more easily seen is Yohanan's negligence in not detecting or at least suspecting the fraud. Few would argue with the proposition that signing one's name to a financial statement for a bank loan would charge a person with constructive knowledge of the

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183. *Id.* at 516-17.

184. *Truitt v. Truitt*, 383 So. 2d 276, 276-77 (Fla. 5th DCA 1980).

185. *DeClaire*, 453 So. 2d at 376.

family's net worth. When later shown a similar disclosure revealing a difference of half a million dollars, the discrepancy should not escape attention. Also, a difference of net income of over \$20,000 a year would be noticed by most reasonably diligent persons. Thus, if the supreme court wanted to accord the original divorce decree and judgment the sanctity the justices apparently felt it deserved,<sup>186</sup> it could have rested on the equitable standard as applied to these facts.<sup>187</sup> The court instead chose to run the maze of definitions and difficult-to-apply distinctions that mark the landscape of the saving clause of Rule 1.540(b).

## XI. CONCLUSION

An analysis of the history and development of Federal Rule 60(b), which governs the procedures by which a party may seek relief from a judgment, reveals that the "saving clause" of the rule contains two separate powers that the federal courts can exercise when fraud is alleged: (1) to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding; and (2) to set aside a judgment or decree for fraud upon the court. Federal cases applying the rule also demonstrate that there are material differences in the applications of the separate powers.

In light of the background of the federal rule, the current interpretation of the counterpart Florida rule, Florida Rule of Civil Procedure 1.540(b), in *DeClaire v. Yohanan* is anomalous. The Florida Supreme Court in *DeClaire* embarked on a journey that it hoped would lead to clarity in the application and interpretation of the saving clause of Rule 1.540(b). However, a reader of the opinion is left with an unclear rejection of a well-considered opinion of Judge Pearson of the Third District Court in *Brown v. Brown*. There, through an analysis of "history, derivation, purpose, and language," he interpreted the Florida saving clause as retaining the same powers that exist under the federal rule. This reading of dual powers in the saving clause is well supported, but the supreme court has apparently rejected it. The court's opinion blended the terms extrinsic fraud and fraud upon the court into one indistinguishable basis for setting aside a fraudulently obtained judgment

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186. All of the justices concurred, with Justice Adkins concurring in the result only.

187. There was another statutory ground on which the court could have found Yohanan's charge of fraud wanting. She was seeking to have the "property agreement" portion of the divorce decree set aside because of the falsity of the affidavit filed pursuant to FLA. R. Civ. P. 1.611(a). That rule does not address the use of the required affidavits for determining property settlements.

through an independent action. By blurring the distinction between these terms, the court failed to recognize substantive and procedural differences that seem well established under the federal rule. Only a presentation of the proper case to the court will allow it to rechart these murky shoals for the practitioner who one day might need to assist a client victimized by a person corrupting the legal system.

Beyond the court's reading of the language of Rule 1.540(b), the interpretation of the substantive rationale behind the rule also presents unanswered questions. By laying down a bright-line rule whereby only extrinsic fraud will qualify for an independent action, did the court intend to foreclose the remedial power of a court to relieve a party for accident or mistake, less common but nonetheless recognized as qualifying for an independent action? The plain language would seem to answer "yes." Under the right circumstances, however, the court might find an alternative route to this more obscure part of the saving clause and restore the other equitable grounds that federal courts have recognized as valid for bringing an independent action.

Finally, in continuing the "troublesome distinction between intrinsic and extrinsic fraud,"<sup>188</sup> the court relied on decisions that merely state the language of the rule without providing conceptual support for the court's position in *DeClaire*. A critical analysis of the Florida cases that the court relied upon demonstrates the difficulty with which the rule is applied and understood and shows the ease with which it can be merely verbalized. One is left to ponder why, in this age of modern rule pleading and practice which emphasizes substance over form, the Florida Supreme Court continues to rely on terms, labels, and distinctions that the same court, almost 40 years ago, saw fit to abolish with regard to motions for relief from judgments procured by fraud.

The court legitimately recognized the need for giving judgments finality, within reason, but this goal could be met by utilizing a test that more readily allows for a recognition of the equities of a situation, without having to steer through inconsistent applications of the *Throckmorton* rule. Cases and commentaries suggest that the goal of protecting the finality of judgments can be obtained by the application of an equity-based standard that focuses on the actions of the plaintiff. By applying this equitable standard, courts are not forced into classifying a wrongdoer's actions under technical defini-

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188. *Truitt*, 383 So. 2d at 276-77.



tions at the expense of fairness to an innocent party. A court thus has the flexibility to protect a judgment when the policies of res judicata outweigh the equities asserted by a defrauded party.

In *DeClaire*, the Florida Supreme Court bypassed an opportunity to use an equitable standard in interpreting the saving clause of Rule 1.540(b) and suggested that the rulemaking process was the proper forum for adding powers to the rule. In making this suggestion, the court shunned ample judicial precedent in which it could have found an equitable standard. This precedent existed in the Florida cases that the court relied upon to continue the difficult distinction between intrinsic and extrinsic fraud. Under the proper circumstances, the court should consider the application of equitable standards to the saving clause or, at a minimum, recognize the dual powers that the *Brown* court discerned in the clause.

*DeClaire* is the rule in Florida today with which litigants, attorneys, and judges must contend. Its exact boundaries are yet to be determined. The court surely wanted to leave a map with which these jurisprudential waters could be sailed with confidence. The course it charted, however, seems little more detailed and reliable than those with which the ancient mariners began their voyages.