This article was originally published in the Commercial Litigation Advisor *(October 2015)*

ANDERSON KILL
COMMERCIAL LITIGATION ADVISOR

It Ain't Over Till It's Over: Reopening Final Judgments Under Federal Rule 60(b)(6)

By Jerry S. Goldman and Nicholas R. Maxwell

Final judgments are final — but not all of the time. Without strong assurances that a final judgment is, as the name suggests, final, litigants could never move forward with their lives. No civil judgment, however, is ever truly final. Federal Rule of Civil Procedure 60(b) sets forth a narrow set of scenarios in which a losing party may seek the court's permission to reopen an otherwise final judgment.

Section (b)(6): A Flexible Remedy, But With a Heavy Burden

Section (b)(6) is the most flexible subsection — it contemplates reopening judgments for "any other reason that justifies relief." Based on this flexible standard, subsection (b)(6) provides ample opportunity for creative lawyering by the losing party. No matter what the nature of the litigation is that resolves in favor of a lawyer's adversary, that lawyer should remain alert for any of the potential circumstances justifying 60(b)(6) relief.[1]

Rule 60(b)(6) grants the court significant discretion. One oft-cited appellate decision called it "a grand reservoir of equitable power to do justice in a particular case."[2] Given section 60(b)(6)'s flexibility, it is tempered by a very stringent standard, and accordingly courts will grant 60(b)(6) only in the most extraordinary circumstances. Although subsection (b)(6) does not include an official time limit, courts are quick to dismiss (b)(6) motions where the losing party does not file its motion promptly after learning of the circumstances that the motion will be based on. This emphasis on timing aligns with the general societal interest in final judgments being final.

Circumstances Warranting 60(b)(6) Relief

One of the most common circumstances warranting 60(b)(6) relief is a subsequent change in law rendering the prior ruling inequitable. In one recent 60(b)(6) ruling, the Second Circuit Court of Appeals reopened a three-year-old final judgment relieving the Kingdom of Saudi Arabia from allegations that it helped fund and execute the 9/11 at-

Jerry S. Goldman is a shareholder in the New York and Philadelphia offices of Anderson Kill. Mr. Goldman practices in the areas of complex litigation, general business law, white collar criminal defense, estate planning and estate and trust administration, employment law, and federal and international taxation.
jgoldman@andersonkill.com | 212-278-1569 (New York) and 267-216-2795 (Philadelphia)

Nicholas R. Maxwell is an attorney in the firm's New York office. Mr. Maxwell's practice concentrates in corporate and commercial litigation, insurance recovery, exclusively on behalf of policyholders, and in environmental and employment law.
nmaxwell@andersonkill.com | 212-278-1161

tacks.[3] The Kingdom had been dismissed on grounds of sovereign immunity, but the plaintiffs alleged a direct conflict with a subsequent Second Circuit decision in a related 9/11 litigation.[4] The Second Circuit in *In re Terrorist Attacks on September 11, 2001* agreed and reversed the district court's denial of the plaintiffs' 60(b)(6) motion, finding that because the two decisions led to different results in suits arising from the same tort, they could not be reconciled.

Of greatest significance to the Second Circuit was the fact that the subsequent case, *Doe v. Bin Laden*, involved precisely the same tort (the 9/11 attacks) as the prior case — if left standing, the first decision dismissing the Kingdom would treat those plaintiffs differently than other 9/11 victims.[5] The Second Circuit panel in *Doe*, though typically bound by prior Second Circuit decisions, admitted that its ruling was inconsistent and even went so far as to secure each member of the prior panel's consent to its inconsistent ruling.[6] Accordingly, a later panel considering the *In re Terrorist Attacks on September 11, 2001* plaintiffs' 60(b)(6) motion reopened the judgment dismissing the Kingdom.[7] That case remains pending.

Still, a lawyer cannot present any subsequent change in law and expect 60(b)(6) relief. Indeed, the general rule is that a change in decision law does *not* warrant 60(b)(6) relief. For example, a judgment based on lack of timeliness should not be reopened simply because a later court interpreted the relevant statute of limitations differently. For another example, a subsequent case lowering a plaintiff's standard of proof does not warrant 60(b)(6) relief where the plaintiff likely could not make out his claim even under the lower standard.

A second type of scenario warranting 60(b)(6) relief involves unauthorized settlements. Where a plaintiff's claim is finally resolved without notice or permission from the plaintiff, courts will often find the extraordinary circumstances necessary to invoke 60(b)(6). Where a class action plaintiff opts out of the class but class counsel revokes the opt-out without notifying the plaintiff, for example, 60(b)(6) may apply. Where the government settles a forfeiture action in a manner not permitted by federal law, the settlement may be considered unauthorized and subject to reopening under subsection (b)(6). The rationale for vacating unauthorized settlements is a sensible one — if a case is in fact settled without the litigant's knowledge, doing anything else would deny the litigant his right to due process.

More mundane procedural issues also sometimes warrant 60(b)(6) relief. In one such case,[8] the defendant requested that the plaintiff's case be dismissed for failure to prosecute, but made its request in a status report rather than a formal motion. The court granted the defendant's request but subsequently vacated that judgment after the plaintiff argued that it could not have been expected to understand that the status report constituted a motion to dismiss.

Circumstances Not Warranting 60(b)(6) Relief

Despite all of the possible reasons to grant 60(b)(6) relief, there are many more circumstances where courts refuse to invoke the subsection. Therefore, 60(b)(6) should not be misinterpreted as a motion for reconsideration, an appeal as of right, or any similar procedural mechanism. Unless circumstances truly warrant relief, a 60(b)(6) motion is a waste of the lawyer's time and his client's money. Such motions will almost universally be denied where they are predicated on circumstances of which the moving party was aware prior to or at the time of the decision in question. Moreover, whenever there is a more specific statute or rule governing the potential reopening of a judgment, that statute, rather than 60(b)(6), is the losing party's first (and likely only) line of attack.

As a few specific examples, courts have rejected 60(b)(6) motions when they (1) challenge the validity of the statute applied to reach the original decision, (2) attempt to pierce the corporate veil of a corporation in order to collect a judgment, (3) are used to circumvent the time limitations in other sections of Rule 60(b) or (4) claim the party was too ill to litigate when he raised no evidence of illness prior to the original judgment. Even

where the prevailing party indisputably failed to comply with certain obligations prior to the original judgment, denial of 60(b)(6) relief will be upheld unless the moving party can show unmistakable error by the district court in denying the motion.

Conclusion

One must not conceive of Rule 60(b) as an automatic second bite at the apple — such a general practice would lead only to wasted time and money. However, "exceptional circumstances" do occasionally exist, and once such circumstances are shown, 60(b)(6) relief is to be granted liberally. Lawyers confronted with seemingly inequitable post-judgment conduct should look carefully at controlling case law and, if there is a reasonable possibility of success, capitalize on this "grand reservoir of equitable power to do justice in a particular case."

ENDNOTES

[1] Rule 60(b) also includes five other equally important bases for reopening a final judgment. Each of these five is more concrete than (b)(6) and therefore requires less analysis here. Nonetheless, the standard for reopening under subsections (b)(1-5) is more lenient, and any motion that could be brought under (b)(1-5) cannot be brought under (b)(6). Therefore, attorneys should analyze whether any of subsections (b)(1-5) can be satisfied before turning to the catch-all (b)(6) approach.

Section (b)(1) permits reopening based on "mistake, inadvertence, surprise, or excusable neglect." Section (b)(2) permits reopening based on newly discovered evidence not previously reasonably discoverable. Section (b)(3) permits reopening in cases of fraud. Section (b)(4) permits reopening when a judgment is void.

Finally, section (b)(5) permits reopening a judgment when it has been released or discharged, or if it is based on a prior reversed or vacated judgment.

Importantly, sections (b)(1-3) are subject to a one-year statute of limitations. Litigants who have missed the one-year mark sometimes try to squeeze their challenges into a (b)(6) challenge, which only must be filed "within a reasonable time," but courts are generally quick to reject such efforts.

[2] *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986).

[3] *In re Terrorist Attacks on September 11, 2001*, 741 F.3d 353 (2d Cir. 2013).

[4] *Id*. at 356.

[5] 663 F.3d 64 (2d Cir. 2011).

[6] *Id*. at 70 n. 10.

[7] Anderson Kill P.C. represents the putative class of families of the victims killed in the 9/11 attacks in their action against the Kingdom of Saudi Arabia.

[8] *ACEquip Ltd. v. Am. Eng'g Corp.*, 218 F.R.D. 364 (D. Conn. 2003).