Alabama Rules of Civil Procedure

VII. JUDGMENT

Rule 60.

Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal or thereafter, such mistakes may be so corrected by the trial court. Whenever necessary a transcript of the record as corrected may be certified to the appellate court in response to a writ of certiorari or like writ.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than four (4) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. If leave of the appellate court is obtained, the motion shall be deemed to have been made in the trial court as of the date upon which leave to make the motion was sought in the appellate court. This rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three (3) years after the entry of the judgment (or such additional time as is given by § 6-2-3 and § 6-2-8, Code of Alabama 1975) to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, supersedeas, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(dc) *District court rule.* Rule 60 applies in the district courts.

[Amended 7-10-90, eff. 10-1-90; Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

Subdivision (a). This subdivision deals solely with the correction of clerical errors. Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b). Thus the Rule 60(a) motion can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what was originally pronounced. E.g., *West Virginia Oil & Gas Co. v. Breece Lumber Co*., 213 F.2d 702 (5th Cir.1954). A similar limitation has applied in Alabama to the procedure provided by Code of Ala., Tit. 7, §§ 566, 567. Under the rule, however, evidence dehors the record may be considered, *Tillman v. Tillman*, 172 F.2d 270 (D.C.Cir.1948), cert. denied 336 U.S. 954, 69 S.Ct. 883, 93 L.Ed. 1108; *Albion-Idaho Land Co. v. Adams*, 58 F.Supp. 579 (D.Idaho 1945). Alabama practice has not permitted use of such evidence. *Davis v. State*, 136 Ala. 136, 33 So. 813 (1902); see *Gaston v. Reconstruction Finance Co*., 237 Ala. 111, 185 So. 893 (1939).

The court may order notice of a motion under Rule 60(a) to be given, as is already true in Alabama in equity. Equity Rule 63. Heretofore, notice has not been required in law actions. Code of Ala., Tit. 7, § 566.

The final two sentences of the subdivision have been substituted for the final sentence of Federal Rule 60(a). The change eliminates the requirement of the federal rule that permission be obtained from the appellate court to correct clerical errors during the pendency of an appeal. Present Alabama law makes no such requirement of leave. *Johnson v. Bryars*, 86 So.2d 371 (Ala.1956); *Phillips v. State*, 162 Ala. 14, 50 So. 194 (1909). Under this subdivision as altered, it will also be possible for the trial court to correct mere clerical errors even after appeal has been completed. This aspect of the rule changes Alabama practice. *Stephens v. Norris, Stodder & Co*., 15 Ala. 79 (1849).

Subdivision (b). This subdivision specifies certain limited grounds upon which final judgments may be attacked, even after the normal procedures of motion for a new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available at common law and in chancery to make such extraordinary attacks upon the judgment or decree.

Present Alabama practice recognizes a number of devices for making an extraordinary attack on a judgment. A judgment at law may be challenged by: a

motion for rehearing within four months from rendition of the judgment, Code of Ala., Tit. 7, § 279, Jones, *The Four Months Statute*, 1 Ala. Law. 237 (1940); a motion to vacate the judgment as void, *Griffin v. Proctor*, 244 Ala. 537, 14 So.2d 116 (1943); a petition for supersedeas, *Thompson v. Lassiter,* 86 Ala. 536, 6 So. 33 (1888); a writ of error coram nobis or coram vobis, *Smith v. State*, 245 Ala. 161, 16 So.2d 315 (1944); an independent proceeding in equity, *Choctaw Bank v. Dearmon*, 223 Ala. 144, 134 So. 648 (1931); and by collateral attack, *A.B.C. Truck Lines v. Kenemer*, 247 Ala. 543, 25 So.2d 511 (1946). A decree in equity may be challenged by: a motion to vacate or expunge from the record, *Griffin v. Proctor*, 244 Ala. 537, 14 So.2d 116 (1943); a bill of review or bill in the nature of a bill of review, Equity Rule 66, *Cunningham v. Wood*, 224 Ala. 288, 140 So. 351 (1932); and by collateral attack, *Merchants Nat. Bank of Mobile v. Morris*, 252 Ala. 566, 42 So.2d 240 (1949). This wealth of devices to challenge the judgment or decree is complicated by overlapping grounds for relief, varying time limits, and differences in procedural details.

Rule 60(b) retains the substance of all the devices listed above, but destroys the artificial boundaries between them. It substitutes for the present separate remedies two simple procedures for delayed attack upon a judgment, a motion and an independent proceeding. If it has been possible to attack a judgment by any of the devices listed above, it will be possible to attack the judgment by a motion or an independent proceeding under this rule, since the rule enumerates all the grounds now available in Alabama for relief from a judgment, and, in addition, specifically preserves relief by “independent action” as it now exists.

The normal procedure to attack a judgment under this rule will be by motion in the court which rendered the judgment. If the relief does not appear to be available under the rule, or if relief from the judgment is sought in some other court than the court which rendered the judgment, the party should bring an independent proceeding. 3 Barron & Holtzoff, *Federal Practice and Procedure,* § 1331 (1958). Wright ed. But an erroneous choice between these procedures is not fatal to the party attacking the judgment. There is little procedural difference between the two methods of attack, and since nomenclature is unimportant, courts have consistently treated a proceeding in form an independent action as if it were a motion, and vice versa, where one but not the other was technically appropriate, and any procedural difference between them was immaterial in the case. *Hadden v. Rumsey Products*, 196 F.2d 92 (2d Cir.1952); 7 Moore’s *Federal Practice*, § 60.38(3) (2d ed. 1971).

In passing on an attack upon a judgment, the court is given a wide discretion. In exercising this discretion, the court must balance the desire to remedy injustice against the need for finality of judgments. Motions to reopen judgments have been denied where many persons have relied on the judgment,

e.g., *Albion-Idaho Land Co. v. Adams*, 58 F.Supp. 579 (D.Idaho 1945); or where many actions were taken on the strength of the judgment, e.g., *Menashe v. Sutton*, 90 F.Supp. 531, 533 (S.D.N.Y.1950); or where a party would be unable to obtain his witnesses for a new action, e.g., *McCawley v. Fleischmann Transportation Co*., 10 F.R.D. 624 (S.D.N.Y.1950). The courts have demanded that a petitioner show good cause for having failed to take appropriate action sooner. E.g., *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). And they have not tolerated motions aimed at protracting litigation needlessly, as where the moving party cannot show a valid claim or defense, or cannot demonstrate that newly discovered evidence is likely to change the result of the challenged judgment. See generally, Note, *Federal Rule 60(b); Relief from Civil Judgments*, 61 Yale L.J. 76 (1952).

Where a judgment is attacked by motion for fraud, newly discovered evidence, or mistake, etc., the motion must be made within a reasonable time and not more than four months after entry of the judgment. See 7 Moore's *Federal Practice*, ¶ 60.28(2) (2d ed. 1971), applying the Federal Rule which affords one year. Attack on the judgment by an independent proceeding, for whatever cause, must be made within three years after entry of the judgment; this limitation, which does not appear in the federal rule, has been added to conform to present Alabama practice, as codified in Equity Rule 66. Finally, where the judgment is attacked by motion as void, or as satisfied or no longer equitable, or for any reason other than those specifically listed in Rule 60(b), the only limitation is that the motion be made within a reasonable time after entry of the judgment. Alabama law has always been that a void judgment could be vacated at any time. *Sweeney v. Tritsch*, 151 Ala. 242, 44 So. 184 (1907). And the requirement of attack within a "reasonable time" seems a sufficient limitation in the unusual situations contemplated by Rule 60(b)(5) and (6). It should be noted that, despite some early doubts in the federal cases, it is now settled that the "other" provision of Rule 60(b)(6) is mutually exclusive with the five specific grounds for attack previously listed. *United States v. Karahalias*, 205 F.2d 331 (2d Cir.1953). See generally Comment, *Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. of Chi.L.Rev. 664 (1950).

Some federal decisions have held that leave must first be obtained from the appellate court before a motion can be made to reopen a judgment once settled on appeal. E.g., *Butcher & Sherrerd v. Welsh*, 206 F.2d 259 (3d Cir.1953), cert. denied 346 U.S. 925, 74 S.Ct. 312, 98 L.Ed. 418 (1954), reh. denied 347 U.S. 924, 74 S.Ct. 513, 98 L.Ed. 1078, rehearing denied 347 U.S. 940, 74 S.Ct. 626, 98 L.Ed. 1089, reh. denied 348 U.S. 939, 75 S.Ct. 354, 99 L.Ed. 736. Contra: *VonWedel v. McGrath*, 100 F.Supp. 434 (D.N.J.1951), aff'd 194 F.2d 1013 (3d Cir.1952). Alabama has made a similar requirement. *Louisville & N.R. Co. v. Mauter*, 203 Ala. 237, 82 So. 487 (1919). Such a requirement of leave from the appellate court is a useless and delaying

formalism. An appellate court cannot know whether the requirements for reopening a case under the rule are actually met without a full record which must obviously be made in the trial court. See *S.C. Johnson & Son v. Johnson*, 175 F.2d 176, 177, 184 (2d Cir.1949), cert. denied 338 U.S. 860, 70 S.Ct. 103, 94 L.Ed. 527; Comm., *Power of Court to Grant Relief from Judgment after Appeal and Issuance of Mandate*, 19 Fed.Rules Serv. 1025 (1954). The fourth sentence of subdivision (b) has been added to the rule, as recommended in the October, 1955 report of the United States Supreme Court's Advisory Committee, expressly to negative any such barren requirement. See 3 Barron & Holtzoff, Wright ed. § 1332. The argument in favor of requiring appellate leave appears at 7 Moore's *Federal Practice*, § 60.42 (2d ed. 1971).

The reference to relief of a defendant not actually personally notified as provided in 28 U.S.C. § 1655, which appears in the penultimate sentence of Federal Rule 60(b), has been omitted from this rule, because Alabama has no similar statute. And a reference to supersedeas has been added to the final sentence, since supersedeas is used in Alabama in lieu of the old writ of audita querela in some situations.

Committee Comments to October 1, 1995,
Amendment to Rule 60

The amendment replaced the citation to the Code of Alabama 1940 (Recomp. 1958) with a citation to the corresponding section of the Code of Alabama 1975. Other changes are technical. No substantive change is intended.

District Court Committee Comments
(Effective July 1, 1983)

Motions for relief from judgment should be looked upon favorably in instances where the time for the taking of an appeal has run in the district court, in view of the limited time in which a defendant must serve an answer in the district court.