The "Savings" Clause of Trial Rule 60(B): Muddy Waters?

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I. INTRODUCTION

Indiana's Trial Rule 60(B) delineates the criterion under which a court may grant relief from a final judgment on motion of a party,[1]

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[1]IND. R. TR. P. 60(B). The rule sets out the following grounds for relief:

(1) mistake, surprise, or excusable neglect;

(2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;

(3) fraud (whether heretofore denominated instrinisic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;

(5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that

(a) at the time of the action he was an infant or incompetent person, and

(b) he was not in fact represented by a guardian or other representative, and

(c) the person against whom the judgment order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) the motion alleges a valid defense or claim;

(6) the judgment is void;

(7) 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

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6),

while also preserving a court's authority "to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court."[2] This preservation of judicial power is often referred to as Rule 60(B)'s "Savings" Clause,[3] due to a court's power to hear a party's independent action[4] claim after the time requirements of Rule 60(B)'s motion remedies have expired.[5] Although Indiana's Rule 60(B) and its federal counterpart[6] preserve the independent action, neither rule sets forth specific guidelines for the utilization of the action.[7] As

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(7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Id.

[2]*Id.*

[3]*See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2868, at 237 (1973).

[4]The term "independent action" does appear in other contexts; however, for purposes of this Article the term will have the limited meaning of those actions brought to relieve a party from a judgment, order, or proceeding or for fraud upon the court after the time limitations of Rule 60(B)'s motion procedure have run. Further, an action based on fraud upon the court is generally recognized as a separate action distinguishable from an independent action. *See* 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.18[8] at 60-195 to 60-197 (2d ed. 1987). For purposes of this Article, fraud upon the court will be considered as an independent action with distinctions made where relevant.

[5]IND. R. TR. P. 60(B). Rule 60(B) provides:

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). An independent action is subject only to the equitable doctrine of laches discussed *infra* text accompanying note 18.

[6]*See* FED. R. CIV. P. 60(b). The Rule provides in pertinent part:

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

This provision is nearly identical to that contained in Indiana's Rule. *See supra* text accompanying note 2.

[7]The promulgators of the Federal rule provide general guidelines with respect to a party's ability to obtain relief from judgment. *See* ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT OF THE UNITED STATES, *reprinted at* 5 F.R.D. 433, 478-79 (1946). However, both the Indiana rule and the Federal rule are void of explicit parameters in connection with the utilization of the independent action.

a result, courts are given discretional license which, in turn, has led to inconsistent precedent.[8]

In June 1987, the Indiana Court of Appeals decided *Magnuson v. Blickenstaff*,[9] and in so doing, tackled head-on what the court described as Rule 60's "muddy waters."[10] However, in an effort to add a degree of clarity to an otherwise confused body of law, the court failed to completely address the issues presented, resulting in an opinion which generates more questions than it does answers. In order to properly analyze the court's decision in *Magnuson*, an overview of the independent action and its treatment by the United States Supreme Court is necessary.

II. Independent Action

A. Background

The origins of the independent action can be traced to England's courts of equity, which established the cause as a bill of chancery.[11] The elements of the action are perhaps best summarized by the Eighth Circuit decision *National Surety Co. of New York v. State Bank of Humboldt*,[12] rendered before the Rules of Civil Procedure were adopted:

> The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.[13]

In entertaining an independent action, a court does not interfere with another court's findings; rather, it acts upon the holder of a judgment in denying him the fruits thereof.[14] The most common ground

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[8]*See infra* notes 23-78 and accompanying text.

[9]508 N.E.2d 814 (Ind. Ct. App. 1987).

[10]*Id.* at 818.

[11]For a discussion of the early development of the independent action, see United States v. Throckmorton, 98 U.S. 61, 67 (1878).

[12]120 F. 593 (8th Cir. 1903).

[13]*Id.* at 599.

[14]7 J. Moore & J. Lucas, *supra* note 4, ¶ 60.36, at 60-368 (citing Johnson v. Waters, 111 U.S. 640 (1884); Arrowsmith v. Gleason, 129 U.S. 86 (1889); Chicago, R.I. & P. Ry. Co. v. Callicotte, 267 F. 799 (8th Cir. 1920), *cert. denied* 255 U.S. 570 (1921) among others).

for an independent action is fraud.[15] While Rule 60(B)(3) does provide a remedy for fraud,[16] the motion procedure is restricted by a one-year time limit,[17] which is not applicable to the independent action for fraud. Although there is no time limit as to when an independent action may be brought, Indiana follows the basic rules of equitable relief, subjecting this cause of action to the doctrine of laches and clean hands.[18]

Similar to the independent action is an action for fraud upon the court. While it encompasses the basic elements of an independent action, it is not restricted by the above-referenced equitable doctrines which limit the use of the independent action.[19] In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*,[20] the United States Supreme Court explicitly stated that an action founded on fraud upon the court would not be subject to the doctrine of laches.[21] Other courts have held that a party seeking relief from judgment based on fraud upon the court is not required to come before the court with clean hands.[22]

B. The Throckmorton/Marshall/Hazel-Atlas Trilogy

One source of confusion and controversy for courts and legal commentators alike is the character of fraud which will justify relief within the context of an independent action.[23] The reason for much of this

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[15]11 C. WRIGHT & A. MILLER, *supra* note 3, § 2868, at 239 (citing Note, *Attacking Fraudulently Obtained Judgments in the Federal Courts*, 48 IOWA L. REV. 398 (1963); Hadden v. Rumsey Prods., Inc., 196 F.2d 92 (2d Cir. 1952)).

[16]*See supra* note 2.

[17]*See supra* note 5.

[18]4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE § 60.18, at 217 (1971). *See also supra* text accompanying note 13, element four.

[19]*See infra* notes 21 - 22; *See also supra* note 4.

[20]322 U.S. 238 (1944).

[21]The Court in *Hazel-Atlas* stated:

> The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. . . . But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. . . . Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

322 U.S. at 246.

[22]11 WRIGHT & MILLER, *supra* note 3, § 2870, at 25-1 (citing Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960)). The absence of the equitable restrictions of laches and clean hands makes the fourth element of the five indispensable elements of an independent action, *see supra* text accompanying note 13, inapplicable to actions brought based on fraud upon the court.

[23]*See infra* notes 31 and 72.

confusion and controversy can be traced to three United States Supreme Court cases in which the issue of fraud arose in connection with an independent action. In 1878, the Court, in *United States v. Throckmorton*,[24] affirmed the circuit court's dismissal of an independent action founded upon a party's use of a fraudulent document in obtaining judgment. The Court stated: "the doctrine is . . . well settled that the court *will not* set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed [intrinsic fraud]."[25] The Court's decision in *Throckmorton* has served as a cornerstone for all subsequent rulings and writings which make an extrinsic/intrinsic[26] fraud distinction in the utilization of an independent action.

Despite the language contained in *Throckmorton*, thirteen years later the Court in *Marshall v. Holmes*[27] stated, "it is the settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, . . . will justify an application to a court of chancery."[28] Based on the foregoing analysis, the Court in *Marshall* held that a judgment obtained by a forged instrument and false testimony *could be* enjoined in equity.[29] The *Marshall* holding, despite the Court's reference to its earlier decision in *Throckmorton*,[30] created two irreconcilable positions with respect to the class of fraud which would give rise to an independent action.[31]

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

[25]*Id.* at 66 (emphasis added). The Court also added:

> We think these decisions establish the doctrine on which we decide the present case; namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

Id. at 68.

[26]Under *Throckmorton* and its progeny, *extrinsic* fraud is typically defined as a party's inability to present his case due to deception or trick and will serve as a basis for obtaining relief from judgment. *See* Town of Boynton v. White Const. Co., 64 F.2d 190 (5th Cir. 1933); Chicago, R.I. & P. Ry. Co. v. Callicotte, 267 F. 799 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921). *Intrinsic* fraud is generally defined as matters presented in reaching the judgment itself, including but not limited to, perjury and false instruments, and will not serve as a basis for obtaining relief from judgment. Wood v. McEwen, 644 F.2d 797 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); Serzysko v. Chase Manhattan Bank, 461 F.2d 699 (2d Cir.), *cert. denied* 409 U.S. 883 (1972).

[27]141 U.S. 589 (1891).

[28]*Id.* at 596 (citations omitted).

[29]*Id.* at 601.

[30]*Id.* at 596.

[31]A discussion of the *Throckmorton/Marshall* conflict is included in Publicker v.

Approximately fifty years after *Marshall*, the Court was presented with an opportunity to rectify the *Throckmorton/Marshall* conflict in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*,[32] a case involving a fraudulently drafted article used by Hartford Empire Company at trial in obtaining a judgment against Hazel-Atlas. However, the Court ignored the *Throckmorton/Marshall*, intrinsic/extrinsic, conflict by classifying the fraud as one committed upon the court[33] and determined that the character of fraud committed is irrelevant when it has been committed on the court.[34]

III. *Magnuson v. Blickenstaff*

A. The Case

Magnuson v. Blickenstaff[35] arose out of an action filed against John Magnuson and his wife by Kenneth Blickenstaff in July of 1982. The 1982 action sought recovery for services performed by Blickenstaff under a real estate listing agreement with the Magnusons. In August 1982, Blickenstaff obtained a default judgment against the Magnusons due to their failure to appear at the default hearing.[36]

After the default judgment was entered, Magnuson filed a Rule 60(B)(1) motion, claiming excusable neglect due to old age. However, in July 1984, the court denied Magnuson's motion, which ruling was not appealed.[37] On June 7, 1985, Magnuson filed a complaint against

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Shallcross, 106 F.2d 949 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940), where the court concluded:

> [t]he relief is, and had to be, asked for by petition on the equity side of the court. The appellant-respondent himself seems to realize this because his brief indicates his principal reliance on United States v. Throckmorton . . . .
> . . . .[A]ppellant's counsel seemed unaware of the existence of another later and conflicting decision in the Supreme Court, namely Marshall v. Holmes (citation omitted) That conflict has been a source of bewilderment to the "inferior" Federal Courts ever since 1891 . . . .
> . . . .In our judgment, and if the case arises, the harsh rule of United States v. Throckmorton . . . will be modified in accordance with the more salutary doctrine of Marshall v. Holmes, above cited. We believe truth is more important than the trouble it takes to get it.

Id. at 950-52.

[32]322 U.S. 238 (1944).

[33]"Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245-46.

[34]*Id.* at 246.

[35]508 N.E.2d 814 (Ind. Ct. App. 1987).

[36]*Id.* at 816.

[37]*Id.*

Blickenstaff requesting that the previous judgment be set aside. The complaint alleged that in obtaining the August 1982 judgment, Blickenstaff "committed fraud upon the court by representing that he had procured a willing buyer [for certain real estate] when in fact the buyer had withdrawn her offer."[38] In response to Magnuson's complaint, Blickenstaff filed a Motion to Dismiss pursuant to Rule 12(B)(6).[39] The trial court granted Blickenstaff's motion "finding that the grounds which Magnuson set forth in his complaint were not shown to be unknown or unknowable to him at the time of his first motion to set aside the default judgment and therefore could not be raised in a second T.R. 60(B) motion . . . ."[40]

On appeal, the Indiana Court of Appeals affirmed the trial court's ruling, holding that Magnuson had failed to exhibit that the alleged fraud was not previously known or available to him.[41] Additionally, the court noted that Magnuson's allegations of fraud were intrinsic in nature and therefore could not support setting aside the judgment under Rule 60(B)'s savings clause. Notwithstanding the intrinsic/extrinsic distinction, the court held that Magnuson's complaint failed "to even approach the well-recognized and accepted definition of fraud on the court . . . ."[42]

B. A Rationale Questioned

In upholding the trial court's decision, the court of appeals initially addressed the trial court's reliance on *Carvey v. Indiana National Bank*.[43] In *Carvey*, the court held that a party may not file repeated Rule 60(B) motions unless there is a showing that the party bringing the motion was unaware or had no opportunity to become aware of certain facts to support the setting aside of a judgment at the time of his initial Rule 60(B) motion.[44] In *Magnuson*, the appellate court found that Magnuson's "record and his brief are devoid of *any* indication that the ground presently alleged . . . was unknown or [un]available to him" prior to the first Rule 60(B)(1) motion.[45]

However, the use of the *Carvey* precedent in the context of an independent action for fraud upon the court is inappropriate. An independent action to relieve a party from judgment is not covered under Rule 60(B)'s *motion* provision; rather, it is preserved as a separate cause

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[38]*Id.*
[39]IND. R. TR. P. 12(B)(6).
[40]508 N.E.2d at 816.
[41]*Id.* at 819.
[42]*Id.*
[43]176 Ind. App. 152, 374 N.E.2d 1173 (1978).
[44]*Id.* at 159, 374 N.E.2d at 1177.
[45]508 N.E.2d at 817.

of action. Although the court attempts to salvage the trial court's ruling by considering "Magnuson's complaint to be indistinguishable from a [Rule] 60(B) motion,"[46] such a position is contrary to a plain reading of Rule 60.[47] Further, Magnuson's failure to plead that he was incapable of discovering the alleged fraud at the time of his Rule 60(B)(1) motion has no bearing on an action based on fraud upon the court because the doctrine of laches is not applicable to such an action.[48]

Perhaps sensing the trial court's misplaced reliance on *Carvey*, the court of appeals proceeded to address the true merits of the case: Magnuson's right to bring an independent action for fraud upon the court based on the alleged fraudulent representations of Blickenstaff. The court recognized that a party may bring an independent action for fraud upon the court independent of Rule 60(B)'s motion provisions,[49] however, the court noted that "no Indiana cases provide . . . a precise definition of fraud upon the court. . . ."[50] In an effort to develop a definition, the court turned to *Chermak v. Chermak*,[51] a case which held, like *Throckmorton*,[52] that allegations of intrinsic fraud (i.e. perjury) can not support the setting aside of a judgment.[53] Relying upon *Chermak*, as well as recent federal decisions[54] and commentary,[55] the *Magnuson*

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[46]*Id.* at 816.

[47]Oddly enough, the court, in footnote 2 of its opinion, stated:

> Magnuson cites us to T.R. 60(B)(8) as allowing an independent action for fraud upon the court. However, the provision allowing an action for fraud upon the court is actually not a subsection of T.R. 60(B), but rather a provision added in the paragraph following the subsections of T.R. 60(B).

Id. at 817 n.2. One authority, relied on throughout the court's opinion, states that a court, by entertaining an independent action, does not interfere with another court's findings. Rather, it acts upon the holder of a judgment in denying him the fruits thereof. 7 J. MOORE & J. LUCAS, *supra* note 4, ¶ 60.36, at 60-368 (citations omitted).

[48]The language in *Carvey*, with respect to a party's lack of information or inability to obtain information, parallels the language contained in *Hazel-Atlas*, where the Supreme Court stated that a party's diligence, or lack thereof, would not preclude an action based on fraud upon the court. *See supra* note 21 and accompanying text.

[49]508 N.E.2d at 817 (citing Caley v. Lung, 257 Ind. 116, 271 N.E.2d 891 (1971); Ayres v. Smith, 227 Ind. 82, 84 N.E.2d 185 (1949); Smith v. Tisdal, 484 N.E.2d 42 (Ind. Ct. App. 1985); and Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979).

[50]*Magnuson*, 508 N.E.2d at 818.

[51]227 Ind. 625, 88 N.E.2d 250 (1949).

[52]*See supra* notes 24-26 and accompanying text.

[53]*Chermak*, 227 Ind. at 627, 88 N.E.2d at 251.

[54]508 N.E.2d at 818 (citing, among others, Great Coastal Express, Inc. v. Int'l. Bhd. of Teamsters, 675 F.2d 1349 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983); Wood v. McEwen, 644 F.2d 797 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); and Serzysko v. Chase Manhattan Bank, 461 F.2d 699 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972)).

[55]"The commentators caution that an independent action for fraud on the court only includes allegations of *extrinsic* fraud." 508 N.E.2d at 818 (citing 4 W. HARVEY & R. TOWNSEND, *supra* note 18, § 60.18; 7 J. MOORE & J. LUCAS, *supra* note 4, ¶¶ 60.33, 60.37[1]).

court concluded that perjury or false evidence "whether denominated intrinsic or extrinsic or neither, is not an accepted ground on which to receive relief from judgment."[56]

The court's finding is subject to question on several grounds. First, by determining that Indiana case law does not provide a "precise" definition of fraud upon the court, the *Magnuson* court overlooks *Caley v. Lung*,[57] decided by the Indiana Supreme Court twenty-two years after *Chermak*. In *Caley*, the plaintiff, Lung, filed an independent action to set aside an adoption on the grounds that there were *fraudulent statements in the adoption petition* filed by the Caleys, as well as fraudulent statements made to Lung in obtaining her consent to the adoption.[58] The Caleys filed a motion to dismiss Lung's independent action, stating that Rule 60(B)'s one-year time limitation precluded Lung from initiating such an action. When the Caleys' motion to dismiss was denied, they appealed.[59]

The Indiana Supreme Court determined that the Caleys' appeal could not be addressed because the denial of a motion to dismiss is not an appealable order.[60] However, the court also determined that the appeal presented an important question that, if resolved at that time, might avoid an appeal at a later time.[61] Therefore, the court concluded that the action which Lung brought "clearly allege[d] that the judgment was procured through fraud upon the court" and should be considered as an independent action.[62]

Second, not only did the court overlook *Caley*, it also failed to address the United States Supreme Court cases of *Hazel-Atlas Glass Co. v. Hartford Empire Co.*[63] and *Marshall v. Holmes*[64] which held that perjury or false evidence *is* an accepted ground on which to receive relief from judgment. Although the court did rely on *United States v. Throckmorton*,[65] that case, unlike *Hazel-Atlas*, was not an action for fraud upon the court. While it is possible to distinguish *Hazel-Atlas* and

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[56]508 N.E.2d at 817.

[57]257 Ind. 116, 271 N.E.2d 891 (1971). Although the *Magnuson* court cites four Indiana decisions, including *Caley*, which discuss fraud upon the court, 508 N.E.2d at 817, it does not review any of the cases. Interestingly, the two court of appeals decisions cited in *Magnuson* refer to *Caley*. *See* Smith v. Tisdal, 484 N.E.2d 42, 44 n.2 (1985); Anderson v. Anderson, 399 N.E.2d 391, 400 n.17 (1979).

[58]*Caley*, 257 Ind. at 117, 271 N.E.2d at 891.

[59]*Id.*

[60]*Id.* at 118, 271 N.E.2d at 892.

[61]*Id.*

[62]*Id.* at 119, 271 N.E.2d at 893.

[63]322 U.S. 238 (1944).

[64]141 U.S. 509 (1891).

[65]98 U.S. 61 (1878).

Marshall from *Magnuson*, the court's failure to even consider these decisions makes such an attempt highly subjective.[66]

Finally, the court, in an effort to bolster its holding, asserts that "[t]he commentators (citing *Harvey* and *Moore*) caution that an independent action for fraud on the court only includes allegations of *extrinsic* fraud."[67] Such a statement is, at best, misleading. While *Moore*[68] may lend some support to the court's position, *Harvey*,[69] does not. *Harvey* commented that "*[s]o-called* intrinsic fraud, *not clearly defined by precedents*, will not support independent relief"[70] and that the intrinsic/extrinsic distinction is one without merit.[71] The court's assertion clearly runs contrary to the concerns expressed by *Harvey*. Additionally, a review of *Wright & Miller*[72] and the Advisory Committee Notes to Federal

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[66]It might be that the *Magnuson* court believed the various federal cases cited in support of its holding adequately addressed the *Throckmorton/Marshall/Hazel-Atlas* conflict. However, a review of several of these federal decisions evidences that the federal courts have no better handle on the operation of the "Savings" Clause than the *Magnuson* court. In Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986) one of the more recent cases cited by the *Magnuson* court in support of its position, the dissent finds that although the majority points to *Hazel-Atlas* as authority for the proposition that fraudulent documents cannot constitute fraud upon the court, it [the majority] "ignores the fact that the *Hazel-Atlas* Court found precisely the opposite - that fraudulent documents . . . can constitute such fraud." *Id.* at 1126 (McKay, J., dissenting). Additionally, in Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983), also cited by the court, the dissent objected to the majority's limited application of fraud upon the court by stating:

> Commentators have suggested that involvement of an attorney is an essential component of fraud on the court when misconduct of other officers of the court is not established. . . . The Supreme Court, however, neither predicated its decision in *Hazel-Atlas* on the narrow ground of an attorney's involvement in the litigant's fraud, nor did it identify this as an element of fraud on the court.

Id. at 1363 (Butzner, J., dissenting).

[67]*Magnuson*, 508 N.E.2d at 818.

[68]7 J. Moore & J. Lucas, *supra* note 4, ¶¶ 60.33, 60.37[1].

[69]4 W. Harvey & R. Townsend, *supra* note 18, § 60.18.

[70]*Id.* at § 60.18 (emphasis added).

[71]*Id.* at § 60.12. Strangely enough the *Magnuson* court recognized *Harvey*'s criticism of the extrinsic/intrinsic distinction, but went on to cite the commentator in support of its holding. 508 N.E.2d at 818.

[72]These commentators state:

> However, Rule 60(b)(3) goes to all fraud, "whether heretofore denominated intrinsic or extrinsic" while no such statement is made in the rule concerning the independent action. Accordingly there is some authority that the old distinction persists if relief is sought by an independent action, rather than by motion, and that the action will lie for "extrinsic" fraud but not for "intrinsic" fraud. This is most unfortunate, if true. The distinction rests on clouded and confused

Rule 60(b)[73] finds that these "commentators" do not support the court's intrinsic/extrinsic policy with respect to an independent action based on fraud upon the court.

The court concluded its opinion by noting that "notwithstanding the intrinsic-extrinsic [fraud] distinction," Magnuson's complaint failed to approach the well-recognized and accepted definition of fraud upon the court[74] which the court set forth as follows:

> "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 . . . .[75]

As referred to earlier, Magnuson's complaint included the claim that Blickenstaff had fraudulently represented to the court that he had obtained a willing buyer, when in fact the buyer had withdrawn her offer.[76] If Magnuson's allegations were true, did Blickenstaff attempt to "subvert the integrity of the court" by misleading the court into believing he had a willing purchaser? Apparently, the court of appeals did not think so. However, in what manner should the court's definition be applied in future cases, and what permits cases such as *Caley* and *Hazel-Atlas* to fall within the court's definition? The court's attempt at formulating a concise definition of fraud upon the court lends credibility to the Ninth Circuit's conclusion in *Toscano v. Commissioner*[77] that most efforts to define fraud upon the court are "merely compilations of words that do not clarify."[78]

IV. Conclusion

In upholding the trial court's finding that Magnuson's complaint failed to state a claim upon which relief could be granted, the Indiana

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authorities, its soundness as a matter of policy is very doubtful and it is extremely difficult to apply (footnotes omitted).

11 C. Wright & A. Miller, *supra* note 3, § 2868, at 240.

[73] *See* Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, *reprinted at* 5 F.R.D. 433, 479 (1946).

[74] 508 N.E.2d at 819.

[75] *Id.* (citing, 7 J. Moore & J. Lucas, *supra* note 4, ¶ 60.33 at 60-360 (emphasis added)).

[76] *Magnuson*, 508 N.E.2d at 817.

[77] 441 F.2d 930 (9th Cir. 1971).

[78] *Id.* at 433.

Court of Appeals has fashioned a hard-and-fast rule that alleged perjury or false evidence is not an accepted ground for receiving relief from judgment under Rule 60(B)'s "Savings" Clause. However, in reaching its decision, the court failed to consider and distinguish two United States Supreme Court decisions and an Indiana Supreme Court ruling which hold that perjury or false evidence can serve as a basis for relieving a party from judgment. The Court of Appeals has left unanswered numerous questions with respect to Indiana's independent action, and until those questions are answered, the waters surrounding Trial Rule 60(B)'s "Savings" Clause will remain muddied.