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Rethinking Extraordinary Circumstances

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Colloquy Essays

RETHINKING EXTRAORDINARY CIRCUMSTANCES[†]

Scott Dodson

ABSTRACT—This short Essay seeks to rationalize the “extraordinary circumstances” requirement of Rule 60(b)(6) of the Federal Rules of Civil Procedure. Under the *Ackermann* rule, courts have held that any extraordinary circumstances must not have been caused by the movant’s own litigation conduct. I argue that the *Ackermann* rule, at its broadest, would be unjust to those litigants most in need of Rule 60(b)(6) relief and would overserve finality interests. A case study of the recent Fourth Circuit case *Aikens v. Ingram* illustrates these points. I propose, contrary to *Aikens*, that the *Ackermann* rule apply more narrowly: only to movants who have intentionally abandoned their litigation.

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INTRODUCTION

Normally, the entry of an unappealed final judgment ends the case forever, even if later developments undermine faith in the accuracy of the decision or the fairness of its procedural grounds. Litigation must have an end, and a final judgment usually marks that point.

Rule 60(b), however, has long been available to provide relief from judgment to losing litigants where justice so demands. The Rule states that a court may relieve a party from final judgment “[o]n motion and just terms” under five enumerated grounds (including mistake, newly discovered evidence, fraud, voidness, and judgment satisfaction) and one catchall provision.¹ The catchall, Rule 60(b)(6), provides that a court can relieve a party from judgment for “any other reason that justifies relief.”²

Because a judgment constitutes a final decision, Rule 60 creates some tension between justice and finality. To address this tension, the Supreme Court has imposed the nontextual requirement that a movant present “extraordinary circumstances” justifying relief.³ Further, in *Ackermann v. United States*, the Court held that a movant was not entitled to relief if his own litigation choices caused his predicament.⁴ In *Ackermann*, the plaintiff’s calculated financial decision not to appeal his denaturalization turned out to be a poor litigation choice after his co-plaintiff was able to overturn a similar denaturalization on appeal. The Court reasoned that Ackermann’s own deliberate choice to end his litigation prevented him from invoking Rule 60(b)(6) to reopen his case after learning of the favorable result of his co-plaintiff’s appeal.⁵

Since then, the federal courts have done little to explain or expound upon the *Ackermann* rule. However, in July 2011, the Fourth Circuit sitting en banc decided *Aikens v. Ingram* and attempted to elaborate on the *Ackermann* rule.⁶ The court held that, under *Ackermann*, a district court

¹ FED. R. CIV. P. 60(b).

² FED. R. CIV. P. 60(b)(6).

³ See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 & n.11 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 613–14 (1949)) (internal quotation marks omitted). This rule is known as the “extraordinary circumstances” doctrine.

⁴ 340 U.S. 193, 202 (1950).

⁵ *Id.* at 196–97.

⁶ 652 F.3d 496 (4th Cir. 2011) (en banc).

could deny Rule 60(b)(6) relief to a plaintiff faced with a limitations defense to a new filing if the plaintiff could have protected his claim by appealing the judgment, seeking a stay, or filing a new action.⁷

Aikens is an important but misguided pronouncement from a full circuit court on the extraordinary circumstances doctrine and the role and scope of the *Ackermann* rule. It applies the *Ackermann* rule too broadly, causing the exception to almost entirely swallow the rule. As a result, *Aikens* relegates Rule 60(b)(6) to the dustbins of legal practice.

Rule 60(b)(6) is an oft-used provision invoked by litigants who otherwise would be saddled with an unjust judgment.⁸ Yet despite the importance of the topic, the literature on Rule 60(b)(6) is some of the sparsest in all of civil procedure. Neither *Aikens* nor any other court or commentator has systematically theorized the *Ackermann* rule and its role in the extraordinary circumstances doctrine. This Essay takes an initial step toward rethinking extraordinary circumstances and the role of the *Ackermann* rule. Specifically, I argue that *Ackermann* should apply only when the movant deliberately chooses to discontinue the case. It should not apply to movants who continue to pursue their claims with diligence. This interpretation of the *Ackermann* rule more sensitively balances the competing interests of equity and finality.

Applying these guiding principles to *Aikens* suggests that the Fourth Circuit overstated the role and scope of the *Ackermann* exception. In so doing, *Aikens* missed a golden chance to provide doctrinal guidance and theoretical coherence to this understudied but widely used mechanism of civil practice.

I. RULE 60(B)(6)

Before the adoption of the Federal Rules of Civil Procedure in 1938, federal courts used a haphazard assortment of common law remedial devices to balance the need to correct unjust judgments with the need for finality in litigation.⁹ The original Rule 60(b) largely replaced this patchwork with specific procedures and limits for granting relief from judgment. Nevertheless, some courts invoked “inherent power[s]” to issue relief on terms that contravened those procedures and limits.¹⁰ The 1948 Amendments altered some of the requirements and added Rule 60(b)(6), a catchall provision recognizing that the need for justice might outweigh the

⁷ *Id.* at 502–03.

⁸ For a discussion of Rule 60(b)(6) and *Ackermann*, see 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 2864 (2d ed. 2011).

⁹ See Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 *YALE L.J.* 76, 76 & n.3 (1952).

¹⁰ *Id.* at 77–78 (internal quotation marks omitted).

need for finality in unanticipated circumstances.¹¹ Rule 60(b), set forth below, has remained substantively unchanged since then:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.¹²

All of the Rule 60(b) justifications erode the finality of judgments, which “secure[s] the peace and repose of society.”¹³ Accordingly, Rule 60(b)(1)–(5) specifies particular justifications for overriding the interests of finality.¹⁴ Rule 60(b)(6), however, presents a unique risk because its open-endedness invites judges to subordinate the interests of finality even when those interests might be especially strong. Textually, Rule 60(b)(6) appears to have no constraint other than whether a reason “justifies relief.” Accordingly, courts often cast it broadly, construing it as “a grand reservoir of equitable power to do justice in a particular case.”¹⁵ To guard against the overuse of Rule 60(b)(6), the Supreme Court has interpreted the Rule to require a showing of “extraordinary circumstances” justifying relief.¹⁶ In *Ackermann v. United States*, the Court held that, under this extraordinary circumstances doctrine, the movant’s individual litigation choices could preclude Rule 60(b)(6) relief.

In *Ackermann*, Hans Ackermann and his business partner, Max Keilbar, were denaturalized on grounds of fraud. The denaturalizations

¹¹ See *id.* at 82 n.31.

¹² FED. R. CIV. P. 60(b).

¹³ *S. Pac. R.R. v. United States*, 168 U.S. 1, 48–49 (1897). On the balance of finality and equity, see Henry Brownstein, Note, *Rule 60(b): A Rule Suitable for a Sua Sponte Motion*, 15 B.U. PUB. INT. L.J. 153, 165–66 (2005).

¹⁴ FED. R. CIV. P. 60(b)(1)–(5).

¹⁵ Christopher G. Meadows, Comment, *Rule 60(b)(6): Whether “Tapping the Grand Reservoir of Equitable Power” Is Appropriate to Right an Attorney’s Wrong*, 88 MARQ. L. REV. 997, 999 (2005) (internal quotation marks omitted).

¹⁶ *Ackermann v. United States*, 340 U.S. 193, 199 (1950); cf. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (considering the extraordinary circumstances doctrine in the habeas context).

were entered as separate judgments. Ackermann did not appeal during the allowable time period, primarily because he believed he could not bear the high cost of appealing the judgment. Keilbar, however, appealed and won a reversal of his denaturalization order. Upon receiving the news of Keilbar's reversal, Ackermann believed that his denaturalization similarly should be reversed. Because the time to appeal had lapsed, he sought to reopen his denaturalization judgment under Rule 60(b)(6).¹⁷

The Supreme Court held that Ackermann was not entitled to Rule 60(b)(6) relief, even if his denaturalization judgment was erroneous, because he

made a considered choice not to appeal His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.¹⁸

The *Ackermann* rule attempts to provide the one concrete guidepost for determining whether a case presents extraordinary circumstances justifying Rule 60(b)(6) relief. Yet it too is unclear. Does the rule apply to *all* free, calculated, and deliberate litigation choices? The recent decision in *Aikens v. Ingram* exposes the difficulty of this question.

II. A CASE STUDY: *AIKENS V. INGRAM*

In *Aikens*, Colonel Frederick Aikens, an active officer in the North Carolina National Guard until 2005, sued his former superior officer, William Ingram, and his former subordinate, Peter von Jess, under § 1983 and the Fourth Amendment for “wrongfully intercepting, reading, and forwarding his emails while he was deployed in Kuwait” during the Iraq War.¹⁹

The district court dismissed Aikens's complaint without prejudice for failure to exhaust intraservice remedies through the Army Board for the Correction of Military Records (ABCMR), a federal agency division charged with hearing grievances regarding federal military records.²⁰ The district court's order stated that if the ABCMR did not have jurisdiction, it would take no action and the “plaintiff may return to federal court.”²¹

Aikens then attempted to comply with the district court order by seeking relief from the ABCMR. However, because the ABCMR could only order federal military records relief and not the state records relief and

¹⁷ *Ackermann*, 340 U.S. at 195–96.

¹⁸ *Id.* at 198.

¹⁹ *Aikens v. Ingram*, 652 F.3d 496, 498 (4th Cir. 2011) (en banc).

²⁰ *Aikens v. Ingram*, 513 F. Supp. 2d 586, 592 (E.D.N.C. 2007).

²¹ *Id.* at 591–92.

monetary damages that Aikens sought, the ABCMR held that it lacked jurisdiction to entertain Aikens's request.²²

By this time, the three-year limitations period on Aikens's § 1983 claims had lapsed (assuming no tolling had occurred during the pendency of the ABCMR's review). Accordingly, and now having exhausted his intraservice remedies, Aikens filed a Rule 60(b)(6) motion to reopen his original case. The district court denied Aikens's motion, holding that any limitations problem was Aikens's own fault for two reasons: (1) Aikens waited two years and five months into the limitations period to file his original complaint and (2) Aikens failed to exhaust his intraservice remedies with the ABCMR before filing suit.²³ Aikens appealed.

The Fourth Circuit, sitting en banc, affirmed the district court in a 7-5 decision that generated four separate opinions. The Fourth Circuit wisely ignored the district court's reasons for denying Rule 60(b)(6) relief. Potential plaintiffs may use much of the limitations period for a number of reasons, such as seeking informal remediation, using formal but nonjudicial grievance procedures, considering the costs and benefits of litigation, finding and hiring an attorney, investigating facts and legal theories, considering legal strategies, and drafting a complaint. That Aikens used up a significant amount of his limitations period is unsurprising because such use is, in part, what the limitations period is designed to encourage. It would be preposterous to fault Aikens for proceeding carefully and thoughtfully through these stages before filing a timely complaint. It would be equally preposterous to fault Aikens for failing to attempt to exhaust his intraservice remedies when the ABCMR conclusively determined that any attempt would have been futile.

Instead of deferring to the district court's reasons, the Fourth Circuit relied upon its own reasons. The court held that Aikens should have appealed the district court's dismissal order, sought a stay of the dismissal order pending exhaustion, or filed a new action before the limitations period expired. Because Aikens declined to pursue these options, the majority reasoned that the limitations predicament he now faced was his own fault, and therefore, the district court's denial of Rule 60(b)(6) relief was not an abuse of discretion.²⁴

Although an appellate court can affirm on grounds other than those relied upon by the district court, the abuse of discretion standard then does not apply to the district court's decision. Rather, an appellate court can

²² *Aikens*, 652 F.3d at 499.

²³ *Aikens v. Ingram*, No. 5:06-CV-185-D, 2008 WL 4831420, at *5 (E.D.N.C. Nov. 5, 2008), *aff'd*, 652 F.3d at 503.

²⁴ *Aikens*, 652 F.3d at 502-03.

affirm on alternate grounds only if, after an independent de novo review, it determines that the judgment was, in fact, correct.²⁵

Thus, the Fourth Circuit, despite its language purporting to defer to the discretion of the district court and despite the concurring opinion's lengthy defense of the abuse of discretion standard, affirmed for its own reasons.²⁶ In the process, the Fourth Circuit created new law on the extraordinary circumstances doctrine by extending the reach of the *Ackermann* rule. Now, Rule 60(b)(6) relief is never available if the movant could have appealed, sought a stay, or filed a new action but deliberately chose not to do so.

That can't be right. Such a rule requires perfect foresight in choosing among reasonable litigation options. If litigants had perfect foresight in their litigation choices it is hard to see when Rule 60(b)(6) relief would be needed. And if it were needed, the reason would almost certainly be because of the litigant's failure to make litigation choices with perfect foresight. The *Ackermann* rule would swallow Rule 60(b)(6).²⁷

Aikens's case is a perfect example. When the district court dismissed his claim for failure to exhaust his intraservice remedies, he had a choice. As the Fourth Circuit recognized, he could have appealed. But the district court had cited to Fourth Circuit precedent that seemed to support the exhaustion requirement, and so the option of appealing might simply have led to an affirmance, putting him right back where he was after dismissal.²⁸ He also could have sought a stay while he went to exhaust, but the language of the district court's order, which did not direct the clerk to close the case, suggested that the district court would leave the case pending while exhaustion was attempted. When the district court issued a final judgment the next day, the district court had no power to enter a stay of its dismissal order without some justification for reconsideration.²⁹ And even if the

²⁵ See *Helvering v. Gowran*, 302 U.S. 238, 245–46 (1937) (explaining that an appellate court can affirm for new reasons “if the decision below is correct”).

²⁶ The Fourth Circuit did not appear to appreciate that it was misapplying the abuse of discretion standard. It purported to rely on the abuse of discretion standard while nevertheless rejecting the district court's reasons. See *Aikens*, 652 F.3d at 502–03.

²⁷ As the dissent argued:

If the majority's approach is all it takes to foreclose a finding of extraordinary circumstances for Rule 60(b)(6) relief, that is, if a court can punish a movant for pursuing reasonable and legitimate strategies simply because—with the benefit of hindsight—the court can conjure up possible alternatives, it is hard to imagine that Rule 60(b)(6) relief can ever be obtained.

See *id.* at 520 (King, J., dissenting).

²⁸ See *Aikens v. Ingram*, 513 F. Supp. 2d 586, 591 (E.D.N.C. 2007) (citing Fourth Circuit decisions requiring the exhaustion of intraservice remedies). It is worth noting that Aikens's Rule 60(b)(6) motion was not a substitute for an appeal seeking to reverse the district court's order holding that exhaustion was required. Such a reversal would be unnecessary because by then Aikens had in fact exhausted his administrative remedies.

²⁹ Once the final judgment was entered, the district court had no authority to issue a stay without some additional filing by Aikens seeking reconsideration, such as a motion under Rule 59 or Rule 60. See FED. R. CIV. P. 62(b).

district court agreed to consider Aikens's request for a stay, there was no assurance that the court would have granted it.

In light of the uncertainty of an appeal or a stay, Aikens chose a different option: he chose to attempt to exhaust. Aikens did not care where his remedy came from, and he no doubt would rather have gotten it immediately from the ABCMR than from waiting years for the appeals process. Plus, the district court had assured Aikens that he could return to court if the ABCMR could not grant him relief. Aikens's decision to comply with the district court's order and seek administrative relief was a perfectly reasonable way to continue the pursuit of his claims. Indeed, it might have been unreasonable for Aikens to have done anything differently.

When the ABCMR refused his claim, Aikens could have filed a new action instead of a Rule 60(b)(6) motion, as the Fourth Circuit pointed out. Yet the limitations issue was uncertain at that time; any new suit would have been timely only if the limitations period had been tolled during the pendency of his original action and during the time he sought to exhaust. Further, a new lawsuit before a judge unfamiliar with the issues and the parties would have required duplicative litigation, with its attendant costs to the parties and the court. Far safer and more efficient, Aikens must have thought, to simply return to where he had left off. The district court invited him to return to federal court, and having jumped through the hoop ordered by the court, Aikens merely accepted that invitation.

Thus, at the time, Aikens's litigation choices were perfectly reasonable ones. True, Aikens freely made them. But it is hardly just to fault him for them. After all, Aikens could have been put in similarly difficult positions if he had done as the Fourth Circuit suggested. If Aikens had appealed and the Fourth Circuit affirmed, would Aikens have been faulted for appealing instead of seeking to exhaust his remedies first? If Aikens had sought a stay and the district court denied it after expiration of the thirty-day deadline to file an appeal,³⁰ would Aikens have been faulted for choosing to seek a discretionary form of relief instead of an appeal as of right? If Aikens had instead filed a new action and the district court rejected any tolling arguments and dismissed on limitations grounds, would he have been faulted for failing to choose to appeal or seek a stay? These rhetorical questions are designed to elicit a point: it is highly problematic to condition Rule 60(b)(6) relief on speculation of which litigation choice, among a variety of reasonable options in pursuit of the claim, might have been more successful. In Aikens's case, any one of them could have been unwise in retrospect. To deny Rule 60(b)(6) relief just because the option the movant selected turned out to be unsuccessful with 20/20 hindsight is to permit Rule 60(b)(6) relief only when it is not needed.

³⁰ This deadline is jurisdictional. *See* Bowles v. Russell, 551 U.S. 205, 213 (2007).

III. BALANCING RULE 60(B)(6) WITH *ACKERMANN*

For these reasons, the *Ackermann* rule ought not to apply when a litigant chooses a litigation option that is a reasonable way to continue pressing his legal claims. I do not mean to place emphasis on the word “reasonable” here. I include that qualification in my proposal only as a way of excluding patently *unreasonable* or fanciful ways of continuing the pursuit of a claim—disobeying a court order, pursuing a course clearly foreclosed by binding precedent, and the like. In such cases, I have no qualms accepting a rule that forces the litigant to live with his mistakes. I suspect, however, that such unreasonable choices will be rare.

I mean instead to focus on a litigant’s intention to continue pressing claims. In such a case, the concerns of finality are light. Indeed, the district court’s dismissal order was without prejudice and specifically contemplated a return to federal court. Meanwhile, Aikens himself continued to pursue his claims for relief with the ABCMR (a perfectly reasonable choice, for the reasons stated above). For all practical purposes, his case against the defendants was continuing. Finality interests were light, if not absent entirely.

Consequently, the *Ackermann* rule ought to apply only to a litigation choice that deliberately ends the dispute, such as settling the claims or abandoning the case altogether. In that circumstance, the finality concerns are real, the defendant has an expectation interest in the end of the case, and sour grapes need not be rewarded.

This construction is consistent with *Ackermann* and its progeny. *Ackermann* involved a movant who declined to appeal, primarily for financial reasons, and failed to pursue his claims in any other forum. In *Polites v. United States*, another Rule 60(b)(6) case, a denaturalized citizen stipulated to a voluntary dismissal of his appeal with prejudice (because circuit precedent was unfavorable at the time) and only moved for Rule 60(b)(6) relief after there was a supervening change in the law.³¹ Similarly, *Gonzalez v. Crosby* involved a habeas petitioner who failed to appeal the denial of his petition and sought Rule 60(b)(6) relief only after a supervening change in the law.³² In each case, the Supreme Court held the denial of Rule 60(b)(6) relief to be proper.³³

In these cases, the movants deliberately and completely abandoned their claims and did not pursue them in any other legal forum. Those movants sat on their laurels, biding their time and saving their resources until a change in the law—for which they could have argued in the first

³¹ 364 U.S. 426, 430–31 (1960).

³² 545 U.S. 524, 537–38 (2005).

³³ Reasonable minds could disagree with the Court’s disposition in these cases. I do not mean to defend them. I only mean to distinguish them from *Aikens* and argue that, even if they are correct, they do not justify the expansive rule that the Fourth Circuit promulgated in *Aikens*.

instance—turned in their favor and gave them new hope. In such cases, the finality interests are strong and the justice interests are arguably light. Thus, the *Ackermann* rule might properly apply to them.

Fred Aikens, by contrast, never gave up pursuing his claims. His circumstances therefore presented a far different case than *Ackermann* and its progeny. In Aikens's case, the finality interests were light and the justice interests were strong. Accordingly, the *Ackermann* rule should not have prevented him from seeking Rule 60(b)(6) relief. His case thus illustrates the proper scope of the *Ackermann* rule: the rule should disallow Rule 60(b)(6) relief only when the movant deliberately chooses to end the dispute.³⁴

CONCLUSION

Rule 60(b)(6), with its requirement of extraordinary circumstances, has caused discord among the courts. The *Ackermann* rule, while providing some guidance, is of uncertain scope. At its broadest, the *Ackermann* rule threatens to swallow Rule 60(b)(6) and tip the balance too far in favor of finality. This Essay suggests a narrower construction, one founded on the realities of litigation and the true interests of finality. This construction, which limits the *Ackermann* rule to those movants who deliberately stop pursuing their claims, opens space for a more equitable consideration of extraordinary circumstances in the context of providing relief from unjust judgments.

³⁴ Aikens continues to pursue his case. He filed a new lawsuit after the Fourth Circuit affirmed the denial of his Rule 60(b)(6) motion, but the district judge dismissed the new suit on limitations grounds. See *Aikens v. Ingram*, No. 5:11-CV-371-BO (E.D.N.C. Feb. 24, 2012). Aikens has appealed.