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A Final Judgment May Be Vacated When the Same Accident Produces Divergent Results in a Federal and a State Court.

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CASE NOTES

CIVIL PROCEDURE—Extraordinary Circumstances—A Final Judgment May be Vacated When the Same Accident Produces Divergent Results in a Federal and a State Court

Pierce v. Cook & Co.,
518 F.2d 720 (10th Cir. 1975).

An accident between an automobile and a tractor-trailer rig that occurred in Oklahoma resulted in two actions, one in federal court on behalf of the deceased driver Ted Pierce and an injured passenger, Ellenwood; the other in state court on behalf of another injured passenger, Davis. The federal court denied plaintiffs Pierce and Ellenwood recovery in accordance with case law.[1] Subsequently, the Oklahoma Supreme Court specifically overruled the prior case law in the suit in state court and ruled in favor of the other injured passenger, Davis.[2] Appellants Pierce and Ellenwood filed a motion for relief pursuant to rule 60(b).[3] Held—*Vacated and remanded.* A single accident which produces divergent results in a federal and a state court constitutes an extraordinary circumstance which justifies vacation of a final judgment.[4]

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, a district court had the power to modify or revoke its final judgment only during the term of the court.[5] This general rule was so inflexible that many courts established local rules extending their terms to provide the parties with sufficient time to file for relief.[6] The only exceptions permitting reconsidera-

1. Pierce v. Cook & Co., 437 F.2d 1119 (10th Cir. 1970).

2. Hudgens v. Cook Indus., Inc., 521 P.2d 813 (Okla. 1973). John Hudgens was a co-guardian of passenger Davis.

3. FED. R. CIV. P. 60(b), Relief from Judgment or Order, reads in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (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.

4. Pierce v. Cook & Co., 518 F.2d 720, 723-24 (10th Cir. 1975).

5. United States v. Mayer, 235 U.S. 55, 67 (1914); Note, *Federal Rule 60(b): Finality of Civil Judgments v. Self Correction by District Court of Judicial Error of Law*, 43 NOTRE DAME LAW., 98, 99 (1967); Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77, 78 (1951).

6. Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627 (1946).

tion of final judgments after expiration of the court term were: (1) if the proceeding seeking relief was begun within the term, or (2) if the court, during the term, reserved control over the judgment and the procedure seeking relief was begun while the court still retained that control.[7]

This term rule was abolished in 1938 when the Federal Rules of Civil Procedure were adopted.[8] Ten years later, however, the rules were amended and the present form of rule 60(b) became effective.[9] The purposes of the change were to adequately state the grounds for relief and to strengthen the finality of judgments against attacks based upon vague grounds.[10] This amended version also abolished ancillary remedies and provided for two types of relief from final judgments: relief obtained by a motion made in the court during the initial action in which judgment is rendered, and relief obtained by a new and independent action which may be initiated in the court that rendered judgment.[11]

When the rule was revised in 1946, the traditional grounds for relief from final judgment were included as the first five subdivisions.[12] There was, however, a need for a residual clause to cover any unforeseen circumstances and subdivision six—allowing relief for "any other reason"[13]—was added as a catch-all; it was drafted in broad terms to apply to areas not specifically covered in the other clauses of rule 60(b). Relief for "any other reason" provided by clause six is to be liberally applied to situations not covered by

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7. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.09, at 7 (2d ed. 1974); Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627 (1946). Other remedies available in certain limited situations were *coram nobis, coram vobis, audita querela*, bill of review and bill in the nature of bill of review. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.09, at 7-8 (2d ed. 1974).

8. FED. R. CIV. P. 60(b); Comment, *Temporal Aspects of the Finality of Judgments the Significance of Federal Rule 60(b)*, 17 U. CHI. L. REV. 664, 668-69 (1950).

9. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.18[6], at 210 (2d ed. 1974).

10. *Id.* ¶ 60.18[1], at 201-202.

11. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2851, at 141-42 (1973); *see* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280 n.22 (D.C. Cir. 1971). The elements required for a valid independent action were enumerated in Bankers Mortgage Co. v. United States, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970):

> (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 defendant; and
> (5) the absence of any adequate remedy at law.

Id. at 79, *quoting* National Sur. Co. v. State Bank, 120 F. 593, 599 (8th Cir. 1903). Provision three could apparently be fulfilled by any one of the reasons listed in rule 60(b).

12. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.27[1], at 340 (2d ed. 1974).

13. FED. R. CIV. P. 60(b)(6) provides for relief from final judgment for any other reason justifying relief from the operation of the judgment. The only time limit applicable to clause six is a reasonable time. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.27[1], at 340-41 (2d ed. 1974).

the other five clauses in rule 60(b) and, when circumstances are appropriate, relief is to be granted to avoid injustice.[14]

The courts will only grant rule 60(b)(6) relief upon a showing of "exceptional circumstances;" the plaintiff must prove that the reason for which relief is sought is not within the provisions of the other five clauses of rule 60(b), and that exceptional circumstances exist which warrant granting of such extraordinary relief.[15] The plaintiff must have suffered some injustice due to these exceptional circumstances and the circumstances must have arisen as a result of either excusable actions on the plaintiff's part or events over which the plaintiff had no control.[16] Rule 60(b)(6) may not be invoked, however, when a party has voluntarily abandoned some legal right, and subsequently claims that such abandonment constitutes either excusable neglect or extraordinary circumstances justifying relief for "any other reason."[17]

The two leading cases interpreting federal rule 60(b)(6) are *Klapprott v. United States*[18] and *Ackermann v. United States.*[19] In *Klapprott,* the petitioner, a naturalized citizen, was imprisoned by the Government for a period of four and one-half years on diverse charges, all of which the Government was unable to sustain. While in the Government's custody, he was deprived of his citizenship by a default judgment, and due to the circumstances of his imprisonment, he was never able to appeal this judgment. Thus, Klapprott was deprived of a fair trial due to circumstances entirely beyond his control. After enumerating the circumstances of the case the Supreme Court held that Klapprott's "allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part."[20] The Court went on to state that the "other reason" clause vests the courts with power to vacate judgments whenever such a remedy is appropriate to accomplish justice.[21] Thus, this decision clearly established the equitable nature of subdivision six by setting forth the extraordinary circum-

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14. Klapprott v. United States, 335 U.S. 601, 615 (1949) (held in jail for six and one-half years); Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968) (government failed to promptly obtain default judgment against guarantor on a note); Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963) (no notice given appellees that the case was being reviewed); Pierre v. Bernuth, Lembcke Co., 20 F.R.D. 116, 117 (S.D.N.Y. 1956) (plaintiff in mental hospital for eight years); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.27[1], at 342-43 (2d ed. 1974); *see* Fleming v. Mante, 10 F.R.D. 391 (N.D. Ohio 1950) (no notice of trial sent to defendants).

15. Stradley v. Cortez, 518 F.2d 488, 494 (3d Cir. 1975).

16. Klapprott v. United States, 335 U.S. 601, 613-15 (1949).

17. Ackermann v. United States, 340 U.S. 193, 200-202 (1950).

18. 335 U.S. 601 (1949). The *Klapprott* opinion is the primary authority supporting relief from final judgments under rule 60(b)(6) in extraordinary circumstances. *Id.* at 613.

19. 340 U.S. 193 (1950).

20. Klapprott v. United States, 335 U.S. 601, 613 (1949).

21. *Id.* at 614-15.

stances—those beyond the movant's control—which forced him into a situation in which he was denied justice.

While the Court characterized *Klapprott* as a case of extraordinary circumstances, none of the circumstances in *Ackermann* were determined to be so extraordinary as to justify relief under rule 60(b)(6).[22] Ackermann was never trapped by circumstances, over which he had no control, in a position in which he was denied the opportunity to adequately defend himself.[23] The failure to find any extraordinary circumstances was based upon Ackermann's freedom of action in choosing not to appeal, and the fact that he had counsel available during the entire period from the filing of the complaint until after the rendering of judgment.[24]

Since the *Klapprott* and *Ackermann* decisions the federal courts have continued to grant relief under rule 60(b)(6), thereby disturbing the finality of judgments only under extraordinary or exceptional circumstances. Generally these circumstances are determined by the facts in each case, and the courts have not established guidelines which automatically justify relief from a final judgment.[25] Two factors, however, which assist a court in determining the existence of extraordinary circumstances are an inequitable or unjust burden imposed upon a petitioner by a final judgment, and the fact that petitioner had no choice under the circumstances but to accept the burden.[26]

Once the extraordinary circumstances required for rule 60(b)(6) relief are established, there remains the question of whether they are so extraordinary as to justify relief. This determination is left to the sound discretion of the trial court and the decision will not be disturbed except for a manifest abuse of discretion.[27] The trial court must exercise sound legal discretion remembering that rule 60(b) was not designed to supersede the normal channels of relief.[28] This discretion is not limited by the court's conscience

22. Ackermann v. United States, 340 U.S. 193, 202 (1950).

23. *Id.* at 201. Ackermann was neither in jail nor had his freedom of movement been restricted from the time the complaint was filed against him until after judgment.

24. *Id.* at 201.

25. *See, e.g.*, Horace v. St. Louis S.W.R.R., 489 F.2d 632, 633 (8th Cir. 1974) (relief denied; attempted to use 60(b) as a substitute for appeal); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651 (1st Cir. 1972) (relief denied; failed to prosecute an appeal); Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967) (relief denied; counsel was available throughout action); Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958) (relief denied; change in the law not extraordinary); Sears, Sucsy & Co. v. Insurance Co. of N. America, 392 F. Supp. 398, 412 (N.D. Ill. 1974) (relief denied; carelessness of attorney).

26. *See* Klapprott v. United States, 335 U.S. 601 (1949).

27. Chief Freight Lines Co. v. Teamsters Local 886, 514 F.2d 572, 576-77 (10th Cir. 1975); *accord*, Horace v. St. Louis S.W.R.R., 489 F.2d 632, 633 (8th Cir. 1974); Wilkin v. Sunbeam Corp., 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973). For a recent case in which the appellate court found an abuse of discretion see Stradley v. Cortez, 518 F.2d 488, 495 (3d Cir. 1975).

28. Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957). *See also* Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967); *In re* Hankins, 367 F. Supp. 1370, 1373-74 (N.D. Miss. 1973).

but rather by the need to do practical justice[29] and "[s]ympathy for a litigant is not a proper basis for reversal."[30]

The weight of authority states that to have a valid rule 60(b)(6) claim, the reason for which relief is being sought must not fall within any one of the other five subdivisions.[31] The courts do not believe the subdivisions may be applied collectively, but rather that they are mutually exclusive.[32] A few courts limit this mutual exclusiveness to the time element of the subdivisions; that is, the reasonable time provision of subdivision six cannot be used to circumvent the one year limitation of the first three subdivisions.[33]

In determining what circumstances are sufficient to invoke rule 60(b)(6) the courts have consistently held that changes in the controlling case law do not justify the granting of relief for "any other reason."[34] The courts have balanced the necessity of stability of the law with the obligation of doing individual equity and have found stability to be more desirable.[35] The Court of Appeals for the Tenth Circuit has even stated that neither a mistake in the law nor a change in the court's view of the law after entry of the judgment would support a rule 60(b)(6) motion for relief.[36]

Appellants who are denied rule 60(b)(6) relief which was sought on the ground of a change in the law are also denied relief under subdivision five.[37]

29. Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957).

30. Menier v. United States, 405 F.2d 245, 250 (5th Cir. 1968) (dissenting opinion).

31. Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975); Gulf Coast Bldg. & Supply Co. v. Electrical Workers Local 480, 460 F.2d 105, 108 (5th Cir. 1972); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651 (1st Cir. 1972); Transit Cas. Co. v. Security Trust Co., 441 F.2d 788, 792 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971); Crane v. Kerr, 53 F.R.D. 311, 312 (N.D. Ga. 1971); FDIC v. Alker, 30 F.R.D. 527, 532 (E.D. Pa. 1962); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.27, at 343 (2d ed. 1974).

32. *E.g.*, Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651 (1st Cir. 1972); Transit Cas. Co. v. Security Trust Co., 441 F.2d 788, 792 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971); Sears, Sucsy & Co. v. Insurance Co. of N. America, 392 F. Supp. 398, 412 (N.D. Ill. 1974). *Contra, In re* Four Seasons Sec. Laws Litigation, 502 F.2d 834, 841 (10th Cir.), *cert. denied*, Ohio v. Arthur Andersen & Co., 419 U.S. 1034 (1974).

33. Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975); *In re* Four Seasons Sec. Laws Litigation, 502 F.2d 834, 841 (10th Cir.), *cert. denied*, Ohio v. Arthur Andersen & Co., 419 U.S. 1034 (1974); Gulf Coast Bldg & Supply Co. v. Electrical Workers Local 480, 460 F.2d 105, 108 (5th Cir. 1972); Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967).

34. Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972); Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952); Class v. Norton, 376 F. Supp. 503, 506 (D. Conn. 1974); Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957); Creedon v. Smith, 8 F.R.D. 162 (N.D. Ohio 1948); Phelan v. Bradbury Bldg. Corp., 7 F.R.D. 429, 432 (S.D.N.Y. 1947).

35. Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957).

36. Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958).

37. FED. R. CIV. P. 60(b)(5) provides for vacation of a final judgment when a case, upon which a judgment was based, is reversed or otherwise vacated.

The problem is in the construction of the statute and the judicial interpretation of the word "based." The courts have determined that "based" means something more than furnishing the precedent upon which a decision is grounded.[38] This interpretation is reasonable and practical, for to allow a vacation of judgment each time there was a change in decisional law would destroy the finality of judgments.[39]

When the Court of Appeals for the Tenth Circuit, in *Pierce v. Cook & Co.*,[40] was presented with a rule 60(b) motion filed on the ground of a change in the law subsequent to judgment, it responded by expanding rule 60(b)(6) coverage in certain limited situations. The court went beyond the single circumstance presented by the change in the law and evaluated the surrounding circumstances of the case as a whole. After considering the circumstances the court vacated its previous affirmance,[41] and remanded the case to the district court without vacating that lower court's judgment.[42]

The first issue decided in *Pierce* concerned jurisdiction. The question was whether the appellate court should itself consider the rule 60(b) motion or merely grant leave to the district court to consider it.[43] Several circuits require that the district courts request leave from the appellate court that affirmed the judgment prior to considering a rule 60(b) motion.[44] The Court of Appeals for the Tenth Circuit has expressly rejected this theory in *Wilkin v. Sunbeam Corp.*[45] Had the court considered Pierce's action in filing this motion as merely a request for leave to file a rule 60(b) motion in the lower court the result would have been a denial as an unnecessary action.[46] Instead, it held that the trial court is in a better position to pass on a rule 60(b) motion;[47] therefore the circuit court chose to consider the motion only as to its own affirmance.[48] This action left the appellants the opportunity to file their rule 60(b) motion in the district court in accordance with *Wilkin*.

The court in *Pierce* also addressed itself to the broad equitable and discretionary powers granted in Federal Rule of Civil Procedure 60(b)(6).[49] The concept was presented that rule 60(b)(6) is a "grand

38. Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972). There is an example of a "based upon" situation in Pierce Oil Corp. v. United States, 9 F.R.D. 619 (E.D. Va. 1949) (dictum) (same sum was awarded in two judgments between the same parties and to prevent double recovery the sum was omitted from one of the judgments).

39. Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952).

40. 518 F.2d 720 (10th Cir. 1975).

41. Pierce v. Cook & Co., 437 F.2d 1119 (10th Cir. 1970).

42. Pierce v. Cook & Co., 518 F.2d 720, 723-24 (10th Cir. 1975).

43. *Id.* at 722.

44. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2873, at 268 n.23 (1973).

45. 405 F.2d 165, 166 (10th Cir. 1968), *cert. denied*, 409 U.S. 1126 (1973).

46. *See id.*

47. *Id.* at 166.

48. Pierce v. Cook & Co., 518 F.2d 720, 724 (10th Cir. 1975).

49. *Id.* at 722.

reservoir of equitable power to do justice in a particular case."[50] This theory of doing justice in an inequitable situation was introduced in *Klapprott* and has been continuously adhered to since that decision.[51] Barring unusual circumstances, however, the interest in finalizing litigation has generally outweighed the equities.[52]

The court in *Pierce* confronted the problem of how far to deviate from this practice of protecting the finality of judgments.[53] In *Collins v. City of Wichita*,[54] the court had already declared that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief [under rule 60(b)(6)]."[55] In *Collins* the court supported the doctrine of finality although a change in the law had occurred subsequently in an unrelated case.[56] This decision was also supported by the weight of authority.[57]

The distinguishing factor between *Pierce* and *Collins* was that the change in law which occurred in *Pierce* was due to a related case that arose from the same transaction, while the change in the law in *Collins* occurred in an unrelated case.[58] Thus the court chose not to apply the law of *Collins* to a situation like *Pierce*. Unless the relation between the two cases, state and federal, created exceptional circumstances justifying relief, the reversal of the precedent upon which *Pierce* was grounded would not be reason to vacate the judgment.[59] The mere fact that the cases arose from the same cause of action would not, by itself, support relief under rule 60(b)(6); the circum-

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50. *Id.* at 722.

51. Klapprott v. United States, 335 U.S. 601, 615 (1949); *accord*, Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968); Laguna Royalty Co. v. Marsh, 350 F.2d 817, 823 (5th Cir. 1965); Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963); Pierre v. Bernuth, Lembcke Co., 20 F.R.D. 116, 117 (S.D.N.Y. 1956); Fleming v. Mante, 10 F.R.D. 391, 392 (N.D. Ohio 1950).

52. *See* Horace v. St. Louis S.W.R.R., 489 F.2d 632 (8th Cir. 1974).

53. Pierce v. Cook & Co., 518 F.2d 720, 722 (10th Cir. 1975).

54. 254 F.2d 837 (10th Cir. 1958).

55. *Id.* at 839.

56. *See id.* at 838.

57. *See* Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972); Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952); Class v. Norton, 376 F. Supp. 503, 506 (D. Conn. 1974); Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957); Creedon v. Smith, 8 F.R.D. 162 (N.D. Ohio 1948); Phelan v. Bradbury Bldg. Corp., 7 F.R.D. 429, 432 (S.D.N.Y. 1947).

58. Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir. 1975). The Oklahoma Supreme Court in Hudgens v. Cook Indus., Inc., 521 P.2d 813 (Okla. 1973) reversed the law which the federal court used as precedent.

59. *See* Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972); Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952); Class v. Norton, 376 F. Supp. 503, 506 (D. Conn. 1974); Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957); Creedon v. Smith, 8 F.R.D. 162 (N.D. Ohio 1948); Phelan v. Bradbury Bldg. Corp., 7 F.R.D. 429, 432 (S.D.N.Y. 1947).

stances must be viewed in their entirety before they may be labelled as so extraordinary as to justify relief.[60]

An inference was also made that the appellants' situation was an excusable one, much like the *Klapprott* situation.[61] The lack of choice on appellants' part concerning the proceedings in diversity was mentioned as a factor affecting the circumstances of the case.[62] The appellants, who had the same facts at their disposal as the state court plaintiffs, who obtained a reversal of the law, were precluded by the diversity action from even attempting to obtain a reversal of the Oklahoma law.[63] The absence of choice in the diversity suit corresponds to the extraordinary situation of *Klapprott* in which petitioner had no opportunity to appeal and was forced to accept the default judgment against him.[64] Thus, the court has set out an extraordinary situation which justifies invoking rule 60(b)(6) and it remains only to prove that the total situation is so exceptional as to justify relief from the judgment.

Gondeck v. Pan American World Airways[65] supports this decision because of its similar circumstances. In *Gondeck* a single accident produced divergent results in two federal courts, one widow recovered and the other did not. The United States Supreme Court in ruling in favor of the widow who had been denied recovery said that the finality of litigation would yield when necessary to further justice.[66] The situation in *Pierce* is at least as unjust as that in *Gondeck* and warrants relief under rule 60(b)(6).[67]

Another problem presented in *Pierce* by the divergent federal and state results is that such results are contrary to the *Erie* doctrine.[68] The intent of that doctrine is to insure that in diversity of citizenship actions the outcome in the federal court is substantially the same as if the case had been tried in a state court.[69] Clearly an unjust situation has arisen where, in a case such as *Pierce*, opposite results occur violating the theory upon which diversity suits are based. The court has thus illustrated another unusual circumstance which is to be considered as a part of the total record when determining whether the circumstances arising in *Pierce* are so extraordinary that they will justify relief from a judgment.[70]

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60. Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957).
61. Klapprott was held in jail for six and one-half years and precluded from appealing a default judgment against him. Klapprott v. United States, 335 U.S. 601 (1949).
62. Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir. 1975).
63. *Id.* at 723.
64. Klapprott v. United States, 335 U.S. 601, 613-14 (1949).
65. 382 U.S. 25 (1965).
66. *Id.* at 26-27.
67. *Compare* Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975) *with* Gondeck v. Pan Am. World Airways, 382 U.S. 25 (1965).
68. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see* C. WRIGHT, FEDERAL COURTS § 55, at 223-28 (2d ed. 1970).
69. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).
70. *See* Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957).