NO. 20-394

IN THE

Supreme Court of the United States

DAVID ALAN SCHUM,

Petitioner

v.

ORIGINAL

FORTRESS VALUE RECOVERY FUND I, L.L.C.; SCHULTE ROTH & ZABEL, L.L.P.; LAWRENCE S. GOLDBERG; DANIEL BERNARD ZWIRN; PERRY GRUSS; HIGHBRIDGE/ZWIRN SPECIAL OPPORTUNITIES FUND, L.P.; BERNARD NATIONAL LOAN INVESTORS, LIMITED,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

David A. Schum, Pro Se
4149 Lovers Lane, Apt. C
Dallas, Texas 75225
469-513-2177
Email: watchradio@aol.com

September 16, 2020

Questions Presented

The questions presented are:

1. Whether a claim brought under Federal Rules of Civil Procedure Rule 60(d)(3) as a result of fraud on the court by attorneys who are sworn officers of the court can be time-barred or as a result of the fraud on the court does Federal Rules of Civil Procedure Rule 60(d)(3) take precedence over all other rules with time-bars.

2. Whether it violates the doctrine of Stare Decisis when a Federal Court arbitrarily establishes a non-specified time bar to a claim brought under Federal Rules of Civil Procedure Rule 60(d)(3) in conflict with Supreme Court and Circuit Court precedent.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

CORPORATE DISCLOSURE STATEMENT

There is no corporate disclosure required by Rule 29.6 in this case.

RELATED PROCEEDIINGS

U.S. Court of Appeals for the Fifth Circuit

In the Matter of: Renaissance Radio, Incorporated, Debtor, David Alan Schum, Appellant v. Fortress Value Recovery Fund I, L.L.C., et al., No. 20-10016 (May 18, 2020) (affirming the judgment of the district court)

In the Matter of: Renaissance Radio, Incorporated, Debtor, David Alan Schum, Appellant v. Fortress Value Recovery Fund I, L.L.C., et al., No. 20-10016 (June 19, 2020) (denying Petition for rehearing and denying Petition for rehearing en banc)

U.S. District Court for the Northern District of Texas Dallas Division

David A. Schum, Appellant, v. Fortress Value Recovery Fund I LLC and Schulte Roth & Zabel LLP, Appellees, No. 3:19-cv-00978-M (December 2, 2019) (affirming Bankruptcy Court's order)

U.S. Bankruptcy Court for the Northern District of Texas Dallas Division

In re: Renaissance Radio, Inc., Debtor, No. 03-33479 – BJH (Chapter 11) (April 11, 2019) (denying Schum's motion)

U.S. Bankruptcy Court for the Northern District of Texas Dallas Division

In re: Renaissance Radio, Inc., Debtor, No. 03-33479 – BJH (Chapter 11) (January 8, 2004) (Judge Barbara Houser's Finding of Fact and Conclusions of Law Regarding Confirmation of Second Amended Plan of Reorganization)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE #**

TABLE OF AUTHORITIES
(continued)

PAGE #

OTHER AUTHORITIES

FEDERAL STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

FEDERAL RULES OF BANKRUPTCY PROCEDURE

SUPREME COURT RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner David A. Schum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is unpublished.

JURISDICTION

The judgment of the Fifth Circuit was entered on May 18, 2020. The Fifth Circuit decision to deny Schum's petition for rehearing and rehearing en banc was entered on June 19, 2020. This Court has Jurisdiction under 28 U.S.C. § 1254(1). The filing deadline for this petition is September 17, 2020.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure

Rule 60. Relief from a Judgment or Order

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. 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.

(c) TIMING AND EFFECT OF THE MOTION.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Federal Rules of Bankruptcy Procedure

Rule 9024. Relief from Judgment or Order

Rule 60 Federal Rules of Civil Procedure applies in cases under the Code except that

(1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c),

(2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the Code, and

(3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230, or §1330. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

NOTES OF ADVISORY COMMITTEE ON RULES—1983

Motions to reopen cases are governed by Rule 5010. Reconsideration of orders allowing and disallowing claims is governed by Rule 3008. For the purpose of this rule all orders of the bankruptcy court are subject to Rule 60 F.R.Civ.P.

Rule 3008. Reconsideration of Claims

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

Rule 5010. Reopening Cases

A case may be reopened on motion of the debtor or other party in interest pursuant to §350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

NOTES OF ADVISORY COMMITTEE ON RULES—1983

Section 350(b) of the Code provides: "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Rule 9024, which incorporates Rule 60 F.R.Civ.P., exempts motions to reopen cases under the Code from the one year limitation of Rule 60(b).

Texas Disciplinary Rules of Professional Conduct

Rule 3.03. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Rule 8.04. Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not the violation occurred in the course of a client-lawyer relationship;
(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;
(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(4) engage in conduct constituting obstruction of justice;

FEDERAL STATUTES

47 U.S. Code § 310 - License ownership restrictions

(b)GRANT TO OR HOLDING BY ALIEN OR REPRESENTATIVE, FOREIGN CORPORATION, ETC.
No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(1) any alien or the representative of any alien;
(2) any corporation organized under the laws of any foreign government;
(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

INTRODUCTION

A final judgment can be overturned by a motion, pursuant to Federal Rule of Civil Procedure 60(d)(3), which is incorporated into the Bankruptcy Rules by Rule 9024, to vacate a judgment based upon fraud on the court.

> "Fraud on the court" is a claim that exists to protect the integrity of the judicial process, and therefore **a claim for fraud on the court cannot be time-barred.** *See* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.21[4][g] & n. 52 (3d ed.2009) (citing *Lockwood v. Bowles,* 46 F.R.D. 625, 634 (D.D.C.1969)).' *Bowie v. Maddox, 677 F. Supp. 2d 276, 278 (D.D.C. 2010).*

This case centers on a Texas bankruptcy exit loan document that was prepared in 2003-2004 by a New York based law firm, Schulte Roth & Zabel, LLP ("Schulte") representing a New York based hedge fund Highbridge/Zwirn Special Opportunities Fund, L.P, ("HBZ"). The lawyers deceived Bankruptcy Court Judge Barbara Houser, the attorneys for the business entities and the majority owner of the businesses, David Schum ("Schum") into believing a domestic hedge fund, Highbridge/Zwirn Special Opportunities Fund, L.P, ("HBZ") a Delaware domiciled limited partnership, was the lender when in actuality, the lender was a foreign illegal lender based in the Cayman Islands, Bernard National Loan Investors, Ltd. ("BNLI").

The contract fraud on the court was not discovered until 2012 by Schum. At the time of the discovery, the fraud had resulted in attempted fraud on the court in a Dallas County Court, fraud on the court in another bankruptcy proceeding, fraud on the court in a Dallas County Court and the illegal transfer of FCC licenses from Schum's company to a subsidiary of HBZ. The frauds were necessary to cover up the original fraud on the court, the financial problems of HBZ and ultimately the transfer of the FCC licenses to a company that was partially owned by offshore entities owned and controlled by the infamous sexual predator Jeffrey Epstein who was laundering his assets of questionable origin through HBZ.

Schum filed a motion under Federal Rule of Civil Procedure 60(d)(3) in the bankruptcy court to address the fraud on the court and prevent the participants in the fraud from profiting. The bankruptcy court ruled Schum's motion was time-barred, the District court Affirmed the bankruptcy court's time-bar ruling and the Fifth Circuit upheld the District Court's affirmation.

Schum timely filed this Petition for Certiorari.

STATEMENT

A. Legal Background

As part of the Federal Rules of Civil Procedure Congress adopted rule 60 to provide relief from a Judgment or Order. Rule 60(b)(2) addresses newly discovered evidence and 60(b)(3) addresses fraud. Rule 60(c)(1) places a time restriction of one year for motions under rule 60(b) for reasons (1),(2) and (3).

A final judgment can also be overturned by a motion, pursuant to Federal Rule of Civil Procedure 60(d)(3), which is incorporated into the Bankruptcy Rules by Rule 9024, to vacate a judgment based upon fraud on the court.

> "Fraud on the court" is a claim that exists to protect the integrity of the judicial process, and therefore **a claim for fraud on the court cannot be time-barred.** *See* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.21[4][g] & n. 52 (3d ed.2009) (citing *Lockwood v. Bowles,* 46 F.R.D. 625, 634 (D.D.C.1969)). *Bowie v. Maddox, 677 F. Supp. 2d 276, 278 (D.D.C. 2010).*

The issue of no time limit to seek relief for fraud on the court was addressed in a 1944 case when the Supreme Court set aside a 1932 judgment. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 251, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* ("judgment is reversed with directions to set aside the 1932 judgment"). In Hazel-Atlas, an attorney for Hartford wrote a spurious article which influenced a court to improperly award a patent to Hartford resulting in a settlement agreement with Hazel for patent infringement. Hazel later discovered the fraud on the

court perpetrated by the attorney and twelve years after the original judgment, the Supreme Court ordered the judgment to be set aside.

Since Hazel-Atlas, there have been cases in the circuit courts that addressed the time bar question, most citing Hazel-Atlas. Moore's Federal Practice cites cases from the Second, Third, Ninth, Tenth and D.C. Circuits all ruling there is no time limit for setting aside judgments based upon fraud on the court.

> **[g] No Time Limit or Laches Applies to Relief Based on Fraud on Court**
>
> Because fraud on the court concerns the integrity of the judicial process itself, a judgment may be set aside for fraud on the court at any time. There is no time limit on any party or court.[52] After all, in the leading Hazel-Atlas case, the United States Supreme Court acted in 1944 to tell the Third Circuit that it should set aside its 1932 judgment because it was procured by fraud on the court.[53]
>
> Many cases also imply that laches is not a defense to an action to set aside a judgment procured by fraud on the court.[54] Technically, this is undoubtedly correct. A judgment procured by fraud on the court should not be allowed to stand solely because someone was not diligent in bringing the fraud to the court's notice. On the other hand, in practice, courts will likely consider the delays involved in determining whether the fraud in question is of the magnitude to constitute fraud on the court. The greater the delay, the more deference the court is likely to give to the concept of finality of judgments. As one court noted:[55]
>
> > As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof.

---

[52] **No time limit for setting aside judgments based on fraud on court.**

2d Circuit See Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir. 1972) ("no time limit is specified" for fraud on court claims).

3d Circuit See Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514. 522 (3d Cir. 1948) ("when a controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry; and the general rule that courts do not set aside their judgments after the term at which they were rendered has no application").

9th Circuit See, e.g., Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 640 n.10 (N.D. Cal. 1978), aff'd per curiam, 645 F.2d 699, 700 (9th Cir. 1981) ("There is no statute of limitations for fraud on the court").

10th Circuit See, e.g., Bulloch v. United States. 721 F.2d 713, 719 (10th Cir. 1983) ("Rule 60(b) does not impose a time limit on motions asserting fraud on the court"); Wilkin v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968) (although motion under Fed. R. Civ. P. 60(b)(2) was untimely, appellate court remanded matter for reconsideration on theory of fraud on court, for which there is no time limit).

D.C. Circuit See, e.g., Lockwood v. Bowles. 46 F.R.D. 625, 634 (D.D.C. 1969) ("the law favors discovery and correction of corruption of the judicial process even more that it requires an end to lawsuits").

[53] **Example of United States Supreme Court setting aside 12-year-old Judgment for fraud on court.**
See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 251, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) ("judgment is reversed with directions to set aside the 1932 judgment").

[54] **Laches Is not defense to action to set aside based on fraud on court.**
See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) (the Circuit Court . . . thought that Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of relief....But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone").
3d Circuit See Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514. 525 (3d Cir. 1948) ("it is of no moment that Whitman's application may not have been promptly presented after it was informed as to the facts").
9th Circuit See Toscano v. C.I.R., 441 F.2d 930, 936-937 (9th Cir. 1971) ("The Commissioner also argues that . . . there was 'gross neglect' in not filing the motion sooner ....As to . . . [this] argument, what the Supreme Court said in Hazel-Atlas ... is pertinent").

[55] **While laches is not defense, unexplained delays may help convince court that there is no fraud amounting to fraud on court.**
See Bulloch v. United States, 721 F.2d 713, 719 (10th Cir. 1983) (Plaintiffs waited 25 years before bringing action to set aside judgment). § 60.21[4][g] MOORE'S FEDERAL PRACI1CE 3D 60-66,67.

The Courts are in agreement that since fraud on the court involves sworn officers of the court and this type of fraud undermines the ability of the courts to make fair and impartial decisions, there cannot be a time limit on when an action can be brought before the court. This is exemplified by the Third Circuit's willingness to examine a 50-year-old settlement agreement to determine if it was based upon fraud on the court. *Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005) (analyzing the merits of a Rule 60 action to set aside a 50-year-old settlement agreement on the grounds that the settlement was procured by fraud on the court).

Fraud on the court involves sworn officers of the court including judges, attorneys and others that may be included. In all adversarial proceedings, litigants have a duty of full disclosure and honesty with the Court. Attorneys take an oath that in part requires them to **"conduct myself with integrity and civility in dealing and communicating with the court and all parties."**

Texas Disciplinary Rules of Professional Conduct lay out the rules that attorneys must abide by in order to maintain the integrity of the judicial system as well as maintain their license

to practice law. The Texas Rules are similar if not exactly the same as the rules in the other states. Attorneys are forbidden to **"engage in conduct involving dishonesty, fraud, deceit or misrepresentation"** (see Texas Disciplinary Rules of Professional Conduct rule 8.04 (a)(3)) and they are obligated to disclose any fraud **"until remedial legal measures are no longer reasonably possible"** (see Texas Disciplinary Rules of Professional Conduct rule 3.03 (c)).

Schum's motion under Federal Rules of Civil Procedure Rule 60(d)(3) claiming fraud on the court was filed in the Bankruptcy Court that presided over the RRI bankruptcy seeking to reopen the bankruptcy case, disallow the claims for attorney fees paid to Schulte as well as interest and fees paid to HBZ. Schum asked for interest and penalties to be paid in addition to the damages. Schum's motion did not seek to have the reorganization plan revoked. Schum's motion was supported with a sworn affidavit and record evidence. The Eleventh Circuit Court recognized the need to not allow those that intentionally and maliciously commit fraud and fraud on the court to benefit or profit from fraudulent contracts or actions. In Global Energies,LLC the Eleventh Circuit Court did not take the attorney's (Pugatch) unprofessional conduct lightly when the court ruled:

> *"The bankruptcy court then shall conduct any hearings necessary in the exercise of all its powers at law or in equity and issue appropriate orders or writs, including without limitation orders requiring an accounting and disgorgement, orders imposing sanctions, writs of garnishment and attachment, and the entry of judgments to ensure that Chrispus, Juranitch, Tarrant, and Pugatch do not profit from their misconduct and abuse of the bankruptcy process." In re Global Energies, LLC (Published), No. 0:12-cv-61483-KMW, Justia 1411129135,ca11, August 15, 2014.*

The domicile of the lender for the Financing Agreement was a major element of the contract and of utmost importance. The lower court's finding that it was immaterial is clearly in error. Schulte went to great lengths in the RRI bankruptcy to make false representations as to the identity of the lender. Schulte identified the lender as BNLI after the Court had approved the Reorganization Plan which identified HBZ as the lender. Schulte intentionally did not disclose

BNLI to the Court or the domicile to anyone involved including the court. The use of a foreign lender was prohibited by Schum and the switch to an illegal foreign lender was an act of fraud and Schulte was the architect of the switch and the fraud on the court.

There is a legal maxim that dates back centuries "Fraus omnia vitiate, "Fraud vitiates everything." The US Supreme Court has ruled in 3 separate cases to uphold the common law maxim: Fraud Vitiates Everything. Those cases are: Nudd v. Burrows, 91 US 426 (1875), "Fraud destroys the validity of everything into which it enters" Boyce's Executors v. Grundy, 3 Pet. (28 US) 210 (1830), "Fraud vitiates everything" United States v. Throckmorton, 98 US 61, 70 (1878) "Fraud vitiates the most solemn contracts, documents and even judgments"

It only makes sense that there would be no time bar for fraud on the court claims since they involve corrupt and unethical conduct on the part of sworn officers of the court. The attorneys mandate to disclose fraud must never expire. Judges and opposing attorneys rely on lawyers acting honestly and when they don't, as in this case, where the attorneys didn't just turn a blind eye to fraud, but in fact they conceded they were the architects of the fraud, the entire legal process was corrupted.

B. Proceedings Below

The Supreme Court and five of the Circuit Courts have ruled over the last 75 years that there is no time limit for setting aside judgments based upon fraud on the court. Since fraud on the court involving attorneys that are sworn officers of the court undermines the integrity of the judicial process itself, the courts have ruled that a judgment may be set aside for fraud on the court at any time.

Attorneys are sworn officers of the court and take an oath in Texas that in part requires them to "conduct myself with integrity and civility in dealing and communicating with the court

and all parties." The attorneys are also subject to the Texas Disciplinary Rules of Professional Conduct when practicing law in the State of Texas which is similar if not exactly the same as those rules for all other states. The rules state in part: Attorneys are forbidden to **"engage in conduct involving dishonesty, fraud, deceit or misrepresentation"** (see Texas Disciplinary Rules of Professional Conduct rule 8.04 (a)(3)) and they are obligated to disclose any fraud **"until remedial legal measures are no longer reasonably possible"** (see Texas Disciplinary Rules of Professional Conduct rule 3.03 (c)).

At the center of the case at hand is a bankruptcy exit loan document ("Financing Agreement") prepared by a New York based law firm, Schulte Roth & Zabel, LLP ("Schulte"). Schulte represented New York based hedge fund Highbridge/Zwirn Special Opportunities Fund, L.P, ("HBZ") a Delaware domiciled limited partnership. HBZ changed its name to D.B. Zwirn Special Opportunities Fund, L.P. ("DBZ") in 2004 following the execution of the Financing Agreement. The management of DBZ, headed up by Daniel Bernard Zwirn, was removed for "financial irregularities" in 2009 and the fund became known as Fortress Value Recovery Fund I LLC ("Fortress") with Fortress VRF I LLC the managing member. Fortress is also domiciled in Delaware and is managing the liquidation of the fund at the direction of the limited partners.

David A. Schum ("Schum") is the majority owner of Renaissance Radio, Inc. ("RRI"). RRI was forced into Chapter 11 bankruptcy in April 2003 by a group of former employees and small investors who filed an involuntary bankruptcy petition. The RRI reorganization plan created a new entity, The Watch, Ltd. ("The Watch") which Schum is the majority owner of. RRI is a limited partner in The Watch and Schum still owns controlling interest in RRI.

An integral part of the RRI reorganization plan was the Financing Agreement. As is standard in the broadcast industry, Schum specified the lender(s) under the Financing Agreement

had to be qualified domestic lenders and the domestic lender specification was required and not negotiable. HBZ was the lender for a $1,000,000 DIP loan to RRI. HBZ also wanted to be the exit loan lender and the DIP loan included a "break-up fee" of $1,000,000 in the event RRI secured exit financing from any source other than HBZ. Schum was required to provide a personal guarantee on the Financing Agreement.

A hearing was held on January 12, 2004 before Bankruptcy Court Judge Barbara Houser to approve the RRI Chapter 11 plan. Schulte prepared a draft of the Financing Agreement and presented it to the attorneys for RRI and Bankruptcy Court Judge Barbara Houser, for their approval as an integral part of the Renaissance Radio, Inc. Chapter 11 Reorganization Plan. The Financing Agreement indicated the lender to be HBZ and Judge Houser issued Findings of Facts and Conclusions of Law designating HBZ to be the lender/agent. HBZ represented to the court and to Schum that they may assign the loan to a wholly owned domestic subsidiary for internal accounting purposes.

Notwithstanding the fact that Schum prohibited the use of a foreign lender, the loan document drafted by Schulte and presented to the judge as well as the final Financing Agreement included a contractual obligation to disclose the use of a foreign lender which needed to be identified no later than the effective date, February 5, 2004, and proof given as to the tax withholding status with the IRS. Article II "The Term Loan" Section 2.09 "Taxes" (c) of the Financing Agreement that was before the court states:

> "**Each Lender that is organized in a jurisdiction outside the United States hereby agrees that it shall, no later than the Effective Date** .... (and from time to time thereafter upon the reasonable request of the Borrower or the Agent, but only if such Lender is legally able to do so), **deliver to the Borrower and the Agent either**
>
> (i) two accurate, complete and signed copies of either (x) U.S. Internal Revenue Service Form W-8ECI or successor form, or (y) U.S. Internal Revenue Service Form W-8BEN or successor form, in each case, indicating that such Lender is on the date of delivery thereof entitled to receive payments of interest hereunder free

from, or subject to a reduced rate of, withholding of United States Federal income tax or

(ii) .... and (y) two accurate, complete and signed copies of U.S. Internal Revenue Service Form W-8BEN or successor form."

Schulte purposely did not make the required disclosure at the hearing before Judge Houser or at the closing of the loan which prevented Schum and the RRI attorney from presenting the case to Judge Houser that a foreign lender was not acceptable. Schulte's intentional fraudulent misrepresentation of an important issue of the contract, specifically the domicile of the lender BNLI, was part of a scheme that improperly influenced the Court in approving the plan using a prohibited foreign lender against Schum's directive.

Following Judge Houser's approval of the Financing Agreement and on the date of closing the loan, February 5, 2004, Schulte presented the final version of the Financing Agreement for execution at the offices of the attorney for RRI and The Watch. Schum signed the Financing Agreement on behalf of the borrower, The Watch, as well as signing as personal guarantor as required.

Six weeks following the closing of the loan, the exit loan closing binders were delivered to Schum on March 19, 2004 from the attorney for The Watch, Ltd. stating: "Enclosed are the closing binders for the **Highbridge/Zwirn Special Opportunities Fund, L.P. loan to The Watch, Ltd.** dated as of February 5, 2004." The Execution Version of the Financing Agreement is 150 pages long with an additional 131 pages of exhibits for a total of 281 pages.

On page 103 of the Financing Agreement, Highbridge/Zwirn Special Opportunities Fund, L.P. is shown to be the agent and lender which was signed by Daniel Zwirn ("Zwirn") and Bernard National Loan Investors, Ltd. ("BNLI") is identified as lender which was signed by Perry Gruss ("Gruss"). The document does not designate the domicile of BNLI.

On page 105 of the Financing Agreement, Schedule 1.01(A), it designates BNLI as the only lender, does not indicate HBZ as a participating lender and does not designate the domicile of BNLI. Schedule 1.01(A) was never included in the red line versions of the Agreement including the one that was approved by Judge Houser. Pages 103 and 105 are the only two places in the document that mention BNLI, the only lender involved with the exit loan, and the domicile is never revealed.

At the time of the Financing Agreement, HBZ was a fairly new hedge fund and not much was known about them. It soon became apparent to all that did business with them that their business model was predatory lending with the intention to "harvest assets" as they described it to their investors.

The events that followed the RRI bankruptcy proceeding where the initial fraud on the court at the hands of Schulte occurred were not before the Bankruptcy Court in Schum's Motion that is the subject of this appeal. That being said, the following demonstrate and put into context how the RRI contract fraud on the court was just the beginning of a carefully executed scheme leading to several other fraud on the court actions by the attorneys for DBZ.

In the spring of 2005, a DBZ employee informed Schum that The Watch was in violation of one or more of the covenants in the Financing Agreement. In May 2005, attorneys with the Dallas office of Vinson & Elkins (V&E), representing DBZ, filed an Application for Appointment of a Receiver in the District Court of Dallas County, Texas 191st Judicial District. A hearing was set for 10:00 AM on May 26, 2005 and the case was titled D.B. Zwirn Special Opportunities Fund, L.P., Plaintiff, v. The Watch, Ltd., Defendant. The case number is 05-05153-J. V&E fraudulently represented to the County Court that DBZ was the lender under the

Financing Agreement and had the right to apply to have a receiver appointed. There was no mention of BNLI.

Heeding the advice of a consultant, Schum sought the same counsel that represented RRI in its bankruptcy to file for Chapter 11 Bankruptcy protection for The Watch to prevent the appointment of a receiver. The case was assigned to the same judge that presided over the RRI bankruptcy, Judge Barbara Houser, case #05-35874-bjh

In the bankruptcy proceeding for The Watch, V&E entered a "Notice of Secured Creditors Debt Balance and Intention to Credit Bid At Auction" claiming DBZ was the RRI Financing Agreement lender and the only secured credit holder. Again, the attorneys for DBZ, now with V&E, fraudulently represented to the same Bankruptcy Court Judge that presided over the RRI bankruptcy, Judge Barbara Houser, that DBZ was the lender under the Financing Agreement and had the right to credit bid at the auction. There was no mention of BNLI and Judge Houser along with everyone else involved were under the impression that DBZ was the lender.

DBZ was allowed to fraudulently win the auction for The Watch assets including the FCC radio licenses and they were allowed to designate their "affiliate" Bernard Dallas LLC as the buyer of the assets of The Watch under the Sales Approval Order on December 29, 2005 prior to the application to the FCC for license transfer. A requirement to even bid at the auction let alone win it was the person or entity must have been qualified to be a FCC licensee. As it was later discovered, neither BNLI nor HBZ were qualified to be FCC licensees (see 47 U.S. Code § 310 (b) (1), (2), (3) and (4)) and only HBZ, BNLI and their attorneys were aware of the fact.

DBZ then made application to the FCC for the license transfers on January 17, 2006. As part of the application, it was necessary for DBZ to disclose the ownership including that of DBZ

the purported winner of the licenses at The Watch bankruptcy auction. The disclosure reveals 0% of the DBZ ownership. There was no mention of BNLI. As a result of HBZ and their attorneys actions and refusal to disclose the ownership, Schum and several other equity holders of The Watch filed an objection to the transfer of the licenses at the FCC.

In 2006 DBZ by their attorneys at V&E sued Schum on the personal guarantee of the Financing Agreement fraudulently claiming once again that DBZ was the lender under the Financing Agreement. DBZ was awarded a judgment against Schum in the amount of $3,572,373.11 plus post-judgment interest at the rate of 8.25%. DBZ filed a motion to reopen the RRI bankruptcy case on August 3, 2006. The case against Schum in State Court is titled D.B. Zwirn Special Opportunities Fund, L.P. Plaintiff v. David A. Schum, Defendant and is Cause # DC-05-05619 in the District Court of Dallas County 116th Judicial District. In April 2019 DBZ, now Fortress, keeping the fraud going, was granted a Writ of Scire Facias to revive the judgment against Schum after 12 years. There was no mention of BNLI.

In the Fall of 2012, Schum discovered a decision dated March 1, 2010, in case # 08 Civ. 3573 (DLC) in the New York Court where the judge's finding of facts states BNLI was a foreign company domiciled in the Cayman Islands. The fact that BNLI was a Cayman Island company was confirmed in the Price Waterhouse Cooper 2004 audited financial statement for the DBZ which was included as an Exhibit in a lawsuit filed in 2011 by the SEC against the CEO for DBZ Perry Gruss. The SEC suit against Gruss was the result of an SEC investigation of DBZ and was filed in the United States District Court Southern District of New York, case # 11 Civ. 2420 (RWS).

The April 8, 2011 complaint filed by the SEC outlines HBZ's financial problems in 2004 and thereafter. Included in the SEC complaint was a description of DBZ not having any funds to

pay their bills or fund the loans and investments they had negotiated but they had an offshore hedge fund, D.B. Zwirn Special Opportunities Fund, Ltd. which had plenty of money to invest but no opportunities to invest legally. The management of DBZ devised a scheme to transfer moneys from the offshore fund to the onshore fund as undocumented inter-fund loans. The moneys were often transferred directly from the offshore account to the borrowers without even "cleaning" the money through the onshore account. This accounting scheme that DBZ used did not affect this case as DBZ used BNLI as the illegal lender. The unethical if not illegal accounting scheme did ultimately lead to the demise of DBZ as the limited partners moved to remove Daniel Bernard Zwirn and his management team from the hedge fund and to have Fortress liquidate the fund.

The record reflects only HBZ/DBZ/Fortress and their attorneys at Schulte and later Vinson & Elkins ("V&E") knew that foreign lender BNLI was the only lender in the RRI Financing Agreement and they did not disclose the domicile of the lender intentionally. The attorneys knew the use of the foreign lender was not permissible and would void the contract and as a result, the fraud on the court strategy was carried into four other legal proceedings.

In 2010, a limited partner in DBZ was involved with an arbitration proceeding with Daniel Zwirn and his companies regarding alleged fraud and misrepresentations. The limited partner companies are Financial Trust Company, Inc. and Jeepers, Inc. and the domicile is not shown for the two companies indicating they are foreign companies. The two companies were owned and controlled by Jeffrey Epstein. Jeffrey Epstein was the notorious convicted felon sex offender that died August 10, 2019 in the Metropolitan Correctional Center in New York City.

An exhibit in the Epstein/DBZ arbitration proceeding is an affidavit of Glenn Dubin which identifies two of the limited partners in DBZ. Mr. Dubin declares that he "invested my personal

and family foundation assets with Zwirn." He also verifies that Epstein's company, Financial Trust Company, Inc., was an investor in DBZ.

The reasons for DBZ and their attorneys at Schulte and V&E to go to such unethical and fraudulent lengths to cover up the identity and domicile of the lender in the Finance Agreement became clear to Schum after he discovered the multiple lawsuits involving DBZ. Despite the fact that they were marketing themselves as a multi-billion dollar hedge fund they did not have the wherewithal to fund the deals they had solicited with legal on-shore resources. Their employees, limited partners, loan brokers and "the street" in general were not aware of the predicament they were in and they were willing to commit fraud on the court to conceal the situation from everyone.

In addition, DBZ was a predator lender and they were after the FCC licenses that were owned by The Watch. 47 U.S. Code § 310(b)(2), (3) and (4) prohibited BNLI from owning licenses as they were a foreign company and prohibited DBZ from owning licenses as it appears that Epstein's companies were offshore and represented over 20% of the DBZ equity. As it later became known, Epstein's felony sexual predator status is prohibited from FCC licensee ownership and FCC licensees are prohibited from laundering money which Epstein was using DBZ to do.

After becoming aware of the unethical and fraudulent accounting practices at DBZ, the limited partners voted Daniel Bernard Zwirn and his management team out in May 2009 and replaced Zwirn with Fortress. The information that has surfaced since then points to Epstein using DBZ to launder his funds from unknown sources to try to legitimize his holdings.

The main assets of RRI and then The Watch were FCC licenses to two radio stations in the Dallas/Ft. Worth Texas market, the fifth largest market in the country. It became apparent

and publicly known after Schum and RRI executed the Finance Agreement that the business model for DBZ was that of a predator lender and they were after the assets of RRI.

On December 28, 2018 Schum filed a motion under Federal Rules of Civil Procedure Rule 60(d)(3) claiming fraud on the court in the Bankruptcy Court that presided over the RRI bankruptcy seeking to reopen the bankruptcy case, disallow the claims for attorney fees paid to Schulte as well as interest and fees paid to HBZ. Schum asked for interest and penalties to be paid in addition to the damages. Schum's motion did not seek to have the reorganization plan revoked. Schum's motion was supported with a sworn affidavit and record evidence.

On February 20, 2019, a hearing was held in front of visiting judge Douglas Dodd. At the hearing, Judge Dodd confronted Schum with the possibility that Schum's motion was time barred which came as a surprise to Schum. The Bankruptcy Court entered the Memorandum Opinion on April 4, 2019 and entered the final Order on April 11, 2019 finding among others that BNLI was the only lender under the Financing Agreement and "Schum's claims are time barred."

Schum timely appealed the Bankruptcy Court decision to the United States District Court for the Northern District of Texas Dallas Division. The District Court ruled: "The bankruptcy court denied Appellant's Motion, finding his allegations regarding the domicile of BNLI were time-barred and insufficient under Federal Rules 60(b) and 60(d)." "Accordingly, its Order denying Appellant's Motion to reopen the RRI bankruptcy proceeding under Bankruptcy Rule 9024 and Federal Rule 60 is AFFIRMED." The District Court also found BNLI to be the only lender for the financing agreement.

Schum timely appealed the District Court decision to the Fifth Circuit Court of Appeals. Schulte appeared in the Bankruptcy Court and the District Court pro hac vice and filed Joinder

Agreement's with Fortress's filings. In the Fifth Circuit proceeding, Schulte appeared representing themselves and Lawrence S. Goldberg. Schulte and Fortress filed separate appellee briefs at the Fifth Circuit. Schulte and Fortress conceded and did not challenge several critical points in their briefs including:

1. The record shows Schum made a contract requirement that a domestic lender be used and that requirement was absolutely not negotiable.
2. The record shows Schulte was the only source of information regarding the Financing Agreement for Schum, the attorneys for RRI and The Watch and for Judge Houser.
3. The record shows BNLI was ultimately the only lender for the Financing Agreement.
4. The record shows BNLI was not a domestic company but was a foreign company domiciled in the Cayman Islands
5. The record shows Schulte purposely never disclosed the domicile of BNLI.
6. The record shows companies owned by Jeffrey Epstein were major limited partners in DBZ and are domiciled outside the U.S. making them foreign companies.

The Fifth Circuit stated "the relief that Schum seeks requires a revocation of the RRI confirmation order." As Schum explained earlier, he did not seek to revoke the confirmation order. The Fifth Circuit also ruled "The district court properly affirmed the bankruptcy court's ruling that Schum's motion was time-barred under Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60." "Schum alleges that he discovered the information giving rise to his claims in 2012, at least six years before he filed his motion in bankruptcy court. This precludes relief under Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b) and (d)."

Schum timely filed this Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit opinion creates a split among the Courts of Appeals on whether a claim brought under Federal Rules of Civil Procedure Rule 60(d)(3) as a result of fraud on the court by attorneys who are sworn officers of the court can be time-barred.

The undisputed evidence in the underlying case shows that Schulte did not just participate in a fraud but actually were the architects of the fraud on the court. Schulte conceded in their reply brief at the Fifth Circuit that they were the author of the Finance Agreement and were the sole source of information regarding the identity of the lender to the Bankruptcy Court, Schum and the attorneys for RRI and The Watch. Schulte conceded they had knowledge that BNLI was the sole lender and they were domiciled in the Cayman Islands. Schulte conceded they purposely did not disclose the domicile of BNLI to Judge Houser, to Schum or to the attorneys representing RRI and The Watch. Schulte conceded that there was a contractual obligation in the Finance Agreement that required disclosure of the foreign lender prior to closing of the loan and that disclosure was never made.

The record evidence shows Schulte had a long term relationship with HBZ as they were the firm that drafted the HBZ partnership agreement in 2003, the RRI DIP loan and the RRI Finance Agreement documents in 2003-2004 and were involved with an internal investigation of DBZ when the financial problems were exposed in 2008.

The undisputed evidence before the courts below reveals how Schum discovered the fraud, how he disclosed the discovery to the attorneys for Fortress at V&E, how he disclosed the discovery to the staff at the FCC and finally how Schum followed proper procedure to file the Motion in Bankruptcy Court to address the fraud on the court accompanied by evidence and

sworn affidavit. It also reveals that Schum was advised by the attorneys for The Watch and the equity holders of The Watch to wait until the FCC proceedings were completed before bringing the fraud on the court to the attention of the bankruptcy court. The FCC proceedings were completed in the spring of 2018.

The Fifth Circuit's holding in this matter is contrary to the view of a majority of circuits that considered the issue. The other circuits view is that a motion brought under Federal Rules of Civil Procedure Rule 60(d)(3) for fraud on the court is not time-barred. The other circuits almost always cite Hazel-Atlas in arriving at their decisions.

1. The Hazel-Atlas Glass Co. v Hartford-Empire Co. decision sets forth a clear interpretation of the time-bar issue in a case that involved fraud on the court in a District Court, the Third Circuit Court of Appeals and the U.S. Patent Office. This Court described the multi-level fraud here:

"Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. 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. Cf. Marshall v. Holmes, supra. Proof of the scheme, and of its complete success up to date, is conclusive. Cf. United States v. Throckmorton, supra." *Hazel-Atlas Glass Co. v Hartford-Empire Co.,322 U.S. 238, 64 S.Ct. 997 (1944).*

and here:

> "From there the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals. Had the District Court learned of the fraud on the Patent Office at the original infringement trial, it would have been warranted in dismissing Hartford's case." Id.

Having established the nature of the fraud this Court addressed the time element of the action:

> "We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered." Id.

Since the 1944 Hazel-Atlas decision the other circuit courts have addressed the time-bar issue of fraud on the court actions as outlined in Moore's Federal Practice:

> **2d Circuit** See Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir. 1972) ("no time limit is specified" for fraud on court claims).
> **3d Circuit** See Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514. 522 (3d Cir. 1948) ("when a controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry; and the general rule that courts do not set aside their judgments after the term at which they were rendered has no application").
> **9th Circuit** See, e.g., Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 640 n.10 (N.D. Cal. 1978), aff'd per curiam, 645 F.2d 699, 700 (9th Cir. 1981) ("There is no statute of limitations for fraud on the court").
> **10th Circuit** See, e.g., Bulloch v. United States. 721 F.2d 713, 719 (10th Cir. 1983) ("Rule 60(b) does not impose a time limit on motions asserting fraud on the court"); Wilkin v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968) (although motion under Fed. R. Civ. P. 60(b)(2) was untimely, appellate court remanded matter for reconsideration on theory of fraud on court, for which there is no time limit).
> **D.C. Circuit** See, e.g., Lockwood v. Bowles. 46 F.R.D. 625, 634 (D.D.C. 1969) ("the law favors discovery and correction of corruption of the judicial process even more that it requires an end to lawsuits").

None of the Courts below have cited a case to show precedent for their finding that Schum's motion brought under Federal Rules of Civil Procedure Rule 60(d)(3) for fraud on the court is time-barred.

2. The courts below including the Fifth Circuit were troubled by the amount of time Schum took to reveal the fraud on the court to the Bankruptcy Court.

> "Schum alleges that he discovered the information giving rise to his claims in 2012, at least six years before he filed his motion in bankruptcy court. This precludes relief under Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b) and (d)."

Schum is acting pro se in this case. Michael Barragan, the attorney that was representing Schum in actions regarding this case died on April 24, 2011, 18 months prior to Schum's discovery of the fraud. Mr. Barragan was a sole practitioner and did not have an attorney to carry on with his practice. Schum sought to have an attorney represent him and as a matter of fact found out about the existence of Federal Rule of Civil Procedure 60(d) from an attorney in

another city that was unable to represent Schum. Another law firm that claims experience in legal malpractice declined Schum's case saying "I see they were not your counsel. You cannot sue them if they were not representing you."

At the hearing in the Bankruptcy Court before visiting Judge Dodd from Louisiana, the following exchange took place:

> MR. SCHUM: Good. Thank you. As you know, I am pro se in this case.
> THE COURT: Right.
> MR. SCHUM: And --
> THE COURT: And you know, though, despite the fact that you're pro se, you're held to the standards of an attorney, right?

Schum had to research the law and at the same time figure out what happened at DBZ and why they and their attorneys at Schulte and V&E were so deceitful in their dealings with the courts. The Courts below have ignored Schulte's contractual obligation to disclose the relevant information about the domicile of BNLI. In addition, the Courts did not hold the attorneys accountable for the ethical obligation of Schulte due to their oath as attorneys and the code of ethics for all attorneys and their legal responsibility to not be involved with fraud on the court. It is a result of Schulte's and V&E's actions that this fraud has lasted this long. The Courts want to hold Schum responsible for their unethical actions.

Instead of Schum being held to the standards of an attorney, the Courts have allowed the fraud to continue, ignored Schulte's responsibilities and held Schum to a standard that is unprecedented and undefined.

This Court addressed the time and effort defense in Hazel-Atlas:

> "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. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be

condoned for that reason alone." *Hazel-Atlas Glass Co. v Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944).*

The Courts below did not like Schum's "delay" in bringing the Federal Rules of Civil Procedure Rule 60(d)(3) motion for fraud on the court before the Bankruptcy Court and wrongfully ruled the motion was time-barred. At the same time, the District court, at the request of V&E, ruled Schum to be a vexatious litigant for filing the motion in the Bankruptcy Court. In summary, Schum was wrong for not filing the motion earlier and wrong for filing the motion at all. Time-barring Schum's motion conflicts with this court's precedent as well as that of the other circuits.

B. The Decision Below is wrong.

In its opinion below, the Fifth Circuit ignored the well-established precedent of the other Circuit Courts and the Supreme Court. Under the doctrine of stare decisis, courts are expected to follow their own previous rulings and also the rulings from higher courts within the same court system. None of the Courts below site any precedent upon which they ruled Schum's 60(d)(3) motion for fraud on the court was time barred.

Clearly, taking into account the concessions made by Schulte (see above) the series of frauds on the court starting with the fraud on the court that Schulte designed and executed in the RRI bankruptcy that is before this court, demonstrates the required elements needed for a successful claim of fraud on the court. The record leaves no doubt that fraud on the court occurred.

> "Although the requirements for a successful claim of fraud on the court elude precise definition, several guiding principles emerge from the case law. **First, the fraud must be egregious.**"`Fraud upon the court' . . . embrace[s] 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, and relief should be denied in the absence of such conduct." *Synanon Church v. United States,* 579 F.Supp. 967, 974 (D.D.C.1984) (quoting 7 MOORE ET AL., FEDERAL PRACTICE ¶ 60.33 (1995)); *see also England v. Doyle,* 281 F.2d 304, 309 (9th

> Cir.1960) (fraud on the court requires "an unconscionable plan or scheme which is designed to improperly influence the court in its decision") (citing *Hazel-Atlas,* 322 U.S. 238, 64 S.Ct. 997). An "indispensable" element is that the fraud "prevented a party from presenting his case." *Reintjes,* 71 F.3d at 48 (citing *Chicago, R.I. & P. Ry. v. Callicotte,* 267 F. 799, 810 (8th Cir.1920)). **Second, the perpetrator of the fraud must possess a sufficient mental state.** One list of essential elements requires the fraudulent conduct to be "intentionally false, willfully blind to the truth, or in reckless disregard for the truth . . . ." *Demjanjuk v. Petrovsky,* 10 F.3d 338, 348 (6th Cir.1993); *cf. Sununu v. Philippine Airlines, Inc.,* 638 F.Supp.2d 35, 41 (D.D.C.2009) (listing knowledge of falsity and intent to deceive as elements of common law fraud). **Third, the extraordinary step of setting aside a judgment requires "clear and convincing" evidence of fraud on the court.** *Shepherd v. Am. Broad. Cos.,* 62 F.3d 1469, 1476-77 (D.C.Cir.1995)." *Bowie v. Maddox, 677 F. Supp. 2d 276, 278 (D.D.C. 2010).*

The record is very clear that Schum was not aware of the illegal foreign lender, BNLI, until the fall of 2012. Schum did everything necessary to prove to the courts below the fraud on the court was the result of Schulte's deception by fabricating evidence in the bankruptcy proceeding that began the unconscionable scheme which improperly influenced the courts' decisions in the (1) RRI bankruptcy, (2) The Watch bankruptcy, (3) the County Court proceeding against Schum resulting in the judgment and finally (4) at the FCC regarding the license transfers. The attorneys representing RRI and The Watch that participated in the bankruptcy proceeding advised Schum to finish with the FCC process prior to bringing his motion before the bankruptcy court. Schum did just that, a process that took from February 23, 2006 until May 29, 2018.

In its opinion below, the Fifth Circuit ignored the well-established precedent of the other Circuit Courts and the Supreme Court that fraud on the court claims are not time-barred. Instead, the Fifth Circuit applied time-bars from other rules that cannot be applied. The fact that fraud on the court is involved makes Federal Rules of Civil Procedure Rule 60(d)(3) take precedence over all other rules including U.S.C. §§ 350(b) or 502(j) or § 1144 as cited by the Fifth Circuit in seeking to time-bar Schum's motion.

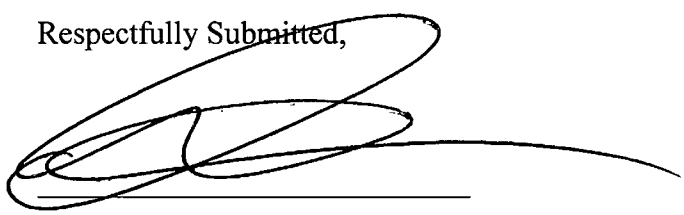
The courts' below ruling that Schum's fraud on the court motion is time-barred would have been rejected in the Second, Third, Ninth, Tenth and D.C. Circuits as well as historically by this Court. The vast majority of attorney s would not even consider risking their reputation, law license and career by fabricating evidence and filing false documents in the process of committing fraud on the court. As was obvious in the case at hand, after they saw how easy it was to commit fraud on the court in the RRI bankruptcy, the other attorneys were emboldened and thought nothing of carrying the fraud into other legal settings. As Schum is pro se, there are currently two attorneys with Schulte and three with V&E on this case. In the past there have been at least two others with Schulte and four others with V&E and none of the attorneys did what was required contractually, ethically or professionally.

Allowing this ruling to stand is not just wrong in the current case but sends the wrong message to attorneys and the courts. Allowing attorneys to commit fraud on the court corrupts the judicial process in a way that has been rejected by this Court and the other Circuit Courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



David A. Schum, Pro Se
4149 Lovers Lane, Apt. C
Dallas, Texas 75225
469-513-2177
Email: watchradio@aol.com

September 16, 2020