Federal Practice & Procedure

Federal Rules Of Civil Procedure

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Chapter 8. Judgment

Rule 60. Relief From Judgment Or Order

C. Relief Under Subdivision (b)

Link to Monthly Supplemental Service

§ 2862 Void Judgment

Primary Authority

Fed. R. Civ. P. 60

Forms

West's Federal Forms § § 4951 to 5010

Rule 60(b)(4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4).[FN1] Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. [FN2] Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

By the same token, there is no time limit on an attack on a judgment as void. [FN3] The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion. A void judgment cannot acquire validity because of laches on the part of the judgment debtor.[FN4]

State law may have some relevance in determining whether a judgment is void, [FN5] particularly if it goes beyond federal law and would strike down a judgment that federal law would permit. On the whole, however, the limits on the power of courts to enter valid judgments are federal constitutional limits, and the procedure for setting aside allegedly void judgments is wholly controlled by the rule, rather than by state law.[FN6] Although the rule requires a motion for relief from the judgment, it has been held that the court on its own motion may set aside a void judgment provided notice has been given of its contemplated action and the party adversely affected has been given an opportunity to be heard.[FN7]

A judgment is not void merely because it is erroneous.[FN8] **It is void only if the court that rendered it lacked jurisdiction of the subject matter, [FN9] or of the parties,[FN10] or if it acted in a manner inconsistent with due process of law.[FN11]**

It must be noted, however, that a court has jurisdiction to determine its own jurisdiction. Thus, if defendant has challenged the court's personal jurisdiction and this issue has been resolved against the defendant by a final judgment, that judgment is not void, but is binding on the issue of jurisdiction.[FN12] By the same token, a court's determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated and decided,[FN13] or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so.[FN14]

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[FN1] **No discretion**

Chambers v. Armontrout, C.A.8th, 1994, 16 F.3d 257, 260, **citing Wright & Miller.**

Honneus v. Donovan, C.A.1st, 1982, 691 F.2d 1, 2, **citing Wright & Miller.**

Hospital Mtg. Group, Inc. v. Parque Ind. Rio Canas, C.A.1st, 1981, 653 F.2d 54, 56, **citing Wright & Miller.**

Covington Indus. Inc. v. Resintex A.G., C.A.2d, 1980, 629 F.2d 730, 733, **citing Wright & Miller.**

Thos. P. Gonzalez Corp. v. Consejo Nacional, C.A.9th, 1980, 614 F.2d 1247, 1256, **quoting Wright & Miller.**

V.T.A., Inc. v. Airco, Inc., C.A.10th, 1979, 597 F.2d 220, 224, **citing Wright & Miller.**

A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside. Jordon v. Gilligan, C.A.6th, 1974, 500 F.2d 701, certiorari denied 95 S.Ct. 1996, 421 U.S. 991, 44 L.Ed.2d 481.

Austin v. Smith, C.A.D.C.1962, 312 F.2d 337.

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

U.S. to Use of Combustion Sys. v. Eastern Metal Prods., D.C.N.C.1986, 112 F.R.D. 685, 686, **citing Wright & Miller.**

Knott v. Penno Leasing Co., D.C.Ohio 1979, 472 F.Supp. 564, 565, **citing Wright & Miller.**

Sagers v. Yellow Freight Sys., Inc., D.C.Ga.1975, 68 F.R.D. 686, 689, **citing Wright & Miller.**

Marquette Corp. v. Priester, D.C.S.C.1964, 234 F.Supp. 799.

M & K Welding, Inc. v. Leasing Partners, LLC, C.A.1st, 2004, 386 F.3d 361, 365, **citing Wright, Miller & Kane**.

A judgment on the merits that is entered after a plaintiff has filed a proper notice of dismissal is void and the court's refusal to vacate an unarguably void judgment is an abuse of discretion. Karak v. Bursaw Oil Corp., C.A.1st, 2002, 288 F.3d 15.

Carter v. Fenner, C.A.5th, 1998, 136 F.3d 1000, certiorari denied 119 S.Ct. 591, 525 U.S. 1041, 142 L.Ed.2d 534.

Office of the Child Advocate v. Lindgren, D.C.R.I.2004, 296 F.Supp.2d 178, 184, **citing Wright, Miller & Kane**.

Smalls v. Batista, D.C.N.Y.1998, 22 F.Supp.2d 230.

United Nat. Ins. Co. v. Waterfront N.Y. Realty Corp., D.C.N.Y.1995, 907 F.Supp. 663.

See also

O'Dea v. J.A.L., Inc., 1991, 569 N.E.2d 841, 846, 30 Mass.App.Ct. 449, **citing Wright & Miller.**

Kukuruza v. Kukuruza, App.1991, 818 P.2d 334, 335, 120 Idaho 630, **citing Wright & Miller.**

Workman v. Nagle Constr., Inc., Utah App.1990, 802 P.2d 749, 754, **citing Wright & Miller.**

State, Dep't of Social Servs. v. Vijil, Utah 1989, 784 P.2d 1130, 1132, **citing Wright & Miller.**

Matter of Adoption of T.N.F., Alaska 1989, 781 P.2d 973, 981, citing Wright & Miller, certiorari denied 110 S.Ct. 1480, 494 U.S. 1030, 108 L.Ed.2d 616.

In Interest of WM, Wyo.1989, 778 P.2d 1106, 1109, **citing Wright & Miller.**

Metivier v. McDonald's Corp., 1983, 449 N.E.2d 1241, 1243, 16 Mass.App.Ct. 916, **citing Wright & Miller.**

2-H Ranch Co. v. Simmons, Wyo.1983, 658 P.2d 68, 73, **citing Wright & Miller.**

In re Marriage of Stroud, Colo.1981, 631 P.2d 168, 170, **citing Wright & Miller.**

Schoffstall v. Failey, 1979, 389 N.E.2d 361, 363, 180 Ind.App. 528, **citing Wright & Miller.**

Aguchak v. Montgomery Ward Co., Alaska 1974, 520 P.2d 1352, 1354, **citing Wright & Miller.**

Chavez v. County of Valencia, 1974, 521 P.2d 1154, 1158, 86 N.M. 205, **quoting Wright & Miller.**

[FN2] **No meritorious defense**

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Schwarz v. Thomas, C.A.D.C.1955, 222 F.2d 305.

Wise v. Herzog, C.A.D.C.1940, 114 F.2d 486.

Grand Forks v. Mik-Lan Recreation Ass'n, N.D.1988, 421 N.W.2d 806, 810, **citing Wright & Miller.**

[FN3] **No time limit**

Precision Etchings & Findings, Inc. v. LGP Gem, Ltd., C.A.1st, 1992, 953 F.2d 21, 22, **citing Wright & Miller.**

Meadows v. Dominican Republic, C.A.9th, 1987, 817 F.2d 517, 521, **citing Wright & Miller.**

In re Center Wholesale, Inc., C.A.9th, 1985, 759 F.2d 1440, 1448, **citing Wright & Miller.**

Misco Leasing, Inc. v. Vaughn, C.A.10th, 1971, 450 F.2d 257.

Taft v. Donellan Jerome, Inc., C.A.7th, 1969, 407 F.2d 807.

Bookout v. Beck, C.A.9th, 1965, 354 F.2d 823.

Judgment was vacated as void 30 years after entry in Crosby v. Bradstreet Co., C.A.2d, 1963, 312 F.2d 483, certiorari denied 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412.

Austin v. Smith, C.A.D.C.1962, 312 F.2d 337.

Hawkeye Security Ins. Co. v. Porter, D.C.Ind.1982, 95 F.R.D. 417, 419, **citing Wright & Miller.**

Sagers v. Yellow Freight Sys., Inc., D.C.Ga.1975, 68 F.R.D. 686, 690, **citing Wright & Miller.**

U.S. v. Melichar, D.C.Wis.1972, 56 F.R.D. 49.

Ruddies v. Auburn Spark Plug Co., D.C.N.Y.1966, 261 F.Supp. 648.

Marquette Corp. v. Priester, D.C.S.C.1964, 234 F.Supp. 799. In this case the judgment was held not to be void, although relief was granted under Rule 60(b)(6).

Delay of 22 years did not bar relief. U.S. v. Williams, D.C.Ark.1952, 109 F.Supp. 456.

Motion by French company and its principal to vacate a default judgment entered against them, which was brought four months after the entry of judgment, was brought within a reasonable time, as required by the

rule governing motions to vacate, given the international status of the parties, the multiple and duplicative lawsuits filed by plaintiff, and the fact that the motion was based on a void judgment. Foster v. Arletty 3 Sarl, C.A.4th, 2002, 278 F.3d 409.

Robinson Engineering Co., Ltd. Pension Plan & Trust v. George, C.A.7th, 2000, 223 F.3d 445, 453, **citing Wright, Miller & Kane**.

Defendants' unreasonable delay in bringing a third motion for relief from judgment, as void for lack of personal jurisdiction, nearly one year after the entry of the default judgments and nearly nine months after filing a second set of such motions, did not alone provide a basis for denial, but the delay did lend support to the district court's rejection on the merits of the claim that the person served was not the resident agent for one of the two defendant corporations. Sea-Land Serv., Inc. v. Ceramica Europa II, Inc., C.A.1st, 1998, 160 F.3d 849, 852, **citing Wright, Miller & Kane**.

In an action by the state legislature's designated children's advocate against the state agency director, the fact that the director raised arguments in support of the motion to vacate the consent decree, governing the agency's night-to-night placement of children who were in its custody, on grounds of voidness, for the first time after nearly seventeen years of litigation, did not make the motion stale. Office of the Child Advocate v. Lindgren, D.C.R.I.2004, 296 F.Supp.2d 178, 184, **citing Wright, Miller & Kane**.

Shenouda v. Mehanna, D.C.N.J.2001, 203 F.R.D. 166.

Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L., D.C.N.Y.2000, 115 F.Supp.2d 367, 373 n. 22, **citing Wright, Miller & Kane**.

Two-year delay in seeking relief from an allegedly void judgment was not unreasonable. Parker, PPA v. Della Rocco, D.C.Conn.2000, 197 F.R.D. 214.

See also

Gatling v. Beach Palace, Inc., App.1988, 365 S.E.2d 736, 736, 294 S.C. 464, **citing Wright & Miller.**

Garcia v. Garcia, Utah 1986, 712 P.2d 288, 290, **citing Wright & Miller.**

Kennecorp Mortgage v. First Nat. Bank, Alaska 1984, 685 P.2d 1232, 1236, **quoting Wright & Miller.**

Solomon v. Atlantis Devel. Inc., 1984, 483 A.2d 253, 257, 145 Vt. 70, **citing Wright & Miller.**

Reynaud v. Koszela, R.I.1984, 473 A.2d 281, 285, **citing Wright & Miller.**

Bowers v. Board of Appeals of Marshfield, 1983, 448 N.E.2d 1293, 1295, 16 Mass.App.Ct. 29, **citing Wright & Miller.**

Barkley v. Toland, 1982, 646 P.2d 1124, 1127, 7 Kan.App.2d 625, **quoting Wright & Miller.**

Calasa v. Greenwell, 1981, 633 P.2d 553, 555, 2 Hawaii 395, **citing Wright & Miller.**

Eggl v. Fleetguard, Inc., N.D.1998, 583 N.W.2d 812, 814, **citing Wright, Miller & Kane**.

But see

A motion challenging the district court's subject-matter jurisdiction in the government's action to revoke the movant's citizenship and cancel his certificate of naturalization was not brought within a reasonable time after disposition, and his prayer for relief from the judgment therefore was untimely, even though his appeal was pending in the interim, and his collateral attack was filed within months of the disposition of that appeal, when the motion was filed approximately four years after the district court entered summary judgment; there was no rule that would have prevented him from filing his collateral motion while his appeal was pending. U.S. v. Dailide, C.A.6th, 2003, 316 F.3d 611, certiorari denied 124 S.Ct. 263, 540 U.S. 876, 157 L.Ed.2d 138.

[FN4] **Effect of laches**

Katter v. Arkansas Louisiana Gas Co., C.A.8th, 1985, 765 F.2d 730, 734, **citing Wright & Miller.**

Misco Leasing, Inc. v. Vaughn, C.A.10th, 1971, 450 F.2d 257.

Austin v. Smith, C.A.D.C.1962, 312 F.2d 337.

Von Dardel v. Union of Soviet Socialist Republics, D.C.D.C.1990, 736 F.Supp. 1, 5, **citing Wright & Miller.**

Ruddies v. Auburn Spark Plug Co., D.C.N.Y.1966, 261 F.Supp. 648.

Defendant's two-year delay in challenging the default judgment entered against it on personal-jurisdiction grounds did not bar it from raising the jurisdictional argument in the context of a motion for relief from judgment. Jackson v. Fie Corp., C.A.5th, 2002, 302 F.3d 515, 524 n. 23, **citing Wright, Miller & Kane.**

U.S. v. One Toshiba Color Television, C.A.3d, 2000, 213 F.3d 147.

See also

Neylan v. Vorwald, 1985, 368 N.W.2d 648, 656, 124 Wis.2d 85, **quoting Wright & Miller.**

Shields v. Pirkle Refrigerated Freightlines, 1979, 591 P.2d 1120, 1125, 181 Mont. 37, **quoting Wright & Miller.**

Citizens Nat. Bank of Grant County v. Harvey, 1976, 339 N.E.2d 604, 607, 167 Ind.App. 582, **citing Wright & Miller.**

[FN5] **Some relevance**

U.S. v. McDonald, D.C.Ill.1980, 86 F.R.D. 204, 207, **citing Wright & Miller.**

See Marquette Corp. v. Priester, D.C.S.C.1964, 234 F.Supp. 799, 802.

Compare

Under both Texas and federal law, only judgments that show a jurisdictional defect on the face of the record are classified as "void judgments" so as to be subject to collateral attack. Little v. Celebrezze, D.C.Tex.1966, 259 F.Supp. 9.

[FN6] **Federal procedure**

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Limit on relief

When defendant's property improperly was forfeited for his unpunishable conduct and defendant asked for more than merely setting the forfeiture decree aside and would have the district court order the government to reach into its coffer and return the money and property involved to him, such further affirmative relief could not be sustained under this rule providing that on a motion made within reasonable time the court may relieve a party from a void final judgment. U.S. v. One 1961 Red Chevrolet Impala Sedan, Serial No. 11837A-177369, C.A.5th, 1972, 457 F.2d 1353.

[FN7] **Act without motion**

McLearn v. Cowen & Co., C.A.2d, 1981, 660 F.2d 845, 849, **quoting Wright & Miller.**

U.S. v. Milana, D.C.Mich.1957, 148 F.Supp. 152.

[FN8] **Merely erroneous**

District court order granting state additional time to retry defendant, after expiration of time limit under initial order issued on remand from reversal of its denial of habeas relief was not void; the district court neither lacked jurisdiction of subject matter or over parties, nor acted in manner inconsistent with due process of law. Chambers v. Armontrout, C.A.8th, 1994, 16 F.3d 257.

Final judgment based on precedent that was later overturned was not a "void judgment" within rule providing for relief from judgment, when it was rendered by a court that had jurisdiction and did not act in a manner inconsistent with due process. Tomlin v. McDaniel, C.A.9th, 1989, 865 F.2d 209.

U.S. v. Holtzman, C.A.9th, 1985, 762 F.2d 720, 724, **quoting Wright & Miller.**

Cel-A-Pak v. California Agricultural Labor Relations Bd., C.A.9th, 1982, 680 F.2d 664, 668, citing Wright & Miller, certiorari denied 103 S.Ct. 491, 459 U.S. 1071, 74 L.Ed.2d 633.

For purposes of Rule 60(b)(4), bankruptcy court ex parte financing order was not "void," even though it was unauthorized insofar as it granted creditor additional security for prepetition debt in consideration for its entering into factoring agreement in making additional advances, in view of the fact that financing order was within perimeters of bankruptcy court's authority. In re Texlan Corp., C.A.2d, 1979, 596 F.2d 1092, 1099, **quoting Wright & Miller.**

A judgment is not void and is therefore not within this rule's ambit simply because it is erroneous, or is based upon precedent which is later deemed incorrect or unconstitutional. Marshall v. Board of Educ., Bergenfield, New Jersey, C.A.3d, 1978, 575 F.2d 417, 422, **citing Wright & Miller.**

Even if a judgment in an action for damages sustained as a result of a secondary boycott was defective because prejudgment interest was awarded, it was not void and the union was not entitled to relief from the operation of the judgment. Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers, Local No. 480, AFL-CIO, C.A.5th, 1972, 460 F.2d 105.

"A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect. In the interest of finality, the concept of void judgments is narrowly construed." Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645, 649.

Friedman v. Wilson Freight Forwarding Co., C.A.3d, 1963, 320 F.2d 244.

Failure of a complaint in a proceeding contesting mining claims to allege the facts of abandonment and the lack of supporting affidavits did not constitute defects that would render original judgments cancelling the mining claims void. Gabbs Exploration Co. v. Udall, C.A.D.C.1963, 315 F.2d 37, certiorari denied 84 S.Ct. 61, 375 U.S. 822, 11 L.Ed.2d 56.

An interlocutory judgment rendered for plaintiff in a patent-infringement action on the consent of the parties was not void, in the absence of service of process, on the ground that defendants' attorney who entered a notice of appearance for defendants and signed a stipulation consenting to judgment was not admitted to practice in the district court in which the judgment was rendered, notwithstanding the court rule that only an attorney of the court could enter appearances for parties or sign stipulations, especially when defendants did not appeal from the judgment or assert fraud or other grounds for setting the judgment aside and did not show prejudice to themselves from the fact that the attorney was not admitted to practice before the court. Schifrin v. Chenille Mfg. Co., C.C.A.2d, 1941, 117 F.2d 92, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

U.S. v. Manos, D.C.Ohio 1972, 56 F.R.D. 655 (default judgment not void even though court had erroneously proceeded under Rule 55(b)(1), rather than Rule 55(b)(2)).

Morgan v. Southern Farm Bureau Cas. Ins. Co., D.C.La.1967, 42 F.R.D. 25.

When diversity of citizenship existed between the corporate parties and the amount involved exceeded $3,000, in an action to enjoin the use of the name "Metropolitan" by defendant, the federal district court had jurisdiction of the action and the judgment rendered was not void, so that the judgment would not be set aside on the ground subsequently raised in defendant's motion that plaintiff failed to comply with the statute requiring a foreign corporation to obtain a certificate to do business in the state as a condition to the maintenance of an action in the state courts. Metropolitan Opera Ass'n v. Metropolitan Opera Ass'n of Chicago, D.C.Ill.1949, 86 F.Supp. 526.

Former employee's contention, that the magistrate judge incorrectly enforced a settlement agreement in the employee's discrimination suit against the former employer, failed to provide a basis for relief from judgment under the standards pertaining to a judgment that is void, or to any other reason justifying relief. Cromer v. Kraft Foods N. America, Inc., C.A.4th, 2004, 390 F.3d 812.

Alleged defects in a mortgage-foreclosure proceeding, such as the mortgagee's failure to name the junior lienholder as a party to the suit and its ostensible failure to give notice of the auction in strict accordance with Puerto Rico law, were merely technical in nature and did not evince any usurpation of power, such as might render the district court's order confirming the sale void and subject to attack at any time. Farm Credit Bank of Baltimore v. Ferrera-Goitia, C.A.1st, 2003, 316 F.3d 62.

Judgment forfeiting real property was not void even if it misidentified a parcel used in the distribution of narcotics and therefore was erroneous, as the identity of the parcel was not jurisdictional, but merely an element of the government's case; the judgment was not a legal nullity since the action was duly commenced, the court had jurisdiction over it, service was properly effected, and the government made a prima facie showing of probable cause. U.S. v. One Rural Lot No. 10,356, Etc., C.A.1st, 2001, 238 F.3d 76.

Even though the district court abused its discretion in dismissing the Federal Election Commission's action for failure to obtain local counsel, that dismissal did not violate due process, and thus the judgment of dismissal was not void; the court had made clear its intention to enforce the local rules strictly. Federal Election Comm'n v. Al Salvi for Senate Comm., C.A.7th, 2000, 205 F.3d 1015.

The district court had the power to dismiss an action against foreign defendants, with prejudice, for failure to prosecute, based on plaintiffs' failure to obtain service of the summons, so the judgment was not void, despite plaintiffs' claim that the action should have been dismissed without prejudice, under the rule setting a time limit for service. O'Rourke Bros. Inc. v. Nesbitt Burns, Inc., C.A.7th, 2000, 201 F.3d 948.

Eberhardt v. Integrated Design & Constr., Inc., C.A.4th, 1999, 167 F.3d 861, 871, **citing Wright, Miller & Kane**.

Thomas, Head & Greisen Employees Trust v. Buster, C.A.9th, 1996, 95 F.3d 1449, certiorari denied 117 S.Ct. 1247, 520 U.S. 1116, 137 L.Ed.2d 328.

Hoult v. Hoult, C.A.1st, 1995, 57 F.3d 1.

The fact that a party to a consent judgment lacked authority to consent does not void the judgment itself. U.S. v. Krilich, D.C.Ill.2001, 152 F.Supp.2d 983.

Defendants were not entitled to relief from judgment on the ground that the judgment was void, when defendants presented no cognizable argument why the judgment was void, other than the fact that the result did not go their way. Virgin Islands Building Specialties, Inc. v. Buccaneer Mall Assocs., Inc., D.C.Virgin Islands 2000, 197 F.R.D. 256.

The existence of a meritorious defense, if established by defendant against whom a default judgment had been entered, would not render the judgment void, when the court that entered the judgment had jurisdiction over the subject matter and parties and had acted in a manner consistent with due process. U.S. v. Assad, D.C.N.C.1998, 179 F.R.D. 170.

Majestic Inc. v. Berry, Minn.App.1999, 593 N.W.2d 251, 257, **citing Wright, Miller & Kane**.

Matter of Estate of Davis, S.D.1994, 524 N.W.2d 125, 128, **citing Wright, Miller & Kane**.

See also

Hendricks v. A.J. Ross Co., 1989, 556 A.2d 1267, 1270, 232 N.J.Super. 243, **quoting Wright & Miller.**

Matter of Estate of McLaughlin, Utah App.1988, 754 P.2d 679, 682, **citing Wright & Miller.**

Brown's Tie & Lumber Co. v. Kirk, App.1985, 710 P.2d 18, 20, 109 Idaho 589, **citing Wright & Miller.**

Magnavox Co. of Tenn. v. Boles & Hite Constr., Tenn.App.1979, 583 S.W.2d 611, 613, **quoting Wright & Miller.**

Incompetency

Incompetency of a party for whom a guardian should have been appointed is correctible on appeal and does not make a judgment void. Scott v. U.S., C.A.5th, 1951, 190 F.2d 134.

Fernow v. Gubser, C.C.A.10th, 1943, 136 F.2d 971.

Beckley Nat. Bank v. Boone, C.C.A.4th, 1940, 115 F.2d 513, certiorari denied 61 S.Ct. 835, 313 U.S. 558, 85 L.Ed. 1519.

Quinn v. Hook, D.C.Pa.1964, 231 F.Supp. 718, affirmed per curiam C.A.3d, 1965, 341 F.2d 920.

Compare

In an action to set aside a default judgment based upon a New York judgment and an arbitration award, in the absence of any proof or indication of the invalidity of the arbitration award, a motion to vacate the judgment in the federal court was denied even if the New York judgment was void. M. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co., D.C.Pa.1951, 11 F.R.D. 172.

[FN9] **Subject-matter jurisdiction**

If there was no subject-matter jurisdiction over the taxpayers' counterclaim in a suit to recover tax deficiencies, then the default judgment entered against the government was void and had to be vacated, and the taxpayers' counterclaim had to be dismissed. U.S. v. Forma, C.A.2d, 1994, 42 F.3d 759.

Default judgment entered on debt that had been discharged in bankruptcy was void and one-year statute of limitations was not applicable. Briley v. Hidalgo, C.A.5th, 1993, 981 F.2d 246, 249, **quoting Wright & Miller.**

Plaintiff's contention that, because Jones Act was adopted for benefit of domestic corporations, it could not be used for benefit of foreign corporations, involved not question of jurisdiction, but rephrasing of argument that district court improperly applied Jones Act to plaintiff, and thus plaintiff could not invoke motion for relief from judgment on basis that district court's judgment was void for lack of jurisdiction. Hill v. McDermott, Inc., C.A.5th, 1987, 827 F.2d 1040, certiorari denied 108 S.Ct. 1052, 484 U.S. 1075, 98 L.Ed.2d 1014.

Watts v. Pinckney, C.A.9th, 1985, 752 F.2d 406, 409, **quoting Wright & Miller.**

In view of judicial ruling pursuant to which default judgment against cross defendant was held to be void for want of jurisdiction, it was abuse of discretion for trial court to refuse to set aside such default judgment. SEC v. Seaboard Corp., C.A.9th, 1982, 666 F.2d 414.

When a Taiwan steel company was "instrumentality" of Republic of China and entitled to protections of Foreign Sovereign Immunities Act, the Court lacked subject-matter jurisdiction over the action and judgment is void. KAO HWA Shipping Co., S.A. v. China Steel Corp., D.C.N.Y.1993, 816 F.Supp. 910, 913, **citing Wright & Miller.**

Crumpacker v. Crumpacker, D.C.Ind.1981, 516 F.Supp. 292, 295, **citing Wright & Miller.**

Bryant, Inc. v. Walters, Miss.1986, 493 So.2d 933, 938, **citing Wright & Miller.**

Note, Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 1977, 87 Yale L.J. 164.

In the context of a motion for relief from judgment as void, a judgment may be declared void for want of jurisdiction only when the court plainly usurped jurisdiction, or when there is a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction. Thus, the bankruptcy court arguably had subject-matter jurisdiction to enter judgment permanently enjoining the creditor of a Chapter 87 corporate debtor from pursuing derivative civil claims against the owners of the debtor, as part of a settlement of an adversary proceeding brought by the trustee against the owners for breach of fiduciary duty, warranting the denial of the creditor's motion to vacate the judgment as void; the injunction was arguably at the heart of the administration of the bankrupt estate, since the owners contributed to the estate as part of the settlement, the creditor consented to jurisdiction by filing a proof of claim against the debtor, the adversary proceeding related directly to property of the estate, and the claims against the owners were based on alter-ego and derivative-liability theories. Central Vermont Pub. Serv. Corp. v. Herbert, C.A.2d, 2003, 341 F.3d 186.

Dispute as to whether a lease had been validly assigned and was included in the bankruptcy estate of the corporate debtor was not one over which the bankruptcy court's alleged lack of subject-matter jurisdiction was so glaring as to permit the litigant to obtain relief from the bankruptcy-court order dismissing the dispute, almost one year after the dismissal order was entered, on the theory that the dismissal order was void based on the court's lack of jurisdiction to enter it; relief was especially inappropriate when the litigant had failed to appeal. In re G.A.D., Inc., C.A.6th, 2003, 340 F.3d 331.

Judgment for plaintiff in a patent-infringement action was void, thus warranting relief from judgment, when a case or controversy did not exist throughout the course of the proceedings due to plaintiff's assignment of the patent to a subsidiary in exchange for status as a nonexclusive licensee, which rendered the case no longer justiciable; the court clearly exceeded the scope of its authority when it rendered judgment, and the issue of subject-matter jurisdiction was not litigated before judgment was granted because plaintiff concealed the facts that gave rise to the issue. Schreiber Foods, Inc. v. Beatrice Cheese, Inc., D.C.Wis.2004, 305 F.Supp.2d 939, order affirmed, but reversed in part on other grounds C.A.Fed.2005, 402 F.3d 1198.

Morgan Equip. Co. v. Novokrivorogsky State Ore Mining & Processing Enterprise, D.C.Cal.1998, 57 F.Supp.2d 863, 868, **citing Wright, Miller & Kane**.

Erroneous subjection to double jeopardy did not constitute lack of jurisdiction or denial of due process in claimant's forfeiture proceeding, and therefore claimant was not entitled to relief from final judgment of forfeiture under rule permitting relief from void judgments. U.S. v. $4,299.32 U.S. Currency, D.C.Wash.1996, 922 F.Supp. 430, 433, **citing Wright, Miller & Kane.**

United Nat. Ins. Co. v. Waterfront N.Y. Realty Corp., D.C.N.Y.1995, 907 F.Supp. 663.

Compare

The explicit adjudication in order granting defendant's motion to dismiss that diversity of citizenship and hence subject-matter jurisdiction were lacking precluded any inference that a determination of existence of jurisdiction was a component of judgment of dismissal with prejudice, and it followed from the adjudication of lack of jurisdiction that purported adjudication of merits in judgment of dismissal was beyond power to court, a "legal nullity" that may be vacated by court which rendered it at any time. Pacurar v. Hernly, C.A.7th, 1979, 611 F.2d 179.

Although the absence of subject matter jurisdiction may make a judgment void, the total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645.

Challenge to the district court's jurisdiction that is raised via a motion to set aside a judgment as void can be sustained only when there is a clear usurpation of power or a total want of jurisdiction. Callon Petroleum Co. v. Frontier Ins. Co., C.A.5th, 2003, 351 F.3d 204.

For a judgment to be void due to lack of subject-matter jurisdiction, there must be no arguable basis on which the federal court could have rested a finding that it had jurisdiction; an erroneous interpretation of a jurisdictional statute does not render the underlying judgment void. Gschwind v. Cessna Aircraft Co., C.A.10th, 2000, 232 F.3d 1342, certiorari denied 121 S.Ct. 2520, 533 U.S. 915, 150 L.Ed.2d 693.

But compare

Consent decree was not void for want of jurisdiction, even if class was overly broad and contained some members who lacked standing, when at least some members had standing and there was no question that the court had jurisdiction to order relief encompassed in the consent decree; any error in entering the decree that expanded class beyond original certification was not "plain usurpation of power" of type necessary to find judgment void. R.C. v. Nachman, D.C.Ala.1997, 969 F.Supp. 682.

[FN10] **Personal jurisdiction**

When Delaware successor to Missouri corporation was not properly served with process, Minnesota federal district court lacked jurisdiction over Delaware corporation and default judgment against it was void and must be vacated. Printed Media Servs., Inc. v. Solna Web, Inc., C.A.8th, 1993, 11 F.3d 838.

When district court dismissed plaintiff's case during pendency of defendant's interlocutory appeal though divested of jurisdiction, judgment was void for lack of jurisdiction. Williams v. Brooks, C.A.5th, 1993, 996 F.2d 728, 730, **citing Wright & Miller.**

Judgment is void, so that party is entitled to relief from judgment on that ground, when the requirements for effective service have not been satisfied, except when defendant has waived insufficiency of service. Combs v. Nick Garin Trucking, C.A.D.C.1987, 825 F.2d 437.

A default judgment entered when there has been no proper service of a complaint is, a fortiori, void, and should be set aside. Gold Kist, Inc. v. Laurinburg Oil Co., C.A.3d, 1985, 756 F.2d 14.

Because the district court did not have personal jurisdiction over defendant, a Costa Rican entity, and the default judgment entered against defendant was therefore void, the district court had a nondiscretionary

duty to grant relief from the judgment. Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, C.A.9th, 1980, 614 F.2d 1247.

In the Matter of Penco Corp., C.A.4th, 1972, 465 F.2d 693, 694 n. 1.

Misco Leasing, Inc. v. Vaughn, C.A.10th, 1971, 450 F.2d 257.

Even though a signed return showing service by the marshal is prima facie evidence of valid service, a party may still have his day in court to prove otherwise. Taft v. Donellan Jerome, Inc., C.A.7th, 1969, 407 F.2d 807.

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Jones v. Watts, C.C.A.5th, 1944, 142 F.2d 575, certiorari denied 65 S.Ct. 310, 323 U.S. 787, 89 L.Ed. 628.

Despite defendant's knowing and willful ignoring of albeit technically defective service, default judgment would be vacated, since judgment was void for want of in personam jurisdiction; however, since defendant's willful conduct forced plaintiffs to seek default judgment, including preparation of pleadings and appearance at hearings, defendant would be required to bear costs incurred by plaintiffs with respect thereto. Leab v. Streit, D.C.N.Y.1984, 584 F.Supp. 748.

Rockwell Int'l Corp. v. KND Corp., D.C.Tex.1979, 83 F.R.D. 556, 559, **citing Wright & Miller.**

DiCesare-Engler Productions, Inc. v. Mainman Ltd., D.C.Pa.1979, 81 F.R.D. 703, 704, **citing Wright & Miller.**

Movants were not barred from applying for vacatur of a void contempt order until they complied with the direction of the court of appeals to post security for fines for contempt, nor did they waive their right to a determination of jurisdiction by the failure to post bond on appeal when the orders were in fact void for lack of jurisdiction over person of the movants and over the subject matter. In re Stern, D.C.N.Y.1964, 235 F.Supp. 680.

When a judgment obtained in a Florida federal district court had been registered in a Pennsylvania district court and defendants, who were residents of that state, moved to be relieved from the effects of the judgment on the ground that the Florida court had no jurisdiction in that defendants were not properly served with process, the motion would not be dismissed but the action would be deferred until additional information had been submitted when there was nothing in the record to show how the Florida court obtained jurisdiction or what kind of proceedings were used to obtain the judgment. Whitehouse v. Rosenbluth Bros., D.C.Pa.1962, 32 F.R.D. 247.

U.S. v. Milana, D.C.Mich.1957, 148 F.Supp. 152.

Seventh Wonder v. Southbound Records, Inc., Ala.1978, 364 So.2d 1173, 1174, **citing Wright & Miller.**

Balchen v. Balchen, Alaska 1977, 566 P.2d 1324, 1326, **citing Wright & Miller.**

No exception applied to warrant consideration of defendant's waived claim that the final judgment was void for lack of proper service of process; there was no miscarriage of justice, defendant had an opportunity to raise the objection, no substantial interests of justice were raised, the proper resolution of the issue was not beyond doubt, and there was no issue of transcending public importance. In re: Worldwide Web Systems, Inc., C.A.11th, 2003, 328 F.3d 1291.

Firearms manufacturer that knowingly allowed a default judgment to be entered against it in a products-liability action, so as to be barred based on the preclusive effect of that judgment from later asserting that it was not the manufacturer of the firearm that injured plaintiff for the purpose of contesting the judgment on the merits, was not barred from raising the question whether it was in fact the gun's manufacturer for the purpose of disputing its minimum contacts with the forum, and of challenging the in-personam jurisdiction of the district court; judicially derived rules of preclusion had to yield to the command of Rule 60(b)(4) authorizing the court to relieve a party from a final judgment on the ground that the judgment is void. Jackson v. Fie Corp., C.A.5th, 2002, 302 F.3d 515.

Default judgment entered against defendant was void when plaintiff did not properly serve defendant. Federal Equipment Corp. v. Puma Industrial Co., D.C.Ill.1998, 182 F.R.D. 565.

Compare

A default judgment could not be reversed on grounds that defendant never was served with process when defendant failed to offer any evidence rebutting the process server's affidavit indicating that process was served. Mobern Elec. Corp. v. Walsh, D.C.D.C.2000, 197 F.R.D. 196.

See generally

Comment, Allocating the Burden of Proof in Rule 60(b)(4) Motions to Vacate a Default Judgment for Lack of Jurisdiction, 2001, 68 U.Chi.L.Rev. 521.

[FN11] **Due process**

Union Switch & Signal v. Local 610, C.A.3d, 1990, 900 F.2d 608, 612, **quoting Wright & Miller.**

Matter of Whitney-Forbes, Inc., C.A.7th, 1985, 770 F.2d 692, 696, **citing Wright & Miller.**

In re Center Wholesale, Inc., C.A.9th, 1985, 759 F.2d 1440, 1448, **citing Wright & Miller.**

Watts v. Pinckney, C.A.9th, 1985, 752 F.2d 406, 409, **quoting Wright & Miller.**

Williams v. New Orleans Public Serv., Inc., C.A.5th, 1984, 728 F.2d 730, 735, **citing Wright & Miller.**

Simer v. Rios, C.A.7th, 1981, 661 F.2d 655, 663, citing Wright & Miller, certiorari denied 102 S.Ct. 1773, 456 U.S. 917, 72 L.Ed.2d 177.

Margoles v. Johns, C.A.7th, 1981, 660 F.2d 291, 295, quoting Wright & Miller, certiorari denied 102 S.Ct. 1256, 455 U.S. 909, 71 L.Ed.2d 447.

V.T.A., Inc. v. Airco, Inc., C.A.10th, 1979, 597 F.2d 220, 225, **citing Wright & Miller.**

Within this rule authorizing relief from a judgment which is void, a judgment is not called "void" merely because it is erroneous, but only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process. In re Four Seasons Secs. Laws Litigation,

C.A.10th, 1974, 502 F.2d 834, 842, citing Wright & Miller, certiorari denied 95 S.Ct. 516, 419 U.S. 1034, 42 L.Ed.2d 309.

District court did not err in vacating its prior order of dismissal, which it found to be void because, under the circumstances of the case, the dismissal was tantamount to a denial of due process of law. Lohman v. General Am. Life Ins. Co., C.A.8th, 1973, 478 F.2d 719, certiorari denied 94 S.Ct. 162, 414 U.S. 857, 38 L.Ed.2d 107.

Judgment enjoining the publication of statements about certain persons is an unconstitutional prior restraint on speech, which will be vacated as void even though the parties had agreed to its entry. Crosby v. Bradstreet Co., C.A.2d, 1963, 312 F.2d 483, certiorari denied 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412.

A motion to have an adjudication of insanity vacated was not mooted by restoration and release order. In re Helman, C.A.D.C.1961, 288 F.2d 159.

On defendant's motion under Rule 60(b)(4) to vacate a judgment adverse to him in a 28 U.S.C.A. § 2255 proceeding, the failure to consider defendant's contention that the judgment was void for denial of due process was error. Winhoven v. U.S., C.A.9th, 1952, 201 F.2d 174.

Bass v. Hoagland, C.A.5th, 1949, 172 F.2d 205, certiorari denied 70 S.Ct. 57, 338 U.S. 816, 94 L.Ed. 494, noted 1950, 59 Yale L.J. 345, and 1949, 62 Harv.L.Rev. 1400.

O'Brien v. National Property Analysts Partners, D.C.N.Y.1990, 739 F.Supp. 896, 900, **citing Wright & Miller.**

Glasgow, Inc. v. Noetzel, D.C.W.Va.1983, 556 F.Supp. 595, 599, **citing Wright & Miller.**

Sonus Corp. v. Matsushita Elec. Indus. Co., D.C.Mass.1974, 61 F.R.D. 644.

Joaquin v. Joaquin, 1985, 698 P.2d 298, 303, 5 Haw.App. 435, **citing Wright & Miller.**

Aguchak v. Montgomery Ward Co., Alaska 1974, 520 P.2d 1352, 1354, **citing Wright & Miller.**

The district court that dismissed a putative class action brought against the county by former youth-program participants who were allegedly sexually assaulted during the program should have given notice of the settlement and dismissal to the putative class members, and the group of putative class members were thus entitled to relief from a void judgment, in view of the extensive publicity devoted to the abuse and resulting lawsuits, presumably leading the putative class members to believe their rights were adequately represented, and the district court's faulty assumption that not many program participants would come forward with allegations of abuse. Doe v. Lexington-Fayette Urban County Gov't, C.A.6th, 2005, 407 F.3d 755.

When an incarcerated claimant received constitutionally inadequate notice of judicial forfeiture proceedings, the judgment was void, and the government could not assert the doctrine of laches as a defense to the claimant's motion for relief from judgment, but the government could allege laches if the claimant subsequently sought remedies of return of the property or its cash value. U.S. v. One Toshiba Color Television, C.A.3d, 2000, 213 F.3d 147.

Order dismissing ERISA action because plan participant failed to appear at a trial of which he never had notice, due exclusively to courthouse errors, and his alleged failure to examine the court file during the five-month period following his submission of pretrial materials, denied him due process and thus was void; the participant had vigorously prosecuted his case and from his perspective was simply awaiting a

trial date. Grun v. Pneumo Abex Corp., C.A.7th, 1998, 163 F.3d 411, certiorari denied 119 S.Ct. 1496, 526 U.S. 1087, 143 L.Ed.2d 651.

Because the district court had no authority to enter a judgment of forfeiture when the complaint was filed more than 60 days after filing of a claim with respect to the vehicle seized for drug-related offense, the default judgment was void and should have been vacated. U.S. v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply, C.A.7th, 1995, 55 F.3d 1311, 1316, **citing Wright & Miller.**

District court's entry of order awarding attorney fees under Equal Access to Justice Act (EAJA) was not consistent with due process and, thus, relief was mandatory under rule providing for relief from void judgments; Secretary of Department of Health and Human Services was not given any notice that her EAJA liability, which had already been resolved by stipulated order, would be redetermined on plaintiff's second motion for fees and, given plaintiff's express reliance on statute under which fees were paid out of plaintiff's social security benefits, had no reason to anticipate that development and, thus, did not oppose motion. Orner v. Shalala, C.A.10th, 1994, 30 F.3d 1307.

A default judgment entered against a defendant is void if the plaintiff did not properly serve defendant. Thus, even assuming that the foreign corporation was doing business in Kansas without authority and therefore was amenable to service via the Kansas Secretary of State, the attempted service on the corporation by sending a summons and complaint to the Secretary of State was invalid, when the Secretary did not mail the summons and complaint to the corporation's registered agent at the address provided by the corporation, and instead mailed the summons and complaint to a different address; due process requires that the service of process by reasonably calculated to provide the defendant with actual notice of the suit and an opportunity to be heard. Howard v. Jenny's Country Kitchen, Inc., D.C.Kan.2004, 223 F.R.D. 559.

Compare

Settlement judgment in forfeiture proceeding was not void on theory that claimant had been deprived of due process when he decided to forego procedures afforded to protect his right to due process after weighing the risks and benefits of further litigation. Schwartz v. U.S., C.A.4th, 1992, 976 F.2d 213, 217, citing Wright & Miller, certiorari denied 113 S.Ct. 1280; , U.S. , 122 L.Ed.2d 673.

Government's failure to send notice of deficiency and failure to give taxpayer notice of application for an entry of default judgment on deficiency assessment did not render default judgment void for purpose of rule relating to relief from judgment. U.S. v. Martin, D.C.N.Y.1975, 395 F.Supp. 954.

Defendant in an obscenity prosecution and parallel civil action under the Racketeer Influenced and Corrupt Organizations Act knowingly and voluntarily waived his First Amendment rights in connection with the entry of a consent decree permanently enjoining him from involvement with the production, sale, or distribution of any sexually explicit materials, and thus the decree was not "void" within the meaning of Rule 60(b)(4), when the district court established in open court that defendant had discussed the decree with his attorneys and that he understood it, and defendant never contended that he did not actually understand the decree. U.S. v. Berke, C.A.9th, 1999, 170 F.3d 882.

Consent judgment issued in federal wrongful death action, brought by mother against city on behalf of minor son whose father was killed by police officer, was rendered void by mother's failure to comply with Louisiana statute requiring her to obtain state court approval prior to confecting settlement of claim by minor. Carter v. Fenner, C.A.5th, 1998, 136 F.3d 1000, certiorari denied 119 S.Ct. 591, 525 U.S. 1041, 142 L.Ed.2d 534.

District court's reciprocal disbarment of an attorney based on disbarment by the court of the state of New York did not violate due process; the attorney pleaded guilty to a felony in state court, state law mandated

disbarment on conviction of a felony, the attorney surrendered his state attorney license pursuant to the plea agreement, and further proceedings in the district court would have been pointless, since the attorney conceded the validity of the state felony conviction. In the Matter of Tidwell, D.C.N.Y.2000, 139 F.Supp.2d 343.

Civil plaintiff was not deprived of due process, and thus was not entitled to relief from judgment, though the court did not provide findings of fact and conclusions of law to support its judgment on two claims; the court afforded plaintiff multiple opportunities to raise the claims. Molinary v. Powell Mt. Coal Co., D.C.Va.1999, 76 F.Supp.2d 695.

Employer merely raised an issue of fact as to whether he received notice of the employee's motion for summary judgment in an FLSA action, and thus, the judgment was not void for purposes of the employer's motion to set aside the judgment, when the employee certified that he had served the motion on the employer at two different addresses. Herman v. Miller, D.C.Ill.1999, 63 F.Supp.2d 918.

Corporate defendant was adequately notified of motion for judgment by default, precluding relief from default judgment on grounds of lack of notice, when plaintiff mailed motion for default judgment by first-class mail, postage prepaid, to defendant's former address. Hewlett-Packard Puerto Rico v. Thomas Indus., Inc., D.C.Puerto Rico 1997, 174 F.R.D. 6.

[FN12] **Personal jurisdiction resolved**

American Sur. Co. v. Baldwin, 1932, 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231.

Baldwin v. Iowa State Traveling Men's Ass'n, 1931, 51 S.Ct. 517, 283 U.S. 522, 75 L.Ed. 1244.

Restatement Second of Judgments, 1982, § 10.

See also

Springfield Credit Union v. Johnson, 1979, 599 P.2d 772, 775, 123 Ariz. 319, **quoting Wright & Miller.**

[FN13] **Subject matter decided**

Durfee v. Duke, 1963, 84 S.Ct. 242, 375 U.S. 106, 11 L.Ed.2d 186, noted 1964, 18 Sw.L.J. 500.

Stoll v. Gottlieb, 1938, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, noted 1939, 39 Col.L.Rev. 274, 6 U.Chi.L.Rev. 293, 48 Yale L.J. 879.

Davis v. Davis, 1938, 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26.

If judgment is not void but rather rests on an erroneous jurisdictional determination, this rule is not properly invoked to extend the time for appeal that has already expired. Kansas City S. Ry. Co. v. Great Lakes Carbon Corp., C.A.8th, 1980, 624 F.2d 822, certiorari denied 101 S.Ct. 363, 449 U.S. 955, 66 L.Ed.2d 220.

Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st 1972, 453 F.2d 645.

Independence Mortgage Trust v. White, D.C.Or.1978, 446 F.Supp. 120, 123, **citing Wright & Miller.**

Plaintiff could not obtain vacation of judgments on the theory that they were void for lack of jurisdiction over the subject matter, when plaintiff positively alleged the court's jurisdiction of the subject matter under the Civil Rights Act, each defendant denied and challenged that jurisdiction, the court accepted plaintiff's claim of jurisdictional base, made rulings and entered judgments that rested inevitably upon the existence of jurisdiction and each of the judgments was affirmed and certiorari to review the affirmance was denied. Rhodes v. Houston, D.C.Neb.1966, 258 F.Supp. 546, affirmed C.A.8th, 1969, 418 F.2d 1309, certiorari denied 90 S.Ct. 1382, 397 U.S. 1049, 25 L.Ed.2d 662.

Restatement Second of Judgments, 1982, § 12.

A lack of subject-matter jurisdiction is not by itself a basis for deeming a judgment void, that is, open to collateral attack, for ordinarily that is a ground for reversal that can be presented to the appellate court on direct appeal. Bell v. Eastman Kodak Co., C.A.7th, 2000, 214 F.3d 798, 801, **citing Wright, Miller & Kane**.

[FN14] **Failed to contest**

Chicot County Drainage Dist. v. Baxter State Bank, 1940, 60 S.Ct. 317, 308 U.S. 371, 84 L.Ed. 329, noted 1940, 28 Geo.L.J. 1006, 53 Harv.L.Rev. 652, 49 Yale L.J. 959.

Nemaizer v. Baker, C.A.2d, 1986, 793 F.2d 58, 65, **quoting Wright & Miller.**

DuShane v. DuShane, Ind.App.1985, 486 N.E.2d 1106, 1107, **quoting Wright & Miller.**

Schoffstall v. Failey, 1979, 389 N.E.2d 361, 363, 180 Ind.App. 528, **quoting Wright & Miller.**

Boskey & Braucher, Jurisdiction and Collateral Attack, 1940, 40 Col.L.Rev. 1006.

Barring egregious jurisdictional error res judicata barred the argument by defendant in denaturalization proceedings that the district court lacked subject-matter jurisdiction to review a visa-eligibility determination and on that basis vacate the order of naturalization, when his status as visa-eligible had been at issue in federal-court proceedings for approximately eleven years, he previously had admitted in his complaint that the courts had jurisdiction to examine his visa eligibility, and he never had challenged the district court's determination that it had jurisdiction. U.S. v. Tittjung, C.A.7th, 2000, 235 F.3d 330, certiorari denied 121 S.Ct. 2554, 533 U.S. 931, 150 L.Ed.2d 721.

If party fails to appeal adverse judgment and then files motion to vacate void judgment after time permitted for ordinary appeal has expired, motion will not succeed merely because same argument would have succeeded on appeal. Kocher v. Dow Chem. Co., C.A.8th, 1997, 132 F.3d 1225.

But compare

Failure of the state to object to award of attorney fees until after judgment was entered on application for award of attorney fees incurred in successful prosecution of suit challenging legislative reapportionment plan and execution proceedings undertaken did not preclude subsequent challenge by way of motion to vacate, either on theory of res judicata or that the state had waived any immunity it might have. Jordon v. Gilligan, C.A.6th, 1974, 500 F.2d 701, certiorari denied 95 S.Ct. 1996, 421 U.S. 991, 44 L.Ed.2d 481.

But see

Griffith v. Sealtite Corp., C.A.7th, 1990, 903 F.2d 495 (court suggests that subject-matter jurisdiction challenge can be made at any time even after a contested action, **citing Wright & Miller** erroneously for that proposition).

11 FPP § 2862

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