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**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	MT-05-1512-McMoPa
)		
7	TIMOTHY JAMES WYLIE and)	Bk. No.	05-61135-RBK
	HEATHER ERIN WYLIE,)		
8)		
	Debtors.)		
9)		
	_____)		
10	UNITED STUDENT FUNDS, INC.,)		
)		
11	Appellant,)		
)		
12	v.)	O P I N I O N	
)		
13	TIMOTHY JAMES WYLIE; HEATHER)		
	ERIN WYLIE,)		
14)		
	Appellees.)		
15)		
	_____)		

Argued and Submitted on July 20, 2006
at Missoula, Montana

Filed - August 14, 2006

Appeal from the United States Bankruptcy Court
for the District of Montana

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Before: McMANUS,¹ MONTALI and PAPPAS, Bankruptcy Judges.

¹ Hon. Michael S. McManus, Chief Bankruptcy Judge for the
Eastern District of California, sitting by designation.

1 McMANUS, Bankruptcy Judge:

2
3 Creditor United Student Funds, Inc. ("USF"), by and through
4 Sallie Mae, appeals from an order denying its motion for
5 reconsideration of an order sustaining an objection to its proof
6 of claim. We hold that the bankruptcy court properly denied
7 USF's motion without reviewing the merits of the underlying claim
8 objection. The record also supports the bankruptcy court's
9 finding and conclusion that USF had been properly served with the
10 objection as well as notice of the hearing on it. The bankruptcy
11 court also correctly concluded that the objection did not require
12 an adversary proceeding. We AFFIRM.

13
14 FACTS

15 Timothy J. Wylie and Heather E. Wylie, the debtors and the
16 appellees in this appeal ("Debtors"), filed a chapter 13 petition
17 on April 18, 2005 and converted it to chapter 7 on June 8.²

18 On May 20 USF filed a proof of claim in the amount of
19 \$8,617.66 ("Claim"). The Claim is based on a student loan that
20 debtor Heather Wylie received while attending college. The
21 Debtors objected to the Claim ("Objection") on August 4,
22 contending that the amount due was \$860.48 rather than \$8,617.66.

23 The certificate of service for the Objection indicates that
24 the Debtors served USF with the Objection on August 4 at the
25 address listed in its Claim. Despite admitting that it had
26 received the Objection, USF failed to file a written response or

27
28

² All dates are in calendar year 2005.

1 a request for a hearing within the 10-day period prescribed by
2 Mont. LBR 3007-2.

3 Even though USF failed to respond to the Objection, the
4 bankruptcy court set a September 6 hearing on the Objection. The
5 bankruptcy court prepared and caused to be served a notice of
6 this hearing ("Notice"). The certificate of service
7 ("Certificate") is appended to the Notice. It is signed under
8 the penalty of perjury, and indicates that the Notice was served
9 on August 26 by first class mail on USF at the address given in
10 its Claim. The Notice was served by an employee of Enterprise
11 Systems Incorporated of Reston, Virginia.

12 USF failed to appear at the hearing. Unopposed by USF, the
13 Debtors presented evidence establishing that the amount of the
14 Claim should be reduced to \$860.00. Immediately after the
15 hearing, the bankruptcy court entered an order sustaining the
16 Objection. In that order, the bankruptcy court noted that USF
17 did not respond to the Debtors' Objection and failed to appear at
18 the September 6 hearing.

19 On September 20, more than 10 days after the entry of the
20 order, USF filed a motion for reconsideration of the order
21 sustaining the Objection. The docket reflects that on the same
22 date USF also filed a brief in support of the motion. Neither
23 the brief nor the motion are in the excerpts of the appellate
24 record.

25 The bankruptcy court heard USF's motion for reconsideration
26 on November 15 and then on December 7, issued its memorandum
27 decision and order denying the motion for reconsideration. This
28 appeal ensued.

1 JURISDICTION

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 §§ 157(b) (2) (B) and 1334. We have jurisdiction under 28 U.S.C.
4 §§ 158(a) (1) and (c) (1).

5
6 ISSUES

7 1. Whether the bankruptcy court abused its discretion in
8 denying USF's motion for reconsideration without considering the
9 merits of, or its defenses to, the Objection.

10 2. Whether the bankruptcy court was clearly erroneous in
11 finding that USF did not present sufficient evidence to establish
12 that it had not received the Notice.

13 3. Whether the Debtors' Objection to the Claim required an
14 adversary proceeding.

15
16 STANDARD OF REVIEW

17 We review the bankruptcy court's decision on a motion to
18 vacate its judgment or order for an abuse of discretion. Hammer
19 v. Drago (In re Hammer), 112 B.R. 341, 345 (9th Cir. BAP 1990),
20 aff'd, 940 F.2d 524 (9th Cir. 1991). A bankruptcy court abuses
21 its discretion if it bases its ruling upon an erroneous view of
22 the law or a clearly erroneous assessment of the evidence.
23 Caldwell v. Farris (In re Rainbow Magazine, Inc.), 136 B.R. 545,
24 550 (9th Cir. BAP 1992). Findings of fact are reviewed for clear
25 error and questions of law are reviewed de novo. Kelley v. Locke
26 (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003); see also
27 Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th
28 Cir. 2006).

1 DISCUSSION

2 USF argues that the bankruptcy court erred in denying its
3 motion for reconsideration because: (1) it ignored evidence that
4 Mrs. Wylie had misrepresented, or at least selectively produced,
5 her school records in order to justify a reduction of the Claim
6 to \$860.00; and (2) it ignored the testimony of an agent for USF,
7 Ruth Hankins, establishing that USF did not receive the Notice
8 setting the hearing on the Objection. USF also asserts that
9 because its Claim is a nondischargeable student loan, the
10 bankruptcy court erred when it permitted the Debtors to challenge
11 the amount of the Claim without commencing an adversary
12 proceeding.

13 On the other hand, the Debtors contend that the bankruptcy
14 court denied the motion for reconsideration, not for reasons
15 related to the merits of the Claim, but because USF failed to
16 respond to the Objection in a timely fashion and failed to
17 establish an excuse for this failure. Further, because the
18 Debtors admit that the Claim is nondischargeable, an adversary
19 proceeding was not required to challenge the amount of the Claim.

20
21 A. Applicability of FRCP 60(b)³

22 "A claim that has been allowed or disallowed may be
23 reconsidered for cause." 11 U.S.C. § 502(j). Rule 3008
24 implements section 502(j): "[a] party in interest may move for
25 reconsideration of an order allowing or disallowing a claim

26
27 ³ All "Rule" references are to the Federal Rules of
28 Bankruptcy Procedure, and all "FRCP" references are to the
Federal Rules of Civil Procedure.

1 against the estate. The court after a hearing on notice shall
2 enter an appropriate order." Rule 3008, however, is silent as to
3 the standard applicable to a motion seeking to reconsider the
4 allowance or disallowance of claims.

5 When a motion is filed pursuant to Rule 3008 within the 10-
6 day period to appeal the original order allowing or disallowing
7 the claim, the motion is analogous to a motion for a new trial or
8 to alter or amend the judgment pursuant to FRCP 59 as
9 incorporated by Rule 9023. See Abraham v. Aguilar (In re
10 Aguilar), 861 F.2d 873, 874-75 (5th Cir. 1988).

11 When reconsideration under Rule 3008 is sought after the 10-
12 day appeal period has expired, the motion is subject to the
13 constraints of FRCP 60(b) as incorporated by Rule 9024. In re
14 Aguilar, 861 F.2d at 874-75; S.G. Wilson Co. v. Cleanmaster
15 Indus., Inc. (In re Cleanmaster Indus., Inc.), 106 B.R. 628, 630
16 (9th Cir. BAP 1989).

17 Thus, a motion under FRCP 59, which must be filed prior to
18 the expiration of the 10-day appeal period, may seek a
19 reconsideration of the correctness and merits of the trial
20 court's underlying judgment. See, e.g., Osterneck v. Ernst &
21 Whinney, 489 U.S. 169, 174-77 (1989).

22 However, when reconsideration is sought under FRCP 60(b)
23 after the appeal period has expired, the party seeking
24 reconsideration is not permitted to revisit the merits of the
25 underlying judgment or argue that the trial court committed some
26 legal error in arriving at that judgment. See, e.g., Van Skiver
27 v. United States, 952 F.2d 1241, 1243-44 (10th Cir. 1991), cert.
28 denied, 506 U.S. 828 (1992). Instead, that party is limited to

1 the narrow grounds enumerated in FRCP 60(b). Id. These grounds
2 generally require a showing that events subsequent to the entry
3 of the judgment make its enforcement unfair or inappropriate, or
4 that the party was deprived of a fair opportunity to appear and
5 be heard in connection with the underlying dispute.

6 This distinction is drawn in order to preserve the finality
7 of the order allowing or disallowing a claim. While Rule 3008
8 permits an order disallowing a claim to be reconsidered, the
9 merits of the claim objection are no longer fair game unless the
10 claimant first establishes a good excuse, cognizable under FRCP
11 60(b), for its failure to timely contest the objection.

12 In this case, the bankruptcy court entered an order
13 sustaining the Debtors' Objection to the Claim on September 6.
14 USF did not file its motion for reconsideration under Rule 3008
15 until September 20, 14 days later. Thus, the bankruptcy court
16 correctly treated the motion for reconsideration as a motion for
17 relief from the order sustaining the Objection and applied the
18 standard applicable to motions under FRCP 60(b).

19 Based on USF's motion, the bankruptcy court determined that
20 USF was not challenging the order sustaining the Objection under
21 FRCP 60(b)(2), (3), (4), or (5), and concluded that those
22 provisions were not germane to its motion for reconsideration.

23 FRCP 60(b)(2), (3), (4), and (5) allow a trial court to set
24 aside an order for "(2) newly discovered evidence which by due
25 diligence could not have been discovered in time to move for a
26 new trial under [FRCP] 59(b); (3) fraud (whether heretofore
27 denominated intrinsic or extrinsic), misrepresentation, or other
28 misconduct of an adverse party; (4) the judgment is void; [or]

1 (5) the judgment has been satisfied, released, or discharged, or
2 a prior judgment upon which it is based has been reversed or
3 otherwise vacated, or it is no longer equitable that the judgment
4 should have prospective application.”

5 USF’s motion requested relief only under FRCP 60(b)(1) and
6 (6). FRCP 60(b)(1) and (6) allow a trial court to set aside an
7 order for “(1) mistake, inadvertence, surprise, or excusable
8 neglect; ... or (6) any other reason justifying relief from the
9 operation of the [order].”

10
11 1. FRCP 60(b)(1)

12 USF argues that the bankruptcy court abused its discretion
13 when it refused to reconsider the disallowance of the Claim under
14 FRCP 60(b)(1). In USF’s view, the bankruptcy court mistakenly
15 relied on Mrs. Wylie’s evidence because she “misrepresented the
16 origination and history of the debt to the Court.”

17 The issue is not whether the bankruptcy court made a mistake
18 accepting or evaluating the uncontested evidence offered by Mrs.
19 Wylie. Instead, the focus is on USF - was its failure to appear
20 at the hearing on the Objection the result of its mistake,
21 surprise, or neglect? If so, was its failure to appear
22 excusable?

23 A proof of claim is presumed to be prima facie valid. See
24 11 U.S.C. § 502(a). The presumption may be overcome by the
25 objecting party only if it offers evidence of equally probative
26 value rebutting that offered in the proof of claim. See Wright
27 v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991); Fullmer
28 v. United States (In re Fullmer), 962 F.2d 1463, 1466 (10th Cir.

1 1992); In re Allegheny Int'l, Inc., 954 F.2d 167, 173-74 (3rd
2 Cir. 1992). The burden then shifts back to the claimant to
3 produce evidence meeting the objection and establishing its
4 claim. In re Knize, 210 B.R. 773, 778 (Bankr. N.D. Ill. 1997).

5 The Debtors filed their Objection pursuant to Mont. LBR
6 3007-2 on August 4. Mont. LBR 3007-2 provides in pertinent part:

7 If a creditor files a response and requests a hearing
8 within ten (10) days of the date of the objection, then
9 the creditor shall notice the contested matter for
10 hearing pursuant to Mont. LBR 9013-1 and shall provide
11 that the hearing on the objection and response shall be
12 scheduled at least 30 days after the date of the
13 creditor's response and request for hearing. A
14 creditor's failure to file a written response to an
15 objection to a proof of claim and request a hearing
16 within ten (10) days of the date of the objection
17 provided by Mont. LBR 28 shall be an admission that the
18 objection is well taken and the Court may sustain the
19 objection without further notice or hearing.

20 USF failed to file a written response to the Objection,
21 despite admitting that it had received the Objection. Mont. LBR
22 3007-2 provided that the bankruptcy court could consider USF's
23 failure to file a response as an admission that the Objection was
24 well taken and could be sustained without further notice or
25 hearing.

26 While USF might have argued in its motion for
27 reconsideration that Mont. LBR 3007-2 impermissibly required it
28 to respond to the Objection "within ten (10) days of the date of
the objection" even though neither section 502 nor Rule 3007
requires a response to a claim objection, it did not raise this
or any other attack on Mont. LBR 3007-2. For the reasons
explained later in this Memorandum, the Panel declines to reach
an issue not raised in the bankruptcy court or briefed for this
appeal.

1 For now, it is sufficient to note that the bankruptcy court
2 did not deem the Objection admitted by USF merely because it
3 failed to request a hearing or respond in writing. Despite USF's
4 failure to respond, the bankruptcy court scheduled a hearing in
5 order to consider the merits of the Claim and the Objection to
6 it.

7 Once again, USF failed to appear. So, the bankruptcy court
8 considered Mrs. Wylie's evidence at the hearing, uncontested by
9 USF, determined that it was sufficient to overcome the Claim's
10 prima facie validity, and then sustained the Objection.

11 If Mrs. Wylie's testimony and other evidence were untrue,
12 intentionally false, or otherwise insufficient, USF should have
13 responded to the Objection and appeared at the hearing in order
14 to point out those evidentiary shortcomings. Instead, it chose
15 to do nothing, and having made that choice, it was not entitled
16 to belatedly contest the Objection by filing a motion for
17 reconsideration absent an additional showing that some surprise,
18 inadvertence, or excusable neglect prevented USF from contesting
19 the Objection in a timely fashion. See Pioneer Investment
20 Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S.
21 380, 393-95 (1993); Pincay v. Andrews, 389 F.3d 853, 855 (9th
22 Cir. 2004).

23 USF maintains that it had a reasonable excuse for failing to
24 appear at the hearing on the Objection. According to Ms.
25 Hankins, an agent of USF, USF did not receive the Notice and did
26 not learn of the hearing until it received the order disallowing
27 its Claim.

28 The bankruptcy court's factual findings regarding service of

1 process and other documents are reviewed for clear error.

2 Jorgenson v. State Line Hotel, Inc. (In re State Line Hotel,
3 Inc.), 323 B.R. 703, 708 (9th Cir. BAP 2005).

4 The bankruptcy court found "little merit" in Ms. Hankins'
5 testimony. This finding is not clearly erroneous.

6 First, the Certificate appended to the Notice is signed
7 under the penalty of perjury and it indicates that the Notice was
8 served by first class mail on August 26 on USF at the address
9 listed in its Claim. This Certificate fully satisfied the
10 requirements of FRCP 5(d), as incorporated by Rule 7005, and is
11 proof of service on USF.⁴

12 Second, the bankruptcy court also found that the Notice had
13 not been returned as unclaimed or undeliverable. This is borne
14 out by a review of the docket.

15 Third, the Notice was sent to USF at the same address used
16 to serve the Objection. USF admits that it received the
17 Objection. Had it wished to contest the Objection, it was
18 required to respond to the Objection. It did not. Its failure
19 to appear at the hearing is consistent with its earlier failure
20 to respond to the Objection.

21 Given these facts, the record is sufficient to support the
22 bankruptcy court's findings that Ms. Hankins' testimony of non-
23 receipt had little credibility, that the Notice had been properly
24 served on USF, and that USF received the Notice.

25
26
27 ⁴ USF apparently seeks to deal with the Certificate by
28 ignoring it. USF failed to provide the Notice and Certificate in
its excerpts of the record. These documents are found only in
the excerpts provided by the Debtors.

1 USF further argues that "no one presented any other
2 testimony that the document was received by [USF]." But, such
3 testimony was not required in order for the bankruptcy court to
4 make a finding that the Notice had been served on, and received
5 by, USF. Mail is presumed to be received by the addressee when
6 it was properly addressed, stamped, and deposited in an
7 appropriate receptacle. See Herndon v. De la Cruz (In re De la
8 Cruz), 176 B.R. 19, 22 (9th Cir. BAP 1994) (citing Hagner v.
9 United States, 285 U.S. 427, 430 (1932)). The Certificate
10 establishes these facts. Testimony that the document had been
11 received by USF was not required. Id.

12 Therefore, because the bankruptcy court's finding that USF
13 had been served properly with the Notice is not clearly
14 erroneous, USF has no justifiable excuse under FRCP 60(b)(1) for
15 its failure to appear at the hearing. As a result, it had no
16 right to contest the merits of the Objection in the context of a
17 motion for reconsideration.

18 The bankruptcy court did not abuse its discretion by
19 refusing to reconsider the disallowance of the Claim. See In re
20 Hammer, 112 B.R. at 345.

21
22 2. FRCP 60(b)(6)

23 USF also asked the bankruptcy court to reconsider the order
24 disallowing its Claim under FRCP 60(b)(6). The bankruptcy court
25 refused to do so. In this appeal, USF has not argued that this
26 refusal was in error.

27 FRCP 60(b)(6) allows a trial court to set aside an order for
28 "any other reason justifying relief from the operation of the

1 [order].” Relief from a judgment or order should be granted
2 “sparingly as an equitable remedy to prevent manifest
3 injustice,” and “only where extraordinary circumstances
4 prevented a party from taking timely action to prevent or correct
5 an erroneous judgment.” United States v. Washington, 394 F.3d
6 1152, 1157 (9th Cir. 2005) (quoting United States v. Alpine Land
7 & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993)).

8 In the only portion of the motion for reconsideration that
9 is in the excerpts of the appellate record, the brief USF filed
10 on November 11, USF argued that: (1) it did not appear at the
11 hearing on the Objection because it did not receive the Notice;
12 and (2) the evidence submitted by the Debtors in support of the
13 Objection lacked merit.

14 These issues are dealt with at length above in the context
15 of FRCP 60(b)(1). They fare no better as a basis for relief
16 under FRCP 60(b)(6).

17 We discern no other possible reason that might have
18 justified the bankruptcy court’s granting of the motion for
19 reconsideration. Moreover, USF has not proven any extraordinary
20 circumstances that prevented it from timely responding to the
21 Objection.

22 Accordingly, this court concludes that the bankruptcy court
23 did not abuse its discretion when it denied USF’s motion for
24 reconsideration under FRCP 60(b)(6).

25
26 3. FRCP 60(b)(3)

27 On appeal, USF also argues that the bankruptcy court ignored
28 evidence of misrepresentation or fraud and should have granted

1 the motion for reconsideration under FRCP 60(b)(3).
2 Specifically, USF asserts that its Claim was disallowed because
3 Mrs. Wylie perpetrated a fraud on the bankruptcy court by
4 producing only selected portions of her school records to support
5 her contention that she owed less than demanded by USF.

6 The bankruptcy court found that USF did "not claim that ...
7 its claimed [sic] was reduced as a result of fraud,
8 misrepresentation or misconduct." The record supports this
9 observation. USF did not argue in its November 11 Pre-Hearing
10 Brief in Support of the motion for reconsideration that the
11 Debtors had obtained an order sustaining their Objection based on
12 fraud or misrepresentation.⁵ Nor is an argument under FRCP
13 60(b)(3) evident from the transcript of the November 15 hearing
14 on the motion for reconsideration.

15 Absent exceptional circumstances, this court generally will
16 not consider arguments raised for the first time on appeal. See
17 El Paso v. Am. West Airlines, Inc. (In re Am. West Airlines,
18 Inc.), 217 F.3d 1161, 1165 (9th Cir. 2000); Baldwin v. Marshack
19 (In re Baldwin), 70 B.R. 612, 617 (9th Cir. BAP 1987) (citing
20 Diamond Nat'l Corp. v. Lee, 333 F.2d 517, 528 (9th Cir. 1964)).
21 USF has not alleged any exceptional circumstances, nor are any
22 evident.

23 This Panel concludes that USF had sufficient opportunity to
24 raise the issue in the bankruptcy court but it failed to do so.
25 Hence, USF will not be permitted to raise the issue for the first
26

27 ⁵ USF has not included its motion for reconsideration or
28 the supporting brief filed on September 20 in the excerpts of the
record.

1 time in this appeal.

2 Notwithstanding this, neither USF's allegations, nor the
3 evidence in the record, are sufficient to support a finding of
4 misrepresentation or fraud of the type required by FRCP 60(b)(3).
5 To prevail, it must be proven that an order was obtained through
6 fraud, misrepresentation, or other misconduct that prevented the
7 losing party from fully and fairly presenting its defense. Also,
8 the fraud must not have been discoverable with the exercise of
9 due diligence. Casey v. Albertson's, Inc., 362 F.3d 1254, 1260
10 (9th Cir. 2004) (citing De Saracho v. Custom Food Machinery,
11 Inc., 206 F.3d 874, 880 (9th Cir. 2000); Pac. & Arctic Ry. and
12 Navigation Co. v United Transp. Union, 952 F.2d 1144, 1148 (9th
13 Cir. 1991)).

14 The fraud and misrepresentation alleged by USF, even if
15 true, does not demonstrate that the Debtors prevented USF from
16 presenting its defense to the Objection. Rather, the evidence
17 goes to the merits of the Objection. USF could have presented
18 its evidence of alleged fraud and misrepresentation in a timely
19 response to the Objection. Instead, USF sat on its right to
20 respond and now it is too late to contest the merits.

21 Accordingly, USF cannot prevail under FRCP 60(b)(3), even if
22 the Panel permitted it to raise the issue for the first time in
23 this appeal.

24
25 B. The Necessity of an Adversary Proceeding

26 USF asserts that the bankruptcy court erred in holding that
27 the Debtors could litigate the validity and "thus the
28 dischargeability" of the Claim by filing a claim objection as

1 opposed to an adversary proceeding.

2 The Debtors did not litigate the Claim's dischargeability.
3 They merely objected to the amount of the Claim.

4 A party in interest may object to the amount of a claim,
5 including one that is nondischargeable, without commencing an
6 adversary proceeding. Rule 7001 enumerates the proceedings
7 requiring an adversary proceeding:

8 (1) a proceeding to recover money or property, other
9 than a proceeding to compel the debtor to deliver
10 property to the trustee, or a proceeding under § 554(b)
11 or § 725 of the Code, Rule 2017, or Rule 6002; (2) a
12 proceeding to determine the validity, priority, or
13 extent of a lien or other interest in property, other
14 than a proceeding under Rule 4003(d); (3) a proceeding
15 to obtain approval under § 363(h) for the sale of both
16 the interest of the estate and of a co-owner in
17 property; (4) a proceeding to object to or revoke a
18 discharge; (5) a proceeding to revoke an order of
19 confirmation of a chapter 11, chapter 12, or chapter 13
20 plan; (6) a proceeding to determine the
21 dischargeability of a debt; (7) a proceeding to obtain
22 an injunction or other equitable relief, except when a
23 chapter 9, chapter 11, chapter 12, or chapter 13 plan
24 provides for the relief; (8) a proceeding to
25 subordinate any allowed claim or interest, except when
26 a chapter 9, chapter 11, chapter 12, or chapter 13 plan
27 provides for subordination; (9) a proceeding to obtain
28 a declaratory judgment relating to any of the
foregoing; or (10) a proceeding to determine a claim or
cause of action removed under 28 U.S.C. § 1452.

20 Nothing in this rule requires an adversary proceeding when only
21 the amount of a claim is in issue.

22 USF argues that the bankruptcy court should have required an
23 adversary proceeding even though the Debtors did not challenge
24 the dischargeability of Mrs. Wylie's student loan.⁶ In USF's
25 view, by litigating the amount of this debt, the Debtors were

27 ⁶ At oral argument before us, Mrs. Wylie's counsel
28 conceded that the \$860.48 owed on the allowed claim was
nondischargeable.

1 "circumventing" the requirement that the dischargeability of a
2 debt can be determined only in the context of an adversary
3 proceeding.

4 This proposition is tantamount to a requirement that any
5 challenge to a proof of claim for a nondischargeable debt, even
6 when the debt is admittedly nondischargeable, be presented in the
7 context of an adversary proceeding. USF presents no authority
8 for this proposition and there is none to present. Cf. In re
9 State Line Hotel, Inc., 323 B.R. at 713 (holding that a claim
10 objection is not governed by the service of process rules
11 applicable in adversary proceedings).

12
13 C. Timing of the Hearing on the Objection and Mont. LBR 3007-2

14 At oral argument before us, USF complained for the first
15 time that it had received an insufficient amount of notice of the
16 hearing on the Objection. USF now argues that the bankruptcy
17 court should have scheduled the hearing on the Objection at least
18 30 days after the service of the Notice as required by Rule 3007.
19 The bankruptcy court served the Notice on August 26 for a hearing
20 on September 6. Only 11 days' notice was given to USF.

21 Absent exceptional circumstances, an appellate court will
22 not consider arguments raised for the first time on appeal. See
23 In re Am. West Airlines, Inc., 217 F.3d at 1165; In re Baldwin,
24 70 B.R. at 617. USF has not alleged any exceptional
25 circumstances, nor are any evident.

26 Moreover, while USF belatedly raised the issue at oral
27 argument, it failed to address it in its appellate brief. USF
28 has failed to provide "[a] statement of the issues presented and

1 the applicable standard of appellate review" as required by Rule
2 8010(a)(1)(C). And, its brief does not comply with Rule
3 8010(a)(1)(E) because it does not include an argument "with
4 respect to the issues presented, and the reasons therefor, with
5 citations to the authorities, statutes and parts of the record
6 relied on." See Brewer v. Erwin & Erwin, P.C. (In re Marquam
7 Inv. Corp.), 942 F.2d 1462, 1467 (9th Cir. 1991).

8 Just as USF's motion for reconsideration might have
9 challenged the requirement in Mont. LBR 3007-2 that it request a
10 hearing on the Objection within 10 days of the Objection, USF
11 might also have challenged the amount of notice it received for
12 the September 6 hearing. Because it raised neither issue below,
13 it deprived the bankruptcy court of the opportunity to consider
14 them. Other than belatedly raising at oral argument the
15 allegedly insufficient notice, USF also has failed to brief these
16 issues for this court.⁷

17
18 ⁷ If USF intended to raise these issues, it had the
19 obligation, in both its motion for reconsideration and its
20 appellate brief, to discuss them and present relevant argument
helpful to their resolution. There is much USF might have
discussed.

21 Rule 3007 requires that a "copy of the objection with notice
22 of the hearing thereon ... be mailed or otherwise delivered to
23 the claimant ... at least 30 days prior to the hearing." There
24 is no requirement that the creditor request a hearing or respond
25 in writing to an objection. May a local rule like Mont. LBR
26 3007-2 dispense with service of a notice of hearing on 30 days'
27 notice? May it condition a hearing on a request for a hearing or
28 a written response even though this is not required by section
502 or Rule 3007? Given that claim objections may be served by
mail, is 10 days sufficient notice of the requirement to file a
response and request a hearing? When a creditor fails to respond
to an objection, no hearing is held under Mont. LBR 3007-2
because the creditor's failure to respond is "an admission that
the objection is well taken," permitting the bankruptcy court to
(continued...)

1 As a result, USF will not be allowed to raise these issues
2 for the first time on appeal.

3
4 CONCLUSION

5 We conclude that the bankruptcy court correctly denied USF's
6 motion for reconsideration without reaching the merits of the
7 underlying Objection. Also, the record supports the bankruptcy
8 court's finding that Ms. Hankins' testimony regarding USF's
9 alleged failure to receive the Notice had little credibility.
10 And, the bankruptcy court correctly concluded that the Objection
11 did not require an adversary proceeding. We AFFIRM.

12
13
14 _____
15 ⁷(...continued)

16 "sustain the objection without further notice or hearing." May
17 such an admission be extracted from the claimant even though Rule
18 3007 does not require a written response to an objection?
19 Questions such as these, none of which were briefed by USF, might
20 be the basis for an argument that Mont. LBR 3007-2, contrary to
21 the requirements of Rule 9029(a), is inconsistent with section
22 502 and Rule 3007. Cf. Sunahara v. Burchard (In re Sunahara),
23 326 B.R. 768, 782-83 (9th Cir. BAP 2005); Steinacher v. Rojas (In
24 re Steinacher), 283 B.R. 768, 772-73 (9th Cir. BAP 2002).

25 Assuming Mont. LBR 3007-2 accords due process to a claimant
26 and is consistent with Rule 3007, may the bankruptcy court
27 conduct a hearing on less than 30 days notice when a claimant
28 fails to respond timely, ostensibly conceding the objection and
waiving a hearing? If so, is Rule 3007 applicable and does it
require 30 days' notice? Or, is less notice permissible? Does
the answer depend on the impact of FRCP 43(e) (providing in part:
"When a motion is based on facts not appearing of record the
court may hear the matter on affidavits ... but the court may
direct that the matter be heard wholly or partly on oral
testimony....")? Once again, issues such as these were not
addressed by USF.

If USF wished to complain about the local rule or the amount
of notice it received, those issues should have been presented in
its motion under Rule 3008 and been adequately briefed for this
appeal. USF failed in both respects.