

**NOV 09 2005**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

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

6	In re:	)	
7	JUNG SUP LEE and KYUNG CHA LEE,	)	BAP No. WW-04-1505-JuMaS
8		)	Bk. No. 03-17022
9		)	Adv. No. 04-01117
10	Debtors.	)	
11	_____	)	
12	JUNG SUP LEE,	)	
13	Appellant,	)	<b>OPINION</b>
14	v.	)	
15	TCAST COMMUNICATIONS, INC.,	)	
16	Appellee.	)	
17	_____	)	

Argued and Submitted on  
July 22, 2005 at Seattle, Washington

Filed - November 9, 2005

Ordered Published - December 14, 2005

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

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Before: JURY,<sup>1</sup> MARLAR and SMITH, Bankruptcy Judges.

<sup>1</sup> Hon. Meredith A. Jury, Bankruptcy Judge for the Central District of California, sitting by designation.

1 JURY, Bankruptcy Judge:  
2

3 After Jung Sup Lee ("Lee") and his wife, Kyung Cha Lee,  
4 filed for bankruptcy, TCAST Communications, Inc. ("TCAST") filed  
5 a complaint against Lee to determine whether a certain debt owed  
6 to it was non-dischargeable pursuant to § 523(a)(2)(A).<sup>2</sup> TCAST  
7 moved for summary judgment in the adversary proceeding, which the  
8 bankruptcy court granted in its favor. Lee timely appealed.

9 Based on issue preclusion, claim preclusion, and full faith  
10 and credit, we AFFIRM the bankruptcy court's decision.  
11

#### 12 I. FACTS

13 Lee operated TTI Telecommunications, Inc. ("TTI"), a  
14 Washington corporation which sold long-distance calling cards  
15 wholesale to retailers. On October 25, 2000, TTI entered into a  
16 written carrier service agreement ("Agreement") with TCAST.  
17 Under the Agreement, TTI agreed to pay fees to TCAST in order to  
18 provide telephone communication services to TTI. Specifically,  
19 TTI agreed to tender a cash deposit in advance based on one month  
20 of projected use. TTI also agreed to pay an increased advance  
21 deposit as it increased its usage over time. Later, TCAST agreed  
22 to allow TTI to pay current charges on a weekly basis in lieu of  
23 an increased deposit.

24 Between May 7 and May 18, 2001, TTI tendered five checks to  
25 TCAST, totaling \$369,380.84, in payment for its services. The  
26 checks bounced due to insufficient funds.

27 TCAST filed a complaint against TTI and Lee on various  
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<sup>2</sup> Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 causes of action, including fraud and breach of contract, in the  
2 Los Angeles County (California) Superior Court. In its  
3 complaint, TCAST requested both compensatory and punitive damages  
4 against TTI and Lee. Although TCAST specified the amount of  
5 compensatory damages in its complaint, it failed to specify an  
6 amount for punitive damages.<sup>3</sup>

7 Lee, appearing through counsel, filed an answer to the  
8 complaint. TCAST served a set of interrogatories on Lee, to  
9 which Lee and TTI failed to respond. After issuing two lesser  
10 discovery sanctions, the court, upon motion by TCAST, granted  
11 terminating sanctions, striking the answer, granting default  
12 judgment against TTI and Lee, and awarding compensatory and  
13 punitive damages. The court entered the default judgment,  
14 awarding both compensatory and punitive damages, on February 14,  
15 2002.

16 TCAST registered the California default judgment in  
17 Washington on June 13, 2002. Lee moved to set aside the  
18 California default judgment in the King County (Washington)  
19 Superior Court on the grounds that the California court lacked  
20 personal jurisdiction and that he had no notice of the discovery  
21 requests, claiming he failed to respond due to excusable neglect  
22 caused by the negligence of his California counsel. The court  
23 denied the motion, finding an insufficient basis for collateral  
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25  
26 <sup>3</sup> TCAST requested \$251,268.25 in compensatory damages but  
27 only requested punitive damages "in an amount to punish TTI and  
28 Lee and to deter others from engaging in similar misconduct."  
Complaint for Breach of Contract, Common Counts, Fraud, and  
Violation of Civ. Code § 1719 (June 5, 2001), at 28. TCAST later  
provided an amount for punitive damages in a declaration in  
support of the entry of judgment, filed February 1, 2002. In the  
declaration, TCAST requested an award of \$369,380.84 in punitive  
damages. See Declaration of Joel Wadman in Support of Entry of  
Judgment (February 1, 2002), at 51.

1 attack and that the California default judgment was entitled to  
2 full faith and credit ("Washington judgment").

3 Lee and his wife filed a voluntary Chapter 11 petition on  
4 May 29, 2003, which case was converted to Chapter 7 on October  
5 11, 2003. TCAST filed a non-dischargeability complaint under  
6 § 523(a)(2)(A) against Lee on March 11, 2004.<sup>4</sup> TCAST first moved  
7 for summary judgment under the doctrine of issue preclusion  
8 (i.e., collateral estoppel) with respect to the compensatory  
9 damages portion of the state court judgment. The bankruptcy  
10 court granted the motion for summary judgment, reserving the  
11 issue of non-dischargeability of the punitive damages portion of  
12 the judgment for later determination. The bankruptcy court  
13 entered its decree with respect to the compensatory damages  
14 ("compensatory damages decree") on June 24, 2004.

15 TCAST then moved for summary judgment with respect to the  
16 punitive damages portion of the judgment under the Rooker-Feldman  
17 doctrine and claim preclusion (i.e., res judicata). The  
18 bankruptcy court granted the motion, finding that claim  
19 preclusion fully applied to the issues actually raised by Lee  
20 before the Washington court in its review of the California  
21 default judgment, as well as to other issues that Lee could and  
22 should have raised at that time. The bankruptcy court also found  
23 that the Rooker-Feldman doctrine barred it from reviewing the  
24 California and Washington judgments. The bankruptcy court then  
25 entered its decree with respect to the punitive damages award  
26 ("punitive damages decree") on September 30, 2004. Lee filed his  
27 notice of appeal of both decrees on October 6, 2004.

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<sup>4</sup> It appears from the record that TCAST named Lee as the only defendant in the adversary proceeding.

1 II. JURISDICTION

2 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
3 and § 157(b) (1) and (b) (2). This panel has jurisdiction under 28  
4 U.S.C. § 158 (b) (1).

5  
6 III. ISSUES

7 (1) Whether the bankruptcy court erred in granting summary  
8 judgment for TCAST by finding that issue preclusion rendered the  
9 compensatory damages portion of the state court judgment non-  
10 dischargeable under § 523(a) (2) (A).

11 (2) Whether the bankruptcy court erred in granting summary  
12 judgment for TCAST by finding that full faith and credit barred  
13 it from reviewing the Washington judgment in its consideration of  
14 the punitive damages portion of the judgment.

15 (3) Whether the bankruptcy court erred in granting summary  
16 judgment for TCAST by finding that claim preclusion barred Lee  
17 from asserting claims he could and should have made before the  
18 Washington court in its review of the punitive damages portion of  
19 the California default judgment.<sup>5</sup>

20  
21 IV. STANDARD OF REVIEW

22 We review the summary judgment of the bankruptcy court de  
23 novo. Tobin v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R.  
24 199, 202 (9th Cir. BAP 2001) (citation omitted). Viewing the  
25 evidence in the light most favorable to the non-moving party, we  
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27 <sup>5</sup> Because we conclude that the bankruptcy court correctly  
28 applied issue preclusion and claim preclusion to the Washington  
judgment, we do not need to reach the issue of whether the  
bankruptcy court was prohibited from reviewing the Washington  
judgment by the Rooker-Feldman doctrine.

1 must determine "whether there are any genuine issues of material  
2 fact and whether the trial court correctly applied relevant  
3 substantive law." Id. (citation omitted).

4 We review the applicability of issue preclusion de novo.  
5 Id. (citation omitted). We review the applicability of claim  
6 preclusion de novo. United States v. Schimmels (In re  
7 Schimmels), 127 F.3d 875, 880 (9th Cir. 1997) (citation omitted).  
8

## 9 V. DISCUSSION

### 10 A. Compensatory Damages

11 Lee argues that the bankruptcy court erred in finding that  
12 issue preclusion applied to the compensatory damages portion of  
13 the default judgment because TCAST failed to establish all the  
14 elements of issue preclusion required for § 523(a)(2)(A) non-  
15 dischargeability. Specifically, Lee asserts that TCAST did not  
16 establish that the issue of fraud was actually litigated and  
17 necessarily decided.

18 Lee contends that § 523(a)(2)(A) requires a creditor to show  
19 that the debtor directly obtained its services through fraudulent  
20 conduct. Lee asserts, however, that he did not obtain the  
21 services of TCAST through his misrepresentations; TCAST had  
22 provided its services *before* Lee issued the bad checks.  
23 Furthermore, even if Lee had obtained the services of TCAST by  
24 issuing these bad checks, only that portion of the debt incurred  
25 through such fraud is non-dischargeable. The California court  
26 made no such findings, however. As such, Lee concludes, the  
27 issue of whether he obtained the services of TCAST through fraud  
28 had not been actually litigated and necessarily decided.

1 Lee's argument fails, however, because § 523(a)(2)(A) does  
2 not require a finding of a receipt of a benefit through the  
3 fraudulent conduct. Muegler v. Bening, 413 F.3d 980, 983-84 (9th  
4 Cir. 2005).

5 The doctrine of issue preclusion applies to dischargeability  
6 proceedings under § 523(a). Grogan v. Garner, 498 U.S. 279, 284  
7 n. 11 (1991). When determining the effect of a state court  
8 judgment, we must apply, as a matter of full faith and credit,  
9 the state's law of issue preclusion. Gayden v. Nourbakhsh (In re  
10 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

11 Under California law, issue preclusion applies only if all  
12 of the following requirements have been met:

13 (1) The issue sought to be precluded must be  
14 identical to that decided in the former  
proceeding;

15 (2) The issue must have been actually litigated in  
16 the former proceeding;

17 (3) The issue must have been necessarily decided  
18 in the former proceeding;

19 (4) The decision in the former proceeding must be  
20 final and on the merits;

21 (5) The party against whom issue preclusion is  
22 sought must be the same as, or in privity with,  
23 the party to the former proceeding.

24 See Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th  
25 Cir. 2001) (citations omitted).

26 The party asserting issue preclusion has the burden of  
27 establishing these requirements. Id. (citation omitted).

28 Section 523(a)(2)(A) provides that a discharge does not  
include any debt for money, property, or services "to the extent  
obtained by false pretenses, a false representation, or actual

1 fraud" (emphasis added). In order to establish that the debt had  
2 been obtained through fraud and is thus non-dischargeable under  
3 § 523(a)(2)(A), the creditor must demonstrate, by a preponderance  
4 of evidence, that:

- 5 (1) The debtor made representations;
- 6 (2) The debtor knew the representations had been  
7 false at the time he or she made them;
- 8 (3) The debtor made these representations with the  
9 intent and purpose of deceiving the creditor;
- 10 (4) The creditor relied on such representations;  
11 and
- 12 (5) The creditor sustained the alleged loss and  
13 damage as a proximate result of these  
14 representations.

13 See American Express Travel Related Services v. Hashemi (In re  
14 Hashemi), 104 F.3d 1122, 1125 (9th Cir. 1996).

15 The elements of fraud under § 523(a)(2)(A) match the  
16 elements of common law fraud and of actual fraud under California  
17 law. Younie v. Gonya (In re Younie), 211 B.R. 367, 373-74 (9th  
18 Cir. BAP 1997), aff'd 163 F.3d 609 (9th Cir. 1998) (citations  
19 omitted).

20 Lee contends that § 523(a)(2)(A) requires the creditor to  
21 show that it had sustained damages by providing services which  
22 the debtor directly obtained through his or her fraudulent  
23 conduct. In other words, Lee asserts that TCAST must demonstrate  
24 that he issued the checks *in exchange for* its services. Lee  
25 argues that the phrase "obtained by" requires TCAST to show, in  
26 addition to the fraud, that Lee obtained a benefit from his  
27  
28



1 fraudulent conduct.<sup>6</sup>

2 A recent Ninth Circuit decision clarifies that there is no  
3 additional requirement for § 523(a)(2)(A) nondischargeability.  
4 See Muegler v. Bening, 413 F.3d 980 (9th Cir. 2005). Rather, the  
5 only consideration material to a determination of the debt's non-  
6 dischargeability is whether the debt arose from fraud. Id. at  
7 983 (citation omitted).

8 The Ninth Circuit held that "a [mere] finding of debt due to  
9 fraud is *all* that is necessary to satisfy § 523(a)(2)(A)." Id.  
10 at 984 (emphasis added). In Muegler, the federal district court  
11 found the debtor guilty of committing intentional fraud under  
12 Missouri law. Id. at 981. A jury awarded the creditors  
13 compensatory and punitive damages. Id. The debtor attempted to  
14 discharge his debt to his creditors through bankruptcy. Id. The  
15 creditors then initiated an adversary proceeding against the  
16 debtor, moving for summary judgment under § 523(a)(2)(A). Id. at  
17 982. The bankruptcy court ruled in favor of the creditors,  
18 finding that issue preclusion barred the debtor from challenging  
19 the fraud ruling. Id. On appeal, the debtor contended that the  
20 creditors failed to establish all of the elements of issue  
21 preclusion for fraud - specifically, identity of the issues -  
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23 <sup>6</sup> Lee cites Fleming v. Preston (In re Preston), 47 B.R. 354  
24 (E.D. Va. 1983) and Snap-On Tools Corp. v. Couch (In re Couch),  
25 154 B.R. 511 (Bankr. S.D. Ind. 1992) to support his argument that  
26 because he had already incurred the debt before he issued the  
27 checks, he did not "obtain" the services of TCAST through the  
28 checks. In Preston and Couch, the debtors obtained the loans or  
property from the creditors before they issued the bad checks to  
repay the creditors. Here, under the Agreement, Lee could not  
obtain the services of TCAST without first paying it. Thus,  
unlike the debtors in Preston and Couch, Lee obtained the  
services by reason of issuing the bad checks.

1 under Missouri law. Id. at 982. The debtor argued that  
2 § 523(a)(2)(A) required the creditors to show that he obtained a  
3 direct or indirect benefit from his misrepresentations. Id.  
4 Since the Missouri jury did not need to find that the debtor  
5 obtained such a benefit from his fraud, the debtor maintained  
6 that the creditors failed to establish identity of the issues  
7 necessary for issue preclusion under § 523(a)(2)(A). Id.

8 The Ninth Circuit held that the court did not need to  
9 determine that the debtor received a benefit in order to  
10 establish fraud under § 523(a)(2)(A). Id. at 984. The Ninth  
11 Circuit acknowledged that it had previously found that a debtor  
12 must receive a direct or indirect benefit from his or her  
13 fraudulent conduct. Id. at 983 (citing In re Arm, 87 F.3d 1046,  
14 1049 (9th Cir. 1996)). The court noted, however, that these  
15 decisions occurred *before* the decision of the Supreme Court in  
16 Cohen v. De La Cruz, 523 U.S. 213, 223 (1998). Muegler, 413 F.3d  
17 at 983. In Cohen, the Supreme Court ruled that a simple finding  
18 of debt arising from fraud is sufficient to meet the requirements  
19 of § 523(a)(2)(A). Id. (citation omitted). Based on the holding  
20 in Cohen, the Ninth Circuit held that “[i]t is only the fact of  
21 an adverse fraud judgment, and nothing more, that is required for  
22 a debt to be non-dischargeable . . . . [thus] the receipt of a  
23 benefit is no longer an element of fraud under § 523(a)(2)(A).”  
24 Id. at 984.

25 Applying the Muegler holding to the instant case, the  
26 bankruptcy court did not need a California finding that Lee had  
27 directly obtained services from TCAST, by issuing the bad checks,  
28 in order to determine that the debt based on fraud was non-

1 dischargeable. The fraud finding alone was sufficient.<sup>7</sup>

2 B. Punitive Damages

3 Lee contends that the bankruptcy court erred in giving the  
4 Washington judgment preclusive effect under full faith and credit  
5 because the underlying default judgment was void under California  
6 law. Lee argues that although California law allows a trial  
7 court to award punitive damages,<sup>8</sup> the California court exceeded  
8 its jurisdiction by granting \$369,380.84 in punitive damages  
9 because TCAST failed to specify that amount in its complaint and  
10 Lee had no prior notice of the amount.

11 Lee also asserts that claim preclusion does not prevent him  
12 from raising the issue of whether the punitive damages portion of  
13 the California default judgment was void because no final  
14 determination has ever been made on that issue. He asserts that  
15 he did not raise the issue before the Washington court and the  
16 Washington court did not bar him from raising it in the  
17 California court. Lee further contends that the Rooker-Feldman  
18 doctrine did not prevent the bankruptcy court from reviewing the

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20 <sup>7</sup> TCAST also set forth sufficient facts to demonstrate that  
21 the damages it sustained were the proximate result of Lee's  
22 fraudulent conduct pursuant to § 523(a)(2)(A). TCAST  
23 demonstrated in the California action that TTI and Lee induced  
24 TCAST to continue providing services by tendering the checks,  
25 even though neither TTI nor Lee had sufficient funds to honor  
26 them. Had TCAST known this circumstance, TCAST would have  
27 discontinued its services. The fact that TCAST had requested a  
28 compensatory damage award less than the total amount of the  
checks indicates that the award was the actual value of services  
induced by Lee's fraud and did not include any pre-existing debt.

<sup>8</sup> California Code of Civil Procedure ("CCP") § 3294(a)  
provides: "[i]n an action for the breach of an obligation not  
arising from contract, where it is proven by clear and convincing  
evidence that the defendant has been guilty of oppression, fraud,  
or malice, the plaintiff, in addition to the actual damages, may  
recover damages for the sake of example and by way of punishing  
the defendant." CAL. CIV. CODE § 3294(a) (West 2004).

1 Washington judgment because it involved an issue of non-  
2 dischargeability, which falls within the exclusive jurisdiction  
3 of the bankruptcy court.

4 Contrary to the arguments advanced by Lee, the bankruptcy  
5 court could not review the Washington judgment because: (1) full  
6 faith and credit compelled the bankruptcy court to recognize and  
7 enforce the Washington judgment; and (2) claim preclusion  
8 prevented the bankruptcy court from re-determining the issues  
9 that were already raised before the Washington court, plus any  
10 issues that Lee failed to assert.

11 1. Full faith and credit bars the bankruptcy court from  
12 reviewing the Washington judgment.

13 28 U.S.C. § 1738 provides that the judicial proceedings of  
14 any court "shall have the same full faith and credit in every  
15 court of the United States . . . as they have by law or usage in  
16 the courts of such State". As such, federal courts must give  
17 state court judgments the same preclusive effect that those  
18 judgments would enjoy under the law of the state in which the  
19 judgment was rendered. Far Out Productions, Inc. v. Oskar, 247  
20 F.3d 986, 993 (9th Cir. 2001).

21 Here, the bankruptcy court was asked to review the  
22 Washington judgment. Under full faith and credit, the bankruptcy  
23 court must apply Washington state law in determining whether it  
24 should give preclusive effect to the Washington judgment.

25 Under Washington state law, full faith and credit requires  
26 courts to recognize and enforce valid sister-state judgments.  
27 Effert v. Kalup (In re Marriage of Effert), 723 P.2d 541, 542  
28 (Wash. Ct. App. 1986). Generally, the validity of a sister-state

1 judgment cannot be collaterally attacked unless the sister-state  
2 court lacked personal or subject matter jurisdiction, committed a  
3 constitutional violation, or issued a judgment obtained through  
4 fraud. Id.; State v. Berry, 5 P.3d 658, 662 (Wash. 2000).  
5 Absent such circumstances, a party may not challenge the sister-  
6 state judgment. See Effert, 723 P.2d at 542-43. In other words,  
7 the Washington court will recognize and enforce a sister-state  
8 judgment even if such judgment was based on an error of law or  
9 fact. See id.; see also e.g., Idaho Dep't. Of Health & Welfare  
10 v. Holjeson, 708 P.2d 661, 664-65 (Wash. Ct. App. 1985).

11 Here, though Lee attempted to collaterally attack the  
12 California default judgment in the bankruptcy court, he did not  
13 collaterally attack the Washington judgment. Lee did not allege  
14 that the Washington court lacked jurisdiction, violated his  
15 constitutional rights, or issued a judgment produced through  
16 fraud. Rather, Lee collaterally attacked the California default  
17 judgment, even though the bankruptcy court lacked the power to  
18 review it. The judgment subject to the review of the bankruptcy  
19 court was the Washington judgment, not the underlying California  
20 default judgment.

21 2. Claim preclusion bars the bankruptcy court from reviewing  
22 the Washington judgment.

23 Under the doctrine of claim preclusion, a party cannot bring  
24 a claim "if a court of competent jurisdiction has rendered a  
25 final judgment on the merits of the claim in a previous action  
26 involving the same parties or their privies." Siegel v. Federal  
27 Home Loan Mortgage Corp., 143 F.3d 525, 528 (9th Cir. 1998)  
28 (quoting Robertson v. Isomedix, Inc. (In re Int'l Nutronics), 28

1 F.3d 965, 969 (9th Cir. 1994)). Claim preclusion applies "where:  
2 (1) the parties are identical or in privity; (2) the judgment in  
3 the prior action was rendered by a court of competent  
4 jurisdiction; (3) there was a final judgment on the merits; and  
5 (4) the same claim or cause of action was involved in both  
6 suits." Rein v. Providian Fin. Corp., 270 F.3d 895, 899 (9th  
7 Cir. 2001) (citing Owens v. Kaiser Found. Health Plan, Inc., 244  
8 F.3d 708, 713 (9th Cir. 2001); Siegel, 143 F.3d at 528-29.

9 All of the elements of claim preclusion are present in the  
10 instant case. First, both of the motions before the bankruptcy  
11 court and the Washington court involved Lee and TCAST. Second,  
12 the Washington court, as a court of general jurisdiction, had the  
13 power to hear and decide the motion to set aside the California  
14 default judgment. WASH. REV. CODE ANN. § 2.08.010 (West 2005).  
15 Third, the Washington court also entered an order denying the  
16 motion with prejudice in the Washington court on the ground that  
17 Lee failed to establish a sufficient basis to collaterally attack  
18 the California default judgment. Finally, Lee made the same  
19 claim before the bankruptcy court and the Washington court - that  
20 the default judgment was void under California law. Since all  
21 the necessary elements are satisfied, claim preclusion bars  
22 further review.

## 23 24 VI. CONCLUSION

25 The bankruptcy court correctly granted summary judgment on  
26 the compensatory damages portion of the state court judgment in  
27 favor of TCAST. TCAST met all the elements necessary for issue  
28 preclusion under § 523(a)(2)(A) by showing that the issue of

1 fraud had been actually litigated and necessarily decided. Under  
2 current Ninth Circuit case law, § 523(a)(2)(A) does not require  
3 the bankruptcy court to find whether Lee received a benefit  
4 through his misrepresentation, but only to find whether the debt  
5 arose from the fraudulent conduct. TCAST only needed to  
6 demonstrate that it sustained damages as a proximate result of  
7 Lee's fraud. Therefore, the issue was actually litigated and  
8 necessarily decided by virtue of the entry of the California  
9 default judgment. As such, issue preclusion applied.

10 The bankruptcy court also correctly granted summary judgment  
11 in favor of TCAST on the punitive damages portion of the  
12 judgment. Although the default judgment may have been void under  
13 California law, full faith and credit prevented the bankruptcy  
14 court from reviewing the Washington judgment. Furthermore,  
15 because the Washington court made a final judgment involving the  
16 same parties and the same claim regarding the validity of the  
17 California default judgment, the doctrine of claim preclusion  
18 applied.

19 AFFIRMED.  
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