

DEC 13 2007

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	OR-07-1272-JKMo
		)		
7	JAMES HENDERSON SANDERS,	)	Bk. No.	97-33882
		)		
8	Debtor,	)	Adv. No.	04-03384
		)		
9	JAMES HENDERSON SANDERS,	)		
		)		
10	Appellant,	)		
		)		
11	v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
		)		
12	PROGRESSIVE CASUALTY	)		
		)		
13	INSURANCE CO., et al.,	)		
		)		
14	Appellees.	)		
		)		

Argued and Submitted on November 30, 2007  
at Seattle, Washington

Filed - December 13, 2007

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

Honorable Trish M. Brown, Bankruptcy Judge, Presiding

Before: JURY, KLEIN and MONTALI, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1) it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 **I. INTRODUCTION**

2 Chapter 7<sup>2</sup> debtor commenced an adversary proceeding which  
3 sought a determination that his restitution debt owed to various  
4 insurance companies was discharged. After a trial, the  
5 bankruptcy court found the debt nondischargeable, dismissed  
6 debtor's complaint and entered judgment in favor of the  
7 defendants (the "Dismissal Judgment").

8 Debtor timely appealed the Dismissal Judgment. However, he  
9 failed to file his opening brief despite being granted two time  
10 extensions to do so. Accordingly, we dismissed debtor's appeal,  
11 which dismissal was not appealed further.

12 Debtor subsequently moved for relief from the Dismissal  
13 Judgment, which the bankruptcy court denied. Debtor timely  
14 appealed.

15 Because the bankruptcy court did not abuse its discretion in  
16 denying debtor's motion for relief from the Dismissal Judgment,  
17 we AFFIRM.

18 **II. FACTS AND PROCEDURAL HISTORY**

19 On January 27, 1997, a criminal judgment (the "Criminal  
20 Judgment") was entered against debtor in the United States  
21 District Court for the Eastern District of California adjudging  
22 him guilty, after a jury trial, of seven counts of mail fraud in  
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24 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
27 enacted and promulgated prior to the effective date of The  
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23, because the case from which this  
appeal arises was filed before its effective date (generally  
October 17, 2005).

1 violation of 18 U.S.C. § 1384, and of aiding and abetting under  
2 18 U.S.C. § 2. The district court sentenced debtor to prison for  
3 51 months and ordered him to make restitution to Harco National  
4 Insurance Company ("Harco"), Progressive Casualty Insurance  
5 Company ("Progressive"), and Liberty Mutual Insurance Company  
6 ("Liberty") in varying amounts that totaled \$5,026,657 (the  
7 "Restitution Obligation").

8 On May 12, 1997, debtor filed his chapter 7 petition.  
9 Debtor obtained his discharge on August 21, 1997.

10 On November 16, 1998, Harco moved to reopen debtor's case to  
11 file an adversary proceeding for nondischargeability of the  
12 Restitution Obligation owed to it. The motion was granted and on  
13 January 7, 1999, Harco obtained a default judgment against debtor  
14 determining that the Restitution Obligation was nondischargeable.  
15 That judgment was not appealed.

16 On June 29, 2004, debtor filed a motion for "Order Affirming  
17 the Discharge of Certain Debts per in Re: Beezley", seeking to  
18 affirm that the Restitution Obligation in its entirety was  
19 discharged. On August 18, 2004, debtor's case was reopened, the  
20 bankruptcy court denied his motion and reaffirmed that Harco's  
21 nondischargeability judgment against debtor remained in full  
22 force and effect.

23 On September 21, 2004, debtor commenced an adversary  
24 proceeding against Progressive, Liberty, Harco and the United  
25 States, seeking a determination that the Restitution Obligation  
26 was discharged because it fell outside the scope of § 523(a)(7)  
27 and § 523(a)(13) was inapplicable. On November 30, 2004, the  
28 bankruptcy court granted Harco's motion to dismiss. Neither

1 Liberty nor the United States filed answers. Progressive  
2 answered debtor's complaint and asserted counterclaims seeking  
3 relief under § 523(a)(2)(A) and (a)(4) if the bankruptcy court  
4 ruled against Progressive on the § 523(a)(13) claim for relief.

5 After a trial on June 14, 2005, the bankruptcy court found  
6 the Restitution Obligation was nondischargeable and entered the  
7 Dismissal Judgment on June 22, 2005. On July 1, 2005, debtor  
8 appealed the Dismissal Judgment. Debtor requested two time  
9 extensions to file his opening brief which we granted. However,  
10 we denied debtor's third request for a time extension and we  
11 dismissed the appeal on January 21, 2006.<sup>3</sup> Debtor did not appeal  
12 our dismissal.

13 On May 22, 2007, debtor moved to reopen the adversary  
14 proceeding to seek relief from the Dismissal Judgment. Debtor's  
15 motion for relief was titled "Fed. R. Bank. P. 3008 Interpreting  
16 Fed. R. Civ. P. 60." Because Rule 3008 governs reconsideration  
17 of orders regarding claims, the bankruptcy court treated debtor's  
18 motion as one for relief from judgment under Rule 9024, which

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22 <sup>3</sup> On October 14, 2005, debtor filed another chapter 7  
23 petition in the District of Arizona. Progressive commenced an  
24 adversary proceeding against debtor seeking to deny discharge of  
25 the Restitution Obligation owed to it. The bankruptcy court  
26 granted Progressive's motion for summary judgment, finding the  
27 Restitution Obligation was nondischargeable under § 523(a)(2) and  
28 (13). Debtor timely appealed and we affirmed the Arizona  
bankruptcy court's order granting Progressive's summary judgment  
on the ground that the Oregon bankruptcy court's findings were  
res judicata with respect to nondischargeability of the  
Restitution Obligation. See Memorandum Decision BAP AZ-06-1382  
filed March 30, 2007.

1 incorporates Federal Rule Civil Procedure ("Civil Rule") 60.<sup>4</sup>

2 On June 1, 2007, the bankruptcy court denied debtor's motion  
3 because it was time-barred under Civil Rule 60(b)(1), (2), and  
4 (3), and the allegations were insufficient to warrant the  
5 granting of relief under subsections (4), (5) or (6).

6 Debtor timely appealed.

### 7 **III. JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
9 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
10 § 158.<sup>5</sup>

### 11 **IV. ISSUES**

12 Whether the bankruptcy court abused its discretion in  
13 denying debtor's motion for relief from the Dismissal Judgment.

### 14 **V. STANDARDS OF REVIEW**

15 We review the denial of a motion for relief from judgment  
16 under Civil Rule 60(b) for abuse of discretion. Tennant v. Rojas  
17 (In re Tennant), 318 B.R. 860, 866 (9th Cir. BAP 2004).  
18 "Under the abuse of discretion standard, we will not reverse  
19 unless we are 'definitely and firmly convinced that the  
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22 <sup>4</sup> We agree with the trial judge that Rule 9024, which  
23 incorporates Civil Rule 60, is applicable to debtor's motion  
24 since he was not seeking reconsideration regarding a claim.

25 <sup>5</sup> The judgment dismissing debtor's adversary complaint does  
26 not expressly dismiss Progressive's counterclaims for  
27 nondischargeability under § 523. Nonetheless, because the  
28 judgment dismissed debtor's complaint against Progressive, we  
determine that Progressive's counterclaims were impliedly  
dismissed as well. Accordingly, there is no jurisdictional  
defect affecting this Panel's immediate review of the denial of  
debtor's motion for reconsideration.

1 bankruptcy court committed a clear error of judgment.'" Tennant,  
2 318 B.R. at 866 (citation omitted). "[A]n appeal from an order  
3 denying a [Fed.R.Civ.P.] 60(b) motion brings up for review only  
4 the correctness of that denial and does not bring up for review  
5 the final judgment." Id. (citation omitted). Accordingly, our  
6 review is limited to the court's denial of debtor's motion for  
7 relief from the Dismissal Judgment, rather than the merits of the  
8 Dismissal Judgment itself. Id.

## 9 **VI. DISCUSSION**

10 On appeal, debtor contends that the bankruptcy court erred  
11 in denying his motion since he alleged "profound corrections"  
12 were made to the "false and misleading documentary record" in his  
13 criminal case on March 28, 2006, two months after the dismissal  
14 of his appeal. According to debtor, these "profound corrections"  
15 constitute extraordinary circumstances warranting reconsideration  
16 and explain why he failed to prosecute his appeal. At oral  
17 argument, however, he conceded that the "corrections" do not  
18 vitiate his conviction of the seven counts of mail fraud.

19 Debtor next contends that the bankruptcy court erred in  
20 denying his motion because the acts that gave rise to the  
21 Restitution Obligation were committed before January 14, 1993,  
22 and, therefore, § 523(a)(7) rather than § 523(a)(13) applies.  
23 Debtor argues that the application of § 523(a)(13) to his prior  
24 conduct violates the ex post facto clause of the United States  
25 Constitution. Debtor also contends that the reasoning of Rashid  
26 v. Powel (In re Rashid), 210 F.3d 201 (3rd Cir. 2000) takes his  
27 Restitution Obligation outside the scope of § 523(a)(7).

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1 To the extent debtor requests a review of the merits of the  
2 Dismissal Judgment, we may not ordinarily conduct such a review.  
3 This is not a timely appeal from the Dismissal Judgment. An  
4 appeal from the denial of Civil Rule 60(b) relief does not bring  
5 the underlying judgment up for review. Tennant, 318 B.R. at 866;  
6 see also Martinelli v. Valley Bank of Nevada (In re Martinelli),  
7 96 B.R. 1011, 1013 (9th Cir. BAP 1988) (noting that an appeal from  
8 a denial of a Rule 60(b) motion brings up only the denial of the  
9 motion for review, not the merits of the underlying judgment).

10 "A [Civil Rule] 60(b)[] motion guides the balance between  
11 'the overriding judicial goal of deciding cases correctly, on the  
12 legal and factual merits, with the interests of both litigants  
13 and the courts in the finality of judgments.'" Sallie Mae Serv.,  
14 LP v. Williams (In re Williams), 287 B.R. 787, 793 (9th Cir. BAP  
15 2002) (citation omitted). We have held that "even though [Civil  
16 Rule] 60(b) motions are liberally construed, 'there is a  
17 compelling interest in the finality of judgments which should not  
18 lightly be disregarded.'" Id. (citation omitted). It is the  
19 debtor's burden to bring himself within the provisions of Civil  
20 Rule 60(b). Martinelli, 96 B.R. at 1013 (finding it was the  
21 moving party's burden to bring themselves within the provisions  
22 of Civil Rule 60(b)(6)).

23 Although there is a narrow exception to the rule against  
24 using Civil Rule 60(b) to review the merits of the underlying  
25 judgment when that judgment is shown to have been infected by  
26 clear error, no such error has been demonstrated in this  
27 instance. McDowell v. Calderon, 197 F.3d 1253, 1255 n. 4 (9th  
28 Cir. 1999) (en banc).

1 Confining our review to the bankruptcy court's denial of  
2 debtor's motion for relief from the Dismissal Judgment, we  
3 conclude that the denial was within the court's discretion.  
4 There are six reasons for granting relief from judgment set forth  
5 in Civil Rule 60(b):

6 (1) mistake, inadvertence, surprise, or excusable  
7 neglect; (2) newly discovered evidence which by due  
8 diligence could not have been discovered in time to  
9 move for a new trial; (3) fraud...or other misconduct  
10 of an adverse party; (4) the judgment is void; (5) the  
11 judgment has been satisfied, released, or  
12 discharged...; or (6) any other reason justifying  
13 relief from the operation of the judgment.

14 A party moving for relief from judgment must make the motion  
15 within a reasonable time and, for reasons (1), (2) and (3), the  
16 motion shall be made not more than one year after the judgment  
17 was entered or taken.

18 The bankruptcy court addressed all six of the enumerated  
19 reasons for granting relief from judgment in deciding debtor's  
20 motion. First, the bankruptcy court properly denied debtor's  
21 motion because it was time-barred under Civil Rule 60(b) (1),  
22 (2), and (3) which require a motion to have been brought no  
23 longer than one year after the judgment was entered. Debtor's  
24 motion was well past the one year. Lake v. Capps (In re Lake),  
25 202 B.R. 751, 759 n.8 (9th Cir. BAP 1996). Debtor's invocation  
26 of Rule 3008 as an exception to the one-year limitation is  
27 unavailing because the motion does not seek reconsideration of  
28 the allowance or disallowance of a claim filed under § 501.

Next, the court correctly ruled that debtor's motion did not  
satisfy any of the grounds enumerated in Civil Rule 60(b) (4) or  
(5). Debtor did not argue that relief from the Dismissal

1 Judgment was warranted because it was void or satisfied. While  
2 debtor asserted that the district court had "corrected" the  
3 indictment supporting the 1997 conviction, the so-called  
4 correction did not alter the prior judgment of conviction and is  
5 not so significant as to warrant a conclusion that the judgment  
6 of conviction that included the order of restitution should lose  
7 prospective effect under Civil Rule 60(b)(5).

8       Lastly, we find the court correctly decided that debtor  
9 failed to show the extraordinary circumstances necessary for  
10 obtaining relief under Civil Rule 60(b)(6). "The Supreme Court  
11 has construed [Civil Rule] 60(b)(6) as providing relief to  
12 parties who were confronted with extraordinary circumstances that  
13 excused their failure to follow ordinary paths of appeal."  
14 United States v. Wyle (In re Pacific Far East Lines, Inc.), 889  
15 F.2d 242, 250 (9th Cir. 1989) (noting that where parties have made  
16 deliberate litigation choices, Civil Rule 60(b)(6) should not  
17 provide a second chance). "'In order to bring himself within the  
18 limited area of [Civil] Rule 60(b)(6) a petitioner is required to  
19 establish the existence of extraordinary circumstances which  
20 prevented or rendered him unable to prosecute an appeal.'" Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341  
21 (9th Cir. 1981) (citation omitted).

23       Debtor's appeal of the Dismissal Judgment was previously  
24 before this Panel. Debtor requested a third time extension to  
25 file his opening brief because the Ninth Circuit Court of Appeals  
26 had issued an order requiring the district court to issue an  
27 order regarding debtor's motion to correct the district court  
28 record. We learned, however, that the district court had denied

1 debtor's motion. Accordingly, we denied debtor's third request  
2 for a time extension to file his opening brief and dismissed his  
3 appeal on January 27, 2006.

4 Debtor contends that it was not until March 2006, after his  
5 appeal was dismissed, that the clerk of the district court  
6 finally corrected the "previously false and misleading  
7 documentary record" in debtor's criminal case. However, the only  
8 change we can discern from the record is that the "Redacted  
9 Superseding Indictment" was corrected to reflect that it was  
10 filed in open court on April 23, 1996, instead of May 28, 1996.  
11 That change in the filing date had no effect on the bankruptcy  
12 court's findings regarding the nondischargeability of the  
13 Restitution Obligation.

14 The letter from the clerk to the debtor dated April 11,  
15 2006, states that the final charges against the debtor are  
16 "reflected on the...Judgment issued by the court." A review of  
17 the Criminal Judgment shows debtor's conviction of crimes under  
18 Title 18, and the bankruptcy court found the Restitution  
19 Obligation to be excepted from discharge under § 523(a)(13).  
20 Debtor acknowledged at the hearing on this matter that the  
21 Criminal Judgment against him on Counts 3,4,5,6,7,8 and 11 was  
22 still valid.

23 We find that debtor has not met the requirement of  
24 "extraordinary circumstances" as defined in Pacific Far East or  
25 Twentieth Century-Fox Film. Debtor had the opportunity to  
26 follow the normal path of appeal but allowed his appeal to be  
27 dismissed. He cannot now have a second bite at the apple.

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1 In sum, debtor did not meet his burden to show that any of  
2 the provisions of Civil Rule 60(b) entitled him to relief from  
3 the Dismissal Judgment.

4 **VII. CONCLUSION**

5 We find no clear error or abuse of discretion in the  
6 bankruptcy court's denial of debtor's motion for relief from the  
7 Dismissal Judgment. Accordingly, we AFFIRM.

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10 KLEIN, Bankruptcy Judge, concurring:

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12 I join the majority decision and write separately to note  
13 the fundamental lack of merit in appellant's ultimate theory for  
14 why he should not be required to pay the \$5,026,657.00 in  
15 restitution ordered by United States District Judge Lawrence K.  
16 Karlton in United States v. Sanders, No. 2:94CR00328-001, U.S.  
17 Dist. Ct., E.D. Cal. pursuant to title 18, United States Code.  
18 Merit is lacking in two areas.

19 I

20 A chapter 7 discharge does not discharge a debt "for any  
21 payment of an order of restitution issued under title 18, United  
22 States Code." 11 U.S.C. § 523(a)(13). This provision was added  
23 to the Bankruptcy Code by the Act of September 13, 1994, Public  
24 Law 103-322, 108 Stat. 2135, and has been continuously in effect  
25 since that time. Hence, it was in effect on May 12, 1997, when  
26 the appellant filed his chapter 7 case in the District of Oregon.

27 It is plain that Judge Karlton's order of restitution was  
28 issued under title 18, United States Code, and that the debt is

1 nondischargeable under § 523(a)(13).

2 Appellant has concocted a theory that § 523(a)(13) does not  
3 apply in his case filed May 12, 1997, because the conduct for  
4 which he was convicted by criminal judgment imposed January 22,  
5 1997, occurred before the enactment of § 523(a)(13) on September  
6 13, 1994. His theory is that applying § 523(a)(13) in his case  
7 would offend the ex post facto clause of the Constitution.

8 The theory lacks merit for several reasons. First,  
9 § 523(a)(13) is a civil statute that applies to all bankruptcy  
10 cases filed after its enactment. Second, the criminal  
11 restitution orders in question are compensatory, not punitive, in  
12 purpose. Third, the cases upon which appellant relies do not  
13 support his position.

14 The linchpin of his theory turns on a snippet of ambiguous  
15 dictum in a Third Circuit decision suggesting that § 523(a)(13)  
16 cannot be applied retroactively. Rashid v. United States (In re  
17 Rashid), 210 F.3d 201, 204 (3rd Cir. 2000). There, both the  
18 order of restitution and the bankruptcy case were filed before  
19 enactment of § 523(a)(13). The retroactivity to which the Third  
20 Circuit was referring related to the time the Rashid bankruptcy  
21 case was filed on July 6, 1994, which was before the September  
22 13, 1994, enactment of § 523(a)(13), which is a conventional  
23 application of the effect of an amendment to the Bankruptcy Code.  
24 Id. at 203. Thus, the restitution obligation in question was  
25 assessed under § 523(a)(7), which makes nondischargeable fines,  
26 forfeitures, and penalties that are payable to and for the  
27 benefit of a governmental unit and that are not compensation for  
28 actual pecuniary loss and was held to be discharged.



1 indictment that seems to have been accomplished by the district  
2 court clerk appears to be insubstantial and without effect on the  
3 criminal conviction and attendant order of restitution and, thus,  
4 is ineligible for relief under Civil Rule 60(b)(5).

5       While our analysis is correct, it is also unnecessary  
6 because the §§ 523(a)(2) and (a)(4) theories are mere capillaries  
7 compared to the jugular vein represented by § 523(a)(13).

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