

**MAR 30 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**NOT FOR PUBLICATION**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**

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In re:	)	BAP No.	AZ-06-1382-PaBMo
	)		
JAMES H. SANDERS,	)	Bk. No.	05-24529-CGC
	)		
Debtor.	)	Adv. No.	06-00211-CGC
	)		
_____	)		
JAMES H. SANDERS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
PROGRESSIVE CASUALTY INSURANCE	)		
COMPANY,	)		
	)		
Appellee.	)		
_____	)		

Submitted Without Oral Argument on March 23, 2007

Filed - March 30, 2007

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

Honorable Charles G. Case, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: PAPPAS, BRANDT 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 Appellant chapter 7<sup>2</sup> debtor James H. Sanders ("Sanders")  
2 appeals an order granting summary judgment in an adversary  
3 proceeding in favor of Appellee Progressive Casualty Insurance  
4 Company ("Progressive") determining that the debt Sanders owes  
5 Progressive is excepted from discharge in his bankruptcy case  
6 under § 523(a)(2) and (13). We AFFIRM.

7  
8 **FACTS**

9 On January 27, 1997, a "Judgment in a Criminal Case" was  
10 entered against Sanders in the U.S. District Court for the Eastern  
11 District of California adjudging him guilty, after a jury trial,  
12 of mail fraud in violation of 18 U.S.C. § 1341, and aiding and  
13 abetting under 18 U.S.C. § 2.<sup>3</sup> For his sentence, the district  
14 court sent Sanders to prison for 51 months, and ordered him to  
15 make restitution to Progressive in the amount of \$4,106,657.00  
16 (the "Restitution Obligation").<sup>4</sup>

17 On May 12, 1997, Sanders filed for chapter 7 relief in the  
18 District of Oregon (the "Oregon Bankruptcy Case"). Sanders was  
19 granted a discharge on August 21, 1997, and the case was closed.

20 In 2004, the Oregon Bankruptcy Case was reopened to allow  
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23 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
26 enacted and promulgated prior to the effective date (October 17,  
2005) of most of the provisions of the Bankruptcy Abuse Prevention  
and Consumer Protection Act of 2005, Pub. L. 109-8, April 20,  
2005, 119 Stat. 23.

27 <sup>3</sup> Case E.D. Cal. 2:94CR00328-001.

28 <sup>4</sup> Sanders was also ordered to make restitution to two other  
parties not involved in this appeal.

1 Sanders to commence an adversary proceeding against Progressive  
2 seeking a declaration that the Restitution Obligation was  
3 discharged in the Oregon Bankruptcy Case. On June 14, 2004, the  
4 Oregon Bankruptcy Court conducted a trial in the adversary  
5 proceeding, at which Sanders appeared pro se. In dismissing the  
6 adversary proceeding, the court recited detailed findings of fact  
7 on the record, including the following:

8           The evidence before the court establishes that  
9           the debtor was convicted under 18 U.S.C.  
10           § 1341. . . . [Sanders] sold insurance  
11           policies to various third parties . . .  
12           involved in the trucking business,  
13           representing himself to them as a stand-alone  
14           insurance company. In fact, the policies  
15           marketed by the debtor were actually group  
16           policies obtained by the debtor through  
17           Progressive. . . . [T]he debtor significantly  
18           understated the number of drivers insured  
19           under the group policies and . . . the  
20           insurance company under-billed for services it  
21           was providing . . . . These facts  
22           sufficiently allege a pattern of intentional  
23           misrepresentation by the debtor which was  
24           relied upon by Progressive. Thus I find that  
25           Progressive has met its burden of [proving]  
26           that the debt owed to it is non-dischargeable  
27           under Section 523(a)(2).

19 Tr. Hr'g 24:13-14; 25:19 - 26:9 (June 14, 2005).

20           The debtor's restitution obligation to  
21           Progressive was entered as a part of the  
22           debtor's sentence for violation of 18 U.S.C.  
23           Section 1341. Section 523(a)(13) specifically  
24           exempts from discharge a debt, quote, "for any  
25           payment of an order of restitution . . . under  
26           title 18, United States Code," close quote.  
27           As such, the debt is clearly exempt from  
28           discharge under Section 523(a)(13).

25 Tr. Hr'g 29:7-13 (June 14, 2005).

26           On June 22, 2005, the Oregon Bankruptcy Court entered its  
27           judgment dismissing the adversary proceeding (the "Oregon  
28           Judgment"). Sanders appealed the Oregon Judgment to this Panel on

1 July 1, 2005. However, the appeal was dismissed for failure to  
2 prosecute on January 21, 2006.<sup>5</sup>

3 On October 14, 2005, Sanders filed another chapter 7  
4 petition, this time in the District of Arizona (the "Arizona  
5 Bankruptcy Case"). A discharge was granted on February 19, 2006.

6 Progressive commenced an adversary proceeding on February 7,  
7 2006, seeking to deny discharge of the Restitution Obligation. On  
8 June 23, 2006, Progressive moved for summary judgment. At a  
9 hearing on Progressive's summary judgment motion on October 2,  
10 2006, the bankruptcy court explained its decision:

11 What I am confronted with here is a final  
12 judgment on the merits of the same case [i.e.,  
13 the Oregon Judgment], that you say was  
14 incorrectly decided, because in effect the  
15 trial judge relied upon information that was  
16 incorrect or was later determined to be  
17 incorrect, and that you can demonstrate that.  
18 But you shouldn't demonstrate that to me. You  
19 need to demonstrate it to her. . . . I don't  
20 have jurisdiction to revisit what Judge Brown  
21 says. . . because as long as her judgment is  
22 valid and there and final, which it is as of  
23 now, then I'm bound under principles of res  
24 judicata to recognize it.

25 Tr. Hr'g 9:4-10; 11:1-6 (October 2, 2006).

26 On October 17, 2006, the bankruptcy court entered a judgment  
27 in favor of Progressive determining that the Restitution  
28 Obligation was nondischargeable under §523(a)(2) and (13) (the  
"Arizona Judgment"). Sanders filed a timely appeal of the Arizona  
Judgment on October 26, 2006.

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25 <sup>5</sup> In the appeal, Sanders sought and obtained two extensions  
26 of time to file an opening brief and excerpts of record. In  
27 granting the second extension, Sanders was warned that no further  
28 delays would be allowed absent extraordinary circumstances. The  
Panel denied Sanders' third motion for an extension and dismissed  
the appeal for failure to prosecute.

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**JURISDICTION**

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction pursuant to 28 U.S.C. § 158(b).

**ISSUE**

Whether the bankruptcy court erred in granting summary judgment to Progressive and determining that Sanders' debt was excepted from discharge on the ground of res judicata.

**STANDARD OF REVIEW**

We review summary judgment de novo. Paine v. Griffin (In re Paine), 283 B.R. 33, 34 (9th Cir. BAP 2002). We also review de novo the preclusive effect of a judgment. Bankruptcy Recovery Network v. Garcia (In re Garcia), 313 B.R. 307, 310 (9th Cir. BAP 2004).

**DISCUSSION**

In granting Progressive a summary judgment,<sup>6</sup> the bankruptcy court determined that, as a matter of law, the debt owed by Sanders to Progressive was excepted from discharge under §§ 523(a)(2) and (13). In doing so, the bankruptcy court decided that there were no genuine issues of material fact, and that the

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<sup>6</sup> Summary judgment in bankruptcy adversary proceedings is governed by Rule 7056, incorporating Fed. R. Civ. P. 56. Fed. R. Civ. P. 56(c) provides that: The judgment sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

1 Oregon Judgment precluded Sanders from contesting the  
2 dischargeability of the debt in the Arizona adversary proceeding.  
3 We agree with this decision.

4 On three occasions in the last five years, the Panel has  
5 issued published opinions concerning the fundamental issue  
6 presented in this appeal. Our view of the applicable law has not  
7 changed. As we stated:

8 The rule is that res judicata principles apply  
9 in bankruptcy so that once a debt is "excepted  
10 from discharge" in a judgment that meets the  
11 requirements for preclusion, it is, except for  
12 the eight exceptions named in [§] 523(b), [7]  
"excepted from discharge" in all subsequent  
chapter 7 cases without need for an  
independent basis for excepting the debt from  
discharge in the later case.

13 \* \* \*

14 In other words, once nondischargeable, always  
15 nondischargeable.

16 In re Paine, 283 B.R. at 37; quoted in In re Garcia, 313 B.R. at  
17 310; Moncur v. Agricredit Acceptance Co. (In re Moncur), 328 B.R.  
18 183, 186 (9th Cir. BAP 2005).<sup>8</sup>

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20 \_\_\_\_\_  
21 <sup>7</sup> Section 523(b) applies to debts excepted from discharge  
22 under §§ 523(a)(1), (3) and (8); three sections under the old  
Bankruptcy Act; § 439A of the Higher Education Act of 1965; and  
§ 733(g) of the Public Health Service Act), none of which are  
applicable here.

23 <sup>8</sup> Curiously, neither Sanders nor Progressive cited any of  
24 these decisions in their briefs in this appeal. While Sanders is  
25 a pro se litigant, and perhaps should not be expected to have  
26 ready access to the Panel's precedents, we are perplexed by the  
27 research shortcomings of Progressive. Moreover, we note that  
28 Progressive's prosecution of the Arizona adversary proceeding was  
likely unnecessary. As we have explained, a judgment establishing  
an exception to discharge entered in a bankruptcy case remains  
enforceable against the same debtor in a subsequent chapter 7  
case; no second nondischargeability proceeding is required. In re  
Moncur, 328 B.R. at 183.

1 In the prior adversary proceeding commenced by Sanders  
2 against Progressive, the Oregon bankruptcy court entered detailed  
3 findings of fact to support its determination that Sanders had  
4 made intentional misrepresentations that were relied upon by  
5 Progressive, and thus, the Progressive claim against Sanders was  
6 nondischargeable under § 523(a)(2). The Oregon bankruptcy court  
7 also concluded that the Restitution Obligation, imposed upon  
8 Sanders by the district court in the criminal action, constituted  
9 an order for restitution under title 18 of the U.S. Code and,  
10 thus, was also clearly exempt from discharge under § 523(a)(13).

11 The Arizona bankruptcy court properly concluded that it was  
12 bound to give preclusive effect to the Oregon Judgment. Claim  
13 preclusion applies in bankruptcy. Brown v. Felsen, 442 U.S. 127,  
14 134-39 (1979). "Claim preclusion generally requires that there  
15 be: (1) parties either identical or in privity; (2) a judgment  
16 rendered by a court of competent jurisdiction; (3) a prior action  
17 concluded to a final judgment on the merits; and (4) the same  
18 claim or cause of action involved in both actions."<sup>9</sup> Rein v.  
19 Providian Fin. Corp., 242 F.3d 1995, 1098 (9th Cir. 2001), quoted  
20 in In re Paine, 283 B.R. at 39. All these requirements are  
21 satisfied here.

22 The record demonstrates, without dispute, that the parties to  
23 the two actions in question, Sanders and Progressive, are  
24 identical. And it is axiomatic that the Oregon Bankruptcy Court  
25 is a court of competent jurisdiction to enter a judgment

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27 <sup>9</sup> Since the Oregon Judgment deals with a federal issue  
28 determined in a federal court, we do not need to examine any  
state-specific rules affecting res judicata.

1 concerning the dischargeability of debt in connection with  
2 Sanders' bankruptcy case. 28 U.S.C. § 1334(b); § 157(b)(2)(I).  
3 In re Sasson, 424 F.3d 864, 871 (9th Cir. 2005) (bankruptcy court  
4 has exclusive jurisdiction to determine whether a debt is  
5 dischargeable in bankruptcy).

6 The Oregon Judgment was a final decision on the merits.  
7 While there had been an appeal of the Oregon Judgment to this  
8 Panel, it was dismissed for lack of prosecution and no further  
9 appeal was taken.

10 Finally, the claim addressed in both the Oregon Judgment and  
11 in the Arizona adversary proceeding was the same: whether the  
12 Progressive debt was excepted from discharge in bankruptcy under  
13 § 523(a) of the Bankruptcy Code.

14 Sanders argues that the Oregon Judgment should not be given  
15 preclusive effect because it was based on flawed or incorrect  
16 information given to the Oregon bankruptcy court. In particular,  
17 Sanders argues that, because of various irregularities in the  
18 filing of the criminal indictment in the district court case, the  
19 Oregon bankruptcy court relied upon an inaccurate record when it  
20 concluded that he engaged in a "pattern of intentional  
21 misrepresentation."

22 Sanders' argument misses the mark in this context. Even if  
23 the Oregon Bankruptcy Court erred in making its determination that  
24 the Restitution Obligation was nondischargeable under § 523(a)(2),  
25 it is of no moment. "Application of principles of res judicata is  
26 not defeated by error in the original judgment" as long as the  
27 loser had the opportunity to test the final judgment on appeal.  
28 In re Paine, 283 B.R. at 39, citing Federated Dep't Stores v.



1 Moitie, 452 U.S. 394, 398 (1981); Richey v. United States, 9 F.3d  
2 1407, 1412 (9th Cir. 1993); 18 WRIGHT & MILLER, FEDERAL PRACTICE &  
3 PROCEDURE § 4403 (“The first lesson one must learn on the subject  
4 of res judicata is that judicial findings must not be confused  
5 with absolute truth.”). Though Sanders believes the Oregon  
6 Judgment was infected with error, because he failed to pursue his  
7 contention in the Oregon court, through appropriate motion to that  
8 court<sup>10</sup> or by appeal, the Oregon Judgment is enforceable and  
9 preclusive in the Arizona adversary proceeding.

10 Finally, we perceive another deficiency in Sanders’ argument.  
11 Sanders’ contention that he is not precluded from attacking the  
12 Oregon Judgment in the Arizona action because of the alleged error  
13 in that judgment addresses only the determination by the Oregon  
14 bankruptcy court that his debt to Progressive is nondischargeable  
15 under § 523(a)(2). The Oregon Judgment also established that the  
16 Restitution Obligation was excepted from discharge under  
17 § 523(a)(13). Neither in his Statement of Issues on Appeal nor in  
18 his appeal briefs does Sanders suggest that the bankruptcy court  
19 relied upon erroneous facts in deciding that the Restitution  
20 Obligation is an order for payment of restitution issued under  
21 title 18 of the U. S. Code, and thus is nondischargeable under  
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24 <sup>10</sup> The bankruptcy court apprised Sanders that he should  
25 consider asking the Oregon bankruptcy court for relief from its  
26 judgment under Fed. R. Civ. P. 60(b)(6), but “as long as her  
27 judgment is valid and there and final, which it is as of now, then  
28 I’m bound under principles of res judicata to recognize it.” Tr.  
Hr’g 11:4-6 (October 2, 2006). In reply, Sanders admitted, “Well,  
I - yeah, I thought about going back to her but like I said I was  
here in front of this court. . . .” Id. at 11:6-8. We express no  
opinion concerning the availability of relief if Sanders were to  
pursue such a motion in the Oregon Bankruptcy Court.

1 § 523(a)(13).<sup>11</sup> Indeed, we can conceive of no condition under  
2 which this debt could be discharged unless the underlying Criminal  
3 Judgment awarding the restitution were reversed on appeal or  
4 modified by the district court.

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**CONCLUSION**

7 We conclude that the bankruptcy court did not err in granting  
8 summary judgment to Progressive on the ground of res judicata  
9 (claim preclusion). We AFFIRM the decision of the bankruptcy  
10 court.

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23 <sup>11</sup> Sanders argued to the Oregon bankruptcy court that  
24 § 523(a)(13) was inapplicable because it constituted an ex post  
25 facto law that became effective after the date of his criminal  
26 activity, and thus violated U.S. CONST. art. I, sec. 9, cl. 3. The  
27 Oregon court rejected that argument, reasoning that the date of  
28 the restitution order, not the criminal activity, was implicated  
in determining the application of § 523(a)(13). Because the  
district court ordered the restitution after the enactment of  
§ 523(a)(13), the amendment to the Bankruptcy Code was applicable  
in Sanders' case. *Id.* Sanders did not attempt to revisit his  
constitutional argument in either the Arizona court or in this  
appeal, and so we have no occasion to address it.