

MAY 14 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WEST AMERICAN INSURANCE
COMPANY, an Ohio corporation,

Plaintiff - Appellant,

v.

JUSTIN L. HERNANDEZ and DANIELA
A. HERNANDEZ,

Defendants - Appellees.

No. 11-35278

D.C. No. 6:07-cv-01447-AA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, Chief District Judge, Presiding

Submitted May 10, 2012**
Portland, Oregon

Before: KOZINSKI, Chief Judge, TALLMAN and IKUTA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court did not abuse its discretion in denying West American Insurance Company's motions under Rules 60(b), 62, and 67 of the Federal Rules of Civil Procedure. West American's motion to resolve a dispute regarding its entitlement to the \$170,000 judgment under the mortgage clause sought relief that was unavailable under Rule 60(b)(6) because it rested on a claim that was not litigated as part of the underlying judgment. *See Delay v. Gordon*, 475 F.3d 1039, 1044–46 (9th Cir. 2007); *see also United States v. \$119,980*, 680 F.2d 106, 107–08 (11th Cir. 1982). West American did not appeal the district court's prior denials of its motion to adjudicate that dispute, and Rule 60(b) is not available for adjudication of claims not adjudicated in the underlying order or judgment. *See Delay*, 475 F.3d at 1046–47. Nor was relief available under Rule 60(b)(5): The judgment had not “been satisfied, released or discharged,” and circumstances had not changed since the judgment was entered such that “applying it prospectively [was] no longer equitable.” Fed. R. Civ. P. 60(b)(5).

West American's motions under Rules 62 and 67 became moot when the district court decided its Rule 60(b) motion.

AFFIRMED.