UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

In re:	*	
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JACK MARKARIAN	*	**BAP No. MW 96-031**
Debtor	*	
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THE AETNA CASUALTY	*	**BK No. 95-40961-JFQ**
AND SURETY COMPANY	*	**Adv. No. 95-4130-JFQ**
Plaintiff/Appellee	*	
	*	
v.	*	
	*	
JACK MARKARIAN	*	
Defendant/Appellant	*	
	*	
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Before Goodman, Vaughn, Carlo, Bankruptcy Judges

ORDER

Per Curiam.

The Appellant Jack Markarian ("Markarian"), moves to vacate the Panel's October 28, 1998 opinion and order ("Order") and to dismiss his appeal nunc pro tunc to February 18, 1998. For the reasons that follow, we deny the Appellant's motion.

Background

On January 22, 1998, Markarian submitted an Assented to Motion of Debtor to Approve Settlement Agreement and Dismiss Bankruptcy

Action to the Bankruptcy Court for the District of Massachusetts ("Bankruptcy Court") in his case-in-chief. That motion moved for approval of a settlement agreement between Markarian and the Appellee, The Aetna Casualty and Surety Company ("Aetna") and voluntary dismissal of Markarian's Chapter 7 case. On February 18, 1998, the Bankruptcy Court approved the settlement agreement and dismissed the case. The clerk's office entered the order on February 20, 1998, and the Notice of Dismissal on March 4, 1998.

However, at the time the parties submitted the motion to the Bankruptcy Court for approval of the settlement, the Panel had Markarian's appeal under submission. Neither party alerted the Panel of an impending settlement or of the Notice of Dismissal. The Panel issued its second opinion in this matter on October 28, 1998.[1] We note that our second opinion vacated portions of our first opinion and affirmed the Bankruptcy Court's decision granting summary judgment.

Discussion

Markarian argues that we should vacate[2] our Order and dismiss

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[1] After the Panel issued its first opinion from an appeal from the Bankruptcy Court, Markarian moved for a rehearing, which was granted.

[2] The Panel's power to vacate is provided by 28 U.S.C. § 2106 (1988), which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or

his appeal nunc pro tunc because no case or controversy existed when we issued our Order on October 28, 1998. In support of his argument, Markarian cites to only two Eleventh Circuit cases, Flagship Marine Servs., Inc. v. Belcher Towing Co., 23 F.3d 341, 342 (11th Cir. 1993), and Key Enters. of Del., Inc. v. Venice Hosp., 9 F.3d 893, 990 (11th Cir. 1993) ("When the settling parties filed the joint motions, no case or controversy existed. Consequently, we no longer had jurisdiction over the issues presented and should have immediately dismissed the appeal in accordance with Ghandtchi."). We note that In re Ghandtchi 705 F.2d 1315 (11th Cir. 1983), cites to United States v. Munsingwear, Inc., 340 U.S. 36 (1950), the holding of which has been limited by U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) ["Bonner Mall"]. Markarian, however, failed to cite to this leading case on this matter.[3]

> reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

§ 2106.

[3] On September 7, 1997, the Panel issued an Order in which we stated:

> It should also be noted that the Appellant failed to mention, let alone distinguish Bonner Mall, the Supreme Court's most recent pronouncement on the issue of vacatur. Had the case law been even perfunctorily researched and Shepardized, it would have been apparent that Bonner Mall limited the holding in Munsingwear, and

We hold that since the Bankruptcy Court did not have jurisdiction to approve the parties' settlement and dismiss the case, the settlement and dismissal are void; therefore, a case or controversy still existed when the Panel entered its Order.

A. The Bankruptcy Court's Jurisdiction.

We hold that the Bankruptcy Court did not have jurisdiction to approve the parties' settlement on the merits and dismiss the case.[4] As stated by the Ninth Circuit:

> The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal. As stated in 9 Moore's Federal Practice, 2d ed., ¶ 203.11, pp. 734-36:
>
> > The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to

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> precludes Munsingwear's applicability to this case. Having filed the instant motion without a determination that it was warranted by existing law, the Fund and its counsel are subject to the imposition of sanctions for violation of Fed. Bankr. R. 9011. However, we will treat this infraction as a warning to the Fund that it has used its "one free bite."

New England Teamsters and Trucking Indus. Pension Fund v. CD Realty Partners (In re CD Realty Partners), No. 97-009, slip op. at 3 (B.A.P. 1st Cir. Sept. 7, 1997). We also extend this favor to the Appellant herein today.

[4] Although appearing to have been entered in the case-in-chief, the parties' settlement compromised the adversary proceeding. However, we note that both remain open because the Bankruptcy Court had no jurisdiction to settle the adversary proceeding which was on appeal.

> any matters involved in the appeal. . . . Thus, after a notice of appeal is timely filed, the district court has no power to vacate the judgment, or to grant the appellant's motion to dismiss the action without prejudice, or to allow the filing of amended or supplemental pleadings. (Footnotes omitted.)
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> Accord, Ruby v. Secretary of the U. S. Navy, 365 F.2d 385 (9th Cir. 1966), en banc, cert. denied, 386 U.S. 1011, 87 S. Ct. 1358, 18 L. Ed.2d 442 (1967); Corn v. Guam Coral Co., 318 F.2d 622 (9th Cir. 1963); Resnik v. La Paz Guest Ranch, 289 F.2d 814 (9th Cir. 1961). This rule is clearly necessary to prevent the procedural chaos that would result if concurrent jurisdiction were permitted.

Bennett v. Gemmill (In re Combined Meals Reduction Co.), 557 F.2d 179, 200 (9th Cir. 1977); accord Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 378 (1985) (quoting Griggs); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); Jusino v. Zayas, 875 F.2d 986, 989 (1st Cir. 1989) ("To be sure, the district court waited over a year to act—and when it did, the case was on appeal. Technically, the district court lacked jurisdiction at that time and, before granting reconsideration, should have issued a brief memorandum asking us to remand."); Peterman v. Indian Motorcycle Co., 216 F.2d 289, 291 (1st Cir. 1954) ("[O]n July 13, 1954, the district court no longer had control over that judgment, since the plaintiff had filed his notice of appeal therefrom on June 21, 1954, and the case

was pending within the exclusive jurisdiction of the Court of Appeals.").

Further, this holding rests on sound public policy. Judicial precedent is not the property of the private litigant. See U.S. Bancorp Mortgage Co., 513 U.S. at 26-7 (citing Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 40 (1993) (Stevens, J. dissenting)). It is an understatement to say that allowing the kind of backwards approach to litigation that the parties present to us today would uproot the "orderly operation of the federal judicial system." U.S. Bancorp Mortgage Co., 513 U.S. at 27. It would, in fact, disrupt it completely. The minor benefit of encouraging settlement is eclipsed entirely by the disruption that vacating issued Bankruptcy Appellate Panel opinions and dismissing appeals nunc pro tunc would effect on the appellate process.

B. The Case or Controversy Existed When the Panel Entered its October 28, 1998 Order.

Since the Bankruptcy Court had no jurisdiction to approve the parties' compromise and enter dismissal, those orders are void; therefore, a case or controversy still existed when the Panel issued its October 28, 1998 Order.

The Supreme Court in Bonner Mall, after referring to section 2106, see supra note 2 and accompanying text, reminds us that federal courts may not "decide the merits of a legal question not

posed in an Article III case or controversy." U.S. Bancorp Mortgage Co., 513 U.S. at 21. It prescribes that the only action for a federal court posed with such a circumstance is to "make such disposition of the whole case as justice may require." Id. (citing Walling v. Reuter Co., 321 U.S. 671, 677 (1944)). Under the equitable doctrine of vacatur as outlined in Bonner Mall, federal courts are required to decide whether the "mootness" was caused by the movant's voluntary action or happenstance. Id. at 24-26.[5] However, we need not determine this issue since we hold that the Bankruptcy Court did not have jurisdiction to enter its orders approving the settlement and dismissing the case.

Therefore, for the aforementioned reasons, we hold that a case or controversy still existed when the Panel issued its October 28, 1998 Order. Therefore, Markarian's motion is denied. Finally, the Panel notes that its Order still stands, from which either party may appeal.

SO ORDERED.

On this 20th day of November, 1998.

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[5] For example, in United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 477-78 (1916), the Supreme Court found that no case or controversy existed as to whether a certain combination of steamship companies violated the Anti-trust Act because World War I (called the "European War" in the decision), the "happenstance," mooted the question—all business had ceased. The Supreme Court directed that the court below reverse the case with instructions to the court below to dismiss without prejudice. Id. at 478.