THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-15045
	)	
GLIATECH, INC., et al.,	)	Chapter 11
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
MEDMARC CASUALTY INSURANCE COMPANY, et al.,	)	Adversary Proceeding No. 02-1416
	)	
Plaintiffs,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
GLIATECH, INC., et al.,	)	
	)	
Defendants.	)	

The debtors' insurers filed this declaratory judgment action asking that their obligation to provide punitive damage coverage to the debtors be determined by Ohio law. On August 6, 2004, the court entered judgment in favor of the debtors finding that the obligation would be determined by the laws of the states where the claims against the debtors were filed.[1] The insurers appealed.

While the case was on appeal, the parties settled other issues in dispute between them in the main bankruptcy case and agreed to seek vacatur of the judgment as part of that resolution.[2]

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[1] Docket 99, 100.

[2] Main case (02-15045) docket 1378, 1381.

The district court remanded the case to this court at the parties' request. Liquidating Gliatech, a post-reorganization entity, now moves to reconsider the judgment and, on reconsideration, to vacate it. The insurance companies do not oppose the motion.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

PROCEDURAL HISTORY

Both before and after Gliatech, Inc, and its related companies (Gliatech) filed for protection under chapter 11, certain individuals sued Gliatech in state courts claiming that they had been injured by a Gliatech product. Some of the lawsuits included a claim for punitive damages and others refused to rule such a claim out. Medmarc Casualty Insurance Company and Federal Insurance Company (collectively, Medmarc) filed this adversary proceeding seeking a declaration that the insurance policies issued to Gliatech do not cover punitive damage claims. Medmarc argued that its obligation to provide coverage was determined by Ohio law and Ohio law prohibits insuring against punitive damage claims, leaving Gliatech without coverage. Gliatech's position was that Medmarc was liable for such damages because, based on contract negotiations between the parties, non-Ohio law applied.

Gliatech initially argued that the action should be dismissed for lack of jurisdiction because there was no case or controversy between the parties, but withdrew that argument early on. (Memorandum of opinion regarding motion to dismiss and cross motions for summary judgment, docket 72 at n. 7).

As the action progressed, the court asked counsel whether various events made the dispute moot. The last such inquiry was on April 5, 2004 (while the case was under submission following trial) when the court issued an order asking if statements made at the chapter 11 confirmation hearing by Gliatech's counsel meant that the debtors were no longer at risk of having to pay punitive damage awards from estate property. The court noted: "If that is the case, this proceeding would appear to be moot." (Docket 96). The parties responded on April 21, 2004 with a joint statement of facts that did not advise the court that the matter was moot. Gliatech now states that it felt the issue was moot at that time, but for unknown reasons it did not say so. Medmarc's position is that the issue was not moot at the time the judgment was entered and is not moot now, but it does not oppose the motion to vacate. This is not surprising given that vacating the judgment will permit Medmarc to raise the choice of law punitive damage issue anew in other forums. Medmarc does not explain what the legal basis for vacatur is if the dispute was not moot before the judgment was entered.

ISSUE

Whether the court should grant Gliatech's unopposed motion to vacate the judgment?

DISCUSSION

Gliatech moved to reconsider the judgment under federal rule of civil procedure 60(b)(6). A motion to reconsider is governed by civil rule 59 and must be filed within 10 days after entry of the judgment. FED. R. CIV. P. 59(b) (incorporated by FED. R. BANKR. P. 9023). This time requirement is jurisdictional. *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 268 (6th Cir. 1998). Because the motion was filed outside of the 10 day window, it cannot proceed as a motion to reconsider.

An untimely motion to reconsider can be considered as a motion for relief from judgment under civil rule 60(b). That rule provides for relief from judgment under five specific circumstances,[3] followed by a sixth: ". . . any [reason other than those set out in 60(b)(1) through (5)] justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6) (made applicable by FED. R. BANKR. P. 9024). Gliatech originally argued two grounds in support of its 60(b)(6) position: (1) the dispute between the parties was made moot by an April 8, 2004 agreed order modifying the automatic stay in certain respects and by Gliatech's global settlement with Medmarc; and (2) Gliatech has made a 100% distribution to unsecured creditors under the plan, leaving only the IRS's subordinated claim to be paid. The funds to defend the judgment on appeal would reduce the amount available to pay the IRS without any benefit to that creditor. In other words, the estate no longer has a financial stake in the issue on appeal and Gliatech wishes to vacate the judgment in its favor so that it does not have to spend the money to defend it.

Rule 60(b)(6) applies "only 'as a means to achieve substantial justice when 'something more' than one of the grounds contained in Rule 60(b)'s first five clauses is present'." *Olle v. The Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (quoting *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989)). This subpart is limited to extraordinary

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[3] Civil rule 60(b)(1-5) states that: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . ." FED. R. CIV. P. 60(b).

circumstances. *Id.* The debtor has not identified any circumstance that would bring this request within 60(b)(6) and relief is not available under that rule.

At the court's request, Gliatech briefed the applicability of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). In *Bonner*, the Supreme Court considered "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed . . . ." *Id.* at 19. The Court discussed the public interest in judicial precedent, finding that decisions are not the private property of the litigants but are instead valuable to the legal community as a whole. If a party challenges a decision, having the case proceed through the appellate process contributes to the "orderly operation of the judicial system." After weighing the competing considerations, the Court held:

> . . . mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion . . . [T]he determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur--which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed.

Id. at 29. The same standard is used by trial courts addressing a motion to vacate judgment following settlement. *See Meis-Nachtrab v. Griffin (In re Meis-Nachtrab)*, 200 B.R. 170, 171 (Bankr. N.D. Ohio 1996).

Gliatech acknowledges that, under *Bonner*, the global settlement with the insurers is an insufficient reason to vacate the judgment. Regrouping, Gliatech argues alternatively that the settlement with the insurers is essentially irrelevant. Instead, the argument goes, Gliatech's

unilateral actions made the dispute moot before this court entered the judgment. At the hearing held on this motion, Gliatech stated unequivocally that as a result of (1) settlements with personal injury creditors under which they agreed to proceed only against the insurers and not against Gliatech's assets; combined with (2) plan confirmation on April 21, 2004, Gliatech did not have any actual risk of having punitive damages assessed against it by any product liability claimant after that date. Gliatech stated that it should have, but did not, so advise the court in response to the court's April 5, 2004 inquiry. *See* hearing held January 20, 2005.

Based on Gliatech's uncontested statements of fact, there was no case or controversy between the parties after April 21, 2004 which means that the court did not have jurisdiction over the dispute. *See Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1182 (6th Cir. 1986) (a party requesting declaratory judgment must have standing and must demonstrate that the matter is ripe for adjudication, and "[e]ven where these requirements are satisfied at inception a case may be rendered moot by changing circumstances during the course of the litigation. When this occurs, justiciability is lost and the action must be dismissed when mootness is found."). The motion is, therefore, granted on somewhat different grounds than those argued, the judgment is vacated, and the adversary proceeding is dismissed.

A separate order will be entered reflecting this decision.

Date: 18 July 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Sean Malloy, Esq.
Diana Thimmig, Esq.

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MEDMARC CASUALTY INSURANCE COMPANY, et al.,	)	Adversary Proceeding No. 02-1416
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
GLIATECH, INC., et al.,	)	
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date,

IT IS, THEREFORE, ORDERED that the second motion for reconsideration of opinion and judgment filed by Liquidating Gliatech (treated as a motion to vacate on the ground that there was no case or controversy between the parties at the time the August 8, 2004 judgment issued) is granted, the judgment is vacated for lack of jurisdiction, and the adversary proceeding is dismissed. (Docket 118).

Date: 28 Jan 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

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