

Not Reported in F.Supp., 1993 WL 256755 (D.Kan.)
(Cite as: 1993 WL 256755 (D.Kan.))

HNOTICE: THIS IS AN UNPUBLISHED
OPINION.

(The Court's decision is referenced in a "Table of
Decisions Without Reported Opinions" appearing in
the Federal Reporter. See CTA 10 Rule 32.1 before
citing.)

United States Court of Appeals, Tenth Circuit.
Sam J. **WALTERS**, D.C., Plaintiff/Counter-
Defendant/Appellant,

v.

MONARCH LIFE INSURANCE COMPANY,
Defendant/Counter-Claimant/Appellee.
No. 96-3296.

Oct. 23, 1997.

Before [BRORBY](#), [HOLLOWAY](#), and [EBEL](#), Circuit
Judges.

ORDER AND JUDGMENT ^{FN*}

^{FN*} This order and judgment is not binding
precedent, except under the doctrines of law
of the case, res judicata, and collateral
estoppel. This court generally disfavors the
citation of orders and judgments;
nevertheless, an order and judgment may be
cited under the terms and conditions of 10th
Cir. R. 36.3.

*1 Following a jury trial at which he recovered
\$44,000 on a breach of contract claim arising from a
disability insurance policy issued by **Monarch Life
Insurance Co.**, Sam J. **Walters** filed a motion for
reinstatement to his rights under the policy, which
Monarch had previously terminated. The district
court denied that motion, concluding that the jury
verdict indicated that **Walters** had not been disabled
for the full period for which he claimed coverage,
and thus that he was not entitled to reinstatement.
After an unsuccessful appeal on other grounds,
Walters filed in the district court a motion under
[Fed.R.Civ.P. 60\(b\)](#) for a declaration that his
insurance coverage had not lapsed. The district court
concluded that, under the law of the case, that issue
was governed by its prior ruling that **Walters** was not

entitled to reinstatement, and accordingly denied the
motion. **Walters** now appeals. We have jurisdiction
under [28 U.S.C. § 1291](#). We affirm.

BACKGROUND

The factual background of this case is discussed in
our published opinion concerning **Walters'** prior
appeal. See [Walters v. Monarch Life Ins. Co., 57
F.3d 899, 901 \(10th Cir.1995\)](#). In brief, **Walters** was
insured under a disability insurance policy issued by
Monarch. (Aplt.App. at 629-34, 652-55.) **Walters**
claimed a disability under the policy after a
parasailing accident that occurred in June 1988. (*Id.*
at 707-12.) **Monarch** paid benefits on that claim for
almost three years, and waived policy premiums
during this time as well. (*Id.* at 660.) However,
Monarch terminated these benefits in September
1991 after determining that **Walters** was not disabled
and had not been for a substantial period of time. (*Id.*
at 42.) At this time, **Monarch** also informed **Walters**
that it was removing the premium waiver. (*Id.* at
660.)

Walters then sued **Monarch** in state court, and
Monarch removed the action to federal court.
Monarch also filed counter-claims for the return of
benefits paid, alleging that **Walters** had fraudulently
filed his disability claims. After a three-week jury
trial, the jury awarded **Walters** \$44,066.43 in
damages, an amount representing about 25% of the
total benefits **Monarch** would owe **Walters** were he
totally disabled for the entire time period. (*Id.* at 192-
93.)

The procedural background of the issue before us is
somewhat more complicated. **Walters** filed three
post-trial motions. First, **Walters** filed a "Motion to
Correct Entry of Judgment" under [Fed.R.Civ.P.
60\(a\)](#), claiming that his rights under the disability
policy should be reinstated. (*Id.* at 197-200.) The
district court ruled that a motion under [Rule 60\(a\)](#)
was not a proper procedure for addressing substantive
concerns about the jury verdict, but invited **Walters** to
seek equitable relief on that issue if he so desired. (*Id.*
at 217-18.) **Walters** did not appeal that decision.

Walters next filed a "Motion for Judgment as a
Matter of Law," claiming that the \$44,000 verdict
was inconsistent with the evidence, as **Walters** had

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claimed he was entitled to \$176,265.72 in damages. (Aplee. App. at 1-13.) The district court denied that motion, ruling that the jury verdict was consistent with the evidence, as the jury could have concluded that **Walters** was only disabled for a portion of the time period during which he claimed disability. (Aplt.App. at 216.) We affirmed that decision on appeal.

<http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1995125500&ReferencePosition=905Walters, 57 F.3d at 905>.

*2 Finally, on July 29, 1993, **Walters** filed a motion for reinstatement of his rights under the **Monarch** disability insurance policy. (Aplt.App. at 223-50.) In an order dated April 4, 1994, the district court denied that motion, concluding that **Walters** was not entitled to reinstatement because the jury verdict for less than the full amount claimed indicated that **Walters** had not proved he was disabled for the entire time period at issue, and thus that **Walters** was not entitled to the remedy of reinstatement. (*Id.* at 294-98.) On April 14, 1994, **Walters** filed a notice of cross-appeal on this issue ^{FN1} (*Id.* at 298A)

^{FN1}. **Monarch** had filed its notice of appeal from the jury verdict on July 26, 1993 (Aplt.App. at 221), and **Walters** had filed his first notice of cross-appeal on August 9, 1993, (*id.* at 292). Following the district court's ruling on the reinstatement issue, **Monarch** filed a second notice of appeal on April 29, 1994, to avoid any argument that its first notice of appeal was premature. (*Id.* at 298C.) In an order dated June 3, 1993, this court consolidated all four appellate docket numbers issued in response to the various notices of appeal. (*Id.* at 298G.)

Oral argument on **Monarch's** appeal and **Walters'** cross-appeal was held on March 3, 1995. **Walters** never briefed the reinstatement issue in connection with that appeal, and never alerted this court to the district court's April 4, 1994 ruling on his motion for reinstatement. On June 6, 1995, we issued an opinion affirming the district court judgment in all respects. We denied **Walters'** motion for rehearing on the reinstatement issue, concluding that **Walters** had failed to bring the relevant district court order to this

court's attention. (*Id.* at 593.)

Following our decision on appeal, **Monarch** filed in the district court a "Motion for Declaratory Ruling that Plaintiff's Disability Insurance Policy Has Lapsed for Non-Payment of Premiums." (Aplee. Supp.App. at 15-38.) **Walters** then filed a "Cross-Motion for Declaratory Ruling that Plaintiff's Disability Insurance Policy Has Not Lapsed for Non-Payment of Premiums." (Aplt.App. at 323-29.) The district court denied both motions in an order issued on August 5, 1996. (*Id.* at 341-46.)

Neither party stated a procedural basis for the declaratory rulings sought; however, the district court treated the motions as filed under [Fed.R.Civ.P. 60\(b\)](#) for relief from judgment.^{FN2} The district court ruled that the issue of lapse was determined in its April 4, 1994, ruling on **Walters'** motion for reinstatement, and that any further consideration of the issue was barred under the law of the case doctrine. Accordingly, the court denied both motions. **Walters** now appeals.

^{FN2}. **Walters** does not argue that the district court erred in treating his motion as a [Fed.R.Civ.P. 60\(b\)](#) motion. (Aplt.'s Br. at 8.)

DISCUSSION

Standard of Review

We review the district court decision not to grant relief under [Fed.R.Civ.P. 60\(b\)](#) for abuse of discretion. See *Omer v. Shalala*, 30 F.3d 1307, 1309 (10th Cir.1994). However, "[a] district court would necessarily abuse its discretion if it based its ruling (under [Rule 60\(b\)](#)) on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quoting *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727 (10th Cir.1993), quoting in turn *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). The issue of whether the law of the case doctrine bars reconsideration of the status of **Walters'** insurance policy is a question of law. See *Wilmer v. Board of Cty. Comm'rs*, 69 F.3d 406, 409 (10th Cir.1995).

I.

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Walters' Reinstatement Claim

*3 The district court properly denied Walters' request for relief under [Fed.R.Civ.P. 60\(b\)](#). Among the grounds upon which a party may obtain relief under [Rule 60\(b\)](#) are “mistake, inadvertence, surprise, or excusable neglect,” [Fed.R.Civ.P. 60\(b\)\(1\)](#), and “any other reason justifying relief from the operation of the judgment,” *id.* 60(b)(6). The district court need not specify which clause of [Rule 60\(b\)](#) serves as the basis for its decision, *see Pelican Production Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir.1990), and in this case the district court did not specify which clause Walters' motion was based on, (Aplt.App.(D.Ct.Order) at 345). Rather, the court concluded that, regardless of which clause Walters' claim was based on, the claim was barred by the law of the case doctrine. (*Id.* at 345-46.) We agree.

In his [Rule 60\(b\)](#) motion, Walters sought a declaration that his insurance policy had not lapsed. However, the district court had previously ruled in its April 4, 1994 order that Walters was not entitled to reinstatement of the policy. (*Id.* at 297-98.) Walters filed a notice of appeal from that ruling, but never briefed or argued the issue to this court. As we noted in denying Walters' petition for rehearing, Walters thus forfeited his right to appellate consideration of the reinstatement issue. (*Id.* at 593.) In its April 4, 1994 order, the district court determined that the jury had not found that Walters was disabled for the entire time period at issue, and thus that he was not entitled to reinstatement. The issue of whether Walters' policy lapsed also turns on whether he was disabled for the entire time period at issue. Accordingly, the district court properly concluded that the law of the case doctrine prevented Walters from relitigating the issue of whether he was still entitled to the benefits of his insurance policy. *See Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536 n. 4 (10th Cir.1995) (holding that the law of the case doctrine “prevent[s] the relitigation of [issues] in subsequent proceedings in the same case” except in rare cases).

Walters now argues that the issue of reinstatement to the policy is distinct from the issue of whether his policy lapsed, and thus that the law of the case doctrine should not be applied. Even if these issues

were distinct, however, Walters would not prevail because he never raised the non-lapse issue prior to the [Rule 60\(b\)](#) motion currently on appeal. As the district court noted in its order denying Walters' motion, Walters “had every opportunity to litigate these issues to this court and on appeal to the Tenth Circuit.” (Aplt.App. at 346.) Walters did not take the opportunity to litigate non-lapse as a distinct issue, and thus has no viable claim for relief on that basis under [Rule 60\(b\)](#).

Accordingly, the district court did not abuse its discretion in denying Walters' motion for relief under [Fed.R.Civ.P. 60\(b\)](#).

CONCLUSION

*4 For the foregoing reasons, we AFFIRM the judgment of the district court.

C.A.10 (Kan.),1997.
 Walters v. Monarch Life Ins. Co.
 131 F.3d 153, 1997 WL 715734 (C.A.10 (Kan.)), 97
 CJ C.A.R. 2505

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