

**SEP 12 2006**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP Nos.	CC-05-1061-BMoT
		)		CC-05-1202-BMoT
7	SUSAN COGLIANO,	)		(Related Appeals)
		)		
8	Debtor.	)	Bk. No.	RS 96-28188 MG
		)		
9	_____	)		
	SUSAN COGLIANO,	)		
10		)		
	Appellant,	)		
11		)		
	v.	)	<b>O P I N I O N</b>	
12		)		
	KARL T. ANDERSON, Chapter 7	)		
13	Trustee; POLIS & ASSOCIATES,	)		
		)		
14	Appellees.	)		
	_____	)		

Argued and Submitted on March 23, 2006  
at Pasadena, California

Filed - September 12, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Hon. Mitchel R. Goldberg, Bankruptcy Judge, Presiding

Before: BRANDT, MONTALI and TCHAIKOVSKY,<sup>1</sup> Bankruptcy Judges.

<sup>1</sup> Hon. Leslie Tchaikovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

1 BRANDT, Bankruptcy Judge:  
2

3 After reopening a case that had been closed for three years, the  
4 chapter 7<sup>2</sup> trustee obtained an order for turnover of funds in debtor's  
5 individual retirement account ("IRA") which were derived from her former  
6 spouse's pension. Six months later, debtor amended her schedules to  
7 exempt the IRA. After a contested hearing, the bankruptcy court  
8 sustained the trustee's objection to the exemption and again ordered  
9 turnover of the funds "so that it would not be dissipated." Debtor's  
10 motion for reconsideration was denied; she did not appeal. Debtor filed  
11 a second amended exemption claim, in which she argued that the IRA was  
12 not property of the estate, but that if it was, it was exempt. The  
13 trustee again objected; the court sustained the objection orally in  
14 2002. The order was not entered until 2005. Debtor appealed.

15 Meanwhile, trustee and his counsel applied for fees, to which  
16 debtor objected, arguing the services did not benefit the estate. The  
17 bankruptcy court approved the final fee application, and the debtor  
18 appealed.

19 Concluding that neither claim nor issue preclusion bars debtor's  
20 assertion in her second claim of exemption that the IRA is not property  
21 of the estate, but that claim preclusion bars her assertion that it is  
22

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23 <sup>2</sup> Absent contrary indication, all "Code," chapter and section  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
25 its amendment by the Bankruptcy Abuse Prevention and Consumer  
26 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from  
which these appeals arise was filed before its effective date  
(generally 17 October 2005).

27 All "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, and all "FRCP" references are to the Federal Rules of Civil  
Procedure. All "CCP" references are to the California Code of Civil  
Procedure.

1 exempt if it is property of the estate, we REVERSE the first order  
2 (exemption), VACATE the second (fees), and REMAND.

3  
4 **I. FACTS**

5 Background. Three years after her divorce from Peyton Frazier  
6 Smythe in 1993, Susan Cogliano filed her pro se chapter 7 petition,  
7 scheduling less than \$50,000 in unsecured debt. She was granted a  
8 discharge, and her case was closed in February 1997.

9 Smythe participated in a "defined benefit plan" through his  
10 employer, Texaco Oil Company. Section 21.04 of the plan provided:

11 **Restrictions on Alienation and Assignment.** No member, Retired  
12 member, [or] Beneficiary . . . will have the right to assign,  
13 [or] transfer . . . her interest in any payments under this  
14 Plan, . . . and payments under this Plan will not in any way  
be subject to any legal process to levy upon or attach the  
same for payment of any claim against any . . .  
Beneficiary . . . .

15 The decree of divorce awarded Cogliano an interest in Smythe's  
16 pension in small monthly amounts. The divorce decree also provided  
17 that, should Smythe elect a lump sum distribution, she would be entitled  
18 to 50 percent of the distribution. Cogliano's personal property  
19 schedule B reflected the monthly payment, although she claimed she had  
20 never received her monthly share and never expected she would, and she  
21 scheduled "spousal support" of \$15,794.61 owing.

22 When she filed her bankruptcy petition, Cogliano did not know that  
23 Smythe had already retired in 1995 and had elected a lump sum  
24 distribution, triggering her entitlement to a one-half share. In 1998,  
25 when she learned of these facts, Cogliano sought a modification of the  
26 divorce decree and initiated judgment enforcement proceedings. The  
27 state court modified the decree, and entered a corrected Qualified  
28 Domestic Relations Order ("QDRO") awarding Cogliano a proportional

1 interest.

2 The exact form in which Smythe held the funds after receiving  
3 distribution from the Texaco pension plan, and the nature of any  
4 restrictions on alienation or transfer, are not clear from the excerpts  
5 of record provided us. Rule 8009(b). Paragraph 4 of Cogliano's  
6 Declaration in Response to Order to Show Cause . . . dated  
7 10 December 2000 indicated that Smythe held them in an IRA. But at the  
8 hearing of Cogliano's motion for reconsideration, trustee's counsel  
9 stated he had never been provided the substantiating documents he had  
10 requested. Transcript, 4 September 2001, at 16-17.

11 Cogliano finally obtained a state court order in California, and  
12 levied the sum of \$64,937.11 from Smythe's account. She opened an  
13 individual retirement rollover account at Charles Schwab (the "IRA") in  
14 July 2000, and transferred the levied funds there in October 2000.  
15 Meanwhile, upon learning of debtor's bankruptcy, Smythe's attorney  
16 contacted former chapter 7 trustee Karl Anderson ("trustee") to inform  
17 him about the IRA.

18 The trustee moved to reopen Cogliano's case under § 350 and to  
19 compel turnover of the IRA under § 542, alleging that Cogliano had  
20 concealed the account. Cogliano disclaimed any concealment, asserting  
21 she either had no interest, or at least knew of none, on the petition  
22 date. The Hon. David Naugle granted the contested motion to compel  
23 turnover, "without prejudice to any and all rights concerning the  
24 Debtor's exempt interest, if any, in the monies turned over to the  
25 Trustee." Order Granting Motion to Compel Turnover, Without Prejudice  
26 to Debtor's Exemption Rights, entered 29 December 2000. Cogliano  
27 eventually turned over \$38,000, and the trustee later moved to abandon  
28 any interest the estate had in the balance.

1        First Amended Schedules. Approximately six months later, debtor  
2 filed amended schedules B, personal property, listing the \$64,000 IRA,  
3 and C, exempt property, claiming it as fully exempt under CCP  
4 § 703.140(b)(10)(E). The trustee objected, contending that the IRA had  
5 been concealed and the exemption should be denied (citing  
6 § 522(g)(1)(B)) and again sought turnover. The court, without findings  
7 or conclusions of law, sustained the trustee's objection to the amended  
8 claim of exemptions, and granted the trustee's motion for turnover and  
9 an accounting. Transcript, 24 July 2001, at 118; Order Granting . . .  
10 Trustee's Motion Objecting to . . . Amended Schedule C, . . . , entered  
11 26 July 2001; Amended Order, 6 August 2001.

12        Debtor moved for reconsideration and sought sanctions, which the  
13 bankruptcy court denied without findings or conclusions, entering an  
14 order 4 September 2001. The court also denied the trustee's counter-  
15 motion seeking to have debtor declared a vexatious litigant. There were  
16 no appeals.

17        Second Amended Schedules. In June 2002, Cogliano, now represented  
18 by counsel, filed her second amended schedules B and C, again listing  
19 her IRA and claiming it exempt under the same provision, CCP  
20 § 703.140(b)(10)(E). Both schedules provided much more detail, and now  
21 asserted that the asset was an ERISA-qualified<sup>3</sup> pension and was thus  
22 excluded from the definition of property of the estate under § 541. The  
23 "description of property" in both schedules read:

24        Vested interest in former husband's Peyton Smythe's ERISA-  
25        qualified defined benefit pension plan arising out of Mr.  
26        Smythe's employment with Texaco.

26        As of date of filing, debtor's known interest in the pension

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27  
28        <sup>3</sup> 29 U.S.C. § 1001 et seq.; see Patterson v. Shumate, 504 U.S.  
753 (1992).

1 has a value of \$1,000.17 . . . ; in addition, debtor has an  
2 interest in the pension of unknown value, depending on if and  
when Peyton Smythe elects to take a lump-sum  
distribution . . . .

3  
4 The foregoing pension benefits are not "property of the  
estate" for purposes of the Bankruptcy Code but are  
5 nevertheless identified in these schedules for disclosure  
purposes[.]

6 The trustee again objected and argued the issue was res judicata.  
7 Cogliano argued she was not precluded from amending her schedules,  
8 pointed out that there had been no finding of concealment, and  
9 explicated the argument that the IRA was not property of the estate.  
10 Without briefing on whether the IRA was estate property under  
11 § 541(c)(2), and without deciding if that issue was precluded under any  
12 theory, the court denied the second amended claim of exemptions,  
13 remarking at the conclusion of hearing:

14 And we don't disagree that the standard of Patterson v.  
15 Shumate is [that] ERISA qualified plans are not imputable  
[includable?] within the estate as a general rule, and but for  
16 concealment in this case, probably [there would] be a little  
different viewpoint.

17 Transcript, 10 September 2002 at 10. There had been no previous finding  
18 of concealment, nor was any made at or after the hearing.

19 Trustee's counsel stated he would lodge an order, Id. at 9, but did  
20 not. In early 2005, debtor moved for entry of the order; the final  
21 order was entered 2 May 2005. Debtor appealed. (No. CC-05-1202).

22 In the lengthy interim period, trustee again moved for turnover in  
23 late 2002, but ultimately withdrew his motion. Judge Naugle recused  
24 himself, and the Hon. Mitchel Goldberg replaced him. At hearing on the  
25 trustee's counsel's interim fee application, and apparently without the  
26 benefit of transcripts of the earlier hearings, he queried whether the  
27 property of the estate issue had been decided and requested briefing,  
28 but then concluded that Judge Naugle's ruling on the claim of exemption

1 was final:

2 THE COURT: This [December 2000] order was very strong about  
3 turning over everything . . . [b]ut it doesn't say he made a  
4 finding that this is property of the estate. Just that it  
5 would be turned over so that it would not be dissipated.  
6 Turnover does not necessarily constitute a finding that it  
7 must be property of the estate.

8 . . . .

9 . . . If she filed requests for exemptions, they were  
10 denied. That's done with. I'm not going to change Judge  
11 Naugle's ruling on that.

12 But if there is not a specific finding under [§ 541],  
13 what is and what is not property of the estate . . . I want to  
14 see if there has been a specific ruling based on hopefully  
15 [the divorce court judge's] order in 2000 that triggered it,  
16 which became a final order, apparently. How Judge Naugle  
17 dealt with the facts to make a determination [that it] was  
18 property of the estate because, fill in the blank [sic].

19 It does not qualify under the exemption clauses. It does  
20 not qualify under the fact that Spendthrift Trusts are not  
21 property of the estate, if it's a [properly] qualified  
22 Spendthrift [trust].

23 Transcript, 30 January 2003 at 16-17 (emphasis added).

24 Thereafter, in September 2003, Cogliano moved to compel the trustee  
25 to turn over the IRA to her; that motion was denied, and an order  
26 entered on 16 December 2003. It was not appealed; none of the papers  
27 are in the record provided to us.

28 Final Fee Application. In mid-2004, trustee filed his final report  
and fee application. At the hearing, the court referred back to the  
property of the estate issue, unambiguously but erroneously presuming  
that it had been resolved:

[T]his case centers around one major theory. [Whether] these  
funds that the debtor received from her ex-husband who decided  
to report all the issues, Pension Fund of Texaco, constitute  
property of the estate or not. The trustee made the business  
decision to argue that it constituted this QUADRO [sic] fund,  
that it somehow constituted property [of] the estate or the  
way it was rolled over. . . . It's not my job to review it.  
Whatever it was the trustee [argued] it was property of the  
estate.

. . . .

1 I cannot unwind the ultimate finding that exists and which is  
2 a final finding that this property was property of the estate.

3 Transcript, 15 December 2004 at 4-5 (emphasis added).

4 The bankruptcy court entered an order allowing fees and costs of  
5 \$47,309.36 to trustee's counsel, Polis & Associates, and to trustee of  
6 \$5133.21. First Amended Stipulation by and Among Administrative Court  
7 Approved Professionals, 27 January 2005. Administrative creditors took  
8 a 44% pro rata discount on their fees, which left nothing for unsecured  
9 creditors. Debtor appealed (No. CC-05-1061).

## 11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
13 § 157(a), (b)(1), and (b)(2)(A), (B) and (E). We do under 28 U.S.C.  
14 § 158(c).

## 16 **III. ISSUES**

17 1. After a claim of exemption has been denied, do the doctrines of  
18 preclusion bar a debtor from later asserting that, under § 541(c)(2),  
19 the asset was not "property of the estate"?

20 2. Do those doctrines bar a second claim that the same asset is  
21 exempt?

22 3. Did the bankruptcy court abuse its discretion in awarding fees  
23 and costs to trustee and trustee's counsel under § 330?

## 25 **IV. STANDARDS OF REVIEW**

26 A. We review conclusions of law and questions of statutory  
27 interpretation, including construction of the Code, de novo, and  
28 findings of fact for clear error. Rule 8013; In re Mednet, 251 B.R.



1 103, 106 (9th Cir. BAP 2000). A factual finding is clearly erroneous if  
2 the appellate court, after reviewing the record, has a firm and definite  
3 conviction that a mistake has been committed. Anderson v. City of  
4 Bessemer City, 470 U.S. 564, 573 (1985).

5 B. Whether property is included in a bankruptcy estate is a  
6 question of law, subject to de novo review. In re Kim, 257 B.R. 680,  
7 684 (9th Cir. BAP 2000), aff'd, 35 Fed. Appx. 592 (9th Cir. 2002).

8 C. We review the determination of whether issue or claim  
9 preclusion applies "de novo as mixed questions of law and fact in which  
10 legal questions predominate." In re George, 318 B.R. 729, 732-33 (9th  
11 Cir. BAP 2004), aff'd, 144 Fed. Appx. 636 (9th Cir. 2005), cert. denied,  
12 \_\_\_ U.S. \_\_\_, 126 S. Ct. 1068 (2006).

13 D. We also review exemption determinations de novo. In re  
14 Goswami, 304 B.R. 386, 389 (9th Cir. BAP 2003).

15 E. We review a bankruptcy court's award of compensation for abuse  
16 of discretion. In re Triple Star Welding, Inc., 324 B.R. 778, 788 (9th  
17 Cir. BAP 2005); In re Riverside-Linden Inv. Co., 925 F.2d 320, 322 (9th  
18 Cir. 1991); In re Mehdipour, 202 B.R. 474, 478 (9th Cir. BAP 1996),  
19 aff'd, 139 F.3d 1303 (9th Cir. 1998). A court abuses its discretion if  
20 it bases its ruling on either an erroneous view of the law or a clearly  
21 erroneous assessment of the evidence. Cooter & Gell v. Hartmarx Corp.,  
22 496 U.S. 384, 405 (1990).

## 23 24 V. DISCUSSION

### 25 A. Property of the estate?

26 Upon filing, all of Cogliano's legal and equitable interests  
27 became part of the estate, subject to her exemption rights. §§ 541(a)  
28 and 522. A debtor's legal and equitable interests on the petition date

1 are determined according to state law. Butner v. United States, 440  
2 U.S. 48, 54-55 (1979).

3 The Supreme Court held in Patterson v. Shumate, that § 541(c)(2)  
4 "entitles a debtor to exclude from property of the estate any interest  
5 in a plan or trust that contains a transfer restriction enforceable  
6 under any relevant nonbankruptcy law." 504 U.S. at 758. Under that  
7 section, "an anti-alienation provision in a valid spendthrift trust  
8 created under state law is an enforceable 'restriction on the transfer  
9 of a beneficial interest of the debtor' and thus serves to exclude the  
10 trust corpus from the bankruptcy estate." In re Moses, 167 F.3d 470,  
11 473 (9th Cir. 1999) (citation omitted). And the Ninth Circuit made  
12 clear in In re Rains, 428 F.3d 893, 905-06 (9th Cir. 2005) that  
13 exclusion of a debtor's interest in an ERISA-qualified plan is  
14 permissive, not mandatory.

15 A debtor may claim as exempt certain property from the estate under  
16 either state or federal law, § 522(b), and § 522(l) sets forth the  
17 procedure for claiming exemptions and objecting to those claimed. But  
18 neither the Code nor the Rules establish a procedure for claiming that  
19 property is excluded from the estate, nor do the official forms provide  
20 a clear way to identify such property, but to assert its exclusion from  
21 the estate, to preclude a later accusation of concealment.

22 California has "opted out" of the federal exemption scheme, so  
23 Cogliano could claim only California exemptions. See Kim, 257 B.R. at  
24 684. A California debtor may elect to exempt her right to receive:

25 [a] payment under a stock bonus, pension, profit-sharing,  
26 annuity, or similar plan or contract on account of illness,  
27 disability, death, age, or length of service, to the extent  
reasonably necessary for the support of the debtor and any  
dependent of the debtor . . . .

28 CCP § 703.140(b)(10)(E); In re Talmadge, 832 F.2d 1120, 1122-23 (9th

1 Cir. 1987).

2 In this appeal Cogliano argues that, even though she amended her  
3 schedules twice expressly to claim the exemption, she need not have done  
4 so because her IRA was not property of the estate under § 541.

5 The basis for the bankruptcy court's order denying her first  
6 amended exemption claim was unclear. The court did not analyze whether  
7 the IRA was a qualified plan which is exempt if it meets the  
8 requirements of California law; rather, her alleged concealment appears  
9 to have been determinative. Concealment may be a ground to disallow a  
10 claimed exemption, as § 522(g)(1)(B) provides in part that the debtor  
11 may exempt property "if . . . the debtor did not conceal such property,"  
12 but, as noted above, no such finding was made. See In re Lopez, 283  
13 B.R. 22, 30 (9th Cir. BAP 2002). But the Code is silent on the  
14 consequences of non-disclosure of property which is not property of the  
15 estate.

16 The order denying the exemption Cogliano claimed in her first  
17 amended schedules became final after reconsideration was denied in  
18 October 2001 and was not appealed. If that order were on appeal with  
19 the record we have, reversal would seem appropriate: a disputed  
20 exemption claim is a contested matter, In re Garner, 246 B.R. 617, 623  
21 (9th Cir. BAP 2000), Rules 4003(b) and 9014 require findings of fact  
22 and the record discloses none.

23 Cogliano's second amended schedule C refers to the same property  
24 claimed exempt in her first amended schedule C, although it is described  
25 somewhat differently. Schedules may be amended to change claimed  
26 exemptions, or to add omitted assets, at any time before the case is  
27 closed, Rule 1009(a), and is allowed in the absence of prejudice or bad  
28 faith. See Goswami, 304 B.R. at 393-94. But an exemption claim does

1 not merit a fresh determination simply by the "clarification" or  
2 variation of description in an amended schedule C.

3 Although the trustee argues bad faith and perhaps prejudice, none  
4 has been established (at least the trustee points to no such finding by  
5 the bankruptcy court), so the dispositive question in this appeal is  
6 whether the denial of Cogliano's first amended claim of exemption  
7 precludes her assertion in her second amended claim of exemption that  
8 the IRA was not property of the estate. If not, the next question is  
9 whether it is nevertheless exempt under the California statute.

10 Although we refer to "her IRA" or "the IRA" for ease of reference,  
11 our precise focus is on Cogliano's interest on her petition date in the  
12 funds which she later recovered from Smythe and placed in her IRA, or in  
13 the account in which those funds were then held.

14  
15 **B. Preclusion?**

16 We begin with the observation that:

17 Whether Debtor's [pension] plans are excluded from the estate  
18 is a question that should be addressed by the bankruptcy court  
19 in the first instance. The exemption question arises only if  
20 the plans are first determined to be property of the  
estate. . . . In fact, if the plans are not property of the  
estate, the bankruptcy court should not make a decision on the  
exemption question.

21 Moses, 167 F.3d at 474 (emphasis added) (quoting In re Spirtos, 992 F.2d  
22 1004, 1007 (9th Cir. 1993)).

23 The Ninth Circuit has concisely framed the preclusion concepts:

24 Generally, the preclusive effect of a former adjudication  
25 is referred to as "res judicata." The doctrine of res  
26 judicata includes two distinct types of preclusion, claim  
27 preclusion and issue preclusion. Claim preclusion treats a  
28 judgment, once rendered, as the full measure of relief to be  
accorded between the same parties on the same claim or cause  
of action. Claim preclusion prevents litigation of all  
grounds for, or defenses to, recovery that were previously  
available to the parties, regardless of whether they were

1 asserted or determined in the prior proceeding.

2 Robi v. Five Platters, Inc., 838 F.2d 318, 321-322 (9th Cir. 1988)  
3 (quotations, citations, and footnote omitted).

4 The burden is on the trustee, who asserts preclusion, to establish  
5 the necessary elements. In re Khaligh, 338 B.R. 817, 825 (9th Cir. BAP  
6 2006).

7  
8 1. Issue Preclusion

9 Issue preclusion:

10 [P]revents relitigation of all "issues of fact or law that  
11 were actually litigated and necessarily decided" in a prior  
12 proceeding. . . . The issue must have been "actually decided"  
after a "full and fair opportunity" for litigation.

13 Robi, 838 F.2d at 322 (citations omitted); see also Christopher Klein et  
14 al., Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am.  
15 Bankr. L.J. 839, 852-58 (2005) ("Klein et al., Principles").

16 We have recently held:

17 Six basic elements must be satisfied before issue  
18 preclusion will be applied. Five of the elements are  
19 described as "threshold" requirements: (1) identical issue;  
20 (2) actually litigated in the former proceeding; (3)  
necessarily decided in the former proceeding; (4) former  
21 decision final and on the merits; and (5) party against whom  
preclusion sought either the same, or in privity with, party  
in former proceeding.

22 The sixth element is a mandatory "additional" inquiry  
23 into whether imposition of issue preclusion in the particular  
setting would be fair and consistent with sound public policy.

24 Khaligh, 338 B.R. at 824-25 (citation and footnote omitted).

25 Four of the five threshold elements of issue preclusion are met  
26 here; only the second, whether the estate property question was actually  
27 litigated in the objection to the first amended claim, is in contention.  
28 Clearly, at the time of the interim fee hearing, the bankruptcy court

1 believed it had been decided by the first judge: "I cannot unwind the  
2 ultimate finding that exists and which is a final finding that this  
3 property was property of the estate." Transcript, 15 December 2004, at  
4 5.

5 But we are not so sure: despite Cogliano pointing out the lack of  
6 an explicit finding on the issue, transcript, 30 January 2003, at 15-19,  
7 the trustee has never identified one, or any hearing at which the issue  
8 was actually addressed on the merits. Nor has he done so on appeal, and  
9 it is his burden as appellee to assure that the record is sufficiently  
10 complete to defend the bankruptcy court's ruling. In re Kyle, 317 B.R.  
11 390, 394 (9th Cir. BAP 2004), aff'd, 170 Fed. Appx. 457 (9th Cir. 2006).  
12 Further, he must specifically reference relevant portions of the record  
13 in his brief, as opposing parties and the court are not obliged to  
14 search the entire record unaided. Rule 8010(a)(1)(D); see Dela Rosa v.  
15 Scottsdale Mem'l Health Sys., Inc., 136 F.3d 1241, 1243-44 (9th Cir.  
16 1998) and Mitchel v. General Elec. Co., 689 F.2d 877, 878-79 (9th Cir.  
17 1982). And we are entitled to presume from the absence of support in  
18 the excerpts that the record does not support the trustee's position.  
19 In re Gionis, 170 B.R. 675, 680-81 (9th Cir. BAP 1994), aff'd, 92 F.3d  
20 1192 (9th Cir. 1996) (table); In re McCarthy, 230 B.R. 414, 417 (9th  
21 Cir. BAP 1999).

22 As noted, we review determinations of the applicability of  
23 preclusion de novo. George, 318 B.R. at 732-33. As there has been no  
24 showing that the property of the estate issue was in fact litigated,  
25 there is no issue preclusion.

## 26 27 2. Claim Preclusion

28 But the doctrine of claim preclusion is distinct: "[i]ssue

1 preclusion bars relitigation only of issues that have been actually  
2 litigated, while the broader brush of claim preclusion may also bar a  
3 cause of action that never has been litigated," George, 318 B.R. at 733,  
4 that is, another action on the same "claim." For these purposes, a  
5 "claim" is a plaintiff's right to pursue remedies "with respect to all  
6 or any part of the transaction, or series of connected transactions, out  
7 of which the action arose." Restatement (Second) of Judgments  
8 ("Restatement") § 24(1) (1982). When there has been a final judgment on  
9 a part of a "claim," the right to obtain remedies against the estate  
10 respecting that claim is extinguished. See Klein et al., Principles, at  
11 849, and George, 318 B.R. at 735-37. The order denying Cogliano's first  
12 amended claim of exemption was a final order in a contested matter:  
13 functionally, a judgment. Rules 9014 and 7054.

14 Because Cogliano could have overcome the objection to her first  
15 amended exemption claim by establishing that the IRA was not part of the  
16 estate under § 541(c)(2), the property of the estate question was, in  
17 preclusion analysis, part of the same transaction or series of connected  
18 transactions.

19 Likewise, were the IRA not property of the estate, Cogliano would  
20 have had a complete defense to the trustee's motions for turnover of the  
21 same property. With several exceptions not here applicable, under  
22 § 542, a trustee may seek turnover only of estate property. Section  
23 542(a) provides:

24 Except as provided in subsection (c) or (d) of this section,  
25 an entity, other than a custodian, in possession, custody, or  
26 control, during the case, of property that the trustee may  
27 use, sell, or lease under section 363 of this title, or that  
28 the debtor may exempt under section 522 of this title, shall  
deliver to the trustee, and account for, such property or the  
value of such property, unless such property is of  
inconsequential value or benefit to the estate.

1 As "entity" includes "person" and "person" includes "individual,"  
2 § 101(15) and (41), it follows that a debtor must, under § 542, "turn  
3 over to the trustee property of the estate, even if the debtor may  
4 exempt that property." In re Carlsen, 63 B.R. 706, 710 (Bankr. C.D.  
5 Cal. 1986) (IRS must turn over garnished funds). The reason is, of  
6 course, that claims of exemption do not always succeed. The bankruptcy  
7 court's 29 December 2000 ruling requiring turnover "without prejudice to  
8 . . . "debtor's exempt interest, if any . . ." is consistent with this  
9 understanding.

10 And defenses which could have been raised, but were not, are  
11 barred. Robi, 838 F.2d at 322; Restatement § 17; Klein et al.,  
12 Principles at 847. Thus, if claim preclusion must be applied, Cogliano  
13 cannot successfully assert in her second claim of exemption that the IRA  
14 was not property of the estate.

15 Restatement § 26(1) sets out exceptions to claim preclusion:

16 When any of the following circumstances exists, the  
17 general rule of § 24 does not apply to extinguish the claim,  
18 and part or all of the claim subsists as a possible basis for  
19 a second action by the plaintiff against the defendant:

20 . . . .

21 (c) The plaintiff was unable to rely on a certain  
22 theory of the case or to seek a certain remedy or  
23 form of relief in the first action because of the  
24 limitations on the subject matter jurisdiction of  
the courts or restrictions on their authority to  
entertain multiple theories or demands for multiple  
remedies or forms of relief in a single action, and  
the plaintiff desires in the second action to rely  
on that theory or to seek that remedy or form of  
relief; or . . . .

25 That is the situation here: with an exception not applicable in  
26 this context, Rule 7001(2) requires an adversary proceeding "to  
27 determine the validity, priority, or extent of a lien or other interest  
28 in property." As we have recently noted, in the context of § 362 stay



1 relief (a contested matter):

2 [T]he determination of interests in property requires an  
3 adversary proceeding. [Rule] 7001(2). Thus, in a relief from  
4 stay motion that is a Rule 9014 contested matter, not a Rule  
5 7001 adversary proceeding, the bankruptcy court is not  
6 authorized by the rules of procedure to enter an "in rem"  
7 order that determines interests in property.

8 . . . .

9 Here, however, there is no adversary proceeding and no  
10 adversary proceeding judgment that might have claim or issue  
11 preclusive effect. It follows that the . . . order . . . is  
12 not conclusive as to interests in the property.

13 In re Johnson, 346 B.R. 190, 195-96 (9th Cir. BAP 2006) (citation  
14 omitted). And we have held that the determination of the validity of a  
15 lien without an adversary proceeding is "void." In re Colortran, Inc.,  
16 218 B.R. 507, 510-511 (9th Cir. BAP 1997). Although we left open the  
17 question of whether property of the estate could be determined in a  
18 contested matter in In re Popp, 323 B.R. 260, 269 n.14 (9th Cir. BAP  
19 2005) (§ 363 sale), we now conclude that the bankruptcy court lacked  
20 authority to determine whether the IRA was property of the estate in  
21 deciding the trustee's objections to Cogliano's claims of exemption, or  
22 in his turnover motion, for nothing in the record suggested any waiver  
23 by Cogliano, see In re Boni, 240 B.R. 381, 385-86 (9th Cir. BAP 1999)  
24 (dischargeability), and giving claim preclusive effect would eviscerate  
25 the possible harmlessness of the error. See In re Munoz, 287 B.R. 546,  
26 551 (9th Cir. BAP 2002) (declaratory judgment re discharge injunction).

27 Thus, the Restatement § 26(1)(c) exception pertains, and there is  
28 no claim preclusion. Accordingly, we will reverse in No. CC-05-1202 and  
remand for determination of whether on her petition date, the funds  
Cogliano recovered from Smythe were in a plan or trust subject to an  
enforceable restraint on transfer or alienation, and thus excludable  
from the bankruptcy estate. If so, the next question is whether

1 scheduling of the IRA in her first amended schedules was sufficient to  
2 render it property of the estate if it was not otherwise excluded. See  
3 Rains, 428 F.3d at 906 (by settlement ceding claim of exemption of a  
4 retirement plan, debtor "necessarily agreed to include the retirement  
5 plan funds in the bankruptcy estate").

6  
7 **C. Exempt?**

8 Even if the IRA is property of the estate, the question of whether  
9 Cogliano may exempt it remains.

10 There is no issue preclusion because the excerpts of record do not  
11 show that the eligibility of the IRA for exemption under California's  
12 statute has ever actually been litigated. The record provided does not  
13 disclose what was actually litigated on the trustee's objection to  
14 Cogliano's first claim of exemption, but as he raised both concealment  
15 and ineligibility, the latter was not necessarily decided.

16 But claim preclusion analysis differs. Rightly or not, the court  
17 on 26 July 2001 entered an order sustaining the trustee's objection to  
18 Cogliano's first amended claim of exemption, and an amended order on 6  
19 August 2001. Cogliano's motion to reconsider was also denied. She  
20 appealed none of these orders.

21 Objections to claims of exemption need not be adversary  
22 proceedings: Rule 4003(b) only prescribes the filing of objections  
23 within the specified time, and delivery of copies to the interested  
24 parties, and 4003(c) mandates "[a]fter hearing on notice, the court  
25 shall determine the issues presented by the objections." Rather, a  
26 claim objection is a contested matter, Garner, 246 B.R. at 623, so the  
27 bankruptcy court had authority to decide the eligibility of the IRA for  
28 exemption on hearing the objection to Cogliano's first amended claim of

1 exemption.

2       The question then becomes whether there is any other reason claim  
3 preclusion does not bar Cogliano's second amended claim of exemption.  
4 She suggests bias or personal animosity on the part of the court,  
5 opening brief, at 21-23, but with no real support: just surmise, based  
6 on the timing of the reversal of another ruling in her ex-husband's  
7 adversary proceeding against her, and the judge's subsequent recusal.

8       Cogliano argues "it is reasonable to infer that [the court's]  
9 judgment may have been similarly clouded and that he may have abused his  
10 discretion . . . ," opening brief at 23 (emphasis added), which is  
11 insufficient "clearly and convincingly [to show] that the policies  
12 favoring preclusion . . . are overcome for an extraordinary  
13 reason . . . [,]" Restatement, § 26(1)(f), even had Cogliano followed  
14 the procedures Restatement § 26(2) requires, laid out in §§ 78-82. As  
15 here pertinent, those sections call for seeking relief by motion or by  
16 independent action to restrain enforcement of the judgment, with  
17 "appropriate pleading and proof." Nothing in the record indicates  
18 Cogliano did so, or attempted to, in any fashion. We decline to find a  
19 sufficiently extraordinary reason on the basis of conjecture.

20       Accordingly, claim preclusion will preclude Cogliano's claim of  
21 exemption if she does not succeed in establishing that her interest in  
22 the funds which she recovered from Smythe and placed in the IRA, or her  
23 interest in the account in which those funds were held on that date was  
24 not property of the estate.

25       If the bankruptcy court finds that the IRA is property of the  
26 estate, it is not exempt.

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28

1 **D. Fee Application Appeal (No. CC-05-1061)**

2 The question under § 330(4)(A)(ii) is whether the services provided  
3 by trustee and his counsel were "reasonably likely to benefit the  
4 debtor's estate" or "necessary to the administration of the case."  
5 Cogliano seeks reversal of the fee award and a denial of all the fees,  
6 accusing the trustee of deliberately misleading the court about the  
7 nature of the asset and mislabeling it as a "concealed securities  
8 account," and argues that the trustee and counsel generated substantial  
9 fees (almost as much as the total unsecured liabilities) to exert  
10 control over an asset which is not property of the estate or is exempt.

11 The bankruptcy court did not make findings on these matters, and  
12 instead premised the fee award on the trustee having prevailed on his  
13 substantive objections to the claims of exemption.

14 We will vacate the award and remand for redetermination once the  
15 property of the estate issue is resolved, noting that one of the  
16 considerations is whether the fees sought are for work reasonably  
17 anticipated to be necessary and beneficial to the estate at the time  
18 rendered. In re Strand, 375 F.3d 854, 860 (9th Cir. 2004). The trustee  
19 could early on have sought explicit rulings on the property of the  
20 estate issue, using the required procedure, and documented that ruling  
21 with a promptly-presented judgement, which would have obviated much of  
22 the litigation for which he now seeks fees, so some skepticism will be  
23 in order.

24  
25 **VI. CONCLUSION**

26 Summing up, when the question of whether property is part of the  
27 estate is in controversy, Rule 7001(2) requires an adversary proceeding,  
28 absent waiver or harmless error, and the determination of that question

1 by motion, while it may have issue preclusive effect, does not have  
2 claim preclusive effect. Here it has neither.

3 We REVERSE and REMAND in No. CC-05-1202 for that determination. If  
4 the IRA is property of the estate, Cogliano's claim of exemption is  
5 precluded.

6 We VACATE the fee award in No. CC-05-1061 and REMAND.

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