

APR 06 2009

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	WW-08-1149-MkMoJu
)		
7	BELLINGHAM INSURANCE AGENCY,)	Bk. No.	06-11721-TTG
	INC.,)		
8)		
	Debtor.)		
9)		
10	A.R.I.S.; NICHOLAS PALEVEDA,)		
)		
11	Appellants,)		
)		
12	v.)	MEMORANDUM*	
)		
13	PETER ARKISON, Ch. 7 Trustee;)		
	BELLINGHAM INSURANCE AGENCY,)		
14	INC.; CHARLES P. FARRINGTON,)		
)		
15	Appellees.)		
)		

Argued and Submitted on February 19, 2009
at Pasadena, California

Filed - April 6, 2009

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: MARKELL, MONTALI and JURY, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 The chapter 7¹ trustee of Bellingham Insurance Agency, the
2 corporate debtor in this case ("Debtor"), filed a motion
3 requesting the bankruptcy court to compel a third party insurance
4 company to turn over certain funds to a creditor, arguing that
5 the bankruptcy estate had no ownership interest in those funds.
6 The bankruptcy court granted the motion; Nicholas Paleveda, a
7 principal and purported creditor of the Debtor ("Paleveda"),
8 appeals.² We AFFIRM.

9 **I. FACTS**

10 Debtor is the successor to PFP Plan Administrators, Inc.,
11 a/k/a the 412(I) Company ("PFP"). Paleveda was a co-owner and
12 the chief executive officer of PFP; appellee Charles Farrington
13 ("Farrington") was a co-owner and officer of PFP.

14 A. Relevant Prepetition Events

15 Paleveda, Farrington and others organized PFP, which was in
16 the business of selling insurance and annuities. At the times
17 relevant to this dispute, Farrington was a licensed insurance
18 agent; Paleveda was not.

20 ¹Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

23 ²The notice of appeal indicates that A.R.I.S. Incorporated
24 ("ARIS") is also an appellant. ARIS did not file a brief,
25 however, and thus has waived any arguments on appeal. Branam v.
26 Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998),
27 aff'd, 205 F.3d 1350 (9th Cir. 1999) (an issue not adequately
28 addressed by appellant in his opening or reply brief is deemed
abandoned). ARIS was represented by separate counsel in the
bankruptcy court, but that counsel did not sign the notice of
appeal. Paleveda admitted at oral argument that he was
representing only himself on appeal.

1 In Washington, only licensed insurance agencies may sell the
2 types of insurance at issue here, and corporations can only be
3 licensed if all individuals "empowered to exercise the authority
4 conferred by the corporate or firm license" are themselves
5 licensed agents. See Wash. Rev. Code Ann. § 48.17.180.
6 Paleveda was unable or unwilling to obtain a license, and,
7 consequently, PFP was not a licensed broker. As a result,
8 Farrington used his license to procure agency, marketing and
9 commission agreements with various insurance companies.
10 Typically, Farrington was the counterparty on contracts with
11 insurers and outside agents. Farrington would in turn assign his
12 commissions or payments due under such contracts to PFP,
13 especially since much of the work undertaken to obtain the
14 policies would have been done by others.³

15 In January 2003, Farrington signed an Independent Marketing
16 Agreement (the "Agreement") with Lafayette Life Insurance Company
17 ("Lafayette"). The first page of the Agreement reflects that the
18 contracting parties were Lafayette and an "Independent Marketing
19 Organization." The text of the Agreement does not name or
20 otherwise identify the Independent Marketing Organization.⁴ The
21

22 ³This arrangement apparently was not lawful and Farrington
23 was reprimanded by Washington Insurance Commissioner for being
24 part of it.

25 ⁴The Agreement does not describe the import of the
26 designation of "Independent Marketing Organization." It appears
27 that Lafayette wanted to make one aggregate commission payment at
28 a time, and rely on the Independent Marketing Organization to
distribute individual commissions to the appropriate sub-brokers
and sub-agents who had a hand in procuring the policy that
generated the commission.

1 identity of the Independent Marketing Organization was therefore
2 the crux of the bankruptcy court's inquiries.

3 The Agreement contains clues as to the identity of the
4 Independent Marketing Organization, none of which is definitive.
5 The Agreement's signature line, the only place where an entity
6 other than Lafayette could identify itself, permits the
7 Independent Marketing Organization to insert its true name and to
8 specify whether it is a corporation, partnership or individual.
9 The Agreement is manually signed by Farrington (and not in a
10 representative capacity). In addition, the signature block
11 indicates that the Independent Marketing Organization which
12 signed the Agreement is an "individual."⁵ Contrary to these
13 indications, however, the words "PFP Plan Administrators,
14 Inc./Charles P. Farrington" appear above Farrington's manual
15 signature.⁶

16 The identity of the Independent Marketing Organization is a
17 key point of dispute as the Agreement states that the Independent
18 Marketing Organization is the only entity entitled to receive
19 "the commissions, service fees and asset based compensation, of
20 any kind, described in (b) [of Section II] below." (Emphasis
21
22
23

24 ⁵PFP was a corporation; the signature block states that
25 "[i]f you are a corporation, the President must sign this
26 Agreement and indicate their title." The president of PFP did
not sign the Agreement.

27 ⁶Farrington maintains that the words "PFP Plan
28 Administrators, Inc./Charles P. Farrington" were added after he
signed the Agreement.

1 added.)⁷ Section II of the Agreement, in turn, provided that the
2 commissions, service fees and asset based compensation would be
3 paid to "you" - i.e., the Independent Marketing Organization -
4 according to an attached schedule of compensation. The Agreement
5 does not provide for payment related to other types of
6 consideration.⁸

7 In February 2007, Lafayette filed a pleading with the
8 bankruptcy court indicating that as of January 31, 2007, it was
9 "holding funds representing compensation owed under the

10
11 ⁷The Agreement provided elsewhere:

12 Your full compensation will be the commissions, service
13 fees and asset based compensation provided for in the
14 Agreement. There shall be no additional compensation
15 or reimbursement to you for services performed or
16 expenses incurred.

(Emphasis added.)

17 ⁸At oral argument, Paleveda asserted that the amounts held
18 by Lafayette constitute "management overrides" (as opposed to
19 commissions) which belong to PFP and which were not at issue
20 during the state court arbitration which we describe later. In
21 making this argument, Paleveda referred to a separate Independent
22 Marketing Organization Agreement not signed by Lafayette and
23 signed by Farrington as "secretary/treasurer." (See Exhibit 6 to
24 Paleveda's declaration filed on February 2, 2007). This is not
25 the agreement in dispute and under which Lafayette admitted owing
26 the held funds. The unsigned and undated agreement referenced by
27 Paleveda in oral argument does contain a separate schedule for
28 override commissions; this override commission schedule, however,
is not attached or incorporated into the Agreement at issue.

Even if the Agreement did contain such a schedule, that
schedule provides that "you" - the Independent Marketing
Organization - would receive those override commissions. It did
not contemplate that certain commissions would be paid by
Lafayette to one recipient, while other amounts due (i.e., the
management override commissions) would be paid to a different
recipient. As explored below, unlike other similar arrangements,
Farrington did not assign the Agreement to PFP.

1 Agreement" in the amount of \$64,895.55. In other words, all of
2 the funds being held by Lafayette and at issue before the
3 bankruptcy court were funds that were payable under the
4 Agreement. The issue considered was thus whether those funds
5 were payable to Farrington or PFP.

6 As we indicate above, the Agreement contemplates no other
7 basis of compensation other that described in its Section II. In
8 addition, Lafayette admitted that the amount it held represented
9 compensation under that Agreement. Furthermore, the Agreement
10 required Lafayette to pay all compensation arising under the
11 Agreement to the Independent Marketing Organization. In light of
12 these facts, a finding that any amount of the held funds was
13 properly paid or payable to PFP or Farrington necessarily meant
14 that PFP or Farrington would be the proper payee of all of the
15 funds held by Lafayette.

16 The amounts payable under the Agreement first became an
17 issue when PFP's principals clashed over the firm's operation and
18 direction, with Farrington and others leaving PFP. Debtor
19 thereafter acquired all of PFP's assets and liabilities. Debtor
20 then sued Farrington and other defendants in Washington state
21 court, alleging (among other things) conversion of corporate
22 property (including commissions) and corporate opportunities.
23 Farrington and the other defendants responded with counterclaims
24 against Debtor.

25 This dispute was sent to arbitration, and from October 31,
26 2005 through November 4, 2005, an arbitrator conducted a hearing
27 on the claims asserted by Debtor and the defendants. In their
28 pre-hearing arbitration memorandum, Farrington and the other

1 defendants put at issue Farrington's entitlement to compensation
2 from Lafayette:

3 As the Respondents will demonstrate at the hearing, PFP
4 had no right to the monies in question - insurance
5 commission checks from ANICO⁹ and Lafayette Life -
6 without an assignment of the same from Charles
7 Farrington, a licensed insurance agent. Farrington
8 agreed, at Paleveda's request, to serve as PFP's
9 licensed insurance agent when the previous license
10 holder left the Company. Farrington agreed to assign
11 to PFP commission moneys received from ANICO, but never
12 assigned any commissions from Lafayette Life.
13 Farrington's assignment with respect to ANICO was
14 premised on an agreement between Farrington and PFP's
15 President, Paleveda, that Farrington would receive some
16 percentage of all commissions earned, and that the
17 Company would keep its promise to bonus Price and
18 Farrington as owners, officers, and directors of the
19 Company. Farrington revoked his assignment when
20 Paleveda made known his intention to breach these and
21 other agreements. As noted, there was never an
22 assignment with respect to the Lafayette Life
23 commissions, and Farrington was, in any event, entitled
24 to the commissions as agent of record. Indeed,
25 Lafayette continues to hold additional commission
26 monies legally owed to Farrington, apparently at the
27 insistence of the Claimant and out of fear of
28 litigation.

17 (Emphasis added.)

18 During the arbitration, Farrington testified that he had
19 never assigned to PFP monies paid or owed by Lafayette under the
20 Agreement (" . . . I never had an assignment with PFP for those
21 monies, so I'm the agent of record, those monies are to be paid
22 to me"), but that he had not made a demand against Lafayette for
23 the funds it was holding. Id. The arbitrator asked counsel for
24 Farrington "why isn't that a claim in this arbitration" and
25 counsel responded that "I did not explicitly request that relief"

27 ⁹Farrington had assigned to PFP any commissions that he
28 would have received from American National Life Insurance Company
(ANICO), but then revoked the assignment.

1 but indicated that the assignment of the Lafayette compensation
2 was nonetheless an issue in the arbitration:

3 [ARBITRATOR]: So that's not within the issues of [sic]
4 being asked to decide here?

5 [FARRINGTON'S COUNSEL]: Well, in only the sense that
6 the relationship between the parties is at issue, yeah, I
7 think it is, because one of the issues is is there an
8 assignment in place.

9 [ARBITRATOR]: So depending on how I rule on that issue
10 that could have impact on his ability or inability to get
11 that to that 40,000 dollars¹⁰ without a whole new legal
12 proceeding?

13 [FARRINGTON'S COUNSEL]: Somebody is going to have to
14 get that at some point, yeah. And I think we can probably
15 avoid having a new lawsuit about that 40,000 dollars.

16 [ARBITRATOR]: I just wanted to make sure about what I
17 was being asked to decide and what I'm not being asked to
18 decide here. Let's move along. I think I now at least
19 understand what you're saying about that issue.

20 [COUNSEL FOR PFP]: So if there was no assignment and
21 you were the agent of record on all these cases why is
22 LaFayette [sic] holding the money back?

23 [FARRINGTON]: You have to talk to Chris.

24 [COUNSEL FOR PFP]: Is it possible that there was an
25 assignment?

26 [FARRINGTON]: No.

27 ER 11:391-92.

28 Farrington testified further about his entitlement to the
compensation under the Agreement. For example, he explained that
commissions from annuities would provide his compensation for
being the licensed agent:

[FARRINGTON'S COUNSEL]: What consideration, if any, did you

¹⁰According to Farrington's testimony, Lafayette held
approximately \$40,000 due under the Agreement at the time of the
arbitration hearing.

1 receive for being the licensed agent?

2 [FARRINGTON]: Well, I didn't receive any consideration.
3 What I did receive was a substantial amount of liability
4 from the standpoint of being the agent for the company.
5 Ultimately any problems that associated with either me being
6 an agent of record on a particular application or any agent
presumably under my umbrella creating any problems out in
the field would have created liability for me, and that's
one of the considerations that I too[k] into account to do
that.

7 And I had discussions with [Paleveda] about getting
8 compensated for that, and he said you know, "No problem,
9 we'll compensate for you that [sic], I mean we'll give you
10 some compensation. And one way you can get compensation is
11 through the annuities. The annuities aren't really a major
12 revenue generator as far as the commissions, so those can go
13 to you as far as commissions for annuities and then we'll
figure out some amount of salary or - and you know, there
will be cases that will need to be placed by an agent in a
particular state where there might not be an agent in that
state available or familiar with 412(I), so you can be the
signer on those."

14 Farrington also testified that he never executed an
15 assignment to PFP of amounts due under the Agreement. A party in
16 interest, Marjorie Ewing,¹¹ filed a declaration with the
17 Washington state court in January 2004 stating that an assignment
18 was "formally" in place with Farrington but was "apparently"
19 revoked by Farrington. No proof of such an assignment was
20 produced by Paleveda or Ms. Ewing, however. When asked if he had
21 revoked any assignment of Lafayette commissions, he responded
22 that he never executed such an assignment and thus "[t]here was
23 nothing to revoke. And that was one thing that Mr. Paleveda
24 indicated, 'I'm not concerned about commissions from annuities
25 because there's no big money there.'" He further testified that

27 ¹¹Ms. Ewing is Paleveda's wife and allegedly owns the
28 majority of Debtor's equity interests.

1 "Paleveda had indicated . . . [that] as long as the license
2 assignment is revoked that money belongs to the agent, not the
3 company."

4 On cross-examination, Farrington explained further why he
5 had assigned other commissions to PFP:

6 [T]ypically in a situation like this the principal of the
7 company . . . would be the licensed agent for the company
8 and there's no question of assignment [because] you don't
9 need to assign anything. But because the principal is the
10 licensed agent, all the money comes into the licensed agent,
11 they have a company they run and you pay money out to the
12 people. Well, this case is very unusual, and the idea is
13 that well, since Nick Paleveda can't get licensed for
14 whatever reason, Marjorie can't get or doesn't want to, they
15 have got to have a licensed agent, they obviously don't want
16 the agent to control all the money so they want an
17 assignment from the agent to the company. That in essence
18 is probably the purpose of the assignment.

19 He reiterated, however, that he executed no such assignment to
20 PFP with respect to amounts payable from Lafayette.

21 Following a multiple-day hearing, the arbitrator entered a
22 "Final Reasoned Award." Among other things, the arbitrator held
23 that Farrington never assigned to PFP his right to commissions
24 from Lafayette:

25 Lafayette Annuity Commission. The Lafayette annuity
26 commission properly was paid to Chuck Farrington as
27 agent of record. His right to commissions from
28 Lafayette was never assigned to [PFP] and he is
therefore entitled to any and all commissions with
respect to policies written in his name and issued by
Lafayette.

On February 3, 2006, the Superior Court of Washington for
Whatcom County entered a judgment confirming and incorporating
the arbitrator's final reasoned award. The court then entered
judgment against Debtor in the amount of \$90,021.92 and
dismissed with prejudice all claims against the defendants.

1 Debtor filed a motion to vacate the judgment, which the
2 state court denied by order dated March 6, 2006. At the hearing
3 on the motion to vacate the judgment, the state court ruled that
4 the dispute over the Lafayette commissions was within the scope
5 of an arbitration agreement between the parties, that the
6 arbitrator's decision constitutes law of the case, that no
7 evidentiary hearing was necessary, and that the arbitrator was
8 not disqualified because of a purported conflict of interest. In
9 ruling on the motion to vacate, the court noted that "it seems to
10 me the whole issue is over who got the commissions. That's what
11 this case is all about." "[T]he true nature of this lawsuit is
12 over collection of those commissions and premiums, and so I'm
13 satisfied that that's the basis of the arbitration as well."

14 Farrington filed a motion with the state court seeking an
15 order compelling turnover of commissions held in his name by
16 Lafayette. On May 12, 2006, the state court entered an order
17 granting the motion and directing Lafayette "to turn over to
18 Farrington within 7 days of receipt of this Order any and all
19 commissions with respect to policies written in Farrington's name
20 and issued by Lafayette."¹²

21 B. Postpetition Events

22 Debtor filed its voluntary chapter 7 petition on June 1,
23 2006, and Peter Arkison was appointed as the chapter 7 trustee
24 ("Trustee"). Debtor's schedules reflect unsecured liabilities in
25 the amount of \$1,595,763.62 and assets in the amount of

26

27 ¹²According to Farrington's opening brief, the Debtor's
28 appeal of the state court judgment was dismissed on or about
January 11, 2008.

1 \$258,881.81.¹³ Debtor listed Paleveda as an unsecured creditor,
2 showing two unsecured claims owed to him: (1) a judgment debt in
3 the amount of \$255,681.00 based on a judgment entered on May 19,
4 2006,¹⁴ and (2) a claim in the amount of \$31,231.41.¹⁵

5 In February 2007, Farrington filed a motion for order
6 compelling Lafayette to comply with the state court order
7 requiring turnover.¹⁶ In that motion, Farrington contended that
8 the arbitrator had resolved the issue of who was entitled to the
9 funds held by Lafayette. Farrington additionally noted that
10 although Lafayette was still holding the funds representing
11 compensation under the Agreement, it had issued multiple 1099
12 forms showing Farrington as the recipient of that compensation.¹⁷

13
14 ¹³These assets include a \$250,000 claim by Debtor which had
15 been asserted and dismissed with prejudice in the state court
litigation.

16 ¹⁴Trustee has filed a complaint against Paleveda, Ewing and
17 ARIS to avoid transfers to them (including the judgment in favor
18 of Paleveda) and to equitably subordinate their debts. To date,
19 however, no judgment has been entered in that adversary
proceeding (A.P No. 08-1132).

20 ¹⁵On May 17, 2007, Paleveda filed a unsecured priority claim
21 in the amount for \$226,781 for wages, salaries and commissions
and for taxes and penalties owed to governmental units. No order
disallowing this claim has been entered.

22 ¹⁶This motion was filed in an adversary proceeding in which
23 Farrington and others had sued Paleveda and his current company.
(Adv. Proc. No. 06-1306).

24 ¹⁷The 1099s for 2004-2007 (introduced as Exhibit 4 to
25 Farrington's supplemental brief in support of turnover of the
26 Lafayette funds (Docket No. 134)) show the recipient's tax
27 identification number as a social security number and not a
corporate tax identification number. The recipient is identified
as:

28 (continued...)

1 Paleveda filed an objection to this motion, arguing that the
2 funds being held constituted management overrides and not
3 commissions awarded to Farrington by the state court. As noted
4 previously, this argument failed to acknowledge that Lafayette
5 was holding funds due under the Agreement, and the Agreement
6 provided that the compensation was limited to its terms (which
7 did not incorporate a management override commission schedule)
8 and that all compensation was payable to "you," that is, the
9 Independent Marketing Organization. The Agreement did not
10 provide that Lafayette would pay a portion of the funds to the
11 Independent Marketing Organization and another portion to someone
12 else. Therefore, the issue was whether Farrington was the "you"
13 to whom Lafayette was to direct its payments under the Agreement;
14 if Farrington was entitled to receive any compensation under the
15 Agreement, he was entitled to all of the compensation.¹⁸

16 Trustee took no position on Farrington's motion to compel,
17 advising the court that he had not had time to review the
18

19 ¹⁷(...continued)
20 Farrington, Chuck P.
21 PFP Plan Administrators Inc.
22 DBA The 412i Company
23 12501 Bel Red Rod. Ste. 215-A
24 Bellevue, WA 98005

25 ¹⁸In various declarations filed with the bankruptcy court,
26 Paleveda contended that Farrington committed fraud against PFP
27 when he purported to sign the Agreement individually as the
28 Independent Marketing Organization. Whether or not such
allegations have merit, they are irrelevant to a determination of
whether the Agreement required Lafayette to pay the compensation
directly to Farrington. If Farrington defrauded PFP, the Trustee
has independent causes of action against Farrington (assuming
such claims are not precluded by the state court judgment).

1 documents and transcripts relating to the arbitration. The court
2 denied the motion without prejudice and advised Trustee to file a
3 motion with respect to the funds held by Lafayette once he had
4 formed an opinion as to the proper disposition of those funds.

5 On November 30, 2007, in the main case, the Trustee filed a
6 motion for order determining that the Lafayette proceeds were not
7 property of the estate and directing Lafayette to turn over all
8 commissions due to Farrington. Alternatively, Trustee sought an
9 order granting relief from the stay to allow parties to litigate
10 the dispute over the funds in state court. In his motion, the
11 Trustee stated that his counsel "has reviewed every transcript
12 from the arbitration in addition to exhibits and deposition
13 transcripts." The Trustee summarized the testimony of Farrington
14 at the arbitration and opined that he was bound by the decision
15 of the arbitrator.

16 ARIS filed an objection to Trustee's motion.¹⁹ Paleveda
17 simply filed a declaration joining ARIS's response. In its
18 objection, ARIS contended that the arbitrator did not award all
19 of the commissions held by Lafayette to Farrington; rather, the
20 arbitrator (and thus the state court) held that Farrington was
21 entitled to commissions with respect to "policies written in his
22 name and issued by Lafayette." Paleveda's declaration contended
23 that the Agreement was written in PFP's corporate name and
24 PFP/Debtor was thus the party entitled to the compensation under
25 it.

26

27 ¹⁹The objection was made by ARIS jointly with Marjorie
28 Ewing, not an appellant here.

1 Lafayette filed a response to Trustee's motion indicating
2 that it has "never contended that Farrington is not entitled to
3 all of the commissions arising under the Agreement or that it was
4 confused internally as to whom the funds actually belong."
5 Rather, Lafayette contended that it was holding the funds because
6 the state court order was ambiguous as to what amounts should be
7 turned over to Farrington (given that not all of the funds were
8 attributable to contracts written by Farrington). "Lafayette
9 correctly recognized that, regardless of its own internal
10 beliefs, it would be exposed to claims from the debtor's
11 principals if it paid funds to Farrington. Lafayette has
12 consistently advised all parties that it was willing to disburse
13 the funds to whomever the court unambiguously directs and has
14 simply asked not to be put in a position where, after disbursing
15 the funds, it would remain in peril of having to defend against
16 adverse claimants."

17 Farrington filed a reply to the "oppositions of Ewing,
18 Paleveda et al.," even though Paleveda had not filed a formal
19 opposition. The Trustee joined in Farrington's reply. Further
20 responses and supplemental responses were filed by Farrington and
21 ARIS. No one objected to the standing of ARIS, Ewing or
22 Paleveda.

23 According to Farrington's supplemental brief, the bankruptcy
24 court directed the parties at a hearing on March 7, 2008, to
25 "submit briefing strictly limited to the issue of who, as between
26 Farrington and the Debtor, was the rightful owner/recipient of
27 the Lafayette commissions and whether Farrington is the owner of
28 those funds or a mere creditor of the estate."

1 On March 21, 2008, the bankruptcy court issued its oral
2 ruling on the Trustee's motion and the "final issue which was of
3 concern to the Court, and that is who owned these things
4 originally":

5 Let's take a look first at the arbitrator's decision. He
6 seems to indicate that Farrington owned these particular
7 policy rights to commissions and that he never assigned
8 them. Then, unfortunately, the arbitrator put forth what I
9 would consider, I wouldn't say loose language, but language
10 that is - you know, sometimes create [sic] more problems
11 than it's worth. That happens to us on the bench from time
12 to time.

13 When he's then ta[l]king about policies written in
14 Farrington's name as if, you know, where you'd go out and
15 Farrington is the guy who's out selling the policy. And
16 certainly, it could mean that. But it's irrelevant to the
17 analysis. It doesn't match up as a sensible conclusion,
18 because it doesn't match the agreements and what the
19 arbitrator's already said. If the arbitrator has already
20 said that he never assigned any of this, why, then, how
21 could he then limit it to the policies that have been
22 written by this particular person?

23 If that's not enough, we need to look to the agreements
24 involved here. First, there's an agreement with PFP, the
25 predecessor of the debtor, that initially does look like a
26 corporate agreement. And then there are ensuing agreements,
27 one signed by Farrington and a later one by Lafayette, and
28 they say "individual." And I don't find them to be
29 ambiguous in terms of who the parties are to them, as far as
30 the contracting parties are concerned. Certainly,
31 Bellingham Insurance's predecessor is named, but boy, these
32 sure look like individual contracts to me, supporting the
33 arbitrator's ruling.

34 1099 is a strong decision by someone. And in this
35 case, why, it runs to Farrington. Granted, we have the
36 check and I, you know, realize the arguments that are
37 there, and there's some suggestion of a prior course of
38 dealing. But you know, we could try this thing for another
39 10 days. And I'm telling you, it's going to come out the
40 same way.

41 The Court's decision is that the bankruptcy estate of
42 Bellingham Insurance has no interest in these funds, and an
43 immediate order should ensue directing that they are
44 payable, rightfully, to Mr. Farrington as his contract
45 provides that he owns those particular funds.

1 On April 4, 2008, after the court issued its oral ruling but
2 before it entered its order, Paleveda filed a motion to
3 reconsider. Among other things, Paleveda argued that the
4 Lafayette commissions were not pled or at issue in the
5 arbitration and that determination of who owned the income stream
6 was "not ripe for summary judgment."²⁰ The bankruptcy court
7 denied this request on April 14, 2008. On May 20, 2008, Paleveda
8 filed a second motion for reconsideration before an order was
9 signed granting Trustee's motion. According to the court's
10 minutes from a hearing held on June 6, 2008, the court denied the
11 motion for reconsideration and barred Paleveda from filing
12 further papers in the bankruptcy case absent advance approval
13 from the court.

14 On June 10, 2008, the bankruptcy court entered an order
15 determining that the funds held by Lafayette did not constitute
16 property of the estate, directing the funds to be turned over to
17 Farrington and barring Paleveda from filing further pleadings
18 absent prior court approval. According to the bankruptcy court's
19

20
21 ²⁰The Trustee's motion was not presented as a motion for
22 summary judgment. Nothing in the record indicates that Paleveda
23 or any other objector ever requested an evidentiary hearing. It
24 appears that, until the motion for reconsideration, the parties
25 treated the court's ruling as a final disposition on the merits.

26 The local rules for the bankruptcy court require a party
27 desiring an evidentiary hearing with live testimony on a motion
28 to "obtain a special setting from the judge's secretary or
scheduling clerk." L.B.R. 9013-1(b)(3). Local Bankruptcy Rule
9013-1(e)(2), entitled "Motion Calendars Shall Not Include Oral
Testimony," states that "the court will not hear oral testimony
on the regularly-scheduled motion calendars unless approved in
advance by the court." Nothing in the record indicates that any
party sought to invoke this rule.

1 docket, Paleveda filed his notice of appeal on June 6, 2008.
2 Under Rule 8002(a), the premature notice of appeal is deemed
3 filed as of the date of entry of the order and is timely.²¹

4 **II. ISSUE**

5 Did the bankruptcy court err in holding that the estate had
6 no interest in the funds held by Lafayette and in directing
7 Lafayette to pay those funds to Farrington?

8 **III. STANDARD OF REVIEW**

9 "We review rulings regarding rules of res judicata,
10 including claim and issue preclusion, de novo as mixed questions
11 of law and fact in which legal questions predominate." Khaligh
12 v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP
13 2006), aff'd, 506 F.3d 956 (9th Cir. 2007) (citing Alary Corp.
14 v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554
15 (9th Cir. BAP 2002)). "Once it is determined that preclusion

16 _____
17 ²¹On November 25, 2008, Farrington filed a motion to
18 supplement the record designations. In particular, Farrington
19 wants to supplement the document at Tab 38 of his excerpts to add
20 the full transcript of the state court hearing on PFP's motion to
21 vacate/reconsider the arbitration award. Supplementation is not
22 necessary, as the limited excerpts reflect that the state court
23 addressed many of the issues raised by Paleveda on this appeal,
24 such as the arbitrator's purported conflict of interest. We will
25 therefore enter a separate order denying this motion to
26 supplement.

27 In a motion to continue the oral argument in this appeal,
28 counsel for Farrington (Mr. Zimbelman) alleged that Paleveda had
filed frivolous complaints against various individuals. On
February 5, 2009, Paleveda filed a request for judicial notice
asking us to consider an email from the Nevada Bar Association
that he has not filed a complaint in that state against Mr.
Zimbelman and others. As the allegation regarding the
purportedly frivolous complaints are irrelevant to the
disposition of this appeal, we will deny the request for judicial
notice.

1 doctrines are available to be applied, the actual decision to
2 apply them is left to the trial court's discretion." Khaligh,
3 338 B.R. at 823.

4 We review the bankruptcy court's findings of fact for clear
5 error and its conclusions of law de novo. Hansen v. Moore (In re
6 Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007). We review
7 mixed questions of law and fact de novo. Eastman v. Eastman (In
8 re Eastman), 188 B.R. 621, 624 (9th Cir. BAP 1995).

9 IV. JURISDICTION

10 Farrington contends that we should dismiss this appeal as
11 moot and for lack of standing by Paleveda. We disagree.

12 Farrington asserts that because Lafayette has already
13 remitted the funds to him pursuant to the bankruptcy court's
14 order, the appeal is moot. We lack jurisdiction to hear an
15 appeal that is constitutionally moot. I.R.S. v. Pattullo (In re
16 Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). "'However, while a
17 court may not be able to return the parties to the status quo
18 ante . . . , an appeal is not moot if the court can fashion some
19 form of meaningful relief.'" United States v. Arkison (In re
20 Cascade Rds.), 34 F.3d 756, 759 (9th Cir. 1994) (quoting Church
21 of Scientology v. United States, 506 U.S. 9, 12 (1992));
22 Northwest Env'tl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1244-45
23 (9th Cir. 1988) (an action is not moot if "there can be any
24 effective relief" between the parties). The party asserting
25 mootness has a heavy burden to establish that there is no
26 effective relief remaining for a court to provide. Northwest
27 Env'tl., 849 F.2d at 1244-45.

28

1 Here, the bankruptcy court could fashion effective relief if
2 we reversed. Farrington has appeared here as appellee; he is not
3 a third party whose rights have vested as a result of a non-
4 stayed order. We could reverse and direct the bankruptcy court
5 to order Farrington to return the funds to the estate. The
6 appeal is therefore not moot.

7 Farrington also contends that Paleveda lacks standing to
8 pursue this appeal, noting that the bankruptcy trustee has filed
9 an adversary proceeding to avoid Paleveda's judgment lien. The
10 bankruptcy schedules indicate that Paleveda holds two unsecured
11 claims: one for unpaid wages and benefits and another under the
12 judgment. Paleveda has filed a separate proof of claim. While
13 the trustee seeks to avoid the judgment and to subordinate
14 Paleveda's claims, no judgment has been entered. Paleveda
15 therefore holds a disputed claim and is a creditor under 11
16 U.S.C. § 101(5)(A) and (10).

17 As a creditor, Paleveda has a direct and pecuniary interest
18 in the bankruptcy order declaring that the bankruptcy estate has
19 no interest in property; the order decreases assets available to
20 pay creditors. "Only a party who is 'directly and adversely
21 affected pecuniarily' by an order of the bankruptcy court may
22 appeal. To provide standing, 'the order must diminish the
23 appellant's property, increase its burdens, or detrimentally
24 affect its rights.'" Debbie Reynolds Hotel & Casino, Inc. v.
25 Calstar Corp, Inc. (In re Debbie Reynolds Hotel & Casino, Inc.),
26 255 F.3d 1061, 1066 (9th Cir. 2001) (quoting Duckor Spradling &
27 Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777
28 (9th Cir. 1999)). A creditor has "a direct pecuniary interest

1 in a bankruptcy court's order transferring assets of the estate."
2 P.R.T.C., 177 F.3d at 778.

3 **V. DISCUSSION**

4 A. Issue Preclusion

5 The arbitrator and state court found Lafayette had properly
6 paid commissions to Farrington and that Farrington did not assign
7 to PFP his rights to commissions from Lafayette. Farrington
8 contends that, based on this finding, the principles of res
9 judicata and collateral estoppel²² preclude Paleveda from
10 asserting that the estate holds an interest in the funds. We
11 agree that the doctrine of issue preclusion applies here.²³

12 Issue preclusion forecloses relitigation of factual matters
13 that have already been decided in prior proceedings. Paine, 283
14 B.R. at 39; see also Harmon v. Kobrin (In re Harmon), 250 F.3d
15 1240, 1245 (9th Cir. 2001); Christopher Klein, et al, Principles
16 of Preclusion & Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J.
17 839, 852 (2005). Here, since the question involves the issue-
18 preclusive effect of a Washington state court's judgment, we

20
21 ²²These often-coupled, familiar phrases are more accurately
22 expressed as issue preclusion and claim preclusion respectively.
23 See Paine v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP
24 2002) (noting that "issue preclusion" includes the doctrines of
25 direct estoppel and collateral estoppel while "claim preclusion"
26 has "often been called 'res judicata' in a non-generic sense")
27 (citing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S.
28 75, 77 n.1 (1984)). We will use these more modern terms in this
memorandum.

26 ²³Claim preclusion does not apply here since the tenor of
27 the proceeding used below - turnover, or more properly,
28 abandonment - is not the same set of rights as were at issue in
the state arbitration.

1 apply Washington preclusion law. 28 U.S.C. § 1738; Marrese v.
2 Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

3 In order to invoke the doctrine of issue preclusion under
4 Washington state law, a party must show that (1) the issue
5 decided in the prior adjudication was identical to the one
6 presented in the second; (2) the prior adjudication ended in a
7 final judgment on the merits; (3) the party against whom the
8 doctrine is asserted was a party or in privity with a party to
9 the prior litigation; and (4) application of the doctrine must
10 not work an injustice. MacGibbon v. MacGibbon (In re MacGibbon),
11 383 B.R. 749, 764 (Bankr. W.D. Wash. 2008) (citing Hadley v.
12 Maxwell, 144 Wash.2d 306, 311, 27 P.3d 600, 602 (2001)).

13 Here, the memorandum filed by Farrington prior to the
14 arbitration indicated that PFP's (and Farrington's) entitlement
15 to the proceeds from the Agreement with Lafayette would be at
16 issue during the arbitration. While Farrington did not file a
17 complaint against Lafayette seeking the withheld funds prior to
18 the arbitration, Farrington's counsel stated during the
19 arbitration that the issue of whether Farrington assigned such
20 funds should be decided by the arbitrator. Thereafter, the
21 arbitrator and counsel for Farrington and PFP queried Farrington
22 about his entitlement to and assignment of the funds. Finally,
23 the arbitrator specifically referred to title to the funds in his
24 final ruling. Clearly, the issue of whether Farrington had an
25 interest in the funds and whether he assigned such an interest
26 was at issue before the arbitrator (and thus the state court).
27 The bankruptcy court faced the same issue. Farrington has thus
28

1 established that the first element of issue preclusion under
2 Washington law has been satisfied.

3 The Washington state court judgment is final and was
4 rendered on merits; when Paleveda requested the bankruptcy court
5 to vacate the state court judgment and arbitrator's award, he
6 acknowledged that the award was final. All appeals from the
7 state court judgment are over, thus indicating that the second
8 element is met.

9 The third prong of the Washington analysis requires that the
10 party against whom preclusion is asserted be the same, or in
11 privity with, a party in the prior litigation. Here, the party
12 against whom issue preclusion is asserted (the Debtor) is the
13 successor-in-interest to the plaintiff (PFP) in the arbitration
14 and state court action, thus satisfying the third element.

15 Given that Trustee (who represents the Debtor's estate)
16 filed a motion conceding that collateral estoppel applied against
17 the estate, we are convinced that the application of the doctrine
18 does not work an injustice. Accordingly, the four elements for
19 invocation of issue preclusion under Washington law exist here.

20 As a result, the bankruptcy court did not err in relying on
21 the state court judgment and the arbitrator's award in
22 determining that the estate had no interest in the funds held by
23 Lafayette, that Farrington had a right to compensation under the
24 Agreement, and that Farrington had not assigned to PFP his rights
25 in that compensation. While the state court judgment and
26 arbitration award may have been ambiguous in stating that
27 Farrington was entitled to any and all commissions "with respect
28 to policies written in his name," they did explicitly resolve the

1 issue of whether the Lafayette annuity commissions were properly
2 paid to Farrington (yes) and whether his right to commissions had
3 been assigned to PFP (no). As the Agreement provides that all
4 compensation would be payable to the Independent Marketing
5 Organization, the finding by the arbitrator that any of the
6 commissions were properly paid to Farrington necessarily means
7 that all of the compensation due under the Agreement was payable
8 to Farrington. The doctrine of issue preclusion thus prohibits
9 relitigation of these issues.

10 B. The Bankruptcy Court Independently Determined that the
11 Estate Had No Interest in the Commissions

12 The bankruptcy court's ruling can be read to hold, in the
13 alternative, that even if issue preclusion did not apply,
14 Farrington had established on the merits that he, and not the
15 Debtor's estate, was entitled to the commissions and payments due
16 under the Agreement. In addition to relying on the arbitrator's
17 award, the bankruptcy court placed weight on other evidence in
18 concluding that Farrington, in the first instance, had ownership
19 rights in the commissions generated under the Agreement. We
20 cannot say that the court clearly erred. A quick overview of the
21 court's analysis demonstrates this point.

22 First, the court observed that the Agreement was signed by
23 Farrington as an individual. Second, the court noted that
24 Lafayette issued 1099s showing Farrington as the recipient of
25 these commissions; these 1099s showed a social security number
26 (and not a corporate identification number) as the tax
27 identification number of the recipient. These facts, in addition
28 to the arbitrator's findings, support the bankruptcy court's

1 conclusion that the estate had no interest in the funds. The
2 bankruptcy court relied on the full record before it²⁴ and came
3 to a reasonable and justifiable conclusion based upon that
4 record. We find no error by the bankruptcy court.

5 C. Other Issues Raised by Paleveda

6 In his opening brief, Paleveda raised other issues in
7 support of his contention that Farrington should not receive the
8 commissions payable by Lafayette. These issues include breach of
9 fiduciary duty and diversion of corporate property and
10 opportunities. PFP identified and briefed these issues in its
11 pre-hearing memorandum to the arbitrator and the arbitrator
12 addressed these issues in his reasoned award (incorporated by the
13 state court). The doctrine of issue preclusion applies to these
14 arguments as well.

15 Paleveda also contends that the state court judgment and the
16 arbitration award should be disregarded because the arbitrator
17 had a conflict of interest. The state court, however, ruled
18 against Paleveda on this point. In its oral ruling supporting
19 its denial of PFP's motion to vacate the judgment on the
20 arbitrator's award, the state court dismissed allegations that
21 the arbitrator's decision should be vacated because of his
22 conflict of interest. The state court's ruling on that motion is
23 final, and thus the doctrine of issue preclusion applies to this
24 theory advanced by Paleveda as well.

25

26

27 ²⁴The bankruptcy court's ruling contained a 2-1/2 page
28 listing of documents and filings consulted by the bankruptcy
court in reaching its decision.

1 Even if the state court had not addressed this issue, we
2 could not modify or reverse the final judgment of the state
3 court. See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486
4 (1983) (district court does not have jurisdiction "over
5 challenges to state court decisions in particular cases arising
6 out of judicial proceedings even if those challenges allege that
7 the state court's action was unconstitutional"); Rooker v.
8 Fidelity Trust Co., 263 U.S. 413, 415-16 (1923) (state court
9 ruling on federal constitutional questions in the state court
10 action could not be modified or reversed by district court);
11 Exxon Mobil v. Saudi Basic Inds. Corp., 544 U.S. 280, 284 (2005)
12 (while narrowing the doctrine of Rooker-Feldman, the Supreme
13 Court held that it applied to "cases brought by state-court
14 losers complaining of injuries caused by state-court judgments
15 rendered before the district court proceedings commenced and
16 inviting district court review and rejection of those
17 judgments").

18 VI. CONCLUSION

19 For the foregoing reasons, we AFFIRM.
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