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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NC-13-1339-JuKiD
)		
6	ARA MARKOSIAN and ANAIT)	Bk. No.	09-50778-ASW
	MARKOSIAN,)		
7)		
	Debtors.)		
8	_____)		
)		
9	CAROL W. WU, Trustee,)		
)		
10	Appellant,)		
)		
11	v.)	O P I N I O N	
)		
12	ARA MARKOSIAN and ANAIT)		
	MARKOSIAN,)		
13)		
	Appellees.)		
14	_____)		

Argued and Submitted on February 20, 2014
at San Francisco, California

Filed - March 12, 2014

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

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

Appearances: _____
 Johnson C.W. Lee, Esq., argued for appellant
 Carol W. Wu, Chapter 7 trustee; Drew Henwood,
 Esq., argued for appellees Ara and Anait
 Markosian.

Before: JURY, KIRSCHER, and DUNN, Bankruptcy Judges.

1 JURY, Bankruptcy Judge:
2

3 Ara and Anait Markosian (collectively, Debtors) filed a
4 chapter 7¹ petition which they converted to chapter 11 and then
5 reconverted to chapter 7. After reconversion to chapter 7, Mr.
6 Markosian received a bonus from his employer of over \$102,000
7 for services rendered while the chapter 11 case was pending.
8 Debtors turned over the bonus to appellant, Carol W. Wu, the
9 chapter 7 trustee, and filed a motion to compel the trustee to
10 return it to Debtors. The bankruptcy court granted Debtors'
11 motion, finding that although the bonus constituted earnings and
12 were property of Debtors' chapter 11 estate under § 1115(a)(2),
13 the bonus reverted to them upon conversion of Debtors' case to
14 chapter 7. This appeal followed.

15 We address an issue of first impression in this Circuit:
16 whether an individual debtor's chapter 11 postpetition earnings
17 which are property of the estate under § 1115 revert to him or
18 her upon a subsequent conversion to chapter 7. As a matter of
19 statutory interpretation, we conclude that they do and AFFIRM.

20 I. FACTS

21 On February 7, 2009, Debtors filed a chapter 7 petition.
22 The United States Trustee moved to dismiss their case for abuse
23 based on Debtors' high income and their ability to pay their
24 creditors. In response, Debtors converted their case to chapter

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 11 on February 11, 2010. More than two years later, Debtors
2 were unable to confirm a plan because Mrs. Markosian had lost
3 her job. Debtors reconverted their case to chapter 7 on March
4 5, 2012.

5 In April 2012, Mr. Markosian received \$102,498.42¹ from his
6 employer for personal services provided while Debtors' case was
7 still under chapter 11. Debtors turned over the bonus to the
8 trustee and subsequently filed a motion to determine their
9 interest in it. The bankruptcy court denied Debtors' motion
10 without prejudice in order for Debtors to file a new motion to
11 address whether the bonus was property of their chapter 11
12 estate pursuant to § 1115(a)(2), and if so, whether it
13 subsequently became property of their chapter 7 estate.

14 Debtors then filed a motion to compel trustee to return the
15 bonus to them as either partially exempted property of the
16 bankruptcy estate or as property excluded from the chapter 7
17 estate upon reversion to chapter 7. Trustee opposed.

18 On January 18, 2013, the bankruptcy court heard the matter,
19 directed the parties to file supplemental briefs and took the
20 matter under advisement. In June 2013, the bankruptcy court
21 issued its memorandum decision. The court found that the bonus
22 constituted earnings from personal services within the meaning
23 of § 1115(a)(2), but concluded that it ceased to be property of
24

25 ¹ Mr. Markosian actually received a gross bonus of
26 \$191,191.00. However, statutory reductions reduced the total
27 bonus by \$72,931.21, and trustee discovered during litigation
28 over the rights to the bonus that Mr. Markosian had used some of
it to purchase company stock worth \$15,761.37, which remains in
his possession or has since been sold.

1 the estate upon conversion to chapter 7 based on the reasoning
2 set forth in In re Evans, 464 B.R. 429, 438-41 (Bankr. D. Col.
3 2011). Because the court found that the bonus was not property
4 of the chapter 7 estate, it did not reach the question whether
5 the money could be claimed exempt. The bankruptcy court entered
6 an order granting Debtors' motion to compel on July 2, 2013.
7 Trustee timely appealed.

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction over this proceeding
10 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
11 under 28 U.S.C. § 158.

12 **III. ISSUE**

13 Whether the bankruptcy court erred by finding that the
14 bonus, which was property of Debtors' chapter 11 estate under
15 § 1115(a)(2), reverted to Debtors upon conversion to chapter 7.

16 **IV. STANDARD OF REVIEW**

17 We review issues of statutory construction and conclusions
18 of law, including the bankruptcy court's interpretation of the
19 Bankruptcy Code, de novo. Samson v. W. Capital Partners, LLC
20 (In re Blixseth), 684 F.3d 865, 869 (9th Cir. 2012).

21 **V. DISCUSSION**

22 As with all statutory construction issues, we start with
23 the statutory language. We begin by looking at § 541 which
24 defines property of the estate. Under § 541(a), the
25 commencement of a case under the Bankruptcy Code creates an
26 estate. Although the estate may acquire property after the
27 commencement of the case, see § 541(a)(6) and (7), estate
28 property remains distinct from the debtor's property. See Smith

1 v. Kennedy (In re Smith), 235 F.3d 472, 478 (9th Cir. 2000).

2 Under § 541(a)(6), "earnings from services performed by an
3 individual debtor after the commencement of the case" are the
4 debtor's property which are excluded from property of the
5 estate.

6 In 2005, the Bankruptcy Abuse Prevention and Consumer
7 Protection Act added § 1115² which, similar to §§ 1306 and 1207,
8 adds an individual debtor's postpetition earnings to property of
9 the chapter 11 estate. The bankruptcy court found that the
10 bonus received by Mr. Markosian post-conversion was property of
11 Debtors' chapter 11 estate under § 1115(a)(2), a ruling not
12 challenged in this appeal. However, § 1115 does not apply upon
13 conversion from chapter 11 to chapter 7. Instead, § 348 governs
14 the effect of a conversion.

15 Although § 348(f)(1)(A) expressly excludes a debtor's
16 postpetition earnings from property of a chapter 7 estate upon
17 conversion from chapter 13 – earnings that are included in the
18 chapter 13 estate under § 1306(a)(2) – there is no parallel
19 provision for chapter 11 debtors. In the absence of a specific
20

21 ² Section 1115 provides in relevant part:

22 (a) In a case in which the debtor is an individual,
23 property of the estate includes, in addition to the
24 property specified in section 541--

25

26 (2) earnings from services performed by the
27 debtor after the commencement of the case but
28 before the case is closed, dismissed, or
converted to a case under chapter 7, 12, or
13, whichever occurs first.

1 statutory provision, we rely on § 348(a), which by its plain
2 language applies to all cases under Title 11, not just certain
3 ones:

4 (a) Conversion of a case from a case under one chapter
5 of this title to a case under another chapter of this
6 title constitutes an order for relief under the
7 chapter to which the case is converted, but, except as
8 provided in subsections (b) and (c) of this section,
9 does not effect a change in the date of the filing of
10 the petition, the commencement of the case, or the
11 order for relief.

9 The statute expressly states that the date of the petition
10 remains unchanged. "Where a case is converted from Chapter 11
11 to Chapter 7, property of the estate is determined by the filing
12 date of the Chapter 11 petition, and not by the conversion
13 date." Magallanes v. Williams (In re Magallanes), 96 B.R. 253,
14 255 (9th Cir. BAP 1988). As of the petition date, § 541(a)(6)
15 excludes from the chapter 7 estate earnings from services
16 performed by individual debtors after the commencement of the
17 case. Therefore, by operation of § 348(a), personal service
18 income that came into Debtors' chapter 11 estate is
19 recharacterized as property of the debtor under § 541(a)(6)³

21 ³ To the extent trustee contends that the postpetition
22 earnings of Mr. Markosian are property of the chapter 7 estate by
23 operation of § 541(a)(7), we reject that argument. Section
24 541(a)(7) makes property of the estate any interest in property
25 that the estate (not the debtor) acquires after the case. Here,
26 the bankruptcy court found that the bonus constituted earnings
27 from personal services of Mr. Markosian under § 1115(a)(2) and
28 that ruling was not appealed. Thus, the earnings fall within the
earnings exception stated in § 541(a)(6). We note however that
there may be chapter 11 cases which are converted to chapter 7
where it is necessary to separate earnings from personal services
by an individual from the earnings of a business. See

(continued...)

1 when the case is converted to chapter 7. Accordingly, upon
2 conversion, the bonus reverted to Debtors.

3 While other courts have come to a different conclusion, we
4 respectfully disagree with their method of statutory
5 interpretation. See Pergament v. Pagano (In re Tolkin), 2011 WL
6 1302191 (Bankr. E.D.N.Y. 2011); In re Hoyle, 2013 WL 3294273
7 (Bankr. D. Idaho 2013) (following Tolkin). In essence, they
8 rely on Congress's failure to enact a parallel provision to
9 § 348(f)(1)(A) for chapter 11 debtors. The Tolkin court opined:

10 The language of [§ 1115] parallels the language of
11 § 1306, and accomplishes the same goal of broadening
12 the scope of property of the debtor's estate
13 significantly beyond the parameters of § 541.
14 However, unlike in a Chapter 13 case, there is no
15 provision similar to § 348(f) to modify the result
16 upon conversion of a Chapter 11 case to another
17 chapter. In re Quillen, 408 B.R. 601, 620 n.33 [Bankr.
18 D. Md. 2009)] (" . . . Section 1115 . . . is identical
19 to Section 1306. Curiously though, no counterpart to
20 Section 348(f) was codified in BAPCPA to
21 correspondingly adjust the reach of Section 1115.").
22 Therefore, what is captured as property of the
23 debtor's estate under § 1115 remains as property of
24 the estate, even after the conversion of the case to
25 another chapter.

19 In re Tolkin, 2011 WL 1302191, at *10. Following Tolkin, the
20 court in Hoyle concluded that, "in light of the omission of a
21 provision equivalent to § 348(f)(1) applicable to the converted
22 chapter 11 case, Debtor's arguments that the DIP accounts at
23 conversion are not 'property of the estate' does [sic] not

25 ³(...continued)
26 FitzSimmons v. Walsh (In re FitzSimmons), 725 F.2d 1208, 1211
27 (9th Cir. 1984) (holding that only the debtor's earnings from his
28 own personal services were exempt under 541(a)(6) as opposed to
all profits generated by his law practice).

1 hold." In re Hoyle, 2013 WL 3294273, at *7.

2 To be sure, nowhere does the Tolkin court mention § 348(a),
3 instead relying on Congress's failure to enact a provision
4 parallel to § 348(f)(1)(A) for chapter 11 debtors. Under this
5 interpretation, § 348(a) has no independent effect despite the
6 statute's plain language that makes it applicable to all case
7 conversions, including those from chapter 11 to chapter 7. See
8 Aluminum Co. of Am. v. Bonneville Power Admin., 903 F.2d 585,
9 590 (9th Cir. 1990) (under statutory rules of construction, one
10 provision of a statute should not be interpreted in a way which
11 is internally contradictory or that renders other provisions of
12 the same statute inconsistent or meaningless).

13 Further, the Ninth Circuit has cautioned that attempting
14 "to divine congressional intent from congressional silence" is
15 "an enterprise of limited utility that offers a fragile
16 foundation for statutory interpretation." Polar Bear Prods.,
17 Inc. v. Timex Corp., 384 F.3d 700, 717 (9th Cir. 2004). Rather
18 than creating a rule out of silence, we consider § 348(f)(1)(A)
19 in context. In this regard, Congress amended § 348 in 1994 to
20 add subsection (f)(1)(A) well before it enacted § 1115. The
21 legislative history of § 348(f)(1)(A) shows that an amendment
22 was needed to resolve a split among courts concerning whether a
23 chapter 13 debtor's postpetition earnings remained property of
24 the estate upon conversion to chapter 7. In re Evans, 464 B.R.
25 at 439 (citing cases and legislative history of § 348(f)(1)(A)).
26 Given the reason for the amendment, the fact that Congress did
27 not enact a parallel provision to § 348(f)(1)(A) for chapter 11
28 debtors when it enacted § 1115 holds little, if any,

1 significance because there was no split of authority yet to
2 resolve. See Brown v. Gardner, 513 U.S. 115, 121 (1994)
3 (congressional silence lacks persuasive significance).

4 In the end, there is no reason to treat chapter 11 debtors
5 differently than chapter 13 debtors in this context. As the
6 Evans court pointed out, at the time Congress enacted § 348(f),
7 it "clearly conveyed its purpose to avoid penalizing debtors who
8 first attempt a repayment plan . . . [t]here is no policy reason
9 as to 'why the creditors should not be put back in precisely the
10 same position as they would have been had the debtor never
11 sought to repay his debts" 464 B.R. at 441.

12 **VI. CONCLUSION**

13 For the reasons stated, we AFFIRM.