

APR 07 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NV-14-1255-JuKuD  
) BAP No. NV-14-1280-JuKuD  
BRENDA B. TODD, ) (Cross-Appeals)  
)  
Debtor. ) Bk. No. 09-14362  
)

\_\_\_\_\_  
BRENDA B. TODD,  
Appellant/Cross-Appellee,)

v. ) M E M O R A N D U M \*  
)

LOWELL E. ROTHSCHILD, Chapter )  
11 Trustee for Fort Defiance )  
Housing Corp., Inc., )  
)  
Appellee/Cross-Appellant,)

VICTORIA L. NELSON, Chapter 7 )  
Trustee, )  
)  
Appellee. )  
\_\_\_\_\_

Argued and Submitted on March 19, 2015  
at Las Vegas, Nevada

Filed - April 7, 2015

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding  
\_\_\_\_\_

Appearances: Brenda Todd argued pro se; Frederick J. Peterson  
of Mesch, Clark & Rothschild, P.C. argued for  
Lowell E. Rothschild, Chapter 11 Trustee for Fort

\_\_\_\_\_  
\* 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 8024-1.

1 Defiance Housing Corp., Inc.\*\*

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2  
3 Before: JURY, KURTZ, and DUNN, Bankruptcy Judges.

4 Chapter 7<sup>1</sup> debtor, Brenda Todd (Debtor), was in a car  
5 accident and suffered significant injuries. Debtor filed a  
6 state court action against the driver and his employer seeking  
7 general and special damages, punitive damages, and attorneys'  
8 fees and costs. The litigation ended in the settlement and  
9 release of Debtor's claims for \$2.5 million (Personal Injury  
10 Settlement). The settlement agreement did not allocate the  
11 lump-sum amount to any damage theory.

12 Subsequently, in the chapter 11 bankruptcy case of Fort  
13 Defiance Housing Corporation (FDHC), the Arizona bankruptcy  
14 court entered a judgment for \$18,500,883.59 in favor of the  
15 chapter 11 trustee, Brenda Moody Whinery (Whinery), and against  
16 Debtor, Lodgebuilder Inc. (Lodgebuilder), and others, jointly  
17 and severally (Arizona Judgment). The court also issued a  
18 permanent injunction, enjoining Debtor from, among other things,  
19 accessing her Solomon Smith Barney account (SSB Account), which  
20 contained monies from her Personal Injury Settlement. In  
21 February 2013, appellee and cross appellant, Lowell E.

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23  
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 \*\* Appellee Victoria L. Nelson is the successor chapter 7  
25 trustee to James Lisowski. Nelson has not filed a brief or  
otherwise participated in this appeal.

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

1 Rothschild, was appointed the successor trustee (Creditor  
2 Trustee) in the FDHC case.

3       Soon after the Arizona Judgment was entered against her,  
4 Debtor filed a chapter 11 petition in the Nevada bankruptcy  
5 court, which was later converted to chapter 7. Months after her  
6 filing, in an amended and corrected Schedule C attached to a  
7 pleading, Debtor claimed as exempt more than \$1 million from the  
8 Personal Injury Settlement proceeds as compensation for loss of  
9 future earnings under Nev. R. Stat. (N.R.S.) § 21.090(1)(w).  
10 Debtor did not file or docket the amended Schedule C, but  
11 e-mailed it to the chapter 7 case trustee and Creditor Trustee's  
12 attorney.

13       Meanwhile, Creditor Trustee and the chapter 7 trustee  
14 entered into a settlement agreement to avoid litigation over the  
15 ownership of Debtor's assets, which were subject to the Arizona  
16 Judgment and injunction (Rule 9019 Settlement). The parties  
17 agreed, among other things, that the SSB Account belonged to  
18 FDHC's estate. Debtor objected to the settlement by asserting  
19 her exemption rights in various assets, including the Personal  
20 Injury Settlement proceeds that were deposited into the SSB  
21 Account. The bankruptcy court overruled Debtor's objection and  
22 entered an order approving the settlement (Rule 9019 Settlement  
23 Order). Debtor attempted to appeal the order by filing a notice  
24 of appeal (NOA) in Lodgebuilder's bankruptcy case and not her  
25 own. She also did not seek a stay pending appeal. The Nevada  
26 district court dismissed the appeal based on Debtor's lack of  
27 standing.

28       Creditor Trustee then filed a motion for summary judgment

1 (MSJ) on the issue of whether Debtor was entitled to an  
2 exemption on any portion of the Personal Injury Settlement  
3 proceeds for loss of future earnings. The bankruptcy court  
4 granted Creditor Trustee's MSJ. Debtor filed an appeal to the  
5 district court. Since there was no stay pending appeal,  
6 Creditor Trustee withdrew monies from the SSB Account and made  
7 distributions pursuant to the terms of the Rule 9019 Settlement  
8 and the confirmed FDHC chapter 11 plan. Meanwhile, the district  
9 court reversed the bankruptcy court's order granting Creditor  
10 Trustee's MSJ, finding there was a genuine issue of material  
11 fact as to whether Debtor was entitled to exempt any portion of  
12 the Personal Injury Settlement proceeds as loss of future  
13 earnings.

14 Subsequently, the bankruptcy court conducted a trial on the  
15 proper allocation of the loss of future earnings damages in the  
16 Personal Injury Settlement award to determine the amount of  
17 Debtor's exemption. The court entered its findings of fact and  
18 conclusions of law (FFCL) and a judgment, finding Debtor was  
19 entitled to exempt \$461,608.02 for loss of future earnings.  
20 Creditor Trustee filed a motion for additional findings,  
21 reconsideration, or to alter or amend the judgment (Motion to  
22 Alter or Amend), which the bankruptcy court denied.

23 Debtor appealed from the judgment and Creditor Trustee  
24 filed a cross appeal. Both parties assign error to the  
25 bankruptcy court's decision on the amount of the exemption.  
26 Debtor claims that the exemption for loss of future earnings  
27 should be \$1,081,540.00. Creditor Trustee contends the amount  
28 should be no more than \$108,008.13 or, alternatively, that the

1 exemption should be disallowed in its entirety based on the  
2 doctrines of res judicata and judicial estoppel.

3 We conclude that Debtor's exemption rights in the SSB  
4 Account are determined by the Rule 9019 Settlement Order and the  
5 Bankruptcy Code. The plain language in the Rule 9019 Settlement  
6 Order stated that the FDHC estate owned the funds in the SSB  
7 Account, the account was transferred to Creditor Trustee, and  
8 there was no carve-out for Debtor's exemption. As a result, the  
9 bankruptcy court no longer had jurisdiction over the SSB Account  
10 since it was neither property of Debtor's estate nor property of  
11 the Debtor. See 28 U.S.C. § 1334(e)(1). Further, under  
12 § 522(b), the debtor may exempt certain property "from property  
13 of the estate." "[O]bviously, then, an interest that is not  
14 possessed by the estate cannot be exempted." See Owen v. Owen,  
15 500 U.S. 305, 308 (1991). Accordingly, the issue of Debtor's  
16 exemption in the funds in the SSB Account became moot once the  
17 funds were no longer property of Debtor's estate or the Debtor.  
18 For these reasons, we VACATE the judgment and DISMISS this  
19 appeal.

## 20 I. FACTS

21 The facts are mostly taken from the parties' Joint Pre-  
22 Trial Statement in which they stipulated to certain facts and  
23 the bankruptcy court's FFCL entered on May 6, 2014.

### 24 A. Prepetition Events

#### 25 1. Debtor's Employment

26 Debtor was employed by Lodgebuilder, a building contractor  
27 which did business with FDHC and other entities. FDHC is a  
28 nonprofit Navajo corporation, incorporated for the sole purpose

1 of building and leasing low income housing on the Navajo  
2 reservation. FDHC operations were funded by federal grants and  
3 federally supported loans. Debtor owned a 20% stake in  
4 Lodgebuilder, and William Aubrey (Aubrey) owned 80%. Debtor  
5 received a \$10,000 monthly salary from Lodgebuilder prior to and  
6 after her car accident.

7 In addition to her interest in Lodgebuilder, Debtor owned  
8 and managed a restaurant called Blondie's in Glacier, Montana.  
9 Blondie's had a gaming license and provided customers with slot  
10 machines, food and drinks.

## 11 **2. The Car Accident**

12 On May 25, 2003, Debtor was injured in a serious car  
13 accident. She filed a state court action against Aaron Wade  
14 Melancon and Casablanca Resorts, LLC, alleging causes of action  
15 for negligence, negligence per se, respondeat superior, and  
16 negligent hiring and supervision. Debtor sought general  
17 damages, special damages, property damages, punitive damages,  
18 and attorneys' fees and costs.

19 After some time, the parties settled the matter. In  
20 exchange for a lump-sum cash payment of \$2.5 million, Debtor  
21 released all claims, demands, and causes of action and damages  
22 of any kind arising out of the incident. The settlement  
23 agreement did not allocate the lump-sum amount to any specific  
24 damage claim. After paying her attorney \$634,339.42, Debtor  
25 received \$1,865,660.58 (Settlement Proceeds) and deposited that  
26 amount into her checking account at Mountain America Credit  
27 Union (MACU).

28 In May 2006, Debtor transferred \$1.5 million of the

1 Settlement Proceeds from her MACU account to her pre-existing  
2 SSB Account which had a balance of \$535,640.86. Debtor  
3 purchased six mutual funds with the \$1.5 million and some  
4 additional cash. On May 31, 2005, the account balance was  
5 \$2,037,991.86, consisting of stocks and cash.

6 After the car accident, Lodgebuilder paid Debtor's medical  
7 expenses and continued to pay her salary. Debtor used \$130,000  
8 of the Settlement Proceeds, plus money from other accounts and  
9 payments from Allstate insurance, to repay Lodgebuilder for the  
10 medical expenses.

### 11 **3. The FDHC Bankruptcy Case**

12 In 2005, FDHC filed a chapter 11 petition in the Arizona  
13 bankruptcy court. Whinery was appointed the chapter 11 trustee.  
14 In October 2006, Whinery filed an adversary complaint against  
15 Lodgebuilder, Debtor, Aubrey, and Everett Ross, alleging breach  
16 of contract, conversion, misrepresentation, negligence, breach  
17 of fiduciary duty, civil conspiracy/aiding and abetting,  
18 fraudulent conveyance, and unjust enrichment, and seeking  
19 general and punitive damages. At the same time, she requested a  
20 temporary restraining order and preliminary injunction freezing  
21 the defendants' assets and bank accounts.

22 In March 2009, the Arizona bankruptcy court entered a  
23 judgment in favor of Whinery and against Lodgebuilder, Aubrey,  
24 and Debtor, in the amount of \$18,500,883.59.<sup>2</sup> The court also  
25 enjoined the transfer of assets that were traceable proceeds of

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26  
27 <sup>2</sup> The Arizona bankruptcy court found that Debtor and Aubrey  
28 converted over \$16 million of FDHC's money by transferring it to  
various Las Vegas casinos.

1 FDHC's assets and which were in the name of Debtor and the  
2 others, including funds in Debtor's SSB Account. Although the  
3 Arizona bankruptcy court froze Debtor's SSB Account, the court  
4 allowed her to withdraw \$206,158.00 from the account for legal  
5 fees and living expenses. Debtor withdrew this amount from the  
6 cash portion of the monies contained in the account.

7 In February 2013, Rothschild became the successor trustee  
8 in the FDHC case.

9 **B. Bankruptcy Events**

10 Shortly after the Arizona Judgment was entered against her,  
11 Debtor filed a chapter 11 petition in the Nevada bankruptcy  
12 court.<sup>3</sup>

13 Prior to her filing, the balance in the SSB Account  
14 decreased due to withdrawals authorized by the Arizona  
15 bankruptcy court and stock market losses in 2008. On March 26,  
16 2009 – the date she filed her petition – the SSB Account had a  
17 balance of \$1,340,719.00. After Debtor filed her bankruptcy  
18 petition, the funds in the SSB Account remained largely  
19 untouched, with the exception of withdrawals authorized by the  
20 Arizona bankruptcy court.

21 On April 10, 2009, Debtor filed her schedules and statement  
22 of financial affairs. In Schedule B, under "Description and  
23 Location of Property," Debtor listed "Smith Barney" with a value  
24 of \$1,340,719.00. In Schedule C, Debtor did not list an  
25 exemption for loss of future earnings under N.R.S.

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27  
28 <sup>3</sup> Aubrey and Lodgebuilder also filed bankruptcy petitions.  
Those cases were jointly administered with Debtor's case.



1 § 21.090(1)(w).

2 On April 30, 2009, Debtor filed amended Schedules B and C,  
3 listing her property claimed as exempt. Again, in Schedule B  
4 under "Description and Location of Property," Debtor put "Smith  
5 Barney" with a value of \$1,340,719.00, but she did not list an  
6 exemption for loss of future earnings in her amended Schedule C.

7 In early September 2009, the bankruptcy court converted  
8 Debtor's chapter 11 case to chapter 7. James Lisowski was  
9 appointed the chapter 7 trustee.

10 On November 25, 2009, Creditor Trustee filed an objection  
11 to Debtor's claimed exemptions, none of which were based on the  
12 loss of future earnings under N.R.S. § 21.090(1)(w). On  
13 December 31, 2009, Creditor Trustee filed an amended objection.

14 On January 5, 2010, Debtor filed a response to Creditor  
15 Trustee's amended objection. Attached to the response as  
16 "Exhibit 1" was a "Corrected & Amended" Schedule C which, for  
17 the first time, claimed an exemption under N.R.S. § 21.090(1)(w)  
18 in the amount of \$1,122,384.00 and another exemption for  
19 compensation for personal injury - pain and suffering - in the  
20 amount of \$377,616.00. The certificate of service showed that  
21 Debtor e-mailed her response to Creditor Trustee's attorney,  
22 Fred Petersen, and to the chapter 7 case trustee. Debtor did  
23 not separately file and docket the "Corrected & Amended"  
24 Schedule C attached as "Exhibit 1" to her response.

25 In July 2011, Creditor Trustee filed a motion to approve a  
26 settlement agreement between himself and the chapter 7 trustee  
27 the purpose of which was to avoid litigation relating to the  
28 ownership of Debtor's assets. Paragraph 2.5 entitled

1 "Accounts" provided:

2 Lisowski acknowledges and agrees that all funds held  
3 in the following accounts: (1) Solomon Smith Barney  
4 Account #5240043413532 . . . , all in the name of  
5 Todd, which accounts are subject to the Injunction,  
6 **are properly owned by, and the assets of, FDHC and**  
7 **subject to the provisions of the FDHC Plan.** Lisowski  
8 agrees that such funds will be turned over to Whinery  
9 on the Effective Date and that he will cooperate in  
10 such turnover, including executing any documents  
11 necessary to effectuate such turnover.

12 (Emphasis added).

13 Debtor objected to the settlement, arguing that it ignored  
14 her exemption rights in various assets, including, but not  
15 limited to, her homestead, her car, and for loss for future  
16 earnings. Debtor argued that any settlement agreement  
17 liquidating her estate should first include and identify her  
18 exemptions permitted by law.

19 Relying on the properly filed Schedule C, Creditor Trustee  
20 responded by pointing out that the bankruptcy court could  
21 determine the limited issue of whether Debtor's homestead  
22 assertion trumped Creditor Trustee's consensual lien on Debtor's  
23 residence and that Debtor had never claimed an exemption for her  
24 car, which was also subject to a consensual lien by Creditor  
25 Trustee.

26 At the August 10, 2011 hearing on the matter, the  
27 bankruptcy court stated:

28 With respect to Ms. Todd's complaints, any issue as to  
29 what exemption she may have are not resolved in this  
30 settlement. . . .the point is all you're doing is  
31 settlement inter se. If, for example, she titled  
32 [sic] to the exemptions she claims, the estate doesn't  
33 get it. Is that -- everybody agrees that's the correct  
34 -- analysis.

35 Counsel for Creditor Trustee responded "Yes." Liskowki stated:

1 "I agree completely. I don't think this resolve [sic] any  
2 issues with the exemptions." The bankruptcy court then said:

3       Everybody agrees. All right. So to the extent there  
4       are exemptions, those exemption issues are preserved.  
5       If you have outstanding objections to exemptions, you  
6       better bring them back on calendar. Otherwise, the  
7       exemptions stand.

8       Neither the Rule 9019 Settlement nor the Rule 9019  
9       Settlement Order contained any provision regarding Debtor's  
10       exemption rights nor did it provide for the carve-out of any  
11       funds in the SSB Account pending the determination of those  
12       rights. The order provided that Solomon Smith Barney accept any  
13       and all instructions concerning transactions in the SSB Account  
14       from Whinery, "as Creditor Trustee, who is the owner of the  
15       accounts as of the date of this Order." Finally, although the  
16       funds in the SSB Account were no longer property of Debtor's  
17       estate per the settlement's plain terms, the bankruptcy court  
18       did not expressly retain jurisdiction to decide Debtor's  
19       exemption rights in those funds. Debtor and Aubrey appealed the  
20       Rule 9019 Settlement Order to the Nevada district court by  
21       filing a NOA in Lodgebuilder's bankruptcy case and not their  
22       own. Lodgebuilder did not file a NOA of the order. The Nevada  
23       district court dismissed the appeal in May 2012, finding that  
24       neither Debtor nor Aubrey had standing.<sup>4</sup>

25       Relying on the Rule 9019 Settlement Order, Creditor Trustee  
26       withdrew funds from the SSB Account and disbursed those funds to

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27       <sup>4</sup> We take judicial notice of the dismissal which was  
28       docketed and imaged in Bankr. Case No. NV-09-14103 at Dkt.  
29       No. 289. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),  
30       293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 the chapter 7 trustee and others pursuant to the terms of the  
2 settlement and FDHC's confirmed chapter 11 plan.

3 In late November 2011, Creditor Trustee filed a renewed  
4 objection to Debtor's homestead exemption. Debtor responded,  
5 arguing that her claims of exemption were contained in the  
6 Schedule C that she filed on April 30, 2009.

7 Debtor then filed an emergency motion for turnover of funds  
8 based on the exemptions claimed in her "Corrected & Amended"  
9 Schedule C. Debtor asserted that the Settlement Proceeds were  
10 exempt under N.R.S. § 21.090(1)(w), and argued that the entire  
11 amount was reasonably necessary for her support.

12 Creditor Trustee responded, arguing that Debtor had failed  
13 to preserve her exemption for loss of future earnings because,  
14 among other things, the "Corrected & Amended" Schedule C had not  
15 been docketed as an amendment. Creditor Trustee further  
16 submitted that under the Rule 9019 Settlement with the chapter 7  
17 trustee, the funds in the SSB Account belonged to the FDHC  
18 estate. Creditor Trustee maintained that Debtor could not now  
19 claim an exemption since the funds had already been transferred  
20 to FDHC and administered per the terms of the settlement  
21 agreement. Based on these arguments, Creditor Trustee asserted  
22 that the doctrines of res judicata, judicial estoppel, and  
23 mootness barred Debtor's motion. Finally, Creditor Trustee  
24 contended that creditors of Debtor's estate and FDHC's estate  
25 would be prejudiced due to Debtor's late amendment of her  
26 Schedule C.

27 In April 2012, the bankruptcy court held a hearing  
28 regarding Debtor's exemptions. In responding to the prejudice

1 concerns raised by Creditor Trustee, the court held that,  
2 although Debtor's attached January amendment was not filed in  
3 compliance with the Rules, it was sufficient to give Creditor  
4 Trustee notice of her intent to claim the exemptions. The  
5 bankruptcy court ordered Debtor to properly file the exemptions.  
6 Despite the court's directive, Debtor did not file a separately  
7 docketed Amended Schedule C listing an exemption for loss of  
8 future earnings.

9 On May 8, 2012, at a status hearing, the court again told  
10 Debtor to file an official amendment to the claim of exemption  
11 and gave her a deadline to do so. About two weeks later, Debtor  
12 filed a "Debtor's Resubmission of Amended Exemptions" with an  
13 attached Schedule C listing "Payments for comp. for future  
14 earnings" in the amount of \$1,122,384.00. Debtor did not file a  
15 separately docketed amended Schedule C.

16 Creditor Trustee then filed a "Notice of Creditor Trustee's  
17 Objection To Debtor's Alleged Exemptions" in which he objected  
18 to Debtor's loss of future earnings exemption and others as  
19 well.

20 Subsequently, Creditor Trustee filed a Motion for Summary  
21 Judgment (MSJ) on the issue of whether Debtor was entitled to an  
22 exemption on any portion of the Settlement Proceeds for loss of  
23 future earnings. Creditor Trustee argued that the Personal  
24 Injury Settlement agreement did not allocate the funds to any  
25 damage theory and did not mention "loss of future earnings."  
26 Creditor Trustee further argued that Debtor continued to receive  
27 substantial wages and other payments from Lodgebuilder after her  
28 accident. The bankruptcy court granted Creditor Trustee's MSJ

1 finding that none of the Settlement Proceeds were exempt as  
2 payment for compensation for loss of future earnings. Debtor  
3 appealed the MSJ ruling to the Nevada district court. There was  
4 no stay pending appeal. The district court reversed the  
5 bankruptcy court's decision, finding that there was a genuine  
6 issue of material fact whether the settlement was for lost wages  
7 or some other purpose.

8 The bankruptcy court then scheduled a trial on the matter.  
9 Both parties submitted trial briefs and the joint pre-trial  
10 statement in which they stipulated to certain facts for purposes  
11 of the trial. Debtor again claimed she was entitled to an  
12 exemption for loss of future earnings in the amount of  
13 \$1,122,384.00. Creditor Trustee asserted that Debtor's claim  
14 for loss of future earnings should be zero and certainly no  
15 greater than \$108,008.13. After the trial, the bankruptcy court  
16 took the matter under submission.

17 On May 6, 2014, the bankruptcy court issued its FFCL.  
18 After tracing the Settlement Proceeds which were commingled in  
19 the SSB Account with Debtor's pre-existing balance, and  
20 deducting amounts attributed to future medical expenses and  
21 bodily injury, the court concluded that Debtor was entitled to  
22 exempt \$461,608.02 for loss of future earnings and that the  
23 entire amount was reasonably necessary for her support.

24 The bankruptcy court also found that although Debtor had  
25 never filed an amended Schedule C, Creditor Trustee's objection  
26 to her exemption for loss of future earnings was timely. The  
27 bankruptcy court opined that the matter should be determined on  
28 its merits, not prejudicing either party for any apparent

1 failure to abide by the Bankruptcy Code and Rules.

2 Finally, the bankruptcy court found that the permanent  
3 injunction imposed by the Arizona bankruptcy court did not  
4 preclude Debtor from litigating her entitlement to exempt the  
5 Settlement Proceeds in the SSB Account. The court did not  
6 address the impact of the Rule 9019 Settlement on Debtor's  
7 exemption rights apparently because it thought those rights were  
8 properly reserved by virtue of the parties' consent to preserve  
9 them at the August 10, 2011 hearing. The bankruptcy court  
10 entered the judgment on the same day it issued the FFCL.

11 Debtor filed a timely appeal and Creditor Trustee filed a  
12 timely cross-appeal. Creditor Trustee filed a Motion to Alter  
13 or Amend which the bankruptcy court denied on September 29,  
14 2014. Creditor Trustee then filed an amended notice of cross  
15 appeal.

16 Debtor has since filed a motion for collection on the  
17 judgment regarding her exemption. Creditor Trustee filed a  
18 motion for a stay pending appeal in response. The bankruptcy  
19 court denied both motions.

## 20 **II. JURISDICTION**

21 We address the bankruptcy court's jurisdiction and our own  
22 jurisdiction to decide the merits of the appeal below.

## 23 **III. ISSUE**

24 Did the bankruptcy court have subject matter jurisdiction  
25 to decide Debtor's exemption claim for loss of future earnings  
26 after it entered the Rule 9019 Settlement Order?

## 27 **IV. STANDARD OF REVIEW**

28 We review de novo questions of subject matter jurisdiction.

1 Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189,  
2 1193 (9th Cir. 2005).

### 3 **V. DISCUSSION**

4 We are required to consider the presence or absence of  
5 subject matter jurisdiction sua sponte. Cannon v. Haw. Corp.  
6 (In re Haw. Corp.), 796 F.2d 1139, 1141 (9th Cir. 1986). The  
7 bankruptcy court's jurisdiction is grounded in, and limited by,  
8 statute. Kirton v. Valley Health Sys. (In re Valley Health  
9 Sys.), 471 B.R. 555, 563 (9th Cir. BAP 2012). Under 28 U.S.C.  
10 § 1334(e) (1), the bankruptcy court has exclusive jurisdiction  
11 "of all the property, wherever located, of the debtor as of the  
12 commencement of such case, and of property of the estate."

13 The parties do not dispute that the SSB Account contained  
14 the Settlement Proceeds. The Rule 9019 Settlement entered into  
15 between Creditor Trustee and the chapter 7 trustee placed  
16 ownership of the SSB Account in FDHC's estate. When property is  
17 no longer property of the estate the court's jurisdiction ends.  
18 See In re Hall's Motor Transit Co., 889 F.2d 520, 522 (3d Cir.  
19 1989) ("The bankruptcy court's jurisdiction does not follow the  
20 property, but rather, it lapses when the property leaves the  
21 debtor's estate."); Elscint, Inc. v. First Wis. Fin. Corp.  
22 (Matter of Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987)  
23 (once property of the estate is sold, the bankruptcy court must  
24 obtain a new source of federal jurisdiction); see also Gardner  
25 v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir.  
26 1990) ("A bankruptcy court has jurisdiction over disputes  
27 regarding alleged property of the bankruptcy estate at the  
28 outset of the case. When property leaves the bankruptcy estate,



1 however, the bankruptcy court's jurisdiction typically lapses,  
2 and the property's relationship to the bankruptcy proceeding  
3 comes to an end."). Accordingly, once the bankruptcy court  
4 entered the Rule 9019 Settlement Order, the court's jurisdiction  
5 over the SSB Account lapsed since it was no longer property of  
6 the estate nor was it property of the Debtor. See 28 U.S.C.  
7 § 1334(e) (1); see also 28 U.S.C. § 157(b) (2) (B) (recognizing  
8 proceedings relating to "exemptions from property of the estate"  
9 as core proceedings over which the bankruptcy court has  
10 jurisdiction).

11 The Rule 9019 Settlement Order did not provide for the  
12 bankruptcy court's retention of jurisdiction over the SSB  
13 Account for purposes of determining Debtor's exemption rights.  
14 Further, although the bankruptcy court orally confirmed with  
15 Creditor Trustee and the chapter 7 trustee that Debtor's  
16 exemption rights in the SSB Account were preserved, that  
17 colloquy did not preserve such rights, nor did it cure the  
18 jurisdictional defect that confronts us. The parties cannot  
19 create subject matter jurisdiction by consent. Arbaugh v. Y & H  
20 Corp., 546 U.S. 500, 514 (2006). Subject matter jurisdiction,  
21 which involves a court's power to hear a case, "can never be  
22 forfeited or waived." Id. A court which lacks subject matter  
23 jurisdiction cannot hear the matter at all and must dismiss it.

24 The plain language of § 522(b) also demonstrates why the  
25 preservation of Debtor's exemption rights was ineffective.  
26 Section "522(b) provides that the debtor may exempt certain  
27 property 'from property of the estate'; obviously, then, an  
28 interest that is not possessed by the estate cannot be

1 exempted." See Owen, 500 U.S. at 308. Once the SSB Account was  
2 transferred out of Debtor's bankruptcy estate, there was nothing  
3 to exempt per the plain language of § 522(b).

4 Finally, we considered whether the bankruptcy court's  
5 jurisdiction to determine Debtor's exemption rights could  
6 survive under a "related to" jurisdictional analysis. "Related  
7 to" jurisdiction exists when "the outcome of the proceeding  
8 could conceivably have any effect on the estate being  
9 administered in bankruptcy." Fietz v. Great W. Sav.  
10 (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988) (adopting the  
11 test in Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir.  
12 1984)). The United States Supreme Court endorsed Pacor's  
13 conceivability standard with the caveats that "related to"  
14 jurisdiction "cannot be limitless," and that the critical  
15 component of the Pacor test is that "bankruptcy courts have no  
16 jurisdiction over proceedings that have no effect on the estate  
17 of the debtor." Celotex Corp. v. Edwards, 514 U.S. 300, 308 &  
18 n.6 (1995).

19 "Related to" jurisdiction does not exist for essentially  
20 the same reason as noted above. Because the Rule 9019  
21 Settlement transferred 100% ownership of the SSB Account to  
22 FDHC's estate, the chapter 7 trustee gave up any rights to the  
23 funds. Thus, the outcome of Debtor's claim to exemption rights  
24 in those funds could not impact creditor recoveries or impact or  
25 involve the chapter 7 trustee in her estate.

26 In sum, the bankruptcy court did not have subject matter  
27 jurisdiction to decide Debtor's exemption rights in the SSB  
28 Account which was no longer property of her estate. This

1 unexpected jurisdictional defect resulting from the Rule 9019  
2 Settlement Order leaves us without authority to consider the  
3 merits of Debtor's exemption claim for loss of future earnings  
4 and the alleged allocation errors raised in this appeal. We  
5 express no opinion whether Debtor could successfully move to  
6 modify the Rule 9019 Settlement Order under Civil Rule 60(b)(6).

7 **VI. CONCLUSION**

8 For the reasons stated, we VACATE the judgment and DISMISS  
9 this appeal.

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