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NOT FOR PUBLICATION

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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. CC-16-1347-TaFC
6	ROSALINDA T. BUENVIAJE,)	Bk. No. 2:16-bk-15191-VZ
7	Debtor.)	
8	_____)	
9	LETICIA L. CHARNETSKY;)	
10	VICTOR C. CHARNETSKY; THE)	
11	FAMILY TRUST OF VICTOR C.)	
12	CHARNETSKY AND LETICIA L.)	
13	CHARNETSKY,)	
14	Appellants,)	
15	v.)	MEMORANDUM*
16	ROSALINDA T. BUENVIAJE,)	
17	Appellee.)	
18	_____)	

Argued and Submitted on February 23, 2017
at Pasadena, California

Filed - March 10, 2016

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

Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding

Appearances: Eric V. Anderton of Catanzarite Law Corporation
argued for appellants; Nicholas Watts Gebelt,
Ph.D. argued for appellee.

* 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(c)(2).

1 Before: TAYLOR, FARIS, and CLEMENT,** Bankruptcy Judges.
2

3 **INTRODUCTION**

4 Chapter 11¹ debtor Rosalinda Buenviaje receives social
5 security benefits; she deposits them into a segregated bank
6 account. After filing a voluntary chapter 11 petition, Debtor
7 claimed the full amount in that bank account as exempt. The
8 bankruptcy court overruled Appellants' objection to the
9 exemption based on its interpretation of California law. We
10 disagree with the bankruptcy court's rationale, but we agree
11 that the objection lacks merit. As a result, we AFFIRM.

12 **FACTS**

13 Debtor filed a voluntary chapter 11 petition. On
14 Schedule A/B, she listed \$30,000 in a Chase Bank deposit account
15 (the "SSI Account"). On Schedule C, she claimed the full amount
16 in the SSI Account as exempt under California Code of Civil
17 Procedure ("CCP") § 703.140(b)(10)(A).

18 Debtor's § 341(a) creditors' meeting was continued until
19 June 24, 2016, and a review of the entire docket indicates that
20 it concluded on that date.² Debtor later, on July 7, 2016,
21

22 ** The Hon. Fredrick E. Clement, United States Bankruptcy
23 Judge for the Eastern District of California, sitting by
24 designation.

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

² We exercise our discretion to take judicial notice of
(continued...)

1 amended her Schedule C, but she did not amend her claim of
2 exemption in the SSI Account in any respect.

3 On July 26, 2016, Appellants objected to four of Debtor's
4 claimed exemptions, including, as relevant here, her exemption
5 of the SSI Account. They argued that CCP § 703.140(b)(10)(A)
6 did not apply because it exempted only the future right to
7 receive payments and did not exempt payments already received.

8 Debtor, naturally, opposed. First, she argued that nothing
9 in CCP § 703.140(b)(10)(A) "limits its protection to the right
10 to receive future social security payments. A debtor can exempt
11 money already received as a social security benefit." Second,
12 she contended that she established the SSI Account specifically
13 for use with her social security income, explained that she
14 deposited her social security income into the SSI Account, and
15 argued that on the petition date the money in the SSI Account,
16 therefore, was exempt.

17 In reply, Appellants augmented their original argument with
18 the observation that, if the California legislature had intended
19 to exempt more than future social security income, it would have
20 included language similar to that found in CCP § 703.140(b)(11).
21 That statute provides an exemption not only for the "debtor's
22 right to receive [certain payments]" but also for "property that
23 is traceable to [the payment]".

24 At the hearing on the exemption objections, Debtor's
25

26 ²(...continued)
27 documents electronically filed in the underlying bankruptcy
28 case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 counsel added a "couple of things" to his client's opposition.
2 Hr'g Tr. (Sept. 20, 2016) 5:12-14. He started: "First off,
3 counsel is correct with the - with respect to the Social
4 Security and there is a different statute that protects
5 prepetition paid Social Security. It's 42 U.S.C.
6 Section 407(a). And so there's a simple solution to dealing
7 with that. I can simply amend Schedule C to apply that"
8 Hr'g Tr. 5:14-19. The bankruptcy court clarified: "Are you now
9 abandoning the argument that 703.140(b)(10)([A]) does not
10 include Social Security benefits that have been paid?" Hr'g Tr.
11 7:5-7. "No," started Debtor's counsel, but the bankruptcy court
12 interjected: "You're just saying there's also a federal
13 exemption, though?" Hr'g Tr. 7:8-10. Debtor's counsel agreed:
14 "Exactly." Hr'g Tr. 7:11.

15 After further argument, the bankruptcy court ruled on other
16 exemptions not relevant to this appeal and then turned to the
17 SSI Account objection:

18 As to the objection as to the Social Security
19 benefits, again, there's nothing in the statute that
20 limits it to benefits -- Social Security benefits that
21 are to be provided or to be received, as opposed to
22 Social Security benefits that have been received, as
23 well as those coming in the future. I have evidence
24 from the debtor in response to the motion that she has
25 segregated her Social Security benefits and that
26 everything in that account is only Social Security
27 benefits.

24 Hr'g Tr. 10:19-11:2. The bankruptcy court continued: "So based
25 upon the exemption claim, there is no basis to disallow that
26 claim of exemption and the moving party cannot cite me to any
27 legal authority that supports its interpretation of the limits
28 as asserted." Hr'g Tr. 11:3-6.

1 The bankruptcy court then entered an order overruling the
2 objection. Appellants timely appealed.

3 JURISDICTION

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
6 § 158.

7 ISSUE

8 Whether the bankruptcy court erred in overruling
9 Appellants' objection and upholding Debtor's claimed exemption
10 in the SSI Account.

11 STANDARD OF REVIEW

12 We review de novo a debtor's right to claim an exemption.
13 Elliot v. Weil (In re Elliot), 544 B.R. 421, 430 (9th Cir. BAP
14 2016). We review the bankruptcy court's factual findings for
15 clear error. Id. A factual finding is clearly erroneous if
16 illogical, implausible, or without support in inferences that
17 may be drawn from the facts in the record. See
18 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
19 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
20 1262 (9th Cir. 2009) (en banc)). And we may affirm on any basis
21 in the record. Bill v. Brewer, 799 F.3d 1295, 1299 (9th Cir.
22 2015).

23 DISCUSSION

24 On appeal, the parties repeat the arguments they raised
25 below, and there is no factual dispute on the key point: they
26 agree that the SSI Account contains exclusively social security
27 proceeds received before Debtor filed bankruptcy. We adopt the
28 undisputed facts as agreed to by the parties, and we affirm but

1 not for the reasons stated by the bankruptcy court.

2 **A. The Social Security proceeds never entered the**
3 **bankruptcy estate.**

4 A debtor is required to list all of her property in her
5 schedules. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d
6 778, 785 (9th Cir. 2001) (“The Bankruptcy Code and Rules impose
7 upon the bankruptcy debtors an express, affirmative duty to
8 disclose all assets” (internal quotation marks
9 omitted)). And generally, “[w]hen a debtor files a Chapter 7
10 bankruptcy petition, all of the debtor’s assets become property
11 of the bankruptcy estate, see 11 U.S.C. § 541, subject to the
12 debtor’s right to reclaim certain property as ‘exempt,’
13 § 522(1).” Schwab v. Reilly, 560 U.S. 770, 774 (2010).

14 In some cases, however, an asset – while listed on a
15 debtor’s schedules – never becomes an estate asset. And here,
16 while the Debtor does little to advance or develop the point,
17 she argues that 42 U.S.C. § 407 protects the SSI Account from
18 inclusion in her bankruptcy estate. In her appellate brief,
19 Debtor quotes the relevant language in 42 U.S.C. § 407(a). And
20 at the hearing before the bankruptcy court, her counsel
21 generally argued that the statute “takes Social Security off the
22 table, period.” Hr’g Tr. 7:13-14. Appellants respond but fail
23 to squarely confront the issue. Neither party cites the
24 extensive and compelling case law discussing the topic. In
25 resolving this issue, we follow the Eighth Circuit, its BAP, and
26 numerous other persuasive authorities.

27 We hold that 42 U.S.C. § 407 “operates as a complete bar to
28 the forced inclusion of past and future social security proceeds

1 in the bankruptcy estate." Carpenter v. Ries (In re Carpenter)
2 ("Carpenter III"), 614 F.3d 930, 936 (8th Cir. 2010). We, thus,
3 agree that this federal statute creates an exception to
4 the general rule of § 541 and operates as a bar to the forced
5 inclusion of social security proceeds, and thus the SSI Account,
6 in the bankruptcy estate.

7 We start with the relevant statutory texts. Section 541
8 provides that the bankruptcy estate is comprised of "all legal
9 or equitable interests of the debtor in property as of the
10 commencement of the case." 11 U.S.C. § 541(a)(1). But
11 42 U.S.C. § 407 provides, as relevant here:

12 (a) The right of any person to any future payment
13 under this subchapter shall not be transferable or
14 assignable, at law or in equity, and **none of the**
15 **moneys paid or payable or rights existing under this**
16 **subchapter shall be subject** to execution, levy,
17 attachment, garnishment, or other legal process, or to
18 **the operation of any bankruptcy or insolvency law.**

16 (b) **No other provision of law, enacted before, on, or**
17 **after April 20, 1983, may be construed to limit,**
18 **supersede, or otherwise modify the provisions of this**
19 **section except to the extent that it does so by**
20 **express reference to this section.**

19 42 U.S.C. § 407 (emphasis added).

20 These statutes conflict; and "courts have struggled to
21 determine when social security proceeds should be included in a
22 debtor's bankruptcy estate." Carpenter III, 614 F.3d at 934
23 (citing cases).

24 The Sixth Circuit determined that the Bankruptcy Reform Act
25 of 1978 did not impliedly repeal 42 U.S.C. § 407. Hildebrand v.
26 Soc. Sec. Admin. (In re Buren), 725 F.2d 1080, 1081 (6th Cir.
27 1984). Accordingly, the Sixth Circuit concluded that the
28 bankruptcy court could not order the government to send social

1 security benefits directly to a chapter 13 trustee. Id.
2 at 1087. The Eighth Circuit, in accord with the Eighth Circuit
3 BAP, came to a similar conclusion in the chapter 7 context; it
4 affirmed the BAP's determination that a chapter 7 debtor's
5 social security proceeds "must be excluded from the bankruptcy
6 estate pursuant to 42 U.S.C. § 407 and may be retained by the
7 debtor." Carpenter III, 614 F.3d at 933.³

8 We agree. Section 407 of Title 42 is unqualified: "It
9 explicitly demands that no past or future social security
10 payments may be subject to the operation of any bankruptcy law."
11 Carpenter III, 614 F.3d at 936. Further, 42 U.S.C. § 407(b)
12 provides that only laws expressly referring to it may limit its
13 application. And, as the Eighth Circuit BAP explained, "no
14 provision in the Bankruptcy Code makes express reference to
15

16
17 ³ We do not find the Eleventh Circuit's Walker v.
18 Treadwell (In re Treadwell), 699 F.2d 1050 (11th Cir. 1983),
19 decision compelling. Carpenter III, 614 F.3d at 935; Carpenter
20 v. Ries (In re Carpenter) ("Carpenter II"), 408 B.R. 244, 248-49
21 (8th Cir. BAP 2009) (distinguishing Treadwell on the facts);
22 In re Radford, 265 B.R. 827, 830 (Bankr. W.D. Mo. 2000). Even
23 if we did find Treadwell persuasive, it would not apply to this
24 case. The Eleventh Circuit reasoned that 42 U.S.C. § 407 was
25 essentially an exemption:
26

27 This analysis of section 522 illustrates that the
28 exemption from the operation of the bankruptcy law
provided by 42 U.S.C.A. § 407 is not absolute. If a
debtor chooses the Bankruptcy Code exemptions, he
gives up the protection of section 407, freeing
accumulated social security benefits for the
satisfaction of creditors.

In re Treadwell, 699 F.2d at 1052. California debtors may not
claim the federal exemptions.

1 [42 U.S.C.] § 407” Carpenter II, 408 B.R. at 248. See
2 also 4 Collier on Bankruptcy ¶ 522.09[10][a] n.76 (Alan N.
3 Resnick & Henry J. Sommer, eds., 16th ed. 2010) (“Congress
4 amended 42 U.S.C. § 407 to clarify that the inalienability of
5 Social Security benefits was not repealed by the Bankruptcy
6 Code, so that such benefits should not even become part of the
7 bankruptcy estate. Social Security benefits are protected by
8 42 U.S.C. § 407 even after they have been received and placed in
9 a bank account.” (citation omitted)).

10 Appellants contend that Debtor waived her ability to claim
11 a 42 U.S.C. § 407 exemption because she did not assert it in her
12 schedules. We disagree. If 42 U.S.C. § 407 applies, as we hold
13 it does, then the social security benefits are excluded from and
14 never enter the estate. A debtor claims exemptions in estate
15 property. Debtor, thus, did not need to assert a “42 U.S.C.
16 § 407 exemption” in the SSI Account. See In re Franklin,
17 506 B.R. 765, 776 (Bankr. C.D. Ill. 2014) (“It follows that
18 since a debtor's right to receive future social security
19 benefits and proceeds traceable to benefits already paid do not
20 become property of the bankruptcy estate, there is no need to
21 claim them as exempt, as the exemption process applies only to
22 property of the estate.”). 42 U.S.C. § 407 creates an exclusion
23 – not an exemption.

24 Appellants’ reliance on In re Varney, 449 B.R. 411 (Bankr.
25 D. Idaho 2011) (Pappas, J), is not persuasive; the case is
26 legally and factually distinguishable.

27 First, although Varney discusses social security disability
28 benefits, it does not consider the effect of 42 U.S.C. § 407.

1 Cf. In re Welsh, 465 B.R. 843, 859-60 (9th Cir. BAP 2012)
2 (Pappas, J., dissenting) ("That 42 U.S.C. § 407(a) may place
3 Social Security benefits out of the reach of, for example, a
4 hungry chapter 7 bankruptcy trustee trying to assemble funds to
5 distribute to creditors is no justification to disregard the
6 existence of such income in judging a debtor's good faith in
7 proposing a particular plan under chapter 13."). Its emphasis
8 on the need for disclosure and claim of exemption in even
9 "unquestionably exempt" estate assets does not aid Appellants
10 where the SSI Account was not an estate asset.

11 Second, factually, it involved a debtor who failed to
12 schedule or exempt an interest in the social security benefits
13 until after the chapter 7 trustee brought a turnover motion.
14 449 B.R. at 415. Here, Debtor disclosed the SSI Account at case
15 initiation. Debtor was required to schedule the SSI Account; it
16 was her asset even if not an asset of the estate.

17 In re Franklin, 506 B.R. at 776 ("[N]otwithstanding the
18 exclusionary effect of § 407, debtors are still required to
19 disclose social security proceeds and their right to receive
20 future benefits in their schedule of personal property. The
21 disclosure requirement, by itself, does not subject such
22 benefits to the operation of the bankruptcy laws." (citation
23 omitted)).

24 Appellants also argue that the funds lost their status as
25 social security payments when Debtor deposited them into an
26 account jointly in the name of her son. Debtor counters that
27 they waived this argument on appeal by failing to raise it
28 before the bankruptcy court. Appellants do not say that they

1 raised it below (they did not), but they contend that we may
2 consider a pure question of law and that Debtor does not dispute
3 that the account is a joint account.⁴ They further suggest that
4 we may consider it in connection with Debtor's 42 U.S.C. § 407
5 argument. We disagree. Central to the bankruptcy court's
6 decision was a finding that the funds in the account were social
7 security benefits: "I have evidence from the debtor in response
8 to the motion that she has segregated her Social Security
9 benefits and that everything in that account is only Social
10 Security benefits." Hr'g Tr. 10:24-11:2. Appellants' "purely
11 legal" point could thus undercut the bankruptcy court's factual
12 findings.⁵ We thus decline to consider the argument because it
13 was raised for the first time on appeal. See Kaass Law v. Wells
14 Fargo Bank, N.A., 799 F.3d 1290, 1293 (9th Cir. 2015).

15 Given the above, the social security proceeds never became
16 estate property; Debtor did not need to exempt them; and,
17 _____

18 ⁴ By a separate motion submitted simultaneously with their
19 reply, Appellants ask us to take judicial notice of Debtor's
20 son's bankruptcy petition. We grant the motion and take
21 judicial notice of the filing of the petition, but not the truth
22 of any facts asserted in it. Cf. Lee v. City of L.A., 250 F.3d
23 668, 690 (9th Cir. 2001).

24 ⁵ In Carpenter II, the Eighth Circuit BAP discussed when
25 social security benefits lose the protection of 42 U.S.C.
26 § 407(a). 408 B.R. at 247-49 (considering Philpott v. Essex
27 County Welfare Board, 409 U.S. 413 (1973), and In re Treadwell).
28 Here, the proceeds are in cash form and still available to
Debtor. If Appellants believe Debtor's son has rights to the
SSI Account, they may raise the matter in his bankruptcy case.
See id. at 249 ("It only makes sense that when the recipient of
social security benefits chooses to give away or spend those
funds, such funds lose the protection of § 407 in the hands of
the person to whom they are paid.").

1 correspondingly, Appellants' objection to Debtor's exemption had
2 no legal import. The bankruptcy court thus reached the proper
3 result in overruling Appellants' exemption objection.

4 **B. Any error in the bankruptcy court's decision was**
5 **harmless.**

6 Although we do not reach them, we acknowledge two
7 intertwined issues that go to the propriety of the bankruptcy
8 court's decision on the merits. First, Appellants' contention
9 that CCP § 703.140(b)(10)(A) does not exempt proceeds traceable
10 to social security payments is apt. We find persuasive their
11 argument regarding the contrast of its language (exempting the
12 "right to receive") with the language of CCP § 703.140(b)(11)
13 (exempting the debtor's "right to receive, or property that is
14 traceable to"). The difference in the statutory language
15 suggests that one exemption applies only to present or future
16 income while another includes an asset traceable to the proceeds
17 of prior distributions. We acknowledge that California law is
18 silent on this point, but we are aided by cases analyzing the
19 identical language in the federal exemptions. See Carpenter II,
20 408 B.R. at 249; In re Panza, 219 B.R. 95, 98 (Bankr. W.D. Pa.
21 1998); In re Williams, 181 B.R. 298, 301 (Bankr. W.D. Mich.
22 1995) ("It appears that Congress intended not to exempt
23 traceable assets under § 522(d)(10) because it did not
24 explicitly do so. The fact that such language is contained in
25 § 522(d)(11) underscores that Congress knew how to include
26 traceable assets in § 522(d)(10) had it desired to do so.");
27 In re Treadwell, 699 F.2d at 1052. The California legislature
28 also knew how to make clear that traceable assets are included

1 as exempt; it did so in CCP § 703.140(b)(11), but it did not do
2 so in CCP § 703.140(b)(10). That said, we need not and do not
3 definitively decide this matter.

4 Second and on the other hand, if we are incorrect in our
5 determination that exemption of the SSI Account was unnecessary
6 because it was not an asset of the estate but are correct that
7 the bankruptcy court misapplied CCP § 703.140(b)(10), the
8 bankruptcy court's overruling Appellants' exemption objection
9 could be harmless error because the objection in the SSI Account
10 appears to be untimely.

11 Rule 4003 both directs debtors to list their § 522
12 exemptions on their schedules and outlines claim objection
13 procedures. In order for an objection to an exemption to be
14 timely, it must be filed within 30 days after the creditors'
15 meeting held under § 341(a) is concluded or within 30 days after
16 any amendment to the list or supplemental schedules is filed,
17 whichever is later. Fed. R. Bankr. P. 4003(b)(1). Here, the
18 § 341(a) meeting likely concluded on June 24, and Appellants
19 filed their objection on July 27, 2016, 32 days later. Debtor's
20 July 7, 2016 amendment did not restart the objection period as
21 to the SSI Account because that claim of exemption was not
22 modified. Bernard v. Coyne (In re Bernard), 40 F.3d 1028, 1032
23 (9th Cir. 1994) (new 30-day objection period runs "only with
24 respect to the exemptions added via the amendment").

25 Unless a party in interest objects, a debtor's claimed
26 exemption "is exempt." 11 U.S.C. § 522(1). This has been
27 referred to as an "exemption by default." Heintz v. Carey
28 (In re Heintz), 198 B.R. 581, 583 (9th Cir. BAP 1996). Thus,

1 through exemption, assets leave the estate and are no longer
2 subject to creditors' claims. Owen v. Owen, 500 U.S. 305, 308
3 (1991); 11 U.S.C. § 522(c). Here, the timing of the objection
4 to exemption may have the same impact as our determination under
5 42 U.S.C. § 407; at the time of objection, the SSI Account was
6 not an estate asset.

7 At oral argument, Debtor's counsel stated that they saw the
8 timeliness issue but decided not to raise it; nor did they raise
9 it in their appellate briefs. Given our decision above, we need
10 not decide whether § 522(1) and Rule 4003(b) limit our ability
11 to review the merits of an untimely exemption objection even
12 when the debtor fails to raise timeliness.

13 **CONCLUSION**

14 Based on the foregoing, we AFFIRM.