

UNITED STATES BANKRUPTCY COURT
 DISTRICT OF SOUTH DAKOTA
 Southern Division

In re:)	Bankr. No. 96-40694
)	
DOROTHY MARIE JORGENSEN)	Chapter 7
Soc. Sec. No. 503-52-4510)	
)	
Debtor.)	
)	
JOHN S. LOVALD, TRUSTEE)	Adv. No. 97-4029
Plaintiff,)	
-vs-)	MEMORANDUM OF DECISION RE:
)	TRUSTEE'S TURNOVER COMPLAINT
STATE FARM INSURANCE)	
COMPANIES)	
Defendant.)	

The matter before the Court is Plaintiff-Trustee John S. Lovald's complaint for turnover of proceeds from a settlement. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendant State Farm Insurance does not have any interest in the \$20,000.00 settlement and that it must endorse the settlement check to the bankruptcy estate trustee.

I.

Dorothy Jorgensen was injured in an automobile accident on October 18, 1994. Under her automobile insurance policy with State Farm Insurance, State Farm paid \$2,000.00 of her medical bills -- the limit under the policy -- in March 1995. Under the policy, Dorothy Jorgensen agreed to

- a. execute any legal papers [that State Farm] need[s];
- b. when [State Farm] ask[s], take action through our representative to seek a recovery;
- c. not hurt [State Farm's] rights to recover;

- d. not make claim to that portion of the recovery that we are entitled to be paid; and
- e. answer truthfully all questions that [State Farm] may ask.

State Farm agreed under the policy not to "seek reimbursement from payments received from a liable party or such party's insurer by a **person** who has complied with all these requirements [emphasis in original]."

The driver of the other car involved in the accident was insured by Prudential Insurance Company. State Farm gave Prudential notice on March 1, 1995 and March 20, 1995 of its subrogation claims for the medical payments. By letter dated June 6, 1995, State farm advised Dorothy Jorgensen's attorney, Randall Blake, that "[w]e will be handling our subrogation claim directly with Prudential at the time of settlement."

Dorothy Jorgensen (Debtor) filed a Chapter 7 petition, schedules, and statement of financial affairs on September 11, 1996. In an amendment to her statement of financial affairs filed November 1, 1996, she listed as an asset a personal injury claim worth \$6,000.00 arising from an automobile accident. She also stated that she expected the suit to be settled soon. Debtor then amended the amendment on November 1, 1996 by removing her estimated value of the law suit. She did not claim the personal injury claim exempt. In an amendment to her schedule of unsecured, non priority creditors, Debtor added the State of South Dakota for \$15,000.00 and State Farm Mutual Automobile Insurance Company for \$2,000.00.

By Order entered December 11, 1996, Randall B. Blake's employment to handle the personal injury suit was approved. Through this date, A. Thomas Pokela was the bankruptcy estate trustee. John S. Lovald replaced him on December 12, 1996. A discharge order was entered December 18, 1996.

On January 13, 1997, Trustee Lovald filed a motion for approval of the personal injury suit. The motion stated the proposed settlement was for \$20,000.00. The Trustee served a notice of the motion to approve settlement on all creditors and other parties in interest, including State Farm at its subrogation office in Lincoln, Nebraska. The notice stated that the last date to file an objection was February 3, 1997. A written settlement between Debtor or the bankruptcy estate and Prudential was not attached to the motion or notice.

On January 13, 1997, the Trustee filed a notice that assets had been recovered. The Clerk then served a notice on all creditors and other parties in interest and advised them to file a proof of claim by April 14, 1997 in order to participate in the Trustee's distribution of assets.

No objections to the Trustee's motion to approve the settlement of the personal injury suit were timely filed. By Order entered February 13, 1997, the settlement was approved.

By letter dated April 7, 1997, State Farm requested \$2,000.00 from Trustee Lovald in subrogation of the medical payments that State Farm had paid on behalf of Debtor. State Farm also contacted Prudential and requested that it be named as a payee on the check.

Prudential complied with State Farm's request. State Farm then refused to endorse the check to the bankruptcy estate.

By the deadline for filing proofs of claim, State Farm had not filed a proof relating to its subrogation claim.

On May 14, 1997, Trustee Lovald filed a complaint against State Farm seeking turnover of the \$2,000.00 in settlement proceeds. Trustee Lovald argued State Farm's claim was not perfected and does not take priority over the bankruptcy estate's claim under 11 U.S.C. § 544.

State Farm answered the complaint on June 4, 1997. State Farm acknowledged that it did not file a proof of claim in the case and also acknowledged that it did not file an objection to Trustee Lovald's proposed settlement. It denied that Debtor or the bankruptcy estate has an interest in the \$2,000.00. State Farm also counterclaimed on the same grounds and argued that Debtor and the bankruptcy estate have no interest in the \$2,000.00 because the funds were owed directly to State Farm from Prudential because of the State Farm's subrogation claim, of which Prudential had notice before Debtor filed her bankruptcy case. State Farm relied on *Bowen v. American Family Ins. Group*, 504 N.W.2d 604 (S.D. 1993).

Trustee Lovald answered State Farm's counterclaim on June 9, 1997. He argued State Farm's subrogation claim was unperfected and therefore void against the bankruptcy estate. He also argued that State Farm was estopped from now claiming \$2,000.00 of the \$20,000.00 settlement because it had not objected to the

settlement. The Trustee also claimed that State Farm should have to share in any of the attorney's fees and costs if its subrogation claim was paid from the settlement. Finally, the Trustee argued that State Farm's claim that the Trustee and Debtor's attorney had not contributed to the settlement was without merit.

On May 12, 1997, Debtor filed a motion essentially asking that she receive some of the settlement proceeds. The legal basis for that request was not stated in the motion. The Trustee filed a response on May 23, 1997 and argued that Debtor had not stated why she was entitled to a share and that Debtor had not shown how her interest would be affected by the pending adversary between the Trustee and State Farm. Accounts Management, Inc., a creditor, also objected to Debtor's motion on the grounds that Debtor had not provided any legal basis for her entitlement to the settlement funds. Debtor filed an amended motion on June 6, 1997 wherein she listed how she thought the \$20,000.00 should be distributed. Again, her legal basis for the proposed distribution was not set forth. Debtor's amended motion was not noticed for objections.

A hearing on Debtor's motion to share in the settlement was held June 10, 1997. Both the original and the amended motion were denied.

The June 10, 1997 hearing also was used as a pre-trial conference on the adversary proceeding between Trustee Lovald and State Farm. The parties agreed to file stipulated facts and were given the opportunity to file briefs. The Trustee's turnover complaint was then taken under advisement.

II.

South Dakota law protects insurers who hold subrogation claims.

It is a well settled rule of law that an insurer is entitled to subrogation, either by contract or in equity for the amount of the indemnity paid. When the indemnity paid by the insurer covers only part of the loss, . . . , leaving a residue to be made good to the insured by the wrongdoer, the right of action remains in the insured for the entire loss. In these cases the insured becomes a trustee and holds the amount of recovery, equal to the indemnity[,] for the use and benefit of the insurer. The rule is founded on the principle that the wrongful act was single and indivisible, and gives rise to but one liability. Upon this theory[,] the splitting of causes of action is avoided and the wrongdoer is not subjected to the multiplicity of suits.

Parker v. Hardy, 41 N.W.2d 555, 556 (S.D. 1950) (quoted in *Bowen*, 504 N.W.2d at 605). However, the insurer's subrogation claim is subject to its proportionate share of expenses incurred in obtaining the recovery whenever the insurer acts through the insured to obtain the recovery. *Bowen*, 504 N.W.2d at 605-607.

Under 11 U.S.C. § 541(a), a bankruptcy estate is comprised on all legal or equitable interests of a debtor in property as of the petition date. The bankruptcy estate does not include any power that the debtor may exercise solely for the benefit of someone else. 11 U.S.C. § 541(b)(1). Further, the bankruptcy estate does not include any equitable interest in property in which the debtor holds only legal title and not any equitable interest. 11 U.S.C. § 541(d).

III.

As explained in *Parker and Bowen*, on the petition date Debtor held in trust any interest that State Farm had in her personal injury suit. However, before Debtor's bankruptcy case was commenced and before the law suit was settled, State Farm informed Debtor's personal injury attorney that it, State Farm, would handle its "subrogation claim directly with Prudential at the time of settlement." Ideally, the Court would have liked the settlement between State Farm and the bankruptcy estate to have been made a party of this record. However, based on the current record, there is nothing to indicate that State Farm changed its mind and directed Debtor or the bankruptcy estate to pursue a resolution of the subrogation claim on its behalf. State Farm did not rescind its letter of June 6, 1995, it did not file a claim proof of claim in this case, and it did not object to the settlement or seek clarification at that time that \$2,000.00 of the \$20,000.00 settlement was not bankruptcy estate property under § 541. It was only after the settlement was final that State Farm stepped forward and wanted a share of the estate's settlement. It was then too late. Therefore, the entire \$20,000.00 comes into the bankruptcy estate. State Farm's argument that its statements in the June 6, 1995 letter meant only that it would not pay a portion of Debtor's attorney fees but that it would still share in any recovery she obtained is not only inequitable but inconsistent. State Farm will have to continue to look to Prudential for payment.

Any constructive trust on the insurance proceeds obtained by Debtor was dissolved by State Farm's June 6, 1995 letter. Had the constructive trust existed on the petition date, however, the \$2,000.00 of the later-obtained settlement probably would not have been estate property under § 541. State Farm has not identified any other statutory or judicial lien that protects its claim that is now, at most, only a contractual right. Therefore, the Trustee's lien avoidance powers under 11 U.S.C. §§ 544, 545, and 546 are not applied here.

State Farm may seek a reconsideration of this decision if the written settlement between Debtor/bankruptcy estate and Prudential expressly included State Farm's subrogation claim. Any such motion, however, should be filed promptly.

Trustee Lovald shall prepare an appropriate order and judgment.

Dated this 17 day of September 1997.

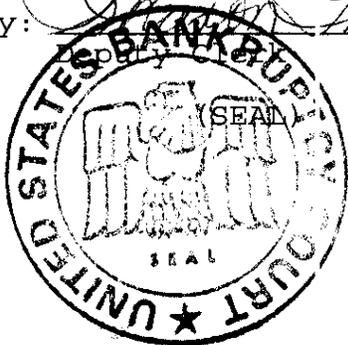
BY THE COURT:



Irvin M. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 



NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

SEP 18 1997

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 97-04029 Form id: 122 Ntc Date: 09/18/97 Off: 4 Page : 1

Total notices mailed: 5

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Aty Helsper, Richard J. PO Box 198, Brookings, SD 57006-0198

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