

APR 21 2005

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OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	CC-04-1350-KMoSn
)		
7	KAVEH LAHIJANI,)	Bk. No.	SV 98-15561-AG
)		
8	Debtor.)		
	_____)		
9)		
10	KAMIAR SIMANTOB; NASSER)		
	LAHIJANI,)		
11	Appellants,)		
)		
12	v.)	OPINION	
)		
13	CLAIMS PROSECUTOR, LLC; BRYAN)		
	MASHIAN; PETER C. ANDERSON,)		
14	Chapter 7 Trustee,)		
)		
15	Appellees.)		
	_____)		

Argued and Submitted on January 20, 2005
at Pasadena, California

Filed - April 21, 2005

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

Honorable Arthur M. Greenwald, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, and SNYDER,* Bankruptcy Judges.

*Hon. Paul B. Snyder, Bankruptcy Judge for the Western
District of Washington, sitting by designation.

1 KLEIN, Bankruptcy Judge:

2
3 What is in a name? Sometimes a lot - of misinformation. If
4 ever there was a misnomer, it is the name of appellee, "Claims
5 Prosecutor, LLC," which should have called itself "Claims
6 Defender" or "Claims Extinguisher" when purchasing the trustee's
7 causes of action to retrieve property allegedly transferred by
8 the debtor. Its owner, who is both a defendant and the debtor's
9 brother-in-law, concedes that the causes of action will not be
10 prosecuted and elected in open court not to attempt to establish
11 that the purchase was in "good faith" for purposes of the 11
12 U.S.C. § 363(m) statutory safe harbor from appellate remedies.

13 This appeal ties together a number of our recent decisions.
14 We have held that the question whether a purchaser at a court-
15 approved sale acted in § 363(m) "good faith" is to be determined
16 by the trial court with findings based on evidence and that the
17 safe harbor can be waived by omission to present such evidence.¹
18 We have held that sale of avoiding actions may simultaneously
19 implicate § 363 "sale" analysis and "compromise" analysis under
20 Federal Rule of Bankruptcy Procedure 9019(a).² We have also
21 explained that 11 U.S.C. § 503(b)(3)(B) recognizes that courts
22 may authorize a creditor to sue in the name of the trustee, at
23 its own expense (but subject to reimbursement under § 503(b)), to

24
25 ¹T.C. Investors v. Joseph (In re M Capital Corp.), 290 B.R.
26 743, 745 (9th Cir. BAP 2003); Thomas v. Namba (In re Thomas), 287
B.R. 782 (9th Cir. BAP 2002).

27 ²Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey
28 Thompson Entm't Group, Inc.), 292 B.R. 415, 421 (9th Cir. BAP
2003) ("Mickey Thompson").

1 recover property transferred by a debtor.³

2 We now conclude that, when a cause of action is being sold
3 to a present or potential defendant over the objection of
4 creditors, a bankruptcy court must, in addition to treating it as
5 a sale, independently evaluate the transaction as a settlement
6 under the prevailing "fair and equitable" test, and consider the
7 possibility of authorizing the objecting creditors to prosecute
8 the cause of action for the benefit of the estate, as permitted
9 by § 503(b)(3)(B). Accordingly, we REVERSE the order approving
10 the sale of the estate's causes of action under § 363.

11
12 FACTS

13 Kaveh Lahijani filed a chapter 7 bankruptcy case in April
14 1998. Discharge was entered in August 1998. The case was closed
15 as a no-asset case in August 1999.

16 Nine months after the bankruptcy case was closed, the
17 appellants Kamiar Simantob and Nasser Lahijani (joined by one
18 other person), who had not been scheduled as creditors and did
19 not otherwise know of Kaveh Lahijani's bankruptcy, sued him and
20 others in state court in an effort to recover about \$10 million
21 that they alleged was embezzled before the bankruptcy.

22 The action, Simantob, et al. v. Lahijani, et al., sounding
23 in fraud, was filed in a state court in May 2000.⁴ It alleged

24
25 ³COM-1 Info, Inc. v. Wolkowitz (In re Maximus Computers,
26 Inc.), 278 B.R. 189, 197-98 (9th Cir. BAP 2002) ("Maximus
Computers"); accord, In re Godon, Inc., 275 B.R. 555, 561-63
(Bankr. E.D. Cal. 2002) ("Godon").

27 ⁴Kamiar Simantob, Kamran Simantob & Nasser Lahijani v. Kaveh
28 (continued...)

1 misrepresentation, concealment, rescission, conspiracy, breach of
2 fiduciary duty, constructive trust, and conversion.

3 While the state court action was pending, the bankruptcy
4 case was reopened and appellee Peter C. Anderson was appointed
5 chapter 7 trustee. The appellants filed a \$9,786,000 proof of
6 claim (all claims total about \$13 million) and commenced an
7 adversary proceeding to have the debtor's discharge revoked or
8 have the debt excepted from discharge.

9 The net result of three years of convoluted state and
10 federal litigation was that, by October 2003, the appellants had
11 lost in state court on all substantive claims for relief and had
12 not succeeded in having the discharge revoked or the debt
13 excepted from discharge.

14 Left with a simple debt that was subject to a valid
15 discharge, the appellants' only remaining avenue for recovery was
16 to maximize the value of the bankruptcy estate available for
17 distribution to creditors. This they proposed to accomplish
18 through the exercise of the trustee's powers to avoid and recover
19 property that the appellants believed Kaveh Lahijani had
20 fraudulently transferred.

21 Since the trustee (who says he is unable to evaluate the
22 underlying merits and, in any event, lacks the funds necessary to
23 wage war) was unwilling to pursue the fraudulent transfer and
24 turnover causes of action, the appellants offered to purchase

26 ⁴(...continued)
27 Lahijani, Micha Mottale, Venice & Vermont, Inc., Bahman ["Bryan"]
28 Mashian, Buchalter, Nemer, Fields & Younger & Does 1 - 100, No.
BC231307, Los Angeles County Super. Ct., filed 5/22/00.

1 them for a price of one-half of net recoveries.

2 The appellants' proposal operated to put the avoiding power
3 causes of action into play as assets that could be auctioned.

4 Kaveh Lahijani's brother-in-law and co-defendant, Bashan
5 "Bryan" Mashian, formed appellee, Claims Prosecutor, LLC
6 ("Claims Prosecutor"), in order to acquire the avoiding power
7 causes of action, offering \$30,000.

8 The chapter 7 trustee evaluated the appellants' 50 percent
9 offer as more beneficial to the estate than \$30,000 and filed a
10 motion for permission to assign his trustee avoiding powers to
11 the appellants, subject to overbid.

12 When "Claims Prosecutor" raised its offer to \$100,000, the
13 trustee switched positions and proposed to accept that offer,
14 subject to overbid and court approval.

15 The trustee subsequently issued a supplemental notice of a
16 contested sale hearing at which the estate property would be
17 auctioned. Pursuant to the notice, which purported to detail
18 overbid procedures, both initial and subsequent overbids had to
19 be in cash or cash equivalent.⁵

21 ⁵The property being sold was described as:

22 any and all assets of the Estate whether real, personal or
23 otherwise including, but not limited to, the following: any
24 and all known or unknown claims, suits, contracts,
25 judgments, demands, damages, debts, obligations, lawsuits,
26 causes of action, losses, penalties, fines, liabilities
27 (including strict liability), encumbrances, liens, costs or
28 expenses, whether or not ultimately defeated, of whatever
kind, nature or description, contingent or otherwise,
matured or unmatured, foreseeable or unforeseeable,
including [fees and expenses].

(continued...)

1 At the sale hearing on June 2, 2004, the trustee insisted
2 that only cash or cash equivalent offers were acceptable to him.
3 He did not explain why percentage offers were unacceptable.

4 During the bidding, the appellants offered a number of
5 overbids that included additional percentage recoveries for the
6 estate (\$101,000 + 10 percent; \$110,000 + 25 percent; and
7 \$130,000 + 25 percent). The trustee objected to the percentages
8 because he wanted a sum certain so the case could be closed.⁶
9 When the appellants persisted, they were effectively forced to
10 state their bids without adding percentages of recoveries, even
11 though they made a record that they wanted to do so.⁷ Their

12
13 ⁵(...continued)
14 Supplemental Notice of Trustee's Motion to Assign Avoiding Powers
15 to Simantob, Subject to Overbid, filed 5/25/04, at 4.

16 ⁶The relevant colloquy was:

17 [APPELLANTS' COUNSEL]: We'll bid \$110,000 plus a 25
18 percent interest in the recovery.

19 COURT: Well, is the Trustee going to object? There may
20 not be a recovery, but they're offering to give a 25 percent
21 recovery.

22 [TRUSTEE'S COUNSEL]: ... [B]ecause of the nature of
23 facilitating overbids in this case, we do not want a
24 percentage of the recovery included in the items. We want
25 the sale over with, the Trustee's involvement with that
26 portion of the case over with. ...

27 COURT: Well, what does the Trustee deem to be the value
28 of this recovery at this time?

[TRUSTEE'S COUNSEL]: Your Honor, other than the offers
that are made, the Trustee has no way of determining the
value of those claims. He has no resources to pursue those
claims. So to the estate as it stands right now without any
bids, the claims are not of any value to the estate.

Tr. 6/2/04 hearing, at 33.

⁷For example, when appellants offered \$130,000, plus 25
percent of the recovery, the following colloquy occurred:

(continued...)

1 final bid was for \$160,000.⁸

2 The court authorized the trustee to sell the causes of
3 action to "Claims Prosecutor", for its high bid of \$175,000 and,
4 as a back-up, to appellants for \$160,000.

5 When the court was asked to find that the purchaser was
6 acting in "good faith" within the meaning of § 363(m) so that the

7
8
9 ⁷(...continued)

10 [APPELLANTS' COUNSEL]: We bid \$130,000, again, plus 25
11 percent of any recovery. ...

12 [TRUSTEE'S COUNSEL]: The Trustee will not accept the
13 portion that is a percentage of the recovery.

14 COURT: ... [are] you going to withdraw your bid?

15 [APPELLANTS' COUNSEL]: No, your honor

16 COURT: Or are you going to modify it to limit it to the
17 \$130,000?

18 [APPELLANTS' COUNSEL]: Well, we're offering that in
19 addition to the \$130,000 cash. It's not contingent.

20 COURT: I understand, and the Trustee is not accepting
21 that. So then the question is what do we do with your bid.
22 ... Are you going to reject the bid or are you going to ask
23 that the bid be limited to the \$130,000?

24 [APPELLANTS' COUNSEL]: Well, if I'm forced to do so, the
25 bid will be limited to the \$130,000. ...

26 [TRUSTEE'S COUNSEL]: The only portion that we would
27 accept, your Honor, is the \$130,000 bid. If that bid is
28 made at \$130,000 without any percentages, we would accept...

COURT: Your bid. You want to modify your bid?

[APPELLANTS' COUNSEL]: Yes, we do, your Honor, but I want
to make it clear for the record that we're offering a
percentage of the recovery ...

COURT: I think the record is clear as to how the
trustee wants to deal with that.

Tr. 6/2/04 hearing at 38-43 (overlapping speech corrected)
(emphasis supplied).

⁸Appellants did not add a percentage to their \$160,000 bid.
At oral argument, counsel explained to us that he believed he had
already made his record on the point and was reluctant to risk
annoying the trial judge. Under the circumstances, we do not
believe appellants waived their right to urge on appeal that
their fixed amount "plus percentage" bid be considered.

1 sale could not be upset on appeal,⁹ it (correctly) noted that our
2 § 363(m) decisions in Thomas and Mickey Thompson emphasize the
3 need for evidence to support such a finding and then declined to
4 make a finding unsupported by evidence.

5 "Claims Prosecutor" declined the court's offer to take
6 testimony directed to the question of § 363(m) "good faith" and
7 represented that the transaction would proceed without the
8 benefit of a finding of "good faith."

9 This timely appeal ensued.

10 JURISDICTION

11 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
12 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).
13
14

15 ISSUES

16 1. Whether the court applied the correct legal standard
17 when approving a § 363 sale of causes of action to a defendant
18 for a sum certain over objection by the main creditor in the
19 case, who wanted to pursue the causes of action.

20 2. Whether the sale of causes of action to defendants in
21

22 ⁹That safe harbor section provides:

23 (m) The reversal or modification on appeal of an
24 authorization under subsection (b) or (c) of this section of
25 a sale or lease of property does not affect the validity of
26 a sale or lease under such authorization to an entity that
27 purchased or leased such property in good faith, whether or
not such entity knew of the pendency of the appeal, unless
such authorization and such sale or lease were stayed
pending appeal.

28 11 U.S.C. § 363(m) (emphasis supplied).

1 this instance meets the requirements for approving a compromise
2 as "fair and equitable."

3
4 STANDARD OF REVIEW

5 Sales under § 363 are reviewed for abuse of discretion.
6 Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th Cir. BAP
7 2001). It is an abuse of discretion to apply an incorrect legal
8 rule. Maximus Computers, 278 B.R. at 194.

9
10 DISCUSSION

11 This appeal involves the sale of causes of action to a
12 defendant over the opposition of creditors. The rules governing
13 sales are implicated, as are the rules governing compromises.

14
15 I

16 Bankruptcy trustees are permitted to sell property of the
17 estate not in the ordinary course of business after notice and a
18 hearing. 11 U.S.C. § 363(b)(1).

19 Objections to sale that are based on inadequacy of price are
20 often resolved by the court ordering an auction, which may occur
21 in open court. Fed. R. Bankr. P. 6004(f).

22 Causes of action owned by the trustee are intangible items
23 of property of the estate that may be sold. These include causes
24 of action owned by the debtor as of the filing of the case. 11
25 U.S.C. § 541(a)(1). In addition, property recovered by the
26 trustee pursuant to, inter alia, turnover and avoiding powers, is
27 property of the estate. 11 U.S.C. § 541(a)(3).

28 Causes of action that exist independent of bankruptcy are

1 commonly sold by bankruptcy trustees under § 363(b).

2 While there is some disagreement among courts about the
3 exercise by others of the trustee's bankruptcy-specific avoiding
4 power causes of action, the Ninth Circuit permits such actions to
5 be sold or transferred. Duckor Spradling & Metzger v. Baum Trust
6 (In re P.R.T.C., Inc.), 177 F.3d 774, 781 (9th Cir. 1999)
7 ("P.R.T.C."); Briggs v. Kent (In re Prof'l Inv. Props. of Am.),
8 955 F.2d 623, 625-26 (9th Cir. 1992).¹⁰ Thus, we focus first on
9 the transaction under ordinary sale rules.

10
11 A

12 We reject appellants' argument that the avoiding power
13 causes of action should not have been sold to one who would not
14 exercise the powers for the benefit of all creditors.

15 The difficulty with this argument is that, under the law of
16 the circuit, trustee avoiding powers may be transferred for a sum

17
18 ¹⁰Most decisions that wrestle with this problem overlook a
19 key statutory analysis that resolves the issue with respect to
20 recovery of property transferred or concealed by the debtor and
21 that, to that extent, makes the P.R.T.C.-Briggs analysis
22 unnecessary. The Bankruptcy Code recognizes, albeit obliquely,
23 that a court may authorize a creditor to prosecute an action to
24 recover property transferred or concealed by the debtor, suing in
25 the name of the trustee but at the creditor's risk and expense,
26 and authorizes reimbursement under 11 U.S.C. §§ 503(b)(3) & (4)
27 in the event of success. Maximus Computers, 287 B.R. at 197-98;
28 Godon, 275 B.R. at 561-69. Thus, it is neither necessary for the
trustee to transfer a cause of action to recover property
transferred or concealed by the debtor, nor to employ a
creditor's attorney as "special" counsel, in order to permit a
creditor to prosecute such an action. Note, however, that
P.R.T.C.-Briggs sweeps broader than § 503(b)(3)(B) because it
applies to all causes of action owned by the trustee and does not
purport to be limited to recovery of property transferred or
concealed by the debtor.

1 certain. P.R.T.C., 177 F.3d at 781-82; Briggs, 955 F.2d at 625-
2 26. The benefit to the estate in such circumstances is the sale
3 price, which might or might not include a portion of future
4 recoveries for the estate. Thus, P.R.T.C. and Briggs do not
5 mandate, as appellants contend, that the avoidance powers can
6 only be sold to a creditor who agrees to pursue those avoidance
7 powers for the benefit of all creditors.

8 To be sure, the common-sense of appellants' argument is
9 captured by the statutory authorization under §§ 503(b) (3) & (4)
10 that permits a creditor, with the permission of the court, to sue
11 in the name of the trustee to recover, for the benefit of the
12 estate, transfers made by the debtor. Maximus Computers, 287
13 B.R. at 197-98; Godon, 275 B.R. at 561-69.

14 While one may wonder whether the analysis in P.R.T.C. and
15 Briggs would have been the same if the Ninth Circuit had had the
16 benefit of the subsequently-articulated Maximus Computers-Godon
17 analysis of §§ 503(b) (3) & (4), P.R.T.C. and Briggs stand for a
18 broader proposition that extends beyond creditors and that
19 extends beyond the recovery of property transferred by the
20 debtor. Moreover, it is law of the circuit that we must follow.

21 Viewed as a sale, the question, thus, boils down to whether
22 the sale price to "Claims Prosecutor" created a greater benefit
23 to the estate than the best offer of appellants.

24
25 B

26 The court's obligation in § 363(b) sales is to assure that
27 optimal value is realized by the estate under the circumstances.
28 The requirement of a notice and hearing operates to provide both

1 a means of objecting and a method for attracting interest by
2 potential purchasers. Ordinarily, the position of the trustee is
3 afforded deference, particularly where business judgment is
4 entailed in the analysis or where there is no objection.
5 Nevertheless, particularly in the face of opposition by
6 creditors, the requirement of court approval means that the
7 responsibility ultimately is the court's.

8 The trustee in this instance refused to entertain bids that
9 included a fixed percentage of net proceeds in addition to a sum
10 certain. In effect, he valued the fixed percentage at zero,
11 which he purported to justify on the basis that he had no way to
12 value the merits of the causes of action being sold. The court
13 deferred to the trustee, accepted the trustee's zero valuation of
14 net litigation proceeds, and essentially required the appellants
15 to stop adding a percentage to their offers. They acquiesced
16 after making a record that they wished to continue to add
17 percentages. After bidding \$160,000, they let "Claims
18 Prosecutor's" \$175,000 bid stand.

19 Two facets bear on the analysis of the question whether the
20 \$175,000 is an appropriate price for the sale. First, there is
21 the problem of thin competition. Second, there is the question
22 whether \$175,000 was actually the higher bid in the face of the
23 additional percentage offered by appellants.

24 The price achieved by an auction is ordinarily assumed to
25 approximate market value when there is competition by an
26 appropriate number of bidders. When competition is constrained,
27 however, the price is less likely to be reliable and should be
28 examined more carefully. The sale of a cause of action to a

1 defendant in circumstances in which the plaintiff is the only
2 competitor is an example of constrained competition that warrants
3 more scrutiny.

4 When the facades are stripped away in this case, the only
5 bidders were a defendant (who apparently was acting in the
6 interest of all fellow defendants) and the plaintiffs (creditors
7 who held about 70 percent of the debt). While the plaintiffs
8 (our appellant) did not bid more than \$160,000, they were willing
9 to add, even though the trustee did not want to hear it, a
10 portion of the net return. The trustee's zero valuation does not
11 inspire confidence in his business judgment.

12 In addition, it is debatable that \$175,000 was actually the
13 high bid in light of the standing offer of a percentage of the
14 net litigation proceeds.¹¹ An economist would place an "expected
15 value" on such a proposition and discount it to "present value,"
16 based on a calculation that, in its simplest form, is the product
17 of the possible result, multiplied by the probability of
18 achieving the result, discounted to present value.¹² The crucial

19
20 ¹¹We are mindful that the final bid by appellants did not
21 state that a percentage of litigation proceeds was also being
22 offered. Under the circumstances, appellants had made a record
23 that amply establishes the percentage additive. In view of the
24 high proportion of appellants' claim in relation to total claims
that would cycle a majority of those funds back to appellants,
there is no rational reason appellants would have voluntarily
ceased including the percentage sweetener.

25 ¹²Present value analysis is a well-understood proposition of
26 elementary economics. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS,
27 ECONOMICS 201-02, 271-73 (14th ed. 1992); EUGENE F. FAMA & MERTON H.
28 MILLER, THE THEORY OF FINANCE 27-29, 209-211 (1972). As applicable,
here, for example, a probability of .05 (one chance in twenty) of
recovering \$1 million in three years with a discount rate of 10
(continued...)

1 point for purposes of the present analysis is that, so long as
2 the pertinent probability is not zero, the expected and present
3 value calculation will yield some value. Any such value should
4 be taken into account.

5 The consequence is that there is good reason to think that
6 "Claims Prosecutor" was not actually the high bidder. Since it
7 elected to proceed without a determination that it was a "good
8 faith" purchaser within the meaning of § 363(m), there is no
9 impediment to reversing and remanding so that the trial court can
10 evaluate the sale in a manner that gives appropriate value to the
11 appellants' bid.

12
13 II

14 There is, moreover, a problem more fundamental than the sale
15 price.

16 Since the transaction amounted to acquisition of causes of
17 action by a defendant for \$175,000, Mickey Thompson teaches that
18 it must also be analyzed as a compromise as to which the court
19 has an independent duty to determine whether it is "fair and
20 equitable." Mickey Thompson, 292 B.R. at 420-21.¹³

21
22 ¹²(...continued)
23 percent would be valued as follows. First, ascertain the
24 expected value in the future period: $.05 \times \$1,000,000 = \$50,000$.
25 Second, compute the present value by dividing by 1.1 (i.e., 1 +
26 10 percent) to the third power (because the period is three
27 years): $\$50,000 \div (1.1 \times 1.1 \times 1.1) = \$50,000 \div 1.331 =$
28 $\$37,565.74$. Id. Hence, the present value of one chance in
twenty of recovering \$1 million after three years is \$37,565.74.

¹³This is also a corollary of the appellate standing rule
that, in the context of a sale or other disposition of estate
assets, creditors have standing to appeal, but disappointed
(continued...)

1
2 A

3 The fair and equitable settlement standard, originally
4 established by the Supreme Court in TMT Trailer Ferry, requires
5 consideration of: (a) probability of success in the litigation;
6 (b) collectability; (c) complexity, expense, inconvenience, and
7 delay attendant to continued litigation; and (d) the interests of
8 creditors, which are said to be "paramount." Protective Comm.
9 for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
10 390 U.S. 414, 424-25 (1968) (Bankruptcy Act); Woodson v.
11 Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th
12 Cir. 1988); Martin v. Kane (In re A & C Props.), 784 F.2d 1377,
13 1380-81 (9th Cir. 1986); Mickey Thompson, 292 B.R. at 420.

14 None of this analysis, which is inherently fact-intensive,
15 relative, and contextual, was undertaken by the bankruptcy court.

16 Some of these issues appear to cut in favor of appellants.
17 Since the interest of creditors is said to be of "paramount"
18 importance and entitled to deference, and since appellants hold
19 the majority of the debt in the case, their position on the
20 amount of the settlement deserves more credence than it received.

21 Correlatively, while keeping the case open during the life
22 of the anticipated litigation would entail delay, there would be
23 little or no cost to the estate. If, as here, the creditors
24

25 ¹³ (...continued)
26 prospective bidders who are not creditors usually do not have
27 standing to appeal. Calpine Corp. v. O'Brien Envtl. Energy, Inc.
28 (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 531 (3rd Cir.
1999); accord, Licensing by Paolo, Inc. v. Sinatra (In re Gucci),
126 F.3d 380, 388 (2d Cir. 1997).

1 holding the majority of the claims filed in the case desire to
2 forego the quick payment of what they see as a small dividend and
3 are willing to bear the expenses, their position on this factor
4 is likewise entitled to deference.

5 Appellants' suggestion that the other creditor that appeared
6 was an LLC that was controlled by the owners of "Claims
7 Prosecutor" has some intuitive appeal. Yet, that possibility is
8 a factual matter that would have to be developed in proceedings
9 in the bankruptcy court.

10 On balance, the record before us is not adequately developed
11 so as to enable an informed determination.

12 By not addressing the fair and equitable settlement
13 standard, the bankruptcy court applied an incorrect legal
14 standard and thereby abused its discretion.

15 Accordingly, the matter needs to return to the bankruptcy
16 court for appropriate proceedings.

17
18 B

19 On remand, the bankruptcy court should consider the
20 alternative of permitting the objecting creditors to sue in the
21 name of the trustee, but at their own risk and expense, to
22 recover the property allegedly transferred by the debtor.

23 As explained in Maximus Computers and in Godon, this
24 alternative is recognized by §§ 503(b) (3) (B) and (4) and carries
25 forward a provision from former Bankruptcy Act § 64a(1).¹⁴

26
27 ¹⁴The House and Senate Reports to the 1978 Bankruptcy Code
28 each state, in identical language, that § 503(b) "is derived
(continued...)

1 A crucial rule of construction regarding the transition from
2 the Bankruptcy Act to the Bankruptcy Code was that judge-made
3 doctrines were presumed to be carried forward except to the
4 extent Congress indicated a contrary intent. See, e.g., Kelly v.
5 Robinson, 479 U.S. 36, 47 (1986).

6 In the instance of § 503(b)(3)(B), Congress demonstrated an
7 intent to keep the creditor-recovery rule of former § 64a(1) in
8 force and, in addition, codified the judge-made rule that the

9
10 _____
11 ¹⁴(...continued)
12 mainly from section 64a(1) of the Bankruptcy Act, with some
13 changes" and refer to including "a creditor that recovers
14 property for the benefit of the estate." S. REP. No. 95-989, at
66 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5852; H.R. REP.
15 No. 95-595, at 355 (1977), reprinted in 1978 U.S.C.C.A.N. 5963,
6311.

16 Former Bankruptcy Act § 64a(1) provided, in relevant part:

17 a. The debts to have priority, in advance of the
18 payment of dividends to creditors, and to be paid in full
19 out of bankrupt estates ... : (1) ...; where property of the
20 bankrupt, transferred or concealed by him either before or
after the filing of the petition, is recovered for the
benefit of the estate of the bankrupt by the efforts and at
the cost and expense of one or more creditors, the
reasonable costs and expenses of such recovery;

21 Bankruptcy Act § 64a(1), 11 U.S.C. § 104(a)(1) (redesignated from
22 § 64b(2) in 1938) (repealed 1978).

23 The change made in 1978 was to codify the judge-made rule
24 that the creditor obtain permission before recovering property
25 for the benefit of the estate. 11 U.S.C. § 503(b)(3)(B),
codifying In re Eureka Upholstering Co., 48 F.2d 95, 96 (2d Cir.
1931) (L. Hand, J.); Godon, 275 B.R. at 562.

26 Creditor recovery was authorized by a 1903 amendment to the
27 Bankruptcy Act, making explicit what had already been recognized
28 as implicit by judge-made law. Chatfield v. O'Dwyer, 101 F. 797,
799-800 (8th Cir. 1900); Godon, 275 B.R. at 561; 3A JAMES WM. MOORE
ET AL., COLLIER ON BANKRUPTCY ¶ 64.104 n.6 (14th ed. rev. 1975).

1 creditor obtain prior permission.¹⁵ Godon, 275 B.R. at 562-63.

2 Under that practice, a creditor acting under the statutory
3 creditor-recovery authority was, and remains, permitted to sue in
4 the name of the trustee to recover the subject property. Id.
5 The creditor, upon obtaining permission to act, has statutory
6 standing to sue. Id. at 562-66.

7 The litigation is conducted at the creditor's risk and
8 expense. Counsel is employed by, and ordinarily paid by, the
9 creditor. Maximus Computers, 278 B.R. at 197-98. Moreover, a
10 lawyer hired by a creditor acting pursuant to § 503(b)(3)(B) is
11 not required to be employed by the trustee under 11 U.S.C. § 327,
12 even though the creditor is suing in the name of the trustee.
13 Id. Unless the lawyer contracts with the creditor to accept only
14 what compensation may ultimately be awarded after the fact under
15 § 503(b)(4), the creditor is responsible for paying counsel

16
17 ¹⁵Judge Learned Hand made the classic statement of the
prior-permission requirement for the creditor-recovery rule:

18 While [§ 64a(1)] does indeed justify such an award after [a]
19 motion to compel the receiver or trustee to undertake a
20 litigation, this is a condition upon the right, at least
21 after a receiver [trustee] has been appointed. The receiver
22 [trustee] is responsible for the collection of the assets,
23 and he alone can authorize any charges against them. If any
24 creditor, petitioning or other, learns facts which lead him
25 to suppose that property has been concealed, he may, and
indeed he should, advise the receiver [trustee], and if the
26 receiver [trustee] prove slack, he may apply to the referee
[bankruptcy judge] to stir him to action. The referee
[bankruptcy judge] or the [district] judge may then
authorize the creditor to proceed, and he will be entitled
to his reward under [§ 64a(1)], but not otherwise.

27 Eureka Upholstering Co., 48 F.2d at 96 (L. Hand, J.) (citations
omitted).

1 according to their agreed-upon terms and bears the risk of not
2 being reimbursed.

3 A creditor's willingness to bear the risk and expense on
4 behalf of the estate for litigating to recover property that
5 would be property of the estate and that would not otherwise
6 deleteriously affect the administration of the estate is a matter
7 that the bankruptcy court is obliged to consider when weighing a
8 compromise that would eliminate the recovery action.

9
10 CONCLUSION

11 The bankruptcy court abused its discretion when it approved
12 the sale of estate assets, including the avoiding power causes of
13 action, to "Claims Prosecutor" without appropriately evaluating
14 appellants' bid and without analyzing the situation through the
15 matrix of the fair and equitable settlement standard. REVERSED
16 and REMANDED for further proceedings consistent with this
17 opinion.