NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-07-1319-JuKPa
LOCK PIATT,	Bk. No. 85-30956
Debtor.	Ref No. 07-05
LOCK PIATT,	
Appellant,	
v.	**M E M O R A N D U M**[1]
BARRY SOLOMON, Chapter 7 Trustee, et al.,	
Appellees.	

Argued and Submitted on May 15, 2008
at Pasadena, California

Filed - May 29, 2008

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

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

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Before: JURY, KLEIN, and PAPPAS, Bankruptcy Judges.

[1] 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 8013-1.

Appellant-debtor Lock Piatt appeals the bankruptcy court's order denying his Motion To Abandon Property, Compel Trustee To File An Accounting And Distribute Surplus of Estate; Request To Close Estate (the "2007 Motion").[2]

Debtor and Barry Solomon, the chapter 7 trustee, entered into a settlement agreement whereby the trustee released debtor from liability for claims alleged in an adversary proceeding and agreed that allowed unsecured claims would be paid without interest. In exchange, debtor agreed that certain real property was property of the estate that could be sold for the benefit of unsecured creditors. The court approved the settlement.

Thereafter, debtor filed two separate motions, more than one year apart, both of which sought an order from the court compelling the trustee to abandon the real property because other assets became available to pay the unsecured claims in accordance with the settlement agreement. The court denied debtor's 2007 Motion after determining it to be one for reconsideration of debtor's earlier motion, which the court also denied and the appeal of which was dismissed as untimely.

We conclude, as a matter of law, that the bankruptcy court erred in denying debtor's 2007 Motion because it viewed the motion as one for reconsideration of his earlier motion. Thus,

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

the court abused its discretion in denying debtor's request for abandonment by not providing an analysis whether the standards for abandonment under § 554(b) were met.

Accordingly, we VACATE the order denying debtor's 2007 Motion and REMAND for the reasons set forth below.

I. FACTS

On October 15, 1985, debtor filed a voluntary chapter 7 petition. On March 18, 1987, debtor received his discharge and his case was closed.

On June 2, 2003, the United States Trustee moved to reopen debtor's bankruptcy case based upon debtor's alleged non-disclosure of his 50% interest in approximately 160 acres of real property located in Medford, Oregon (the "Property").[3] The court reopened debtor's case by order entered July 15, 2003, and Barry Solomon was appointed chapter 7 trustee.

On April 30, 2004, the trustee filed an adversary proceeding against debtor, individually and in his capacity as trustee of the Piatt Family Trust.[4] The trustee asserted that a portion or all of debtor's interest in the Property was property

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[3] Debtor, individually and as trustee of the Piatt Family Trust, and Matthew Sauls, individually, and the trustees of the Sauls 1978 Trust (collectively, the "Sauls") held title to the Property. Matthew Sauls apparently prompted the reopening of debtor's case when he brought debtor's interest in the Property to the attention of the United States Trustee.

[4] The trustee also named as a defendant, Tierra Grandee, Ltd. ("Tierra Grandee"), and alleged that it was debtor's alter ego to whom debtor transferred a portion of the Property. The trustee pled six claims for relief: declaratory judgment, fraudulent conveyance, turnover, alter ego, bankruptcy fraud and violation of the automatic stay, and preliminary injunction.

of his bankruptcy estate and sought to set aside fraudulent transfers of the Property.[5]

In March 2005, the trustee and debtor entered into a settlement agreement resolving all claims alleged in the complaint.[6] The salient terms provided (1) debtor's interest in the Property was property of the estate and subject to the trustee's rights to sell under § 363; (2) once the Property was sold the adversary proceeding would be dismissed with prejudice; (3) the maximum total payment to unsecured creditors would be $508,725; (4) unsecured creditors would receive the principal amount of their allowed unsecured claims without interest; and (5) administrative and priority claims would be paid in full. The settlement further purported to bring closure to a twenty-year dispute between debtor and the co-owners of the Property, the Sauls.[7] Finally, the settlement enabled a pending sale of a four-acre parcel of the Property to close.[8]

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[5] If the Property was property of debtor's estate, it remained property of the estate despite the closing of the debtor's case because debtor failed to list the asset. See generally Cusano v. Klein, 264 F.3d 936, 945-46 (9th Cir. 2001); see also § 554(d) which provides that property of the estate that is not abandoned and not administered remains property of the estate. § 554(d); Havelock v. Taxel (In re Pace), 159 B.R. 890, 898-99 (9th Cir. BAP 1993).

[6] Tierra Grandee did not sign the settlement and it is unclear whether the trustee contemplated any further action against it after entering into the settlement with debtor.

[7] How the settlement brought closure to the dispute between the Sauls and debtor is unclear since the Sauls were not signatories to the settlement agreement.

[8] Pacificorp, an Oregon public utility company, purchased the parcel for $425,000. Pacificorp had previously commenced a

(continued...)

The bankruptcy court approved the settlement agreement by order entered April 14, 2005, and set a claims bar date for July 1, 2005. Due to the age of the case, the trustee could not locate current addresses for some of the listed creditors. Accordingly, notice of the claims bar date was published in newspapers of general circulation in the areas of Medford and Coos Bay, Oregon, and Washoe County, Nevada. Ultimately, four creditors filed allowable claims totaling $193,352.08.

Thereafter, the bankruptcy court granted the trustee's motion to sell the Property for approximately $21 million to Medford Hillside Project, LLC ("MHP") by order entered July 21, 2005. When the sale did not close in mid-October as planned, the trustee and MHP amended the purchase and sale agreement and extended the closing date. The amendment required MHP to pay an additional $325,000 earnest money deposit, designated as liquidated damages if the sale did not close. MHP also paid an extension fee in the amount of $125,000.

On December 22, 2005, the trustee requested court approval for a second extension to close the sale to MHP. The second amendment to the purchase and sale agreement required MHP to pay an additional $750,000 earnest money deposit, in $250,000 increments, designating the entire amount as liquidated damages if the sale did not close. A later third extension required no further payment.

The proposed sale terminated on April 6, 2006. Approximately $600,000, or one-half of the liquidated damages

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[8](...continued)
condemnation action in connection with the parcel in the state court after obtaining relief from stay from the bankruptcy court.

and extension fee went to the bankruptcy estate, the other half going to the Sauls.[9]

On May 31, 2006, debtor filed a Motion to Compel Trustee to Pay the Creditors, Pay Taxes, Close the Estate and Abandon the Property, claiming that the estate had sufficient funds to pay administrative and unsecured creditor claims in accordance with the settlement agreement. Therefore, debtor argued that the trustee should pay the claims, abandon debtor's interest in the Property and close the estate. Debtor maintained that since all creditors could be paid, the purpose of the settlement agreement would be fulfilled.

The trustee opposed debtor's motion, contending it was an impermissible collateral attack[10] on the order approving the settlement agreement. The trustee further argued that making distributions at that time did not serve the best interest of the creditors and estate. Specifically, the trustee contended he had tax liabilities arising from the sale of property to Pacificorp, the settlement with Medford Highlands, LLC, and the receipt of earnest money deposits and extension fees from MHP.

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[9] The estate also received $75,000 through the court-approved settlement of a state court lawsuit filed by Medford Highlands, LLC, against debtor and others pertaining to the water tank on the Property.

[10] When the trustee uses the term "collateral attack" it appears he is relying upon the rules of res judicata (claim and issue preclusion) not the collateral attack doctrine. While res judicata refers to the effect of an earlier judgment on a subsequent action, collateral attack refers to the method of attempting to circumvent an earlier judgment by filing a subsequent action. Collateral attacks are so disfavored that they rarely succeed. Rein v. Providian Fin. Corp., 270 F.3d 895, 902 (9th Cir. 2001).

He also maintained that his ongoing administrative expenses connected with the sale of the Property could not be predicted. Finally, in response to debtor's motion, MHP threatened to sue the trustee and the Sauls on various grounds related to the purchase and sale agreement and asserted that it would seek the return of $1.5 million.

Persuaded by the trustee's position, the bankruptcy court interpreted debtor's motion as one for reconsideration of the settlement order. The court surmised that only Fed. R. Civ. P. 60(b)(6)[11] applied and found the requirements for relief under that subsection were not met.

In explaining its ruling, the court commented that debtor was "cherry picking" which parts of the settlement agreement to enforce and which parts to disregard. Specifically, the court opined that debtor was attempting to enforce the settlement by having creditors paid without interest and yet also receive the Property back without it being sold for the creditors' benefit.[12] The court found the settlement agreement could have anticipated that there might be assets, other than the Property, to satisfy

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[11] Fed. R. Civ. P. 60(b), made applicable to cases under the Code by Rule 9024, provides: "On motion and just terms, the court may relieve a party ... from a final judgment ... for the following reasons: (6) any other reason that justifies relief."

[12] Debtor's request for abandonment of the property disturbed the court because he did not propose to pay the unsecured claims in full with interest. However, the court seemed to not recognize that without the compromise, calling for payment without interest, the trustee could not have administered the Property as estate property and would not have collected the nonrefundable deposits without completing the litigation. Both parties gained from the compromise.

all creditors without the payment of interest, but it did not do so. Finally, the court suggested on the record that it would "have expected the trustee to join with the debtor and to indicate that there is no reason to continue the effect of the settlement agreement."

Several months after debtor filed his motion, the bankruptcy court directed the trustee to pay the principal amount of the allowed unsecured claims immediately by order entered December 4, 2006. The court, however, denied the balance of debtor's motion.

On December 15, 2006, debtor filed his Notice of Appeal of the December 4, 2006, order in the United States District Court for the District of Nevada. On May 1, 2007, the district court entered an order and judgment dismissing the appeal as late filed.

More than a year after filing his initial motion seeking abandonment of the Property (but shortly after debtor's appeal of the order denying his initial motion was dismissed) on June 19, 2007, debtor renewed his request to have the trustee abandon debtor's interest in the Property and distribute the surplus assets to him. Debtor argued that the trustee's continued administration of the estate was a breach of his duty to debtor — the sole remaining party in interest in the case. Debtor further argued that the trustee continued to incur unnecessary expenses and costs in liquidating debtor's interest in a surplus estate. The debtor pointed out the administrative expenses amounted to double the creditors' claims. Finally, debtor provided declarations from the creditors who had filed claims,

none of whom opposed the return of surplus property to debtor or the closing of his case.

The trustee opposed the 2007 Motion as an attempt to get a "second bite at the appellate apple." According to the trustee, the bankruptcy court did not have jurisdiction to consider the motion because the order denying debtor's previous request for abandonment was final, the appeal of the order having been dismissed as untimely.

The trustee also maintained that the settlement agreement could not be vacated in part simply for debtor's benefit. Rather, it had to be vacated in its entirety, which would create "chaos" for the entities who received title to portions of the Property. He also contended that some parties relied upon the settlement: creditors who would not be paid their statutory interest and Mr. Sauls who cooperated with the trustee in connection with the sale. In addition, if vacation of the settlement occurred, other unknown creditors who did not file claims, and whose claims would be untimely, would be entitled to payment. Lastly, the trustee maintained that "but for" the settlement agreement, the creditors were "otherwise statutorily entitled to interest."

The bankruptcy court considered debtor's 2007 Motion as one for reconsideration of his earlier motion under either Rule 9023 or 9024. The court concluded that no new evidence supported debtor's second request for abandonment. It further found that relief under either Rule was untimely and it lacked jurisdiction to grant the relief. Finally, the court found that even if it had jurisdiction, no basis to abandon the Property existed

because the order approving the settlement agreement was final and it had previously denied debtor's first request to abandon the Property.

The court denied debtor's 2007 Motion by order entered August 13, 2007. Debtor filed a timely appeal.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 over this core proceeding under § 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the bankruptcy court abused its discretion in denying debtor's 2007 Motion to abandon the Property.

IV. STANDARD OF REVIEW

The bankruptcy court's decision to authorize or deny abandonment is reviewed for an abuse of discretion. Viet Vu v. Kendall (In re Viet Vu), 245 B.R. 644, 647 (9th Cir. BAP 2000). A court abuses its discretion if its decision is based on an erroneous conclusion of law. Id.

V. DISCUSSION

This appeal involves the interplay between the trustee's duty under § 704(a)(1), the abandonment of estate property under § 554(b) and a court-approved settlement that contemplated the sale of the Property for the benefit of unsecured creditors.

The trustee's paramount and primary duty is set forth in § 704(a)(1) which provides: "the trustee shall (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." See

§ 704; see also Estes & Hoyt v. Crake (In re Riverside-Linden Inv. Co.), 925 F.2d 320, 322 (9th Cir. 1991)(stating that the trustee's main duty is to expeditiously close the estate). To fulfill his statutory duty of expeditiously reducing the debtor's property to money for equitable distribution to creditors, the trustee has discretion to abandon property of the estate that is burdensome or of inconsequential value and benefit to the estate under § 554(a).[13] In some instances, the bankruptcy court's discretion is substituted for that of the trustee when a motion to abandon property is brought by a party in interest under § 554(b).[14] Under either subsection, the policy behind § 554 is to assist the trustee in complying with his statutory duty under § 704(a)(1). See Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.), 816 F.2d 238, 246 (6th Cir. 1987)(noting that trustee's purpose is to liquidate the estate for the benefit of unsecured creditors and, therefore, the trustee need not administer property that is burdensome to the estate since the unsecured creditors would not benefit).

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[13] Section 554(a) provides: "After a notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

[14] Section 554(b) provides: "On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Under this subsection, the moving party has the burden of establishing that the property at issue is burdensome or of inconsequential value and benefit to the estate. Viet Vu, 245 B.R. at 647.

This case presents the unusual scenario where unexpected surplus assets exist after payment to unsecured creditors pursuant to a court-approved settlement agreement. The trustee, however, is resolved to defend the settlement agreement at all costs and will not agree to abandon the Property to debtor because debtor agreed that the Property should be sold. In exchange, the trustee agreed to release claims against debtor and agreed on behalf of unsecured creditors that they would not receive interest on their claims. Thus, debtor's 2007 Motion sought to have the bankruptcy court substitute its discretion for that of the trustee under § 554(b).

Debtor contends the court abused its discretion in denying his § 554(b) request for abandonment of the Property in several respects. First, he maintains the court erred by construing his 2007 Motion as one for reconsideration of his earlier motion. Next, he argues the court misconstrued the settlement agreement as not providing for the abandonment of estate property and assets.[15] Finally, debtor contends the court abused its discretion in denying his request for abandonment of the Property and the return of surplus assets to him because the Property is burdensome and of inconsequential value and benefit to the estate when unsecured creditors have been paid pursuant to the settlement.

We address debtor's arguments below.

[15] We do not address this issue because it was part of debtor's earlier motion, the merits of which are not before us.

A. The Bankruptcy Court Erred by Considering Debtor's 2007 Motion as One for Reconsideration of his Earlier Motion

Debtor's 2007 Motion sought to compel the trustee to abandon the Property, file an accounting and distribute the surplus estate. Debtor's argument for abandonment of the Property was simple: since all the unsecured creditors were already paid in accordance with the settlement agreement, the trustee no longer needed to liquidate the Property for their benefit. Thus, debtor argued that the court should order the trustee to comply with his duty under § 704(a)(1) by abandoning the Property to debtor and closing the estate as expeditiously as possible.

Essentially the trustee asserts that debtor's successive motions for abandonment were based upon the same grounds and each motion constituted a collateral attack on the settlement agreement. The trustee argues that since the court denied debtor's motion for abandonment in 2006 and debtor did not timely appeal that order, the bankruptcy court lacked jurisdiction to grant debtor's second request for the same relief. We disagree and conclude that the bankruptcy court incorrectly analyzed debtor's 2007 Motion as one for reconsideration of his earlier motion.

At first glance, it may appear that debtor's 2007 Motion did not assert any new legal theories from those set forth in his earlier motion. However, neither § 554 nor Rule 6007[16]

[16] Rule 6007(b) provides that "[a] party in interest may file and serve a motion requiring the trustee...to abandon property of the estate."

specifies the time in which a court must order abandonment of estate property nor do they prohibit successive motions. This is not surprising: asset values in a bankruptcy case are seldom static over time and circumstances may change with the passing of time. Thus, the issues of whether property of the estate is burdensome to the estate or is of inconsequential value and benefit to the estate are temporal. Whenever a motion for abandonment is denied — whether or not the bankruptcy court expressly instructs the parties that the door remains open — the movant remains free to make a new motion, based upon changed circumstances at a future date.

Here, debtor's abandonment request, filed over a year after his prior motion, should have been treated as a new motion, which could be decided in light of different circumstances. First, the trustee paid the unsecured creditors pursuant to the settlement agreement and the court's order in 2006. Notably, debtor's request for payment to unsecured creditors was not included in debtor's 2007 Motion. Next, the trustee and his professionals continued to incur administrative expenses since debtor's earlier motion. See K.C. Mach. & Tool, Co., 816 F.2d at 246 (noting that in enacting § 554, Congress was aware of the claim that some trustees took burdensome or valueless property into the estate and sold it to increase their commissions). Third, the Property had not yet sold despite the trustee's efforts, which began in July 2005.[17] Since 2005 the economic

[17] The trustee implies that the settlement agreement should be construed to allow the trustee to continue his efforts to sell the property in perpetuity at debtor's expense. However, the (continued...)

climate has generally worsened, the values of real property have declined and there is a shortage of available money, making the Property more difficult to sell. Fourth, the lawsuit threatened by MHP against the trustee never materialized and had not occurred at the time of the hearing on this appeal. Finally, debtor provided declarations from all creditors, who supported his request for abandonment and the closing of his estate.

We observe that those creditors who provided declarations appear fully capable of protecting their rights. For example, declarant Richard Hawkins served as the representative of Medford Construction Co.; Yvonne Spooner as Vice President, Manager of Risk Containment for Washington Mutual Bank; and James Laurick as the attorney of record for Bank of America. Furthermore, the bankruptcy court's prior concern about debtor "cherry-picking" certain parts of the agreement to his benefit is perplexing. The creditors received notice of the motion seeking approval of the settlement agreement and thus knew that they would not receive interest on their claims. No prepetition creditors opposed either the motion seeking approval of the

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[17](...continued)
trustee's most recent attempts to sell the Property have included provisions for his discretionary distributions to debtor if he collected liquidated damages. The most recent purchase and sale agreement was terminated on December 7, 2007. We take judicial notice of the trustee's Ex Parte Application to Approve Second Amendment to Purchase Agreement and Authorizing Discretionary Interim Distributions to Debtor; Order Approving Application which was imaged by the bankruptcy court in Bankruptcy Case No. 85-30956 at Dkt. No. 448 and the Termination of Purchase and Sale Agreement and Receipt of Earnest Money which was imaged by the bankruptcy court in Bankruptcy Case No. 85-30956 at Dkt. No. 464. Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

settlement or debtor's successive requests for abandonment of the Property.[18]

In sum, we conclude that debtor was not barred from filing a new motion for abandonment of the Property due to the passage of time and changed circumstances. For these reasons, we hold that the bankruptcy court should have analyzed debtor's 2007 Motion as a new motion for abandonment.

B. The Bankruptcy Court Erred in Denying Debtor's 2007 Motion Seeking Abandonment of the Property

The bankruptcy court's order, although primarily addressing debtor's 2007 Motion as one for reconsideration of his initial motion, also denies debtor's request for abandonment.

Before granting a request for abandonment of estate property, the bankruptcy court must find either (1) the property is burdensome to the estate; or (2) the property has both inconsequential value and benefit to the estate. Viet Vu, 245 B.R. at 647. Conversely, if the court denies the motion, it follows that there must be findings that administration of the property will cause either benefit or value to the estate. Here, the bankruptcy court's attention focused on the standards for reconsideration and, therefore, the court expressed no views on the merits of debtor's request for abandonment of the Property by application of the elements under § 554(b).

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[18] The trustee's argument regarding "other creditors that may be out there" also assumes he can find them. Notice of the claims bar date was given by publication in several newspapers. Thus, the bankruptcy court determined that this mode of notice to creditors was sufficient to allow them to file a timely proof of claim.

Accordingly, we conclude that remand is appropriate for further proceedings to ensure that both parties have the opportunity to develop the appropriate record for or against abandonment in light of our conclusions set forth above.

In closing, we reiterate that the trustee's paramount and primary duty is to liquidate the estate for the benefit of unsecured creditors and close the estate as expeditiously as is compatible with the best interests of parties in interest. The only remaining party in interest in this case is the debtor. Thus, unless the trustee can present legitimate, persuasive reasons to the bankruptcy court to justify his continued efforts to sell the property, abandonment would seem appropriate.

VI. CONCLUSION

Accordingly, we VACATE and REMAND.

KLEIN, Bankruptcy Judge, concurring:

I join the majority decision and concur specially because the puzzle created by the dubious modification of the bankruptcy distribution scheme set forth at § 726 makes it uncertain whether the trustee should cease marketing activities and abandon the property.

In principle, the analysis of whether the property in question is of inconsequential value and benefit to the estate under § 554(b) ought to be easy where the premise of the motion is that the estate is a so-called "surplus" estate in which property will be distributed to the debtor under § 726(a)(6).

Such a distribution to the debtor is permitted if, and only if, all distributions required by § 726(a)(1)-(5) are being made.

When there is a "surplus" estate in which all distributions prescribed by § 726(a)(1)-(5) are made, a trustee is ordinarily pleased to close out the case and distribute or abandon the surplus to the debtor because the trustee is not compensated for distributions to the debtor. Specifically, the trustee's fee is capped by stated statutory percentages "upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims." § 326(a) (emphasis supplied).

Here, the trustee has obtained substantial funds without actually selling the real estate that was agreed to be sold pursuant to the settlement agreement. Whether there is enough to constitute a "surplus" estate is uncertain. If those funds are sufficient to pay the full amounts provided by § 726(a)(1)-(5), then the property is probably of inconsequential value and benefit to the estate within the meaning of § 554(b) and there would be no likely bankruptcy purpose in prolonging the case, even if there was an agreement that the trustee may sell the property. Such a prolongation would be vulnerable to the criticism that the chapter 7 trustee is operating with base motives for the purpose of running up compensable administrative expenses, including fees for attorneys. This dispute should not be about trustee expenses and compensation for the trustee's professionals.

The § 726(a)(1)-(5) calculation ought to be straightforward. The contingent uncertainties ought not to

cause paralysis. The estate's tax liabilities based on the trustee's transactions through the present should not be difficult to calculate. Similarly, administrative expenses, including professional fees, should be easily ascertained. The third tier, § 726(a)(3) — tardy claims filed after a bar date — is a problem that can be addressed, in substantial part, by the trustee filing claims on their behalf pursuant to § 501(c) and depositing the associated distributions into the registry of the court in the same manner as other unclaimed distributions. Finally, the § 726(a)(5) fifth tier of distribution, "interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this [§ 726(a)] subsection," may also be readily calculated because the trustee has already paid most of the filed claims. If the numbers under the full statutory distribution scheme do not add up to a "surplus" estate, then the motion to abandon should be denied.

The caveat is that I have emphasized the need to comply with the § 726(a) distribution scheme.

The joker in the deck is that the parties appear to be operating on the fallacious assumption that § 726(a)(5) interest can be ignored because the settlement agreement purported to provide that creditors would not receive interest. The § 726(a)(5) interest is likely to be a substantial amount in view of the twenty-three years since the date of the filing of the petition. Appellant also ignores § 726(a)(3), which mandates distribution at the third tier for tardy claims notwithstanding the passage of a claims bar date.

I have serious reservations about whether a trustee can ever enter into a settlement that contemplates an ultimate distribution to the debtor after squeezing out § 726(a)(3) tardy claims and § 726(a)(5) interest claims. At least with respect to creditors who did not waive their right to interest (and we know that a number of creditors were not located after the case reopened in 2003 and, thus, did not even receive notice of the settlement motion), a trustee ought to be worried about personal liability.

I also have serious reservations about whether a bankruptcy court has authority to alter the § 726(a) distribution scheme in a settlement between the trustee and a debtor, unless the creditors deleteriously affected thereby actually agree to such treatment. This is not so much a problem for the court as it is for a trustee, who may be placed in the unhappy position of defending fiduciary claims notwithstanding reliance on a court order that turned out to be ineffective as to the complainant.

The consequence of these quandaries is that when the court, on remand, makes the § 726(a)(1)-(5) calculations to ascertain whether there is a "surplus" estate for purposes of making the § 554(b) inconsequential-value-and-benefit-to-estate analysis, the sum is likely to be considerably greater than the appellant anticipates, even if one excludes the trustee expenses and trustee attorney fees that should be disallowed if a case actually in "surplus" is being unduly prolonged for less-than-honorable reasons.