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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-07-1196-PaBaK
PERSISTENCE CAPITAL, LLC, Debtor.	Bk. No. SV 05-16450-KT
EZ/HS, LLC, Appellant,	
v.	**M E M O R A N D U M**[1]
DAVID HAHN, Chapter 7 Trustee, Appellee.	

Argued and Submitted on October 24, 2007
at Los Angeles, California

Filed - November 5, 2007

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

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

Before: PAPPAS, BARDWIL[2] and KLEIN, 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.

[2] Hon. Robert Bardwil, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

EZ/HS, LLC ("EZHS") appeals the bankruptcy court's order granting chapter 7[3] trustee David Hahn ("Trustee")'s motion to approve a settlement agreement between Trustee and Bruinbilt, LLC ("Bruinbilt"). We VACATE and REMAND because the bankruptcy court did not correctly evaluate the terms of a settlement agreement as a sale of estate assets under § 363(b).

FACTS

In March 2004, Transamerica Occidental Life Insurance Company ("Transamerica") issued policy no. 1-15606197 to the Personal Involvement Center Trust #1 ("PIC") consisting of a pool of life insurance policies insuring 1,200 individuals ("Pool 1"). The face amount of each of those 1,200 policies is $275,000. Under the beneficiary designation for each policy, when a death benefit becomes payable (the "Pool 1 death benefit"), $15,000 is payable to the beneficiary designated by the insured, and $250,000 is payable to PIC.

On March 6-8, 2004, PIC and Persistence Capital, LLC ("Persistence" or Debtor herein) entered into a series of transactions that gave Persistence the right to collect from Transamerica the portion of each death benefit payable to PIC (i.e., $250,000 per insured). In return, Persistence loaned PIC $2,246,068 for the payment of premiums on Pool 1 policies.

[3] 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 (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

On July 15, 2004, PIC, Persistence and Bruinbilt formed the Bruinbilt Partnership, which was intended to replace the transactions of March 6-8. Persistence and Bruinbilt were each assigned a 46.15 percent ownership of the partnership, with the remaining 7.7 percent left to PIC. The purpose of the Bruinbilt Partnership was "limited to the acquisition and retention until maturity" of the Pool 1 insurance policies. Pursuant to the Bruinbilt Partnership agreement, Bruinbilt contributed $2,500,000 in cash, and Persistence was given credit for the $2,246,068 it had contributed on March 8. Persistence was designated as managing partner. PIC contributed all of its rights, title and interest to the proceeds under the policies to the partnership. At about the same time, Persistence and Bruinbilt entered into a Master Agreement by which Bruinbilt transferred to Persistence $7,500,000, which included payment of its $2,500,000 obligation to the Bruinbilt Partnership. The Master Agreement provided that Bruinbilt would receive $7,500,000 from the insurance pools before Persistence received any distributions from the Bruinbilt Partnership.

Bruinbilt alleges that the Master Agreement provided for a preferred return on its investment by September 1, 2004, and that Persistence defaulted on that agreement. On September 2, 2004, Bruinbilt filed a lawsuit against Persistence, Bruinbilt v. Persistence Capital, LLC, case no. 320894 (Los Angeles Superior Court). This action was eventually referred to arbitration, and the arbitrator awarded Bruinbilt approximately $12,500,000 plus costs and attorney's fees as against Persistence.

There followed a series of transactions between Persistence and EZHS by which EZHS allegedly lent Persistence $4,250,000 on October 22, 2004, and $750,000 on November 1, 2004, secured by Persistence's interests in Pool 1 and related rights. The timing, receipt and use of these funds is disputed.

Persistence filed for chapter 11 relief on September 13, 2005. Following the conviction of its managing member for securities fraud, the bankruptcy court ordered the appointment of a chapter 11 trustee for Persistence. David L. Hahn was appointed to that position on March 6, 2006. The bankruptcy case was converted to one under chapter 7, effective June 6, 2006, and Hahn became chapter 7 trustee.

Bruinbilt filed an unsecured creditor's claim in Persistence's case for $13,874,450.00 on January 5, 2005.

On February 3, 2006, Transamerica filed a Complaint in Interpleader pursuant to 28 U.S.C. § 1335 in the U.S. District Court for the Central District of California, case no. CV 06-0654 NM, against Persistence, Bruinbilt, EZHS and others[4] (the "Interpleader"), seeking, among other things, a judicial determination of the parties' respective rights to Pool 1 death benefits.

On May 31, 2006, Bruinbilt filed a Cross-Complaint in the Interpleader against EZHS. Bruinbilt alleged that its rights to the Pool 1 death benefits were superior to those of Persistence and EZHS because it acquired those rights from Persistence in the secured transaction on July 15, 2004, which predated the secured

[4] The other parties listed in the Complaint in the Interpleader have disclaimed any rights to the Pool 1 funds.

agreements between Persistence and EZHS, which were executed in October and November of 2004.

On June 30, 2006, EZHS filed an Answer and Counterclaim in the Interpleader, arguing that its rights were superior to Persistence and Bruinbilt because Persistence defaulted under the terms of its notes and EZHS foreclosed on the debt on June 16, 2005.

Meanwhile, in the bankruptcy case, Hahn ("Trustee") had commenced an adversary proceeding against Bruinbilt on October 25, 2005, later adding Persistence as a defendant. In his Second Amended Complaint, filed September 19, 2006, Trustee sought, (1) declaratory relief concerning the parties respective interests in Pool 1 and the death benefits (Claim 1); (2) avoidance of the Bruinbilt liens as fraudulent transfers (Claim 2) and preferences (Claim 3); (4) declaratory relief concerning the avoided Bruinbilt transfer (Claim 4); and (5) avoidance and recovery of EZHS's lien on Persistence's rights in Pool 1 and the foreclosure on the basis of actual fraud.

The District Court withdrew the reference of the adversary proceeding on January 3, 2007, consolidated it with the Interpleader, and, on March 2, 2007, dismissed Claims 1 and 5 under Trustee's Second Amended Complaint. Trustee filed a Third Amended Complaint, which was dismissed by the District Court with prejudice on June 25, 2007.

On April 5, 2007, Trustee filed a motion in the bankruptcy case to approve a proposed settlement (the "Settlement Agreement") with Bruinbilt . In the Settlement Agreement, Trustee agreed to assign to Bruinbilt the bankruptcy estate's rights, title, and

interest, if any, in the following assets:

- Trustee's claims in the Interpleader;
- Any interplead funds;
- Trustee's claims to avoid the EZHS transfers and the foreclosure;
- Trustee's claims in the Third Amended Complaint;
- The Bruinbilt Partnership;
- The Bruinbilt Master Agreement;
- Pool 1;
- Any Pool 1 Death Benefits;
- Related notes, credit agreements and assignments.
- In addition, Trustee agreed to waive the Persistence attorney-client privilege in litigation between Bruinbilt and the estate's former counsel, Loeb & Loeb LLP.[5] Bruinbilt was also authorized to settle, compromise, or otherwise liquidate its rights in the Interpleader, Pool 1 litigation or Bruinbilt Partnership without further approval of Trustee or the bankruptcy court.

As consideration for the above, Bruinbilt agreed that:

- Bruinbilt would be solely responsible for costs of litigation in connection with the recovery of Pool 1, and the bankruptcy estate would recover 25 percent of any net recovery from Bruinbilt's interest in Pool 1 and the District Court Claims, after reimbursement of Bruinbilt's attorney's reasonable attorney's fees in an amount not to exceed $100,000.
- Bruinbilt would reduce its claim against the bankruptcy estate by any recovery from the District Court litigation and the lawsuit against Loeb & Loeb.

In his motion, Trustee argued that approval of the Settlement Agreement was in the best interests of the estate because it allowed the parties to resolve their differences fully, and that

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[5] Loeb & Loeb was Trustee's former counsel. Bruinbilt sought waiver of the attorney-client privilege so that Bruinbuilt could obtain a copy of an opinion letter written by Loeb & Loeb which would apparently be useful in other litigation.

the provision for a 25 percent potential recovery was reasonable in light of the Trustee's chances of success on the merits, and the costs of pursuing the District Court litigation to trial.

EZHS, a target of both Trustee and Bruinbilt in the District Court litigation, filed an opposition to Trustee's motion on April 20, 2007, arguing that the settlement was not in the best interests of the estate, because the estate might achieve a greater return from a sale of its rights under § 363. In the opposition, EZHS offered to pay Trustee $50,000 cash for all claims of Persistence in the Settlement Agreement. EZHS argued that this was a good bid, in that it represented immediately available cash, whereas under the Settlement Agreement, there would be a long delay before there would be a return, if any, to the estate.

The bankruptcy court conducted a hearing on Trustee's motion to approve the Settlement Agreement on April 23, 2007. Trustee, EZHS, Bruinbilt, and Horace Ardiger and Charles Littlewood[6] were represented by counsel and were heard.

Perhaps surprisingly, counsel for Trustee responded to the EZHS objection by arguing that it made little difference whether the Settlement Agreement was analyzed by the bankruptcy court as a compromise or a sale:

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[6] It is not clear in the record who Charles Littlewood is, other than describing himself as a potential "claimant." We cannot determine if he is a potential claimant against the bankruptcy estate or a claimant against the Pool 1 death benefits. Littlewood objected to the Settlement Agreement on the grounds that this was an insurance pool, and there was no provision for payment of the estate's share of premiums after the case was closed. The bankruptcy court did not address this argument in its decision. However, Littlewood is not a party to this appeal nor did EZHS raise this issue on appeal, so we need not consider it.

> Whether we call this a settlement or a sale, your Honor, I don't so much think it matters, because the Trustee has undertaken a very detailed economic analysis of what's going on here. And I think that the analysis is the same either way. . . . So, we have evaluated their overbid offer. If your Honor wants to consider this a sale, we're happy to look at it that way.

Counsel for Trustee contended that EZHS's $50,000 overbid was inadequate. Tr. Hr'g 11:23 – 12:2 (April 23, 2007).[7]

The bankruptcy court overruled EZHS's objection and granted Trustee's motion. The entirety of the court's explanation of its reasons for doing so follows:

> THE COURT: Right. Well, I think the Trustee's position persuades me and that the motion ought to be granted. . . . But, I am persuaded that it's not – – the fate of the estate's interest needs to be dealt with – – been dealt with in another court, and someone needs to be put into position to pursue that, and the estate doesn't have any assets. They don't have hundreds of thousands of dollars to throw into – many of my questions – by other parties here asked those questions and those have been – and I've been satisfied with the answers. I think that it is – I have no way of adequately evaluating 50,000 versus 30,000 versus 55,000 dollars. But, I am able to evaluate the theory of what it is that has led the Trustee to seek this compromise and I agree that, knowing what we know, that the economic benefit appears to weigh most heavily in favor – for the estate, in favor of granting this motion.

Tr. Hr'g 38:10 – 39:4.

The bankruptcy court entered its order approving the Settlement Agreement on May 10, 2007. EZHS filed a timely notice of appeal on May 14, 2007.

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[7] Counsel for Ardiger, one of the estate's largest creditors, asked for additional time to evaluate the Settlement Agreement. In its order approving the Settlement Agreement, the bankruptcy court modified the Settlement Agreement to meet the objection of Ardiger.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction pursuant to 28 U.S.C. § 158.

ISSUES

1. Whether this appeal is moot.
2. Whether the bankruptcy court abused its discretion in granting Trustee's motion to approve the Settlement Agreement.

STANDARDS OF REVIEW

We examine our own jurisdiction, including mootness issues, de novo. Wiersma v. D.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 110 (9th Cir. BAP 2005).

A bankruptcy court's decision to approve a settlement is reviewed for abuse of discretion. Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003) ("Mickey Thompson"). Sales under § 363 are reviewed for abuse of discretion. Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th Cir. BAP 1998). It is an abuse of discretion to apply an erroneous view of the law or a clearly erroneous assessment of evidence. Cheng v. K&S Diversified Enters. (In re Cheng), 308 B.R. 448, 452 (9th Cir. BAP 2004), aff'd, 212 F. App'x 644 (9th Cir. 2005). Otherwise, we do not reverse the bankruptcy court unless we have a firm and definite conviction that the court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors. Marz v. Loral Corp., 87 F.3d 1049, 1057 (9th Cir. 1996); Mickey Thompson, 292 B.R. at 420.

DISCUSSION

I.

This appeal is not moot.

Trustee argues that this appeal is moot under the doctrine of equitable mootness. Equitable mootness prevents an appellate court from reaching the merits when an appellant has "'failed and neglected diligently to pursue their available remedies to obtain a stay'" and changes in circumstances "'render it inequitable to consider the merits of the appeal.'" Darby v. Zimmerman (In re Popp), 323 B.R. 260, 271 (9th Cir. BAP 2005)(quoting Focus Media, Inc. v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2004)). Our court of appeals invokes equitable mootness when an appellant does not obtain a stay pending appeal, and transactions in reliance upon the order appealed have occurred that are "complex and difficult to unwind." Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d 923, 933 (9th Cir. 1999).

Trustee argues that EZHS did not obtain a stay pending appeal and two events have occurred, as the result of which it would be impossible for us to fashion effective relief. First, in reliance on the order approving the Settlement Agreement, Trustee has assigned all the estate's claims to Bruinbilt. The District Court also dismissed Trustee's Third Amended Complaint, leaving Trustee with only his right to share in any recovery through Bruinbilt. Second, Trustee argues that, in reliance on the Settlement Agreement, he has waived the attorney-client privilege in favor of Bruinbilt, something Trustee contends can not be "unwaived."

Trustee's argument assumes that the estate's claims in the District Court action are irremediably lost. Although the

District Court dismissed Trustee's claims, such was not a final order. "An order dismissing one party while allowing suit to continue against the remaining defendants is not a final, appealable order." Spec. Invs, Inc. v. Aero Air, Inc., 360 F.3d 989, 993 (9th Cir. 2004). Trustee's right to appeal the dismissal has not yet accrued, and thus Trustee may still enjoy the right to pursue the estate's claims in the litigation.

Regarding Trustee's waiver of the debtor-corporation's attorney-client privilege, we acknowledge that this privilege is likely permanently lost. However, Trustee does not explain how, under the facts of this case, a waiver of the attorney-client privilege for Persistence will significantly prejudice the bankruptcy estate's position if the bankruptcy court's approval of the Settlement Agreement is reversed.

Although the waiver of the attorney-client privilege can not be "undone" on appeal, we can reverse the Settlement Order and, as discussed above, Trustee will retain claims with potential value. Even a partial remedy is sufficient to prevent a case from being moot. Calderon v. Moore, 518 U.S. 149, 150 (1996). Hence, this appeal is not equitably moot.

II.

The bankruptcy court should have analyzed the Settlement Agreement under the criteria for approving a sale under § 363, as well as the criteria for approving a settlement under Rule 9019(a).

It is uncontroverted that Persistence's various claims in the Interpleader, which are transferred to Bruinbilt under the Settlement Agreement, are property of the estate. Causes of action owned by a bankruptcy trustee are intangible items of property that may be sold or otherwise disposed of. Lahijani v.

Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 287 (9th Cir. BAP 2005). Our court of appeals allows assignment of causes of action in settlement agreements. P.R.T.C., 177 F.3d at 774. This Panel has held that,

> The disposition by way of "compromise" of a claim that is an asset of the estate is the equivalent of a sale of the intangible property represented by the claim, which transaction simultaneously implicates the 'sale' provisions under section 363 as implemented by Rule 6004 and the settlement procedure of Rule 9019(a).

Mickey Thompson, 292 B.R. at 421. Therefore, a bankruptcy estate's disposition of a claim against another, which is acknowledged as property of the estate, pursuant to a settlement requires the satisfaction of the standards for approval of both a settlement under Rule 9019(a) and a sale under § 363.[8]

A.

The Settlement Agreement Analyzed Under Rule 9019

Rule 9019(a), governing compromises, provides that,

> On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other entities as the court may designate, the court may approve a compromise or settlement.

Rule 9019(a).

The bankruptcy court is required to conduct an inquiry into all "factors relevant to a full and fair assessment of the wisdom of the proposed compromise." Protective Comm. for Indep.

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[8] Trustee, in his Opening Brief, argues that not every assignment of a claim in a settlement agreement must be analyzed as a sale pursuant to § 363. This argument seems inconsistent with that made at the hearing in the bankruptcy court, where counsel for Trustee stated that "I don't so much think it matters . . ." whether a compromise or a sale was implicated in the Settlement Agreement. Tr. Hr'g 11:7-11. Of course, under the case law, the distinction can be a critical one, as it is here.

Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968). The criteria for this inquiry are as follows:

> In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider: (a) probability of success in the litigation, (b) the difficulties, if any, to be encountered in the matter of collection, (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; [and] (d) the paramount interest of creditors and a proper deference to their reasonable views in the premises.

Martin v. Kane (In re A&C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986). The court of appeals repeated these criteria in In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988), and they are often referred to as the Woodson factors. The bankruptcy court has wide latitude and considerable discretion in evaluating a proposed settlement because the judge "is uniquely situated to consider the equities and reasonableness." United States v. Alaska Nat'l Bank (In re Walsh Construction, Inc.), 669 F.2d 1325, 1328 (9th Cir. 1982).

Here, the bankruptcy court did not specifically address the Woodson factors in approving the Settlement Agreement, and thus we must review the record to determine if there was adequate support for approval of the Settlement Agreement. We may affirm the bankruptcy court on any basis supported in the record. Greatwood v. United States (In re Greatwood), 194 B.R. 637, 639 (9th Cir. BAP 1996).

Probability of success in the litigation. The bankruptcy court made no findings regarding the likelihood that Persistence would succeed in the District Court in its claims to Pool 1. Trustee, however, in both his pleadings and in argument at the

hearing on the Settlement Agreement, reminded the court that Trustee had suffered several unfavorable rulings in the District Court, including the recent dismissal of his Third Amended Complaint. Trustee was obviously facing an uphill battle in that litigation and decided that the estate's prospects for recovery were better aligned with Bruinbilt than on its own. There is support in the record, therefore, for the first Woodson factor.

Difficulties, if any, to be encountered in the matter of collection. This factor is not relevant in an Interpleader. The prevailing party would be awarded the pooled funds and future rights.

Complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it. Here, the bankruptcy court did make a finding of fact that the estate had limited resources to finance the litigation. In this regard, the record supports approval of the Settlement Agreement. Moreover, even a cursory review of the history of the Interpleader demonstrates the extreme complexity of the issues and facts in that action. The third Woodson factor favors approval of the Settlement Agreement.

The paramount interest of creditors and a proper deference to their reasonable views in the premises. It is less clear that the there is support in the record for the fourth Woodson criteria. Arguably, sharing in any potential recovery by Bruinbilt could serve creditors' interests more than Trustee's continuing individual efforts in the litigation. However, as we discuss below in examining the settlement agreement as a sale of assets, the court made no attempt to compare the value of the settlement

as against continuing litigation or EZHS's overbid. Additionally, one major creditor, Ardiger, questioned elements of the Settlement Agreement at the hearing (although the bankruptcy court did modify the Settlement Agreement to ease his concerns). Finally, there is no indication in the record that Trustee canvassed the creditors as to their views of the Settlement Agreement, which omission is exacerbated by the timing of the hearing on the compromise on fewer than the 20 days of notice prescribed by Rule 2002(a)(3). On this record, we cannot say that the fourth Woodson factor unambiguously supports approval of the Settlement Agreement.

To be sure, our court of appeals has never indicated that all four of the Woodson factors must support approval of a settlement or compromise. A&C Props., 784 F.2d at 1382 ("While creditors' objections to a compromise must be afforded due deference, such objections are not controlling"). Instead, it need only appear that the bankruptcy court took the four factors into consideration and gave them appropriate weight. We conclude that, on balance, there is sufficient support in the record for approval of the Settlement Agreement according to the Woodson factors such that we can not say the bankruptcy court abused its discretion in approving this arrangement.

B.

The Settlement Agreement Analyzed as a Sale Under § 363 and Rule 6004

Our analysis, however, does not end with a consideration of the Woodson factors. When confronted with a motion to approve a settlement under Rule 9019(a), "a bankruptcy court is obliged to consider, as part of the 'fair and equitable' analysis, whether

any property of the estate that would be disposed of in connection with the settlement might draw a higher price through a competitive process and be the proper subject of a section 363 sale." Mickey Thompson, 292 B.R. at 421-22.

Under § 363(b), after notice and a hearing, a trustee may dispose of property of the estate other than in the ordinary course of business. Rule 6004 prescribes the required extent and timing[9] of notice of a trustee's proposed sale of estate assets. Beyond these notice and hearing requirements, a trustee is required to ensure that a maximum value is obtained for the asset: "The court's obligation in § 363 sales is to assure that optimal value is realized by the estate under the circumstances. The requirement of notice and a hearing operates to provide both a means of objecting and a method of attracting interest by potential purchasers." Lahijani, 325 B.R. at 288-89.

In this case, the bankruptcy court shortened the time for notice of the hearing on the approval of the Trustee's proposed compromise. And there is no indication that Trustee or the bankruptcy court attempted to solicit offers for the assignment of the bankruptcy estate's claims in the Interpleader other than from Bruinbilt. EZHS made an offer in open court to purchase the estate's interests in the Interpleader for $50,000, and requested that the bankruptcy court allow open bidding on Trustee's claims. The court declined this request.

[9] Pursuant to Rule 2002(a)(2), referenced in Rule 6004, parties in interest shall be given 20 days' notice of a proposed sale of property of the estate other than in the ordinary course of business.

EZHS's suggested that the cash bid was superior to a questionable long-term investment that may return nothing. Our court of appeals has endorsed approval of bids under the right circumstances that provide for future sharing of the proceeds of pending litigation. P.R.T.C., 177 F.3d at 780-82; Briggs v. Kent (In re Prof'l Inv. Props. of Am.), 955 F.2d 623, 625-26 (9th Cir. 1992). Trustee attempted to justify the lack of competitive bidding in this case, combined with the shortened notice of the sale, because of exigent circumstances. According to Trustee, because the discovery cutoff date in the Interpleader was firm,[10] and the District Court was not inclined to extend discovery so that Trustee could market the estate's claims, there was a need to act quickly.

We are not persuaded that shortened time for notice of the bankruptcy court's consideration of the Settlement Agreement was justified. As EZHS points out, there was no evidence offered in

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[10] As EZHS notes in its Reply Brief, in his arguments to the bankruptcy court for shortened notice, counsel for Trustee may have incorrectly characterized the District Court's position regarding the discovery cutoff date:

> Another time sensitivity to this whole issue is that the District Court Judge, in no uncertain words, said the discovery cut-off date that he set, which I believe is June 30th - it's in a couple of months - in the interpleader action is not going to move.

Tr. Hr'g 6:8-12 (April 23, 2007)(emphasis added). In fact, the District Court's comments on this topic had been:

> We started discovery, and I set a deadline and a cutoff for that. Unless there's good cause, I would not be inclined to change any of the dates.

Tr. Hr'g 35:9-12 (District Court Status Conference March 19, 2007). EZHS asserted at oral argument of this appeal that discovery is still open.

the bankruptcy court to show that the District Court would not extend the discovery cutoff date in the Interpleader if it had been requested to do so. No such request had been made. And, as it turned out, the District Court did indeed extend the discovery cutoff date in the Interpleader from June 30 to December 7, 2007.

In addition, the bankruptcy court's comments at the conclusion of the hearing made clear that it would not attempt to evaluate the value of the EZHS offer, or other bids, as compared to the terms of the Settlement Agreement. That was an incorrect application of the legal standard enunciated in Mickey Thompson, 292 B.R. at 421-22.

In sum, we believe that the bankruptcy court abused its discretion in not allowing additional time for the hearing on approval of the Settlement Agreement and by not allowing competitive bidding to occur to ensure that the disposition of the estate's claims would result in maximum gain for the estate. The bankruptcy court was required to employ the procedures, and to attempt to analyze the transaction embodied in the Settlement Agreement, under the standards for approval of sales under § 363. Adequate notice of the opportunity to submit offers for the purchase of the estate's rights in the District Court litigation should have been given to interested parties. And since an overbid was submitted, the bankruptcy court was required to analyze and compare the value of that offer to any benefit flowing to the estate from the Settlement Agreement. Because this did not occur, we have the firm and definite conviction the bankruptcy court committed a clear error of judgment in approving the Settlement Agreement.

CONCLUSION

We VACATE the bankruptcy court's order approving the Settlement Agreement and REMAND the matter to the bankruptcy court for further proceedings. If Trustee chooses to continue with the proposed disposition of the estate's claims under the Settlement Agreement, adequate notice of that proposal must be given to interested parties and competing offers solicited. If an offer is submitted,[11] the bankruptcy court should evaluate the proposed disposition of the estate's claims in the Interpleader as a sale under § 363 and Rule 6004.[12]

[11] At oral argument, in response to questions from the Panel, counsel for EZHS could not commit that, if it were allowed to do so, it would again offer $50,000 for the estate's rights in the Interpleader. Of course, if, after proper procedures are employed, no other offers are presented, the bankruptcy court may decide to approve the Settlement Agreement yet again.

[12] EZHS also argues that the Settlement Agreement should not have been approved because it was not an arms-length transaction for Trustee given his relationship with Bruinbilt. This issue was raised for the first time on appeal. Generally, we will not address an issue raised for the first time on appeal. United States v. Reyes-Alvarado, 963 F.2d 1184, 1189 (9th Cir. 1992). This waiver rule promotes fairness and judicial efficiency. United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991). Our court of appeals recognizes three narrow exceptions to the rule: (1) exceptional circumstances require review to prevent a manifest miscarriage of justice, (2) a new issue arises while the appeal is pending because of a change in the law or (3) the issue is purely legal and the record is fully developed. Reyes-Alvarado, 963 F.2d at 1189. We do not find that these exceptions apply here and we will not exercise our discretion in reviewing this issue. However, EZHS is not foreclosed from asserting the argument upon remand to the bankruptcy court.