

MAR 15 2011

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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NOT FOR PUBLICATION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. OR-10-1110-MkHJu
)
 CEDAR S. WARREN,) Bk. No. 07-60674
)
 Debtor.)
 _____)
)
 ROBERT DORROH; BARBARA DORROH,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 DAVID F. WURST, Chapter 7)
 Trustee; CEDAR S. WARREN,)
)
 Appellees.)
 _____)

Argued and Submitted on January 21, 2011
at Seattle, Washington

Filed - March 15, 2011

Appeal From The United States Bankruptcy Court
for the District of Oregon

Honorable Frank R. Alley, Chief Bankruptcy Judge, Presiding

 Appearances: Joshua S. Markowitz of Carcione, Cattermole,
 Dolinski, et al, argued for Appellants Robert and Barbara Dorroh;
 and David Bryan Mills argued for Appellee David Wurst, Chapter 7
 Trustee.

 Before: MARKELL, HOLLOWELL and JURY, Bankruptcy Judges.

 *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.

1 glitch. Based on a notice of lien that Deerbrook received from
2 Superior, Deerbrook insisted that it needed to name Superior as a
3 co-payee on any settlement payment made to the Dorrohs.

4 Otherwise, Deerbrook asserted, it risked liability to Superior
5 for any amount paid to the Dorrohs without making provision for
6 Superior's potential subrogation and reimbursement rights.

7 The Dorrohs represented to Deerbrook that Superior had
8 denied Dorroh's workers' compensation claim and therefore that
9 there was no need to provide for a potential subrogation claim.
10 The Dorrohs, however, never submitted to Deerbrook proof of the
11 denial of the workers' compensation claim.¹ On the other hand,
12 the Dorrohs did offer to indemnify Warren and hold Warren (but
13 not Deerbrook) harmless "from any third parties who may claim
14 against your insured for additional monies over and above the
15 \$15,000." Jan. 31, 2001 Letter from Joseph Carcione, Jr. to Jason
16 Kenady.

18 ¹In fact, at the same time that Superior sent its form
19 denial letter to Dorroh, Superior sent several other documents to
20 him requesting that he fill out various forms and provide
21 documentation to support his workers' compensation claim. A
22 couple of months later, Superior followed up with two additional
23 letters. One advised that, under California law, any settlement
24 between Dorroh and the third party responsible for his injury was
25 invalid without the consent of Dorroh's employer/workers'
26 compensation carrier, and that the carrier would be entitled to
27 reimbursement from any third party settlement for any sums paid
28 by the carrier to Dorroh or for his medical treatment. The other
letter referenced the "continuing investigation" of Superior and
requested information and documents concerning any actions that
Dorroh was pursuing to recover on account of the automobile
accident. The Workers' Compensation Appeals Board eventually
ruled that Dorroh was injured in the course and scope of his
employment. As a result, Dorroh ultimately received hundreds of
thousands of dollars in workers' compensation benefits.

1 The impasse did not break. The Dorrohs then filed a
2 personal injury complaint against Warren and others in the
3 California Superior Court (the "State Court"). While the State
4 Court litigation was pending, Warren filed a chapter 7
5 bankruptcy. The Dorrohs obtained relief from the automatic stay
6 so that they could proceed to trial in the State Court and
7 liquidate their claim against Warren.

8 The State Court bench trial resulted in a \$16.5 million
9 judgment against Warren in favor of the Dorrohs (\$15 million on
10 account of Dorroh's personal injury claim and \$1.5 million on
11 account of his wife's loss of consortium claim). Warren and
12 Deerbrook appealed the State Court judgment, which was upheld on
13 appeal and is now final.

14 Meanwhile, Warren had scheduled as an asset of his
15 bankruptcy estate a "bad faith claim" against Deerbrook (the "Bad
16 Faith Claim"). The Trustee summarily described the Bad Faith
17 Claim as follows:

18 The Dorrohs contend that Deerbrook did not accept their
19 offer to settle the matter for policy limits and that a
20 claim in favor of the debtor has arisen for bad faith
21 refusal to settle the claims. The Trustee asserts that
22 any such claims and all other prepetition claims of the
debtor against Deerbrook and any related insurance
entity arising out of the foregoing accident are
property of the estate.

23 May 18, 2009, Motion to Settle & Compromise.

24 In May 2009, subject to bankruptcy court approval, the
25 Trustee reached agreement with Deerbrook for the settlement of
26 the Bad Faith Claim in exchange for a cash payment from Deerbrook
27 of \$125,000 (the "2009 Deerbrook Settlement"). The Trustee moved
28 for bankruptcy court approval of the 2009 Deerbrook Settlement.

1 The Dorrohs filed an objection to the 2009 Deerbrook
2 Settlement because, according to them, the Bad Faith Claim was
3 worth millions. Along with their objection, the Dorrohs
4 submitted a competing offer, which provided for the Dorrohs to
5 pay \$47,000 to the Trustee (the "2009 Competing Offer"). This
6 sum was meant to cover the Trustee's commission, all of the
7 Trustee's attorney fees and all of the allowed general unsecured
8 claims. The Dorrohs also agreed to subordinate their claim to
9 all timely-filed claims, which meant that all timely-filed claims
10 other than the Dorrohs' subordinated claim would be paid in full.
11 In exchange for the \$47,000, the Trustee would retain counsel on
12 a contingency-fee basis to litigate the Bad Faith Claim. Any
13 proceeds recovered from the litigation would then be paid to the
14 Trustee to reimburse litigation costs, to satisfy any unpaid
15 administrative expenses, and then to pay the only remaining claim
16 - that of the Dorrohs.

17 In June 2009, the Trustee moved for contingent approval of
18 the 2009 Competing Offer. According to this motion, the Trustee
19 would accept the Dorrohs' 2009 Competing Offer only if the
20 bankruptcy court denied approval of the 2009 Deerbrook
21 Settlement.

22 In July 2009, the Trustee filed a brief in support of the
23 2009 Deerbrook Settlement. According to the Trustee, this offer
24 was "generous" because the Bad Faith Claim "had little or no
25 merit." The Trustee further described the claim as "not viable"
26 and described the chances of prevailing on the claim as de
27 minimus. The Trustee also explained that the Dorrohs' 2009
28 Competing Offer was inferior, because the Trustee would be

1 obligated to keep the estate open potentially for years while
2 prosecution of the Bad Faith Claim took place, and because the
3 funds the Dorrohs offered to pay would be more than eaten up by
4 the costs and expenses associated with the bad faith litigation.

5 For roughly the next six months, the Dorrohs on the one hand
6 and the Trustee and Deerbrook on the other hand engaged in heated
7 litigation over the merits of the 2009 Deerbrook Settlement and
8 the 2009 Competing Offer. This included discovery, discovery
9 disputes, a two-day bench trial, and multiple pre- and post-trial
10 briefs. At least in part as a result of the ongoing litigation,
11 the Trustee filed a Notice in November 2009 in which he declared
12 that the Dorrohs' 2009 Competing Offer no longer was in the best
13 interest of the estate. He thus effectively withdrew his support
14 for the 2009 Competing Offer.

15 After that withdrawal, in December 2009, the Dorrohs made a
16 series of new offers to the Trustee in an attempt to address
17 concerns and problems raised by the Trustee to each of the
18 Dorrohs' offers. Ultimately, at the conclusion of the two-day
19 bench trial, the court gave Deerbrook and the Dorrohs until
20 January 11, 2010 to submit to the court their final and best
21 bids, the bids to be sealed and opened by the court.

22 When unveiled, Deerbrook's final bid proposed to purchase
23 the estate's Bad Faith Claim in exchange for the following:

- 24 1. Deerbrook would pay all administrative expenses (estimated
25 at \$100,000);
- 26 2. Deerbrook would make its best efforts to purchase (at full
27 value plus 5% interest - roughly a \$25,000 value) all
28 unsecured claims other than the Dorrohs' claim;

- 1 3. Deerbrook would withdraw all claims it purchased; and
- 2 4. Deerbrook would pay \$125,000 to the estate on account of all
- 3 claims not purchased.

4 Under the Dorrohs' competing final bid, the Dorrohs would
5 purchase the estate's Bad Faith Claim in exchange for the
6 following:

- 7 1. The Dorrohs would waive any right to payment on account of
8 their bankruptcy claim and waive any standing they otherwise
9 might have in the bankruptcy case; according to the Dorrohs,
10 for case administration purposes, their waiver would be
11 equivalent to a withdrawal of their claim, but the
12 waiver/withdrawal would be without prejudice to any rights
13 that the Dorrohs, Warren, or the estate might have against
14 Deerbrook; and
- 15 2. The Dorrohs would pay to the Trustee an amount sufficient
16 to: (a) satisfy in full all allowed administrative claims
17 and the Trustee's commission, (b) satisfy in full (plus
18 interest) all valid and timely-filed unsecured claims, and
19 (c) create a surplus estate (by paying one additional dollar
20 beyond what is necessary to satisfy items (a) and (b)).

21 The bankruptcy court ultimately issued a memorandum decision
22 holding that Deerbrook's final bid was superior to the Dorrohs'
23 final bid. In its decision, the bankruptcy court first
24 determined that the Bad Faith Claim had little or no legal merit.
25 According to the bankruptcy court, Deerbrook did not act in bad
26 faith because it was entitled to protect itself from liability by
27 making reasonable provision for Superior's potential
28 reimbursement claim, and the Dorrohs' refusal to consider or

1 accept payment terms reasonably addressing the subrogation claim
2 issue absolved Deerbrook from any liability for not settling
3 within the policy limits. See Coe v. State Farm Mutual
4 Automobile Ins. Co., 66 Cal.App.3d 981, 66 Cal.Rptr. 331 (1977).
5 The bankruptcy court reasoned that Coe was controlling and that
6 Deerbrook's proposed settlement was a more than adequate recovery
7 for the estate on account of the bad faith claim. Thus evaluated
8 as a compromise, the court concluded that the sale to/settlement
9 with Deerbrook was fair, equitable and reasonable under the
10 criteria set forth in Martin v. Kane (In re A & C Properties),
11 784 F.2d 1377 (9th Cir. 1986).

12 As for the court's evaluation of Deerbrook's offer from a
13 sale perspective, the bankruptcy court acknowledged the Dorrohs'
14 argument that the Dorrohs' final bid was more advantageous to the
15 estate. Without citation to authority, however, the bankruptcy
16 court concluded that the Dorrohs' final bid was inferior and
17 should be rejected because it would generate wasteful litigation
18 in state court and was unfair to Deerbrook, which would
19 needlessly have to bear the cost of defending against an
20 unmeritorious claim.

21 The bankruptcy court also rejected the Dorrohs' argument
22 that the Trustee's proposed sale to/settlement with Deerbrook
23 amounted to an impermissible attempt to avoid § 726's
24 distribution scheme. According to the court, assuming without
25 deciding that the Trustee's proposal did violate § 726's
26 distribution scheme, rejecting the deal on that basis would exalt
27 form over substance because all of the estate's creditors other
28 than the Dorrohs would be far better off, and the Dorrohs would

1 not be significantly worse off, than they would be if § 726's
2 distribution scheme was strictly enforced.

3 The bankruptcy court entered an order approving the sale
4 to/settlement with Deerbrook. The Dorrohs timely appealed.²

5 JURISDICTION

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
7 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.
8 § 158(a)(1).

9 ISSUES³

10 1. Did the bankruptcy court abuse its discretion by approving
11 the settlement with Deerbrook as a compromise under

12
13 ²Even though the parties to this appeal served on Deerbrook
14 a copy of the notice of appeal and copies of all of the appellate
15 briefs, Deerbrook never formally was made a party to this appeal.
16 If the BAP Clerk's Office has not already done so, it should
17 amend the BAP docket to list Deerbrook as an interested party, to
18 ensure that Deerbrook timely receives a copy of our disposition
19 of this appeal.

20 ³Both the Trustee and the Dorrohs made statements in the
21 bankruptcy court indicating that the Bad Faith Claim did not
22 accrue under California law until the Fall of 2009, well after
23 Warren commenced his bankruptcy. Some courts have held that a
24 cause of action that does not accrue under state law until after
25 the bankruptcy is filed is not property of estate. See e.g.
26 In re de Hertogh, 412 B.R. 24, 28-31 (Bankr. D. Conn. 2009).
27 However, in the Ninth Circuit, any contingent interest of the
28 debtor "sufficiently rooted in the pre-bankruptcy past" is estate
property, even if the contingency is not satisfied until after
the bankruptcy is filed. See Neuton v. Danning (In re Neuton),
922 F.2d 1379, 1382-83 (9th Cir. 1990) (contingent interest in
trust property); Rau v. Ryerson (In re Ryerson), 739 F.2d 1423,
1425-26 (9th Cir. 1984) (contingent rights under employment
contract); Ellwanger v. Budsberg (In re Ellwanger), 140 B.R. 891,
898 (Bankr. W.D. Wash. 1992) (contingent legal malpractice
claim). In any event, the Dorrohs did not raise this issue
either in the bankruptcy court or in its appellate briefs, so it
is deemed waived. Golden v. Chicago Title Ins. Co. (In re Choo),
273 B.R. 608, 613 (9th Cir. BAP 2002).

1 Rule 9019?

- 2 2. Did the bankruptcy court abuse its discretion by approving
3 the settlement with Deerbrook as a sale of estate property
4 under § 363?

5 STANDARDS OF REVIEW

6 We review a bankruptcy court's decision to approve a
7 compromise for abuse of discretion. Goodwin v. Mickey Thompson
8 Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.),
9 292 B.R. 415, 420 (9th Cir. BAP 2003) (citing In re A & C Props.,
10 784 F.2d at 1380). We also review sales approved under § 363 for
11 abuse of discretion. Fitzgerald v. Ninn Worx Sr Inc. (In re
12 Fitzgerald), 428 B.R. 872, 880 (9th Cir. BAP 2010) (citing
13 Simantob v. Claims Prosecutor, LLC. (In re Lahijani), 325 B.R.
14 282, 287 (9th Cir. BAP 2005)).

15 Under the abuse of discretion standard of review, we first
16 “determine de novo whether the [bankruptcy] court identified the
17 correct legal rule to apply to the relief requested.” United
18 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).
19 And if the bankruptcy court identified the correct legal rule, we
20 then determine under the clearly erroneous standard whether its
21 factual findings and its application of the facts to the relevant
22 law were: “(1) illogical, (2) implausible, or (3) without support
23 in inferences that may be drawn from the facts in the record.”
24 Id. (internal quotation marks omitted).

25 DISCUSSION

- 26 **A. The bankruptcy court abused its discretion when it approved**
27 **the settlement with Deerbrook as a compromise under**
28 **Rule 9019.**

Rule 9019 permits a bankruptcy court to approve a compromise

1 or settlement. While Rule 9019 gives the bankruptcy court broad
2 discretion in approving settlements, it may only approve them if
3 they are "'fair and equitable' to the creditors." Mickey
4 Thompson, 292 B.R. at 420 (emphasis added) (citing Woodson v.
5 Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620
6 (9th Cir. 1988)). Further, the settlement must be reasonable
7 under the circumstances, and it must be in the best interests of
8 the estate. Mickey Thompson, 292 B.R. at 420 (citing A & C
9 Properties, 784 F.2d at 1381). The trustee bears the burden to
10 establish that the criteria for approval of the settlement have
11 been met. Id.

12 The fairness and equity of a settlement are evaluated under
13 the criteria set forth in Woodson and A & C Properties, which
14 are:

- 15 (a) The probability of success in the litigation;
16 (b) the difficulties, if any to be encountered in the
17 matter of collection; (c) the complexity of the
18 litigation involved, and the expense, inconvenience and
19 delay necessarily attending it; [and] (d) the paramount
20 interest of the creditors and a proper deference to
21 their reasonable views in the premise.

19 Mickey Thompson, 292 B.R. at 420 (citing A & C Properties,
20 784 F.2d at 1381).

21 The bankruptcy court here recited and considered the
22 appropriate criteria from these cases, but we question its
23 application of the facts to the relevant legal rules. We
24 primarily are concerned that the settlement with Deerbrook
25 contravenes the Bankruptcy Code's rules for distribution of
26 estate property under § 726. That section sets forth a detailed
27 scheme for the equitable distribution of assets of the estate.
28 This statutory scheme is a foundational premise of the Bankruptcy

1 Code; it provides the textual basis for the fundamental principle
2 that creditors of equal priority should receive pro rata shares
3 of the debtor's property. Begier v. I.R.S., 496 U.S. 53, 58
4 (1990); Endo Steel, Inc. v. Janas (In re JWJ Contracting Co.,
5 Inc.), 371 F.3d 1079, 1081 (9th Cir. 2004); see also Cunard
6 Steamship Co. v. Salen Reefer Servs. AB,773 F.2d 452, 459
7 (2d Cir. 1985) ("The guiding premise of the Bankruptcy Code, like
8 its predecessor, the Bankruptcy Act, is the equality of
9 distribution of assets among creditors.").

10 By unequally distributing proceeds from the liquidation of
11 an estate asset - the settlement of the Bad Faith Claim - the
12 settlement as approved contravened the fundamental concept of
13 ratable distribution to creditors. In exchange for the Bad Faith
14 Claim, Deerbrook in part promised to use its best efforts to
15 acquire at face value, plus 5% interest, all unsecured claims
16 other than the Dorrohs'. This blatant discrimination against the
17 Dorrohs' multi-million dollar claim returned to the estate a
18 value of roughly \$25,000.

19 The Trustee argues that, because Deerbrook was agreeing to
20 pay the above-referenced consideration directly to the creditors,
21 the settlement was not at odds with § 726. According to the
22 Trustee, so long as he never touched the settlement funds, an
23 uneven distribution of the settlement funds was permissible. The
24 Trustee cites Official Unsecured Creditors' Committee v. Stern
25 (In re SPM Mfg. Corp.), 984 F.2d 1305, 1313 (1st Cir. 1993), for
26 the unremarkable proposition that the rule requiring ratable
27
28

1 distribution of estate property only applies to estate property.⁴

2 The Trustee's argument ignores the fact that the \$25,000 to
3 be paid by Deerbrook under the settlement was part of the
4 consideration from the Trustee's sale of the estate's Bad Faith
5 Claim against Deerbrook. As this consideration was property of
6 the estate pursuant to § 541(a)(6), all of the proceeds needed to
7 be accounted for and distributed ratably to the estate's
8 creditors, including the Dorrohs. See § 726; see generally
9 Hansen v. MacDonald Meat Co. (In re Kemp Pacific Fisheries Inc.),
10 16 F.3d 313, 316 (9th Cir. 1994) (holding that the debtor
11 transfers property of the estate for preference purposes if the
12 transfer "'diminish[es] directly or indirectly the fund to which
13 creditors of the same class can legally resort for the payment of
14 their debts, to such an extent that it is impossible for other
15 creditors of the same class to obtain as great a percentage as
16 the favored one.'" (quoting 4 Collier on Bankruptcy ¶ 547.03, at
17 547-26 (15th ed. 1993))).

18
19 ⁴Some courts have construed SPM Mfg. expansively and have
20 cited this case for the proposition that, under a chapter 11
21 plan, a senior creditor class may "gift" or voluntarily
22 contribute some of its plan distributions to a junior creditor
23 class without violating the absolute priority rule; other courts
24 have rejected this notion. See In re Journal Register Co.,
25 407 B.R. 520, 529-34 (Bankr. S.D.N.Y. 2009) (listing cases going
both ways and applying gift doctrine). The Second Circuit
recently rejected this attempt to broadly construe SPM Mfg. Dish
Network Corp. v. DBSD North America, Inc. (In re DBSD North
America, Inc.), 2011 WL 350480 (2d Cir., Feb. 7, 2011).

26 Regardless, this construction of SPM Mfg. is patently
27 inapposite to the facts presented here. Deerbrook is not a
28 senior or secured creditor proposing to gift its plan
distribution to another creditor class, but rather is proposing
to funnel proceeds from the sale of an estate asset to some but
not all of the debtor's unsecured creditors.

1 The bankruptcy court concluded that the uneven distribution
2 of the settlement funds did not materially disadvantage the
3 Dorrohs, so enforcing § 726 in this case would exalt "form over
4 substance." According to the bankruptcy court, if the \$25,000
5 Deerbrook intended to pay directly to the unsecured creditors
6 other than the Dorrohs was excised from the settlement as a
7 violation of § 726, and Deerbrook only paid the \$125,000 slated
8 for ratable distribution to all unsecured creditors, then all of
9 them, including the Dorrohs, would receive less money.

10 But the court's analysis is flawed. It erroneously assumes
11 that the \$25,000 in settlement funds were not going to be
12 distributed to all unsecured creditors other than the Dorrohs.
13 In reality, the settlement as approved provided for this
14 distribution. Indeed, the court's order approving the settlement
15 expressly directs the Trustee and Deerbrook to "carry out the
16 terms of the Deerbrook proposal," including this \$25,000
17 distribution. If this same \$25,000 were ratably distributed, the
18 Dorrohs could expect to receive an additional \$24,975, as their
19 multi-million claim, liquidated and uncontested, essentially
20 engulfs all other claims. In short, the bankruptcy court clearly
21 erred when it found that the uneven distribution of settlement
22 funds did not materially disadvantage the Dorrohs.

23 As a result, the bankruptcy court misapplied the facts to
24 the criteria for approving compromises and thereby abused its
25 discretion. In the parlance of Hinkson, the bankruptcy court's
26 findings regarding the impact of the settlement on the ratable
27 distribution of the estate's assets was not supported by
28 inferences that could be drawn from facts in the record.

1 Further, its findings regarding the value of the Bad Faith Claim
2 and Deerbrook's litigation expenses (if the claim were sold to
3 the Dorrohs) also were problematic, as discussed below.

4 **B. The bankruptcy court abused its discretion when it approved
5 the settlement with Deerbrook as a sale of estate property
under § 363.**

6 When a trustee seeks to settle a claim that is an asset of
7 the estate, the proposed settlement of the claim is equivalent to
8 a sale of the intangible property associated with that claim;
9 therefore, the proposed settlement implicates not only the
10 compromise procedures of Rule 9019, but also the sale provisions
11 of § 363 and Rule 6004. Mickey Thompson, 292 B.R. at 421; see
12 also Fitzgerald, 428 B.R. at 884; Lahijani, 325 B.R. at 290.

13 Pursuant to § 363(b) and Rule 6004, a trustee may sell
14 estate property other than in the ordinary course of business.
15 The trustee, and ultimately the court, are required to assure
16 that any proposed sale provides the optimal value for the asset
17 to be sold. See Fitzgerald, 428 B.R. at 884; Lahijani, 325 B.R.
18 at 288-89; Mickey Thompson, 292 B.R. at 421-22. Once competing
19 bids are presented, the trustee and the court must ascertain
20 which bid is of greater benefit to the estate. See Lahijani,
21 325 B.R. at 289-90; see also Fitzgerald, 428 B.R. at 883-84.

22 Here, the bankruptcy court received competing final bids
23 from both Deerbrook and the Dorrohs. In ascertaining the
24 relative value of each bid, the bankruptcy court exclusively
25 focused on one factor: if the Dorrohs successfully acquired the
26 Bad Faith Claim, they intended to litigate the claim in state
27 court. According to the court, it would have been inequitable to
28 facilitate the Dorrohs' attempts to litigate the Bad Faith Claim

1 and to subject Deerbrook to the expense of defending against the
2 claim. The court's determination hinged on its assessment of the
3 Bad Faith Claim as having little or no merit.

4 The bankruptcy court's analysis of the competing bids is
5 problematic in a number of respects. First of all, we cannot
6 agree with the bankruptcy court's determination for the following
7 reason: if, as the bankruptcy court believed, it was inequitable
8 to make Deerbrook defend against the Bad Faith Claim, it also
9 should have been inequitable for the Trustee to accept
10 Deerbrook's significant consideration offered to acquire the Bad
11 Faith Claim - by most accounts an amount approximating a quarter
12 of a million dollars.⁵ Conversely stated, if it was equitable
13 for the Trustee to take \$250,000 from Deerbrook for the purchase
14 of a claim of little or no merit, it also should have been
15 equitable for the Trustee to accept a purchase offer of
16 potentially greater value to the estate from the Dorrohs and let
17 Deerbrook defend against the Bad Faith Claim to the tune of
18 \$250,000.

19 Of course, if the bankruptcy court had made an express
20 finding that the Bad Faith Claim was frivolous, then the
21 Trustee's sale/compromise of the Bad Faith Claim would have been
22 as inappropriate as litigating it. Faced with a truly frivolous
23 claim, the court should have denied any sale or compromise of the
24 claim, and the Trustee likely should have sought to abandon the
25 claim under § 554. See generally Lopez v. Specialty Restaurants

27 ⁵The parties estimated that Deerbrook expected to pay
28 approximately \$250,000 for all components of its purchase of the
Bad Faith Claim.

1 Corp. (In re Lopez), 283 B.R. 22, 32-33 (9th Cir. BAP 2002)
2 (Klein, J., concurring). On a fair reading of the record as a
3 whole, we cannot conclude that the bankruptcy court found that
4 the Bad Faith Claim was frivolous; we are not yet to the point
5 where payment of \$250,000 can be claimed to be a nuisance
6 settlement. Moreover, the conduct of all of the parties - the
7 Dorrohs, the Trustee and Deerbrook - generally has been
8 inconsistent with the notion that the claim is frivolous.⁶

9 Second, we hold that the financial burden to a non-debtor of
10 needing to defend itself in state court against a claim sold by
11 the estate is not a relevant consideration in weighing the
12 benefit to the estate of competing offers for the purchase of the
13 claim.⁷ Furthermore, there was no evidence in the record from
14 which the bankruptcy court could have concluded that the expense
15 of defending against the Bad Faith Claim would be any greater a
16

17 ⁶Whatever merit is attributed to the Bad Faith Claim, so
18 long as it is not frivolous, our analysis and disposition of this
19 appeal stands. We have reviewed the various arguments in support
20 of and against the merits of the Bad Faith Claim. Suffice it to
21 say that we do not consider the Bad Faith Claim frivolous. There
22 is perhaps a little traction in some of the Dorrohs' arguments.
23 For instance, it is conceivable that the Dorrohs might be able to
24 distinguish Coe based on the facts surrounding the Dorrohs'
25 settlement offer, particularly their written representation that
26 the workers' compensation claim had been denied and their offer
27 to indemnify Deerbrook's insured (Warren) for any claims in
28 excess of the \$15,000 policy limits to be paid by Deerbrook. We
emphasize that we do not mean to express any opinion on the
merits or ultimate likelihood of success of the Bad Faith Claim,
other than to say that we do not think it is frivolous.

⁷Our holding is consistent with Ninth Circuit law that a
party having to defend against litigation instead of achieving a
"quick victory" constitutes minimal prejudice. See Bateman v.
U.S. Postal Service, 231 F.3d 1220, 1224-25 (9th Cir. 2000).

1 financial burden to Deerbrook than immediately paying \$250,000 on
2 account of the settlement. In fact, California has procedural
3 rules that ultimately could enable Deerbrook to recoup a
4 significant amount of its state court litigation fees and/or
5 costs. See, e.g., Cal. Civ. Proc. Code §§ 128.7, 998. Thus, if
6 the claim is as meritless as Deerbrook contends, then it is quite
7 possible that the net financial burden to Deerbrook of litigating
8 the Bad Faith Claim might be less than the cost of its settlement
9 with the Trustee.

10 Third, having exclusively focused on its equity
11 determination, the court in effect neglected to weigh the
12 relative value of the competing final bids. Given that the
13 bankruptcy court did not determine which bid was of greater
14 benefit to the estate, its ruling did not meet the requirements
15 for approval of a sale. See Lahijani, 325 B.R. at 289-90; see
16 also Fitzgerald, 428 B.R. at 883-84.

17 Fourth, as noted previously, Deerbrook's final bid suffered
18 from the infirmity that it proposed a distribution to unsecured
19 creditors that contravened § 726. In light of this defect, the
20 court had no choice but to reject Deerbrook's final bid as
21 presented. On remand, the bankruptcy court perhaps could reform
22 Deerbrook's final bid to excise the offending provision; however,
23 the reformed bid on its face would not appear to benefit the
24 estate's creditors as much as the payments and waiver on the face
25 of the Dorrohs' final bid. The Dorrohs in their final bid agreed
26 to voluntarily waive any right to payment on account of their
27 claim against the estate and agreed to fund whatever amount was
28 necessary to: (1) satisfy all allowed administrative expenses,

1 (2) pay the Trustee's commission, and (3) pay all timely-filed
2 allowed unsecured claims (other than their own) in full, plus
3 interest at the legal rate. Thus, unlike Deerbrook's proposal
4 (as reformed), the Dorrohs' proposal on its face provides for
5 full payment to all unsecured creditors other than the Dorrohs.

6 The Trustee has offered two reasons on appeal why he
7 believes that the Dorrohs' final bid was inferior to Deerbrook's.
8 First, the Trustee has asserted the Dorrohs' final bid presented
9 the Trustee with the prospect of being drawn into further
10 disputes and litigation in both the bankruptcy court and in the
11 state court. According to the Trustee, this additional
12 litigation could prevent the bankruptcy estate from closing for a
13 long time and could cause administrative expenses to escalate
14 drastically and beyond the Dorrohs' ability to pay. Second, the
15 Trustee has asserted he is justifiably skeptical (1) that the
16 Dorrohs can and will fully cover all of the monetary obligations
17 they are committing to in their final bid, and (2) that the
18 Dorrohs will honor all of their obligations without the Trustee
19 having to resort to court enforcement.

20 The Trustee's concerns are material and could affect the
21 value of the Dorrohs' bid, but the bankruptcy court did not
22 render any findings resolving these issues. Consequently, we
23 must remand. The bankruptcy court's disposition of these issues
24 is essential, especially since the credibility of the parties is
25 implicated.

26 For all of the foregoing reasons, the bankruptcy court
27 abused its discretion when it approved the settlement with
28 Deerbrook as a sale of estate property.

CONCLUSION

Accordingly, the bankruptcy court's order granting the Trustee's motion to sell and/or settle the Bad Faith Claim shall be VACATED, and this matter shall be REMANDED for further proceedings.

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