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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 00-10145
)
THE V COMPANIES and) Chapter 7
V-S ARCHITECTS, INC.,) (Jointly Administered)
)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Virgil Brown, Jr., the chapter 7 trustee, moves to compromise multiple claims via a settlement agreement.¹ (Docket 574, 579). Creditor Ulmer & Berne LLP objects. (Docket 578). The hearing on this matter was held on October 9, 2003. On December 9, 2003, the Sixth Circuit Court of Appeals remanded jurisdiction to permit this court to rule on the motion. For the reasons stated below, the trustee's motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

¹ The parties to the settlement agreement are the trustee, the estate of Paul V. Voinovich, Step II Development and Management Co., North Coast Village Limited Partnership, Gateway Plaza Limited Partnership, AEC National, Inc., CCMC Corp., Christine Voinovich, Deborah McCann, Paul M. Voinovich, Vocon aka Vocon Design, Inc., Steven Voinovich, Heidi Armstrong, Harry Keagler, Jerry Hazlewood, John Workley, KW Architects, Inc., 2450 Prospect Co., Ltd., Gateway Manor Congregate Apartments Limited Partnership, Gateway Health Care Centers Limited Partnership, and the Board of County Commissioners of Jefferson County, Ohio.

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FACTS

Debtors V Companies and V-S Architects, Inc. filed chapter 11 petitions on January 7, 2000. The United States trustee eventually moved to convert the cases to chapter 7. The debtors vigorously contested that request. Based on evidence produced at a lengthy hearing, the court entered an order converting the cases on March 8, 2002. Virgil Brown, Jr. is the chapter 7 trustee.

A. The Adversary Proceeding

While the cases were in chapter 11, the Board of County Commissioners of Jefferson County, Ohio (Board) requested and received leave to prosecute avoidance actions on behalf of the debtors' estates. The Board then filed an adversary proceeding captioned *Jefferson County Board of County Commissioners v. Paul V. Voinovich, et al.*, Adv. No. 02-1007. The amended complaint names Paul V. Voinovich (the debtors' principal) and 18 others as defendants, alleges breaches of fiduciary duty, preferential and fraudulent transfers involving corporate officers and related entities and individuals, and similar conduct and misconduct, and requests judgment against the defendants (jointly and severally) in an amount of not less than \$15,000,000.00. The amended complaint also requests that the debtors, Paul V. Voinovich, and various other defendants be treated as "mere alter egos of one another and, for that reason, the corporate forms . . . disregarded[.]"

Several defendants moved to dismiss on the ground that the Board lacked standing to bring the adversary proceeding. The court held that the Board did have standing and that the chapter 7 trustee should be substituted as plaintiff for the Board. The moving defendants

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appealed to the Bankruptcy Appellate Panel of the Sixth Circuit, which affirmed. The decision was then appealed to the Sixth Circuit.

In the meantime, because no party had requested or been granted a stay pending appeal, the adversary proceeding moved forward. Eventually, the parties asked the court to refer the case to mediation, which the court did. The compromise now at issue is the result of that mediation effort.

B. The Florida Probate Proceeding

Paul V. Voinovich died after the adversary proceeding was filed. His probate estate is pending in Lee County, Florida and Christine Voinovich is the probate estate's representative. In that capacity, she has been substituted as a defendant in the adversary proceeding.

The trustee filed a \$15,000,000.00 claim in the probate proceeding. Christine Voinovich objected to it and the matter is pending before the probate court.

An inventory filed in the probate proceeding lists the non-exempt personal property and real estate as having a value of \$1,654,038.00. The claims filed in the probate proceeding, excluding the chapter 7 trustee's claim, total \$2,352,554.00.

C. The Proposed Compromise

The compromise is the product of a mediation process that included months of discovery and negotiations. As a result of that effort, the parties have agreed to settle the adversary proceeding and the trustee's probate claim, subject to approve of the bankruptcy court and the probate court. The settlement, which guarantees that the chapter 7 estate will receive at least \$1,250,000.00, has these terms:

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- (1) the parties will obtain a final order from this court granting judgment in favor of the trustee and against the probate estate in the adversary proceeding in the amount of \$15,000,000.00;
- (2) the parties will obtain a final order in the probate proceeding which approves the withdrawal of the objection to the trustee's claim;
- (3) upon the entry of these two orders, Christine Voinovich will pay \$500,000.00 to the trustee and will guarantee a \$750,000.00 net recovery to the trustee from the probate estate which is to be secured by a \$750,000.00 irrevocable standby letter of credit;
- (4) the trustee will continue to assert his claim in the probate proceeding. If the net distribution on his claim totals \$750,000.00 or more, then Christine Voinovich is relieved from any further monetary obligation to the trustee. If the net distribution on the trustee's claim is less than \$750,000.00, Christine Voinovich will pay the amount of the shortfall;
- (5) the parties will dismiss with prejudice all claims made in the adversary proceeding, with the exception of the \$15,000,000.00 judgment against the probate estate and the parties will release all claims they may have against other parties (other than the claims the trustee may have to enforce the \$15,000,000.00 judgment against the probate estate and the trustee's claim in the probate proceeding);
- (6) Gateway Health Centers Limited Partnership and Gateway Manor Congregate Apartments Limited Partnership shall purchase the probate estate's interest in the partnerships for a net purchase price of \$1,640,000.00. Those proceeds will be distributed as follows: \$360,000.00 to Christine Voinovich and \$1,290,000.00 to the probate estate.
- (7) The trustee may request that the settlement be declared void with respect to any party that has intentionally, fraudulently, and materially failed to fully and accurately disclose reasonable available financial information required by the settlement.

If the probate court does not approve Christine Voinovich's decision to withdraw her objection to the trustee's claim against the probate estate, the settlement will not go forward.

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D. The Objection

The law firm of Ulmer & Berne is a creditor of both (1) the debtors and (2) the probate estate. The firm asks that the compromise be rejected because Christine Voinovich has conflicting interests and should not have approved the settlement on behalf of the probate estate. The firm contends that giving the chapter 7 trustee a \$15,000,000.00 judgment against the probate estate will unfairly hurt the other probate creditors because it will substantially reduce the amount available to them.

DISCUSSION

A. Bankruptcy Rule 9019(a)

Bankruptcy Rule 9019(a) provides that a bankruptcy trustee must submit a proposed compromise for court approval. FED. R. BANKR. P. 9019(a). “In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between a debtor and [its] creditors must be approved by the court as fair and equitable.” *Reynolds v. Comm’r of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988). When considering a proposed compromise, “the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. The court is not permitted to act as a mere rubber stamp or to rely on the trustee’s word that the compromise is ‘reasonable.’” *Id.* (citing *In re American Reserve Corp.*, 841 F.2d 159, 162-63 (7th Cir. 1987)).

“Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). However, when considering

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a proposed settlement the bankruptcy court “is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement ‘fall[s] below the lowest point in the range of reasonableness’[.]” *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

The court must consider “all . . . factors relevant to a full and fair assessment of the wisdom of the proposed compromise.” *Anderson*, 390 U.S. at 424. These factors are: (1) the probability of success in the litigation; (2) the difficulty of collection; (3) the complexity of the litigation, including any attendant expense, inconvenience, and delay; and (4) the paramount interest of creditors. *See Fishell v. Soltow (In re Fishell)*, 47 F.3d 1168 (6th Cir. 1995) (unreported); *Bard v. Sicherman (In re Bard)*, 49 Fed. Appx. 528 (6th Cir. 2002) (unreported). *See also Myers v. Martin (In re Martin)*, 91 F.3d 389 (3d Cir. 1996).

The parties do not dispute the law that governs the motion to compromise. They disagree, however, as to whether the proposed compromise warrants approval under the legal standards.

B. The Trustee’s Position

The trustee argues that the compromise is fair, equitable, and falls within the range of reasonableness considering the relevant factors. He believes that it is in the best interests of the debtors, their estates,² and creditors. The compromise provides a substantial minimum payment of \$1,250,000.00 to the bankruptcy estates, preserves the opportunity for the bankruptcy estates to recover whatever additional amounts may lawfully be recovered in the probate proceeding, and reduces litigation expenses. If the settlement is approved, the trustee believes he will have

² Although the motion refers to one bankruptcy estate, there are two.

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sufficient funds to pay all chapter 7 and 11 administrative expenses and a dividend of approximately 20% to unsecured creditors.

C. Ulmer & Berne's Position

Ulmer & Berne contends that the settlement unfairly works to the detriment of creditors who hold claims against both the bankruptcy and the probate estates. The argument is that, but for the settlement, the probate creditors would receive a higher payment from the probate estate. Allowing the trustee's \$15,000,000.00 claim will significantly increase the total claims in the probate case and decrease the amount paid to each probate creditor. The firm argues that the trustee has offered no explanation or basis to justify the entry of a \$15,000,000.00 judgment against the probate estate. The objector also questions why Christine Voinovich and the probate estate are the only party defendants who are contributing to the settlement. The firm contends that other parties ought to contribute (presumably decreasing the amount to be paid by the probate estate) unless there is proof that they are financially unable to do so.

D. Analysis of the Proposed Compromise

The complexity of the litigation, including expense, inconvenience, and delay. The adversary proceeding involves 19 defendants and multiple factually intensive claims. Adjudicating those claims would be a lengthy and costly process. Additionally, the trustee's ability to collect on any judgment obtained could be substantially delayed by multiple appeals, this being a determined group of defendants. This factor weighs in favor of the proposed compromise.

Probability of success on the merits. There is no question that the amount of the settlement (a minimum recovery of \$1,250,000.00) accounts for the probability that the trustee

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would succeed on the merits of the claims asserted in the adversary proceeding. This factor weighs in favor of the proposed compromise.

The difficulty of collection. Christine Voinovich and the probate estate are the source of the settlement payments. The firm contends this is unfair because the trustee did not prove that it would be difficult to collect from the other defendants. In response, the trustee asserts that his claims against the other defendants are more difficult to prove and their collectibility is problematic. The trustee reached the latter conclusion after requesting, receiving, and reviewing financial information from the non-contributing defendants.³ Having done so, he represents that Christine Voinovich is the only individual defendant with any significant net worth. Additionally, the trustee believes that the business defendants ceased having much value after Mr. Voinovich died. The proposed compromise takes into account the potential collectibility of the defendants and this factor, therefore, weighs in favor of the proposed compromise.

The interest of creditors. This factor focuses on the interests of the creditors of the bankruptcy estates. Under the compromise, the bankruptcy estates will receive at least \$1,250,000.00 with the potential for further recovery from Mr. Voinovich's probate estate. Creditors in these cases will clearly benefit if the compromise is approved as it will result in their being paid a substantial percentage of their debt in the near future.

The firm acknowledges this benefit, but argues that the compromise harms creditors who hold claims against both the bankruptcy and the probate estates because it will decrease their recovery from the probate estate. This objection must be discounted, however, because it is

³ This is apparent from the settlement term that allows the trustee to undo the settlement with respect to any party who has intentionally, fraudulently, and materially failed to fully and accurately disclose reasonable available financial information required by the settlement.

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based not on the firm's status as a creditor of the bankruptcy estate but rather on its status as a creditor of the probate estate. The firm candidly acknowledged at oral argument that its grievance is that the trustee negotiated a settlement which favors the bankruptcy estates over the probate estate. The trustee is *supposed* to be negotiating from the vantage point of the bankruptcy estate and the fact that he did so is a reason to approve the compromise rather than a reason to disapprove it.

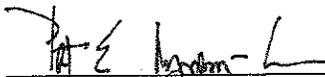
The heart of the objection is the firm's belief that Christine Voinovich (for whatever reason) did not negotiate the best deal she could have on behalf of the probate estate. That is a matter to be addressed by the probate court. For this court's purposes, it is clear that the proposed compromise benefits the creditors of the debtors' estates. This factor also weighs in favor of the proposed compromise.

After considering and balancing all of the facts and circumstances, the court concludes that the proposed compromise should be approved.

CONCLUSION

For the reasons stated, the trustee's motion to approve compromise is granted. A separate order will be entered reflecting this decision.

Date: 12 Decemb 2003

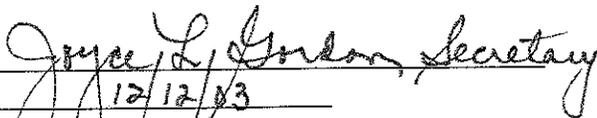


Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Alan Lepene, Esq.
Jack Rosati, Esq.
Richard Hardy, Esq.
Pete Elliott, Esq.
Virgil Brown, Jr., Trustee

By:

Date:


12/12/03
Joyce L. Gordon, Secretary

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)	
Debtors.)	Judge Pat E. Morgenstern-Clarren
)	
)	<u>ORDER</u>

For the reasons stated in the memorandum of opinion filed this same date, the chapter 7 trustee's motion to compromise the claims in adversary proceeding no. 02-1007 is granted and the objection of creditor Ulmer & Berne is overruled. (Docket 574, 578).

IT IS SO ORDERED.

Date: 12 December 2003



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge

Served by mail on: Alan Lepene, Esq.
Jack Rosati, Esq.
Richard Hardy, Esq.
Pete Elliott, Esq.
Virgil Brown, Trustee

By: Joyce L. Gordon, Secretary

Date: 12/12/03