

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CHAPTER 7
	)	
GREGORY ALAN APPLGATE,	)	CASE NO. 05-67759
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
	)	<b>MEMORANDUM OF OPINION ON</b>
	)	<b>MOTION TO AUTHORIZE TRUSTEE</b>
	)	<b>TO COMPROMISE AND SETTLE</b>
	)	<b>CERTAIN CLASSES OF CLAIMS</b>
	)	<b>(NOT INTENDED FOR</b>
	)	<b>PUBLICATION)</b>

This matter is before the court on the Motion of the Trustee for an Order Authorizing Him to Settle Certain Classes of Claims Without Further Notice or Hearing, filed with this court on October 9, 2007. Trustee filed the instant motion under Fed. R. Bankr. P. 9019(b).

The court has jurisdiction of this proceeding pursuant to 28 U.S.C. §§ 1334 and the general order of reference entered in this district on July 16, 1984. Venue in this district and division is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding to the extent it pertains to the administration of the estate under 28 U.S.C. § 157(b)(2)(A); the underlying adversary proceedings affected by the instant motion are also core proceedings under 28 U.S.C. § 157(b)(2)(F) and (H).

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

**BACKGROUND AND PROCEDURAL POSTURE**

Debtor was engaged in running a Ponzi scheme, primarily in Ashland, Ohio and the vicinity. He was forced into bankruptcy by involuntary petition on October 11, 2005.

Trustee has currently filed eighty-six adversary proceedings to recover property from prepetition transferees, some as preferential transfers and others as fraudulent transfers. Because of the likelihood of numerous settlements and the prospective administrative burdens of complying with the requirements of Rule 9019(a) in all such instances, Trustee brought the instant motion under Rule 9019(b), proposing classes of controversies and terms upon which Trustee requests authority to settle with the defendants in that class without further notice or hearing. At the hearing, Trustee noted both the number of adversaries at that time likely to be

filed (since actually filed) and the fact that, because Ashland is such a small community,<sup>1</sup> it would be good to have some kind of organized framework for handling settlements because of a concern that enough affected individuals in this case actually know one another that comparisons among themselves regarding who got a “better deal” would be all but inevitable. The provisions are complex and the following overview is intended to summarize only the most significant features of the proposal.

The motion primarily divides transferees along two lines: preferential transfers vs. fraudulent transfers, and claims of under \$100,000.00 vs. claims of \$100,000.00 or greater. Two structural elements of the settlement, in turn, are common among each potential grouping along the aforementioned lines: first, a waiver option, and second, an escalator clause. These involve not matters of initial categorization, but rather, decisions to be made by adversary defendants. The first provision is a waiver option: Trustee requests the authority to give transferees a choice: settle at one amount and maintain the claim against the estate, or settle at a lesser amount but waive the right to file a proof of claim.

The escalator clause is not a clause per se, but a structural artifact of the proposed pre-authorized settlement terms: the terms under which Trustee requests authority to settle expeditiously get harsher for transferees as time progresses after the granting of the instant motion.<sup>2</sup> (Trustee’s Mot. ¶¶ 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, and 12.7.) For example, the recipient of a preference under \$100,000.00 could settle for 80% of the value of the transfer (and preserve his claim against the estate) if done within 30 days; however, that percentage would rise to 85% 31 days after the granting of this motion, 90% after 61 days, and 100% after 91 days. In other words, if a preferential transferee does not settle within three months, the settlement offer is essentially off the table. A recipient of a preferential transfer of \$100,000.00 or more could settle for 90% within 30 days or 95% within 60 days; after 61 days, that percentage, too, rises to 100%. The Trustee justifies this vice-tightening provision by stating that it will minimize the administrative costs to the estate to resolve each claim and provide an incentive for each defendant to settle. (Trustee’s Mot. ¶ 25.)

## LEGAL ANALYSIS

One of the duties of the Trustee in a Chapter 7 case is to “collect and reduce to money the property of the estate for which such trustee serves, and close such as estate as expeditiously as compatible with the best interests of the parties in interest.” 11 U.S.C. § 704(a). Compromise and settlement are favored in bankruptcy to reduce the cost of litigation and expedite its administration. See, e.g., In re West Pointe Properties, L.P., 249 B.R. 273, 282 (Bankr. E.D.Tenn. 2000). The Federal Rules of Bankruptcy Procedure require court approval of compromises and settlements. Fed. R. Bankr. P. 9019. The default rule in such cases is that court approval is only to be given after notice and a hearing. Fed. R. Bankr. P. 9019(a). However, Fed. R. Bankr. P. 9019(b) provides a mechanism to “pre-approve” settlements of

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<sup>1</sup> As of the 2000 census, there were only 21,249 people in the City of Ashland and 52,523 people in the entirety of Ashland County.

<sup>2</sup> In the case of an adversary proceeding not yet filed, the date of filing, rather than the date of the accompanying order, is to be used as the initial date for calculating claim aging.

claims that might be too numerous for efficient administration under the requirements of 9019(a). Rule 9019(b) provides that, “[a]fter a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settled controversies within such class or classes without further hearing or notice.” The subsection “permits the court to deal efficiently with a case in which there may be a large number of settlements.” Fed. R. Bankr. P. 9019 Advisory Committee Note (1983). This case clearly meets the latter definition. The appropriateness of invoking Rule 9019(b) is not in question.

In bankruptcy cases, compromises between the debtor and his creditors must be approved by the bankruptcy court as fair and equitable. Protective Committee for Independent Stockholders of TMT Trailer Ferr v. Anderson, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d. 1 (1968). The decision to accept or reject a proposed settlement lies within the sound discretion of the bankruptcy court and will only be overturned if such discretion is abused. In re Albert-Harris, Inc., 313 F.2d 447, 449 (6th Cir. 1963). The court is to determine whether the proposed settlement is in the “best interest of the estate,” McGraw v. Yelverton (In re Bell & Beckwith), 87 B.R. 476, 478, a test which the court applies by considering four factors:

- (1) The probability of success in litigation;
- (2) The difficulties, if any, to be encountered in collecting any judgments that might be rendered;
- (3) The complexity of the litigation involved, as well as the expense, inconvenience, and delay necessarily attendant to the litigation; and
- (4) the paramount interests of creditors with proper deference to their reasonable views.

Id. The Trustee’s motion has tried to take into account each of these factors individually. For example, the terms for settling preference claims are substantially stricter than those for settling fraudulent transfer claims, based on the reasonable assessment that preference actions are more “cut and dried” than fraudulent transfer actions and much more likely to result in recovery were the underlying adversaries litigated fully. The interests of creditors are served by reducing the overall number of creditors (due to the number of transferees likely to accept the waiver option) and incentivizing adversary defendants to settle.

Most of the proposed settlement terms are unobjectionable and can confidently be said to be in the best interest of the estate and creditors.

The one provision that gives the court some pause is the escalator clause. None of the cases cited by Trustee involve such a proposal to gradually close the door on settlement the longer a defendant holds out. While compromises are favored in bankruptcy and the court is duly concerned with the paramount interests of creditors, it cannot also be denied that the vice-tightening effect of this provision could deter adversary defendants from pursuing rights to which they are entitled under law—both the right to take their case to trial and the right to negotiate for other settlement terms than those enumerated in Trustee’s motion, particularly if there are variations in the facts. Given that the court’s primary concern is the best interests of the

estate—the rights of adversary defendants are conspicuously absent from the list of factors for consideration under Bell & Beckwith—this might, on first blush, appear to be of little concern to the court. Indeed, the court does not consider this a factor to be used in determining whether to approve Trustee’s motion; the motion will be granted. The court here is concerned more with the likely perception—or possible misperception—of this ruling than any weakness of its legal merits. Most of the people affected by the Applegate Ponzi scheme are not sophisticated litigants, many are *pro se* litigants,<sup>3</sup> and to state that most members of the community are not well versed in the mechanics of Rule 9019(b) motions would be a dramatic understatement. The court understands that Trustee wants to incentivize settlement and that there may be reasons to pursue settlements as close to uniform from one similarly situated defendant to the next as possible. However, the court is equally concerned that, misinterpreted, Trustee’s motion—and an order granting—could be misinterpreted, particularly given the effect of the escalator clause—as a door closing on *all* settlement rather than a door closing only on settlement without further need for the involvement of the court. It may or may not be that the Trustee does in fact intend its motion to outline a take-it-or-leave-it offer, but it must be made explicit that the court’s order does not reach so far (either to endorse or prevent such a bargaining position on the part of Trustee). The court is determined to be cautious in order to prevent its order on this motion from becoming something it is not. It is *permission* to settle *without further notice or hearing*. It neither *mandates* any settlement nor *precludes* any settlement, except insofar as other settlements on other terms will still require approval of this court under Rule 9019(a).

Similarly, most of the complaints contain different causes of action, preferences and fraudulent transfers. Nothing in this order restricts anyone from settling one claim but not the other.

An order granting Trustee’s motion, with the court’s reservations, shall therefore be entered concurrently with this opinion.

DEC 12 2007

**/s/ Russ Kendig**

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RUSS KENDIG  
U.S. BANKRUPTCY JUDGE

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<sup>3</sup> Four *pro se* objections were filed to the instant motion, and this was before the adversaries were filed.

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