CHAPTER FOUR

CLAIM SETTLEMENTS

A. It's Settled... Or Maybe Not

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Settlements are the mother's milk of bankruptcy. Not only do settlements play an exceedingly practical role in resolving most disputes in bankruptcy cases, but their importance has been well recognized in case law[2] and enshrined in Bankruptcy Rule 9019(a). No wonder bankruptcy courts defer to a trustee's or debtor in possession's (DIP) reasonable business judgment in compromising a dispute, and the threshold for approval of compromise settlements is whether it exceeds the lowest level of reasonableness[3] (a fairly relaxed standard if there ever was one).

As settlements often play such an integral part in the bundle of compromises necessary for a successful reorganization, it becomes crucial that they are done right. As such, and especially when the settlement itself is either complex or a part of a larger compromise, there are many "moving parts" to consider. The recent case of *In re Teligent Inc. (Savage & Associates PC v. K&L Gates LLP, et al.)*[4] examined two such important components that often arise in the process of crafting settlements: the ability to maintain desired confidentiality and the scope of the binding effect of the settlement on third parties. This case is instructive as to how courts may treat such components so that the architects of settlements—as well as their antagonists—can adjust their expectations accordingly.

1 The opinions expressed are solely his own and do not represent those of either his law firm or its clients.
2 *See, e.g., In re Martin,* 91 F.3d 389, 393 (3d Cir. 1996) ("[t]o minimize litigation and expedite the administration of the bankruptcy estate, '[c]ompromises are favored in bankruptcy.'") (quoting *Collier on Bankruptcy,* ¶ 9019.03[1] (15th ed. 1993)).
3 *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir. 1983) (in determining whether to approve proposed settlement, bankruptcy court should "canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness" (internal quotations omitted)).
4 640 F.3d 53 (2d Cir. 2011).

The dispute in *Teligent* arose out of a settlement in a chapter 11 case. When Teligent Inc. hired Alex Mandl as its CEO in 1996, the company extended Mandl a $15 million loan. The loan was to be due and payable immediately if Mandl resigned his employment without "good reason," but would be automatically forgiven if Teligent terminated Mandl's employment other than for "cause."[5]

Mandl retained the law firm K&L Gates LLP around April 2001 in connection with his potential departure from Teligent. At that time, $12 million was outstanding on the loan. K&L Gates drafted a severance agreement for Mandl that, according to the law firm, "reflect[ed] that Teligent had terminated Mandl other than for Cause effective as of April 27, 2001, thus triggering automatic loan forgiveness."[6]

Less than a month after the parties ratified the severance agreement, Teligent filed for chapter 11. Savage & Associates PC was appointed by the bankruptcy court to be the unsecured claims estate representative. In discharging its duties pursuant to this role, Savage filed an action against Mandl under §§ 548 and 550 of the Bankruptcy Code to recover the balance of the loan. Mandl again retained K&L Gates to represent him in connection with this adversary proceeding.[7]

The bankruptcy court held a one-day trial after which it concluded that Mandl had resigned before Teligent terminated his employment and therefore, Mandl was liable for the balance of the loan. That finding was not appealed.[8]

Shortly after the bankruptcy court issued its decision relating to the loan, Mandl retained Greenberg Traurig LLP as new counsel. Greenberg Traurig then filed a number of motions, including a motion for relief from the judgment based in part on a claim of newly discovered evidence. Around the same time, Savage commenced a new lawsuit in the Eastern District of Virginia against Mandl, Mandl's wife, and ASM Investments LLC, an entity associated with Mandl, alleging that Mandl had fraudulently transferred certain property through ASM to his wife in order to shelter his assets from creditors.[9]

All parties to the action in Virginia participated in a voluntary mediation in attempt to resolve both the motions before the bankruptcy court as well as the Virginia action. Greenberg Traurig invited K&L Gates to participate in the mediation to address Mandl's claim that K&L Gates committed malpractice in the course of rep-

5 *Teligent,* 640 F.3d at 55.
6 *Id.*
7 *Id.* at 56.
8 *Id.*
9 *Id.*

resenting him during his termination from Teligent and in the resulting adversary proceeding. K&L Gates declined to participate.[10]

In setting up a framework for the mediation, the parties agreed to be bound by the terms of the protective orders routinely employed by the U.S. Bankruptcy Court in the Southern District of New York in the context of court ordered mediation. The protective orders imposed limitations, *inter alia*, on the disclosure of information relating to the mediation. However, the protective orders provided no guidance on when, or if, a party might be entitled to release confidential information connected to the mediation.[11]

Although formal mediation did not result in a settlement, the parties thereafter reached an agreement. In exchange for dismissal of the action in Virginia, Mandl agreed to pay the estate $6.005 million and to commence a malpractice suit against K&L Gates. The agreement terms also required Mandl to remit to the estate 50 percent of the net value of any malpractice recovery. The bankruptcy court approved the settlement pursuant to a motion under Federal Rule of Bankruptcy Procedure 9019.[12]

As required by the settlement, Mandl filed a malpractice action against K&L Gates in the Superior Court of the District of Columbia. During discovery, K&L Gates sought documents relating to "the negotiations leading up to the Settlement Agreement, including all mediation and settlement communications[.]" K&L Gates argued that the discovery was "critical to issues such as causation, mitigation, and damages." In response to K&L Gates's request, Mandl produced certain documents.[13]

When Savage learned that Mandl had disclosed confidential mediation communications, Denise Savage, the firm's principal, contacted Mandl, insisting that he withhold all documents relating to the settlement agreement. She also demanded that K&L Gates destroy or return any such documents in its possession. Both parties complied with these requests.[14]

K&L Gates then filed a motion with the bankruptcy court, seeking to lift the confidentiality provisions of the protective orders. The bankruptcy court denied the motion, reasoning that, among other things, K&L Gates had not shown a need for

10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*

all mediation communications, though the law firm had sought discovery of the entire universe of documents. The bankruptcy court also noted that its conclusion was "not intended to foreclose K&L's right to argue before the District of Columbia court that a specific communication is not covered by the confidentiality provisions of the [protective] Orders (*e.g.*, it was not made 'during the mediation process'), or that the court should nevertheless order disclosure of a specific communication under applicable law."[15]

Savage opposed the motion to lift the protective orders before the bankruptcy court and cross moved for injunctive relief prohibiting K&L Gates from asserting any defense in the District of Columbia action relating to the mediation of the action filed in Virginia. Specifically, Savage sought to enjoin K&L Gates from raising as a defense to malpractice that certain provisions in the settlement agreement between Mandl and Savage were invalid. The bankruptcy court denied Savage's motion for injunctive relief, and the district court affirmed.[16]

The Second Circuit Court of Appeals considered the appeal and cross-appeal from the order of the district court affirming the order of the bankruptcy court. With respect to K&L Gates' cross-appeal, the protective orders were silent as to when their confidentiality restrictions may be lifted. Therefore, the Second Circuit ruled that disclosure would have been warranted only if the party seeking disclosure had demonstrated (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery and (3) that the need for the evidence outweighed the interest in maintaining confidentiality.[17] The court found that K&L Gates failed to make the requisite showing and, accordingly, concluded that there was no error in the denial of its motion.[18]

With respect to Savage's lead appeal, because K&L Gates was found to be, at most, a potential debtor of a debtor of the bankruptcy estate, it could not have been considered a "party in interest" with standing to contest the validity of the settlement agreement when the motion to approve that agreement was pending before the bankruptcy court.[19] The Second Circuit ruled that there was no error in the holding that K&L Gates is not barred from asserting a defense challenging the validity of any provision of the settlement agreement in connection with the related malpractice

15 *Id.* at 57.
16 *Id.*
17 *Id.* at 58, 59.
18 *Id.* at 59, 60.
19 *Id.* at 61.

action that was pending against K&L Gates.[20] Accordingly, the Second Circuit affirmed the order of the district court in its entirety. What lessons can be learned from *Teligent* that will help bankruptcy practitioners in crafting the terms of settlements? Here are three.

What is intended to be kept confidential may not always remain confidential. Not surprisingly, settlements are often preceded by negotiations, either privately or through bankruptcy court-ordered mediations. The settling parties generally prefer—and often insist—that the negotiations remain privileged and confidential, as such discussions may have wider implications (as in *Teligent*) than just to the immediate dispute being resolved. Sometimes, even certain terms of the settlement itself are subject to highly negotiated confidentiality restrictions (which becomes rather tricky to effect in the face of judicial headwinds that are hostile to anything that limits the transparency of the bankruptcy process). As such, the element of confidentiality is often baked into many aspects of the entire settlement process.

Against this, and notwithstanding carefully crafted language, settling parties try to preserve some expectation of confidentiality in an imperfect world. In *Teligent*, the confidentiality of the mediation that led up to the settlement was bolstered by two protective orders, which, under the facts of the case, ultimately withstood K&L Gates' attempted assaults because of its failure to adequately demonstrate its need for disclosure according to the three-prong test applied by the Second Circuit.[21]

The good news for proponents of settlement confidentiality is that if the process is designed and implemented skillfully (*e.g.*, by obtaining appropriately broad protective orders and with confidentiality reserved in other documentation, etc.), the presumption of confidentiality will generally be respected by courts that apply a specific, fact-based test in any subsequent challenge to the stated need for confidentiality.[22] The bad news for proponents of settlement confidentiality is that there is in fact a test for undoing it. As such, third parties that seek to collaterally attack settlement confidentiality have a clear road map for doing so. However, in *Teligent*, K&L Gates was unable to satisfy that test and, applying the appropriate standard of review on appeal, the appellate court affirmed the bankruptcy and district courts in denying K&L Gates' motion to lift the protective orders prohibiting disclosure of communications made

20 *Id.*
21 *Id.* at 60.
22 *Id.* at 59.

during the mediation.[23] The lesson for architects of settlements is that if confidentiality is really important, it should be well documented, an appropriate record should be made at the Bankruptcy Rule 9019 settlement approval hearing, notice should be given to third parties that might have an interest in overturning the confidentiality restrictions (which may not always be effective) and the settlement proponents should then hope for the best. Even the best-planned protections of confidentiality may still be somewhat porous, so expectations (for both proponents and objectors) should be tempered accordingly.

Notice alone will not always bind third parties to the terms of a settlement if they are not deemed to be a "party in interest" as defined by § 1109(b) of the Bankruptcy Code.[24] As bankruptcy practitioners, the notion of adequate notice has been drilled into us and placed on a statutory, as well as constitutional, pedestal.[25] No wonder we reflexively assume that adequate notice cures all due-process ills, but not so fast. *Teligent* teaches us that sometimes giving actual notice to third parties (in order to set up a waiver and estoppel defense) may not be as effective as it might seem. Notice only counts when the party to whom it is given enjoys the requisite status of a "party in interest." In *Teligent*, actual notice of the settlement was given to K&L Gates (presumably to support Savage's position that K&L Gates would be bound by the settlement). In affirming the courts below, the Second Circuit ruled otherwise, reasoning (through an analysis of the jurisprudence of § 1109) that because K&L Gates was not a "party in interest," it never had standing to object to the settlement in the first instance.[26] Accordingly, the fact that K&L Gates was given notice of the settlement was indeed meaningless (sort of the same pointlessness that inspired the biblical injunction against casting pearls before swine[27]).

This is not to suggest that careful practitioners should not always try to give actual notice to parties that they would like to have bound by the settlement. Rather, it is only to caution that giving notice is not in and of itself a magic bullet, and indeed its efficacy may be subject to reconsideration in hindsight. The lesson here is that even with bankruptcy court-approved settlements, third parties will not be bound if indeed they cannot be bound. Regrettably, proponents of settlements can never be sure about the status of these outliers until the binding effect of the settlement is tested in some type of future collateral attack. This lingering uncertainty pres-

23 *Id.* at 60.
24 11 U.S.C. § 1109(b).
25 *See generally* 11 U.S.C. § 102(1); Fed. R. Bankr. P. 2002.
26 *Id.* at 60.
27 *See* Matthew 7:6 (KJV).

ents both a danger (for the settlement proponents) and an opportunity (for their antagonists). This leads into the final lesson.

Forward thinking is required. A court enforcing the settlement will usually be looking backwards and the toughest test of a settlement may not be at the Bankruptcy Rule 9019 settlement-approval hearing. What proponents of settlement agreements should be concerned about is a subsequent collateral attack on the enforceability of its terms. Under the circumstances of most cases, it is fairly easy to identify which parties will most likely try to upset or undermine the settlement. Sometimes they come out of left field. Of course, giving actual notice to known antagonists is a prudent first layer of defense. However, that alone may not have the desired preclusive effect if they are not deemed to be a "party in interest." Moreover, even relying on the bankruptcy court to enforce the very terms of the settlement it previously approved is not always a safe bet (as Savage found out in *Teligent* when it unsuccessfully sought to enjoin K&L Gates from raising questions about the validity of certain provisions of its settlement agreement as a defense to malpractice in a related action).

As with all supposedly final judgments and orders, retrospective consideration of the enforceability of a settlement (with the benefit of 20/20 hindsight) is an unavoidable risk.[28] Nevertheless, careful practitioners should be able to anticipate and plan ahead for known unknowns (as opposed to unknown unknowns) by incorporating certain protections into their settlement agreements, the settlement approval orders and the evidentiary records created at the Bankruptcy Rule 9019 settlement-approval hearing. These include, inter alia, favorable findings of fact and conclusions of law, retention of jurisdiction by the bankruptcy court to interpret and enforce the terms of the settlement (why not at least try for the "home court" advantage?), giving notice to potential objectors (as a predicate to a future waiver and estoppel defense), inclusion of settlement bar injunctions in settlement-approval orders and appropriate additional protective orders and timing of consummation of the settlement (to possibly moot appeals or collateral attacks). By necessity, these features are often fact-specific and must be thought through in the specific context of each case. The lesson here is that it really "ain't over 'til it's over."[29]

28 *See, e.g.,* Fed. R. Bankr. P. 9024 (incorporating Fed R. Civ. P. 60 (b)).
29 Lawrence Peter "Yogi" Berra (b. 1925).

B. Bankruptcy Settlements for Sale: Questionable Law, Ethics and Policy

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The Fifth Circuit recently held in *Cadle Co. v. Mims (In re Moore)*[1] that because the proposed settlement of a claim under Bankruptcy Rule 9019 could also be construed as the disposition of an estate asset, when considering the approval of a settlement a bankruptcy court must consider whether to conduct a sale in an auction context under § 363 of the Bankruptcy Code.[2] While the ability of a debtor or trustee to sell claims for the highest and best values under § 363 is clear, once a claim is tested (and litigated) by a debtor or trustee, and a settlement is negotiated and proposed for approval under Rule 9019, it should no longer be considered to possess the character of a pre-petition claim available for sale, but instead a post-petition creature of the Code, to be approved or denied under the reasonableness standards of Rule 9019.[3] To hold otherwise would effectively render Rule 9019 a nullity, seriously undermine the salutary benefits of claims settlements (and mediation and other settlement processes), and otherwise compromise the ethical ability of a debtor or trustee to negotiate in good faith.

Facts

In *Moore*, the Cadle Company held more than 86 percent of the unsecured claims against the estate of James Moore (the debtor). Cadle had a pre-petition suit against Moore alleging that he had used two of its business entities to shield assets from

1 *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010).
2 Under the facts of the case (discussed *infra*), there was an unsolicited offer to purchase the claim for a higher amount than the settlement. While it may be tempting to argue that Cadle should be limited to similar situations, if one accepts the Fifth Circuit's view that the settlement is an asset of the estate, a principled distinction cannot be made that would relieve a debtor of some duty or obligation to test the "market" for the settlement under § 363 in every case.
3 In evaluating any such settlement, the court may consider and weigh any evidence of the value of the settlement in relation to offers to purchase the claims that the debtor may have received.

creditors. The debtor commenced a chapter 7 case as summary judgment motions were pending, thereby staying the litigation before the motions could be decided.

The debtor's chapter 7 trustee inherited the state court claims, which were arguably the most significant assets of the estate. In order to cover legal fees to continue to prosecute the claims, the trustee permitted the case to be financed by the former plaintiff Cadle and engaged Cadle's lawyers. After $60,000 in fees, Cadle decided that it would be better off cutting out the trustee and estate (which it dominated in any event) and made an offer to purchase the claims for $10,000. The trustee rejected the offer, and negotiations to sell the claims continued, but to no avail.

In the meantime, the trustee negotiated and reached a settlement agreement with the debtor, calling for a cash payment of $35,000, and moved for approval of the settlement under Rule 9019. Cadle raised its offer to purchase the claims to $50,000. It also filed an objection to the proposed settlement under Rule 9019, alleging that the settlement was akin to a sale and that the trustee was required to select Cadle's higher offer to maximize the value of the estate.

The bankruptcy court approved the settlement on the basis that it was superior to continued litigation with an uncertain outcome. It did not consider whether in the circumstances a sale to Cadle (or anyone else) might be appropriate under § 363, which the district court affirmed. However, the Fifth Circuit reversed on the basis that Cadle's higher competing offer required the bankruptcy court to at least consider the propriety of an auction and § 363 sale procedures.[4]

The question thus became whether a claim settlement *must* be offered for sale. Even though the Fifth Circuit in *Moore* was careful to limit its holding to a reversal on the basis of the bankruptcy court's *failure to consider* the 363 sale option, and not on the basis of the actual *failure to conduct* such a sale, the decision strongly suggested that a settlement is an asset to be treated like any other pre-petition property of the estate, such that the rejection of a bid higher than the proposed settlement amount may be questionable and erroneous. If, as *Moore* instructs, a sale of claims in the settlement context must be considered when a higher offer

4 In a recent opinion rendered after *Moore,* the Fifth Circuit held that the sale consideration requirements set forth in *Moore* would not extend to a liquidating trustee appointed under a confirmed plan to administer a liquidation trust in accordance with a trust agreement governed by state law. The court held that because the liquidating trustee's obligations were defined in a trust agreement governed by state law, the trustee's decision to assign a cause of action owned by the trust was governed by the business-judgment rule. The court held that the trustee comfortably satisfied that standard, notwithstanding the existence of a competing bid for the cause of action submitted for the first time in a motion for reconsideration, and after the bankruptcy court's entry of an order that formally approved the assignment. *EFO Energy Inc., et al., v. Dan Lain, et al.,* No. 10-10400 (5th Cir. Feb. 3, 2011).

has been made, it necessarily follows that a debtor or trustee should actively solicit offers and conduct public or private sale processes in any settlement. If this is what the Fifth Circuit meant in *Moore* (and the decision can be so construed), then it is highly questionable as a matter of law, ethics and policy. The bankruptcy court could fairly have been criticized for not considering the existence of the higher unsolicited offer in evaluating the reasonableness of the settlement under Rule 9019, but the authors do not believe that the bankruptcy court should have considered the propriety of a sale process or that the trustee was under any obligation to conduct one (or to accept the unsolicited offer).

Legal Issues

If claims settlements were intended to be treated as asset dispositions under § 363, Rule 9019 would be completely superfluous. Instead of moving for settlement approval, a debtor or trustee could simply move for the sale of the settlement, and the settlement would then be deemed approved if there were no higher bids than the settlement amount. It would be easy enough to let the market decide whether the settlement is reasonable.

Of course, we cannot read Rule 9019 out of the rulebook. The question of whether a settlement amount is sufficient consideration is already a well-established part of the Rule 9019 process. The bankruptcy court in *Moore* was free to consider whether the trustee's proposed settlement at $35,000 was reasonable in light of Cadle's offer to pay $50,000 for the claims. If the settlement were rejected as unreasonable on that basis, the trustee could then have tried to negotiate a higher settlement amount, or continued the litigation.

Other courts, including those within the Third, Sixth, Seventh and Ninth Circuits, have expressed views similar to those set forth in *Moore*.[5] Some have openly advocated for testing the value of claims via an auction, as in *Moore*.[6] However, other opinions are closer to the views advocated here: They acknowledge that since a settlement is a transaction outside the ordinary course of business, they may only be approved after complete disclosure and review by the bankruptcy court and other

5 *See Myers v. Martin (In re Martin),* 91 F.3d 389, 394-95 (3d Cir. 1996) ("The instant agreement compromised an asset of the debtors' estate...thereby implicating Section 363."); *In re Nicole Energy Servs.,* 385 B.R. 201, 228-29 (Bankr. S.D. Ohio 2008); *In re Telesphere Commc'ns,* 179 B.R. 544, 552 (Bankr. N.D. Ill. 1994); *Goodwin v. Mickey Thompson Entertainment Group Inc. (In re Mickey Thompson Entertainment Group Inc.),* 292 B.R. 415, 421-22 (9th Cir. B.A.P. 2003).

6 *See In re Mickey Thompson Entertainment Group Inc.,* 292 B.R. at 421-22 ("When confronted with a motion to approve a settlement under Rule 9019(a), a bankruptcy court is obligated to consider, as part of the 'fair and equitable' analysis, whether any property of the estate that would be disposed of in connection with a settlement might draw a higher price through a competitive process and be the proper subject of a section 363 sale.").

7 *See In re Martin,* 91 F.3d at 395 ("The import of Section 363 is that a trustee is prohibited from acting unilaterally; this schema is intended to protect both debtors and creditors...by subjecting a trustee's actions to complete disclosure and review by the creditors of the estate and by the bankruptcy court.").

interested parties.[7] This is consistent with the overarching goal of evaluating and approving settlements under Bankruptcy Rule 9019—to ensure that a proposed settlement transaction is "fair and equitable."

Disclosure and judicial review do not lead inexorably to the conclusion that a settlement is the functional equivalent of an estate cause of action that can or should be sold. The First Circuit Court of Appeals flatly rejected the argument that a settlement is a marketable asset, holding that such an argument was "fraught with problems."[8] In *Hicks, Muse*, the First Circuit held that a settlement could not be a sale of estate assets because the plain meaning of the terms "settlement" and "sale" were fundamentally inconsistent with each other.[9]

Policy Issues

As a policy matter, "compromises are favored by the law" and "are also a normal party of the reorganization process."[10] However, by permitting or even encouraging third parties to submit competing bids, the delicate settlement balance struck between the trustee and defendant would be undermined. The "auction" approach advocated in *Moore* will likely have the effect of chilling settlement negotiations and preventing potentially beneficial settlement agreements. Indeed, what incentive would a defendant have to negotiate a settlement (or participate in mediation) if the result of an agreement is the creation of nothing more than the opening bid in a further auction process?

Concomitantly, undermining the settlement process with the threat of an auction will likely increase the duration and intensity of the litigation to the detriment of the parties and the courts. This will be true whether the defendant chooses to negotiate a settlement or not (unless there is no higher bid at auction) because the purchaser of any "settlement" is likely to continue the litigation in order to earn an appropriate "return" on its investment in the claim. We can imagine a new species of distressed asset funds trying to purchase settlements in order to litigate to a higher figure or leverage the purchase into a higher settlement amount paid to the fund and rather than the estate.

Ethical Issues

Lastly, how can a debtor or trustee fulfill the ethical responsibility of negotiating in good faith, in furtherance of the many salutary benefits of settlements and compro-

8 *Hicks, Muse & Co. v. Brandt (In re Healthco Int'l),* 136 F.3d 45 (1st Cir. 1998).
9 *Id.* at 49.
10 *In re Dow Corning Corp.,* 198 B.R. 214, 221 (Bankr. E.D. Mich. 1996).

mises, if the intention is not to advocate that the settlement be approved, but that the settlement be offered for further sale? A settlement is the product of reciprocal risk analyses, legal analyses and factual determinations.

It is true that debtors negotiate § 363 sales of assets to lead bidders, and no ethical principles are compromised when both sides understand that the bid will yet be subject to a market test, but an asset sale under § 363, and the negotiations with a proposed purchaser of such assets, is an extremely poor analogy to the negotiating process in a settlement. In a § 363 process, the purchaser ordinarily gets substantial benefits and protections for having its bid subject to auction, including break-up or topping fees and expense reimbursement. From an ethical standpoint, both sides are aware of the process and the purchaser protections, which seem to be fair tradeoffs for any concern that the debtor is not going to advocate the resulting deal except as a fair "floor" for an auction.

In a settlement of claims, there is zero possibility of any benefit for the defendant (in the purchaser's position). There is only the downside of potential disapproval (already in existence) or, if there is to be an auction, of having "shown its hand" in a willingness to compromise, and being subjected by a claims purchaser to further litigation, fees and higher settlement demands. It would be bizarre (and not likely to be approved) for a topping fee or expense reimbursement to be awarded to a defendant in a settlement being placed for auction.

Conclusion

Therefore, from the perspective of law, policy and ethics, a settlement should be considered a post-petition creation to be treated solely as approved or not approved under Rule 9019, and not a pre-petition asset subject to sale under § 363. Parties are free to put on evidence in a Rule 9019 motion that the settlement should be disapproved as not sufficiently high, which presumably could include evidence that someone is willing to pay more for the underlying claim, were that claim offered for sale. If the law tilts in the other direction, as Moore seems to have held, there will be damaging effects on settlement processes, including mediation and other alternative dispute resolution, negative impacts on the ethical duties to negotiate in good faith, higher fees and expenses in litigation, and greater intrusions on judicial time and resources.