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From : "T Kost"

To : "Paul Dulberg" , "Alphonse Talarico"

Subject : One approach to answering Baudin's Argument 1

What follows is one approach to answering Baudin's Argument 1 on page 8.

Baudin states on page 5: "On October 31, 2016, the Bankruptcy Court heard the BK Trustee's motions and entered an order authorizing the Bankruptcy Trustee to retain the Baudin Defendants to represent Plaintiff's bankruptcy estate in pursuing the Personal Injury Claim and for giving the bankruptcy trustee the power to execute any documents necessary to enter into a binding mediation agreement relative to the Personal Injury Claim.b

11 U.S.C. § 327(a) states that: (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

The employment of professionals must be approved by the court. Court approval must be sought prior to the rendering of any services.

Olsen filed notice of motion to enter into ADR on October 4, 2016 (bk document 34-0).

The legal theory that Olsen gave to the BK judge on October 31, 2016 when asking to go into ADR appears most likely to be based on Baudin's recommendations which Dulberg refused to consent to.

How is it possible that Olsen chooses ADR as Baudins recommended it at least since filing the notice of motion to enter into ADR on October 4, 2016, and gave the same argument to the Judge on October 31, 2016 that Baudin gave to Dulberg in July, 2016? The Baudins did not have the court's leave to "render any service" until October 31, 2016.

Olsen's legal theory is in this transcript:

09 And then, presumably, if the Court
10 grants that, the second one is to authorize the
11 estate to enter into -- I'm not sure what you call
12 it, but binding mediation. But there's a floor of
13 \$50,000, and there's a ceiling of \$300,000.
14 And I guess I've talked with his
15 attorney. He seems very enthusiastic about it.
16 There may be some issues about the debtor being a
17 good witness or not, I guess.
18 It had to do with a neighbor who asked

19 him to help him out with a chainsaw, and then I guess
20 the neighbor kind of cut off his arm, or almost cut
21 off his arm right after that. There's some
22 bitterness involved, understandably, I guess.
But I don't do personal injury ~ Work at
24 all, so I'm not sure how that all flows through to a
25 jury, but he didn't seem to want to go through a jury

1 process.
2 He liked this process, so ...

How did Olsen get the idea that Dulberg has some issue about being a good witness? Who told him that?

from where did the idea of placing a \$300,000 limit come? Olsen is in agreement with it following whose advice? How did Olsen come to be in agreement with the \$300,000 limit on October 4, 2016 or before if Baudin's couldn't act as special counsel for the estate until October 31, 2016?

MR. OLSEN: Well, I guess the
13 mediators don't know there's a floor and a ceiling.
14 I'm not sure where that comes from, but that's --
15 yeah.
16 And whatever number they come back at
17 is the number we're able to settle at, except if it's
18 a not guilty or a zero recovery, we get 50,000, but
19 to come back at 3 million, we're capped at 300,000.

MR. OLSEN: I don't want to
2 micromanage his case.

3

4

5

THE COURT: But that, too, sounds reasonable.
There's been no objection?

MR. OLSEN: Correct.

5

6 THE COURT: Very well. I will approve
7 -- authorize, if you will, for you to enter into the
8 binding mediation agreement, see where it takes you.

How did Olsen already (apparently before October 4, 2016) come to agree that this is the best course to fulfill his obligations as trustee? On whose advice if the Baudins was first granted the capacity to act as special counsel on October 31, 2016? Olsen must have received the ideas

about ADR and made a final decision to enter into ADR at least 25 days before Baudins were legally allowed to act as counsel for the estate.

What was the source of these recommendations if not the Baudin's? Olsen claims it is what the Baudin's and Dulberg wanted.

In what capacity did the Baudin's give Olsen this information and Olsen act on it if they were not yet retained and therefore could not render any service until after the ADR order was already approved by the judge?

Baudin states on page 5: "In its order, the Bankruptcy Court authorized the bankruptcy trustee to adopt the contingency contract previously entered into between Plaintiff and the Baudin Defendants. (Id.) The Bankruptcy Court also authorized the trustee to "execute such documents as are necessary to accomplish the matters set forth herein." (Id.) As for the latter set of relief, the bankruptcy court stated: "I will approve – authorize, if you will, for you [the BK Trustee] to enter into the binding mediation agreement, see where it takes you." (Transcript of BK hearing, pp. 2, 5, attached as Group Ex. 6A to Ex. A.)"

The Judge authorized binding mediation based on what the Trustee told the judge. The trustee informed the judge that "dulberg agreed..." and assured the judge "there are no objections". Dulberg never agreed. Either the Baudins lied to Olsen by informing him that Dulberg agreed or Olsen lied to the judge on his own without first being informed that Dulberg agreed by the Baudins. This is a question of fact.

The Baudin's even admit that Dulberg refused to consent to ADR, so they either lied to Olsen before they were legally able to perform any service about Dulberg consenting or Olsen invented this lie without any input from Baudins.

If Olsen lied about Dulberg's consent without any input from the Baudin's, then how is it possible that Olsen is recommending the same ADR process that the Baudin's have been recommending to Dulberg since at least July, 2016?

The Baudins admit that Dulberg never consented to ADR so somebody clearly lied about Dulberg's consent. The misrepresentation to the judge prior to his issuing an order is fact. The question is, who lied?

Baudin states on page 5: "The agreement also appears to bear Plaintiff's own signature."

Dulberg never consented and refused to sign the proposed contract. So how his signature appeared on any ADR agreement is a question of fact.

Baudin states on page 8: "But Plaintiff had no ability to recover anything from his Personal Injury Claim because he did not own it – the Bankruptcy Estate did."

Dulberg was also a beneficiary to the bankruptcy estate as his debts were paid in full and he recovers all property of the bankruptcy estate.

According to the U.S. Bankruptcy Code, Section 726 – Distribution of property of the estate
(quote)

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of—

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(end quote)

Dulberg, as the debtor, was a stakeholder in the bankruptcy estate. If the first 5 types of claimants listed in section 726 are paid in full, Dulberg becomes the sole claimant to any remaining money and therefore the sole stakeholder in what remains of the bankruptcy estate.

Randall Baudin II and Kelly Baudin and The Baudin Law Group were retained by the trustee to represent the bankruptcy estate and Dulberg was the sole stakeholder of all funds in the estate once the first 5 types of claimants listed in section 726 have been paid in full. Therefore Randall Baudin II, Kelly Baudin and The Baudin Law Group acting as legal counsel for the estate owed a duty of due care to Dulberg when acting in this capacity.

In "Handbook for Chapter 7 Trustees" published by the U.S. Government page 31 states: "The principal duty of the trustee is to collect and liquidate the property of the estate and to distribute the proceeds to creditors. A chapter 7 case must be administered to maximize and expedite dividends to creditors." Dulberg was a beneficiary of the estate.

In "Handbook for Chapter 7 Trustees" published by the U.S. Government page 31 states: "The principal duty of the trustee is to collect and liquidate the property of the estate and to distribute the proceeds to creditors. A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case. The trustee must be guided by this fundamental principle when acting as trustee."

In "Handbook for Chapter 7 Trustees" published by the U.S. Government page 31 states:

"B. STATUTORY AND GENERAL DUTIES

The specific statutory duties of a trustee are set forth in section 704(a). The trustee shall:

1. Collect and reduce to money the property of the estate and close the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. § 704(a)(1).
2. Be accountable for all property received. 11 U.S.C. § 704(a)(2)."

In "Handbook for Chapter 7 Trustees" published by the U.S. Government page 31 states: "The chapter 7 trustee is the representative of the estate. 11 U.S.C. § 323(a). The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries – namely, all classes of creditors, including those holding secured, administrative, priority, and non-priority unsecured claims, as well as the debtor's interest in exemptions and in any possible surplus property. The duties enumerated under section 704 are specific, but not exhaustive.

Baudin states on page 8: "Once Plaintiff filed for bankruptcy protection, he lost standing to pursue any personal injury claims because, upon filing for bankruptcy, any such claims became part of the bankruptcy estate."

Once again, Dulberg was the only beneficiary of the estate once the creditors were paid and the creditors were paid in full.

Baudin states on page 8: "The bankruptcy trustee had the sole power to pursue and control the claim, which he exercised"

But not any way they please. "A chapter 7 case must be administered to maximize and expedite dividends to creditors." Dulberg was the beneficiary with the single largest interest in the estate.

Baudin states on page 9: "Upon commencement of the case, a debtor's interests in property vest in the bankruptcy estate, and the debtor surrenders the right to control estate property because property of the estate falls under the exclusive jurisdiction of the bankruptcy court. See 28 U.S.C. § 1334(e). Because property of the estate is in custodia legis by virtue of the bankruptcy filing, it is administered exclusively by a specifically designated fiduciary, a trustee. See, e.g., 11 U.S.C. §§ 323(a), 363, and 704."

"The principal duty of the trustee is to collect and liquidate the property of the estate and to distribute the proceeds to creditors. A chapter 7 case must be administered to maximize and expedite dividends to creditors." Dulberg was a beneficiary of the estate.

Baudin states on page 10: "Although Plaintiff need not have identified the Personal Injury Claim as among his personal property for the claim to have become part of the bankruptcy estate, he did in fact identify the claim on an Amended Schedule B. (See Ex. C.) "

There was no choice. Dulberg must identify the claim on schedule B.

Baudin states on page 10: "The Estate and Bankruptcy trustee never relinquished that ownership or power, but instead assumed control over the Personal Injury Lawsuit, including the decision whether to mediate and on what terms."

As the transcript record shows, the decision the trustee took appears to be what the Boudins (or some unknown party) told them some time before October 4, 2016 even though the Baudins were not authorized to act as special counsel until October 31, 2016. From all available information Oslen appears to be following Baudin's advice and was in possession of the ADR document on or before October 4, 2016 when he filed the notice to enter into ADR.

The trustee either intentionally misinformed the judge or was intentionally misinformed from the Baudins that Dulberg consented to the ADR. The Trustee did not sign the ADR agreement.

Dulberg's signature appears on the document but Dulberg denies ever signing the document.

4 cases are cited on page 9. They are:

Wright, 79 Ill.App.3d at 990; Board of Managers of 1120 Club Condominium Association v. 1120 Club, LLC, 2016 IL App (1st) 143849

Biesek v. Soo Line R.R. Co., 440 F.3d 410, 413 (7th Cir. 2006).

Cannon–Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006) (if estate, through trustee, abandons a cause of action, then creditors no longer have an interest, and claim reverts to debtor's hands

n re Enyedi, 371 B.R. 327, 333 (N.D. Ill. 2007

I haven't looked at them in detail yet. It is probably possible to show that the cases are not related to the Dulberg case.