

11 USC § 327(c)  
Fed R Bankr P 9006(b)  
Fed R Civ P 26(b)(1)  
Settlement

Marandas v. Bishop, Tsoumas v. Sassalos, Adv. No 92-3095, Civ. No. 93-1024-FR In re Sassalos, Case No. 391-34382-S07

10/28/93 J.Frye Aff'g PSH published at 160 BR 646

The bankruptcy court approved a settlement between the trustee and a creditor that may have received fraudulent conveyances over the objection of another creditor. The objecting creditor appealed and the district court affirmed all the decisions made by the bankruptcy judge.

The bankruptcy judge did not abuse her discretion by denying the objecting creditor's motion to pursue discovery which the judge determined to be irrelevant.

The bankruptcy judge correctly denied the creditor's unopposed motion for summary judgment on an action which had not been commenced.

Appointment of one creditor's attorney as special counsel for the trustee did not violate § 327(c) because the interest of the trustee and the interest of the creditors were identical when the attorney was appointed. A potential conflict did not arise until another creditor objected to the settlement. The bankruptcy court did not err in failing to remove special counsel before the initial hearing on the motion to approve the settlement.

The excusable neglect standard enunciated in Pioneer Inv. Servs. Co. v. Brunswick Assocs., 113 S.Ct. 1489 (1993) does not

apply to the deadline to object to discharge or dischargeability of a debt in a chapter 7 case.

The bankruptcy court considered the appropriate factors in approving the settlement between the trustee and defendants.

P93-18(21)

FILED

U.S. BANKRUPTCY COURT

DISTRICT OF OREGON

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U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

OCT 28 1993

TERENCE H. DUNN, CLERK

BY \_\_\_\_\_ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re

KOSTA SASSALOS,

Debtor.

JOHN S. MARANDAS, P.C.,

Objecting Putative Creditor  
and Appellant,

v.

ALEXANDER T. BISHOP, ESQ.,  
TRUSTEE, KOSTA SASSALOS,  
STAN TSOUMAS, ARMA TSOUMAS,  
SPIRO SASSALOS and EUGENIA  
TERZIS-SASSALOS,

Contracting Parties.

STAN TSOUMAS and ARMA TSOUMAS,

Plaintiffs,

v.

KOSTA SASSALOS,

Certified to  
25 of original filed in six offices.

Date 10-29-93 Defendant.

*[Handwritten signature]*

CV 93-1024JO

Case No. 391-34382-S07  
Chapter 7

Contested Matter  
(In re Approval of  
Settlement Agreement)

Civil No. 93-1024-FR

O P I N I O N

Adversary Proceeding  
No. 92-3095

1 John S. Marandas  
2 John S. Marandas, P.C.  
3 1600 S. W. Fourth Avenue, Suite 667  
4 Portland, Oregon 97201

5 Attorney for Appellant

6 Daniel F. Vidas  
7 Dunn, Carney, Allen, Higgins & Tongue  
8 851 S. W. Sixth Avenue, Suite 1500  
9 Portland, Oregon 97204-1357

10 Attorneys for Appellee  
11 Alexander T. Bishop, Trustee

12 FRYE, Judge:

13 The matter before the court is the appeal of John S.  
14 Marandas, P.C., objecting putative creditor, from a decision  
15 of the United States Bankruptcy Court for the District of  
16 Oregon.

#### 17 BACKGROUND

18 Debtor, Kostas Sassalos, filed a voluntary petition in  
19 bankruptcy under Chapter 7, Case No. 391-34382-S07, on July 3,  
20 1991. In the bankruptcy schedules and the petition that he  
21 filed, Sassalos listed only the following creditors: a travel  
22 agency to which he owed approximately \$840, and Stan and Arma  
23 Tsoumas who had a judgment against him in the sum of \$350,000  
24 plus interest in the Circuit Court of the State of Oregon for  
25 the County of Multnomah. The judgment that the Tsoumases had  
26 obtained against Sassalos arose from the default of Sassalos  
as the purchaser of a restaurant known as The Gourmet Broiler.  
Prior to filing his petition in bankruptcy, Sassalos returned  
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1 The Gourmet Broiler to the Tsoumases, the contract creditors,  
2 who continued to operate it.

3 On June 4, 1992, the bankruptcy court granted relief to  
4 the Tsoumases from the automatic protective stay of the bank-  
5 ruptcy court so that the Tsoumases could execute their judg-  
6 ment against Sassalos, and so that the restaurant could be  
7 sold at a Sheriff's Sale pursuant to the judgment entered by  
8 the Circuit Court of the State of Oregon for the County of  
9 Multnomah.

10 On March 12, 1992, Stan and Arma Tsoumas, as plaintiffs,  
11 filed Adversary Proceeding No. 92-3095, seeking to prevent  
12 Sassalos from obtaining a discharge in bankruptcy pursuant  
13 to Section 727 of the Bankruptcy Code. They alleged that  
14 Sassalos concealed certain property and assets, fraudulently  
15 transferred property and assets to his children, filed false  
16 schedules, made false statements in his statement of affairs,  
17 and failed to keep adequate financial records.

18 The discovery efforts of the Tsoumases in Adversary Pro-  
19 ceeding No. 92-3095 were difficult and lengthy. The Tsoumases  
20 discovered evidence suggesting concealed and/or transferred  
21 assets; however, it appeared to them that these assets were  
22 either located in the country of Greece, the homeland of  
23 Sassalos, or had been transferred to his children, except for  
24 one asset which had been transferred to John S. Marandas, the  
25 objecting creditor and the appellant herein, after Sassalos

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1 had filed his petition in bankruptcy.<sup>1</sup> Even with a favorable  
2 verdict against Sassalos, the Tsoumases would have faced dif-  
3 ficulties in executing a judgment against foreign property  
4 and in pursuing actions for fraudulent conveyance against the  
5 children of Sassalos.

6 On or about July 17, 1992, the parties engaged in a set-  
7 tlement conference before the Honorable Elizabeth L. Perris,  
8 United States Bankruptcy Judge. The trustee in bankruptcy,  
9 Alexander T. Bishop, participated in the settlement confer-  
10 ence, as did the children of Sassalos. For purposes of the  
11 settlement conference, the children and the wife of Sassalos  
12 were treated as a single party.

13 The parties reached a settlement, which was reduced to  
14 writing. The settlement provided, in part, for the dismis-  
15 sal by the Tsoumases of the adversary proceeding and for  
16 the release of all of their claims against Sassalos and his  
17 family. In return, Sassalos and his family agreed to pay  
18 \$12,000 to the trustee in bankruptcy for the benefit of the  
19 bankruptcy estate, and agreed that the trustee would waive  
20 any claim he had against the Tsoumases under Section 542 of  
21 the Bankruptcy Code for rents and profits generated by the  
22 operation of the restaurant after the filing of the petition  
23 in bankruptcy.

24 Finally, Sassalos and his family agreed to cooperate  
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26 <sup>1</sup> John Marandas had represented Sassalos with respect to  
legal and business matters unrelated to this bankruptcy.

1 with the trustee and his special counsel in their efforts  
2 to recover on claims against John Marandas for post-petition  
3 payments, including testifying and providing documentary evi-  
4 dence. The parties agreed that the trustee would hire as  
5 special counsel Tilman Hasche, the attorney for the Tsoumases,  
6 for the purpose of pursuing a claim against the creditor, John  
7 Marandas.

8 John Marandas objected to the settlement on the grounds  
9 that 1) there had been no accounting by the Tsoumases for any  
10 of the profits from the operation of the restaurant; 2) the  
11 judgment in favor of the Tsoumases was based on false state-  
12 ments and/or non-disclosures; and 3) Marandas had no liabi-  
13 lity for claims based on post-petition transfers and would be  
14 entitled to sanctions against the trustee and the bankruptcy  
15 estate if a "formal claim" was filed. Marandas also filed  
16 a "motion for summary judgment" and documents in support of  
17 his objections to the settlement agreement. Marandas sought  
18 a ruling of the bankruptcy court that he had no liability;  
19 objected to the employment of Tilman Hasche as special counsel  
20 to the trustee on the grounds of conflict of interest because  
21 Hasche had represented the Tsoumases; and sought an extension  
22 of time to commence his own adversary proceeding against  
23 Sassalos.

24 A hearing on the motion for approval of settlement and  
25 on the objections of Marandas to the settlement was set for  
26 January 13, 1993 before the Honorable Polly S. Higdon, United

1 States Bankruptcy Judge. Prior to January 13, 1993, disco-  
2 very had "gotten out of hand" (Transcript of February 26,  
3 1993, p. 92); a number of pleadings were filed; and Marandas  
4 and Hasche filed claims and cross-claims for sanctions and  
5 also filed ethical complaints against each other with the  
6 Oregon State Bar Association.

7 On January 13, 1993, Marandas and the trustee appeared  
8 personally without legal counsel; Hasche appeared on behalf  
9 of the Tsoumases; and Paul Cosgrove appeared on behalf of  
10 the children of Sassalos. As a result of that hearing, Judge  
11 Higdon revoked the order appointing Hasche as special counsel  
12 for the trustee and instructed the trustee to hire independent  
13 counsel to represent him regarding the settlement agreement.  
14 The hearing was adjourned to February 26, 1993.

15 On January 15, 1993, Judge Higdon denied the motions of  
16 Marandas and Hasche to compel production and limited discovery  
17 to the issue of whether the trustee had sufficient information  
18 before him at the time of the settlement conference to have  
19 included the paragraph concerning the potential claim against  
20 Marandas to recover an alleged post-petition transfer. Judge  
21 Higdon denied the motion of Marandas for an extension of time  
22 within which to file his own adversary proceeding and denied  
23 the motion of Marandas for a ruling on summary judgment that  
24 he had no liability for alleged post-petition transfers  
25 received from Sassalos.

26 At the hearing on February 26, 1993, Marandas appeared



1 personally and without legal counsel; the trustee appeared  
2 personally and by and through his attorney, Daniel Vidas; and  
3 the Tsoumases appeared by and through their attorneys, Tilman  
4 Hasche and Richard Parker. The children of Sassalos did not  
5 appear.

6 The attorney for the trustee advised the court that the  
7 settlement was reasonable based on the facts and the documents  
8 in evidence as of July 17, 1992. Judge Higdon approved the  
9 settlement. In addition, although she declined to find that  
10 Hasche had a conflict of interest, Judge Higdon instructed the  
11 trustee to continue to be represented by independent counsel  
12 in regard to the pursuit of any claims against Marandas.

#### 13 CONTENTIONS OF THE PARTIES

14 Marandas contends that the court erred as to the fol-  
15 lowing matters: 1) in closing discovery at the hearing on  
16 January 13, 1993 and in denying the motions of Marandas to  
17 continue discovery; 2) in denying Marandas' motion for summary  
18 judgment; 3) in not removing Tilman Hasche as special counsel  
19 for the bankruptcy estate prior to the hearing on February 26,  
20 1993; 4) in denying the motion of Marandas to extend the time  
21 for filing an adversary proceeding; and 5) in approving the  
22 settlement agreement.

23 The trustee argues that the court did not err as to any  
24 of these matters, and that Marandas' claims should be dis-  
25 missed under the doctrine of equitable mootness.

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## STANDARD OF REVIEW

This court acts as an appellate court over decisions of the bankruptcy court reviewing findings of fact under the clearly erroneous standard and reviewing conclusions of law de novo. In re Holm, 931 F.2d 620, 622 (9th Cir. 1991); In re Daniels-Head & Assocs., 819 F.2d 914, 918 (9th Cir. 1987).

## ANALYSIS

### 1. The Doctrine of Equitable Mootness

On July 22, 1993, this court denied as moot the motion of Marandas to dismiss without prejudice. Minute Entry dated July 22, 1993. In denying the motion without prejudice, it was the intent of the court that Marandas was not precluded from claiming that any individual assignment of error is moot. The trustee argues that Marandas' appeal to this court should be dismissed because Marandas has failed to request or otherwise seek a stay pending appeal. The trustee does not specify which individual claims of error were rendered moot by the doctrine of equitable mootness. Because the trustee renews the same argument made in the motion to dismiss, without claiming that any individual assignments of error are moot, the arguments of the trustee amount to a request that the court reconsider the denial of its motion to dismiss. No motion for reconsideration has been filed; therefore, the court will not address an issue previously ruled upon.

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1           2.     Judge Higdon's Discovery Rulings

2           The purpose of the hearings held on January 13, 1993  
3     and on February 26, 1993 was for the court to consider the  
4     adequacy of the settlement agreement and to consider the  
5     objections of Marandas to the settlement agreement. Judge  
6     Higdon indicated that she had thoroughly reviewed the file,  
7     including the motions and accompanying evidence submitted  
8     by the parties. Transcript of January 13, 1993, pp. 2-3.  
9     Judge Higdon also listened to extensive argument regarding  
10    the various motions filed by Marandas. Id. at 27-49. In  
11    an order dated January 15, 1993, Judge Higdon ruled that:

12                 (2) All motions to compel production are  
13                 denied.

14                 . . . . .

15                 (8) The trustee, Mr. Hasche on behalf of  
16                 his client, Mr. Tsoumas, and Mr. Marandas shall  
17                 immediately cease all further discovery related  
                in any way to all matters until further order of  
                the court.

18     Order, January 15, 1993, Bankruptcy Case No. 391-34382-S7,  
19     pp. 1-2.

20           In addition, Judge Higdon vacated the status of Hasche as  
21    special counsel and required the trustee to obtain independent  
22    counsel. Judge Higdon instructed the attorney for the trustee  
23    to proceed:

24                 in any way he chooses to gather the information  
25                 that he knows this court will want to hear in sup-  
26                 port of that settlement agreement. He may choose  
                to do nothing . . . . He may think that with the  
                testimony of the trustee, the testimony of the other  
                parties that were present at the time of the settle-  
                ment agreement and laying out to the court what all

1 of the problems and ramifications were that the  
2 trustee was looking [for] at the time but it was an  
3 appropriate settlement agreement and he didn't need  
to go any further.

4 Transcript of January 13, 1993, pp. 56-57. Judge Higdon  
5 narrowed the issue for the hearing on February 26, 1993 to  
6 whether the settlement agreement should be approved, includ-  
7 ing paragraph 12, which provided that the parties assist the  
8 trustee in pursuing an action against Marandas. The court  
9 indicated that the testimony regarding the alleged post-  
10 petition transfer to Marandas, which had been submitted to  
11 the court, was sufficient for the court to determine whether  
12 the settlement should contain paragraph 12 of the settlement  
13 agreement. Transcript of January 13, 1993, p. 57. Judge  
14 Higdon stated:

15 I don't want to go into the merits of the action  
16 against Mr. Marandas, uh, at the time of the settle-  
17 ment agreement hearing. All I want to know is if  
there was a legitimate reason . . . to assume that  
there was a good cause of action out there and put  
that in as part of the settlement agreement.

18 Id.

19 Following the court's indication on February 26, 1993  
20 that it would approve the settlement agreement, Marandas moved  
21 the court for a continuance and for the opportunity to conduct  
22 further investigation and thereafter to submit further evi-  
23 dence to the court. This motion was denied. Judge Higdon  
24 stated: "I'm going to rule against you . . . I do not believe  
25 that any of that is relevant." Transcript of February 26,  
26 1993, p. 93.

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1           It is within the discretion of a judge to limit disco-  
2           very as appropriate under Fed. R. Civ. P. 26(b)(1). Judge  
3           Higdon reviewed the evidence which had been provided by  
4           Marandas in support of his motions and had listened to exten-  
5           sive oral argument. Judge Higdon considered the issues raised  
6           by Marandas, acted on one of these issues by appointing inde-  
7           pendent counsel, and determined that the other objections of  
8           Marandas had limited relevance as to the question of whether  
9           the terms of the settlement agreement should be approved. It  
10          was not an abuse of discretion for Judge Higdon to deny the  
11          motions to compel and to order Marandas to cease any further  
12          discovery efforts. Likewise, it was not an abuse of discre-  
13          tion for Judge Higdon to deny Marandas' motion for a contin-  
14          uance in order to pursue further discovery which Judge Higdon  
15          determined was irrelevant.

16        3.     The Motion of Marandas for Summary Judgment

17           Prior to the hearing on January 13, 1993 of the motion  
18           for approval of the settlement and Marandas' objections to  
19           the settlement, the trustee's special counsel, Tilman Hasche,  
20           had made a written demand on Marandas for the alleged post-  
21           petition payments he had received. In the contested matter  
22           regarding the approval of the settlement, Marandas had filed  
23           a "motion for summary judgment" seeking a ruling that he had  
24           no liability for the alleged transfers of the post-petition  
25           payments he had received. Marandas argues that the bankruptcy  
26           court was clearly erroneous in denying his "motion for summary

1 judgment" because there were no objections or countervailing  
2 affidavits presented in opposition to the motion.

3 At the hearing on January 13, 1993, Judge Higdon stated:  
4 "[W]hat you are in essence asking me to do with this motion  
5 for summary judgment is to decide the merits of a potential  
6 controversy between yourself and the trustee that hadn't even  
7 been filed yet and I'm not gonna [sic] do that. . . . This  
8 has nothing to do with the settlement agreement." Transcript  
9 of January 13, 1993, pp. 59-60.

10 Fed. R. Civ. P. 56 envisions summary proceedings fol-  
11 lowing the commencement of an action. At the hearing on  
12 January 13, 1993, there had been no "commencement of an  
13 action" against Marandas; therefore, Judge Higdon correctly  
14 denied his motion for summary judgment.

15 4. Removal of Special Counsel Tilman Hasche

16 Pursuant to the order of the court dated September 21,  
17 1992, Tilman Hasche was appointed as special counsel for the  
18 trustee in bankruptcy for the purpose of bringing an avoidance  
19 and recovery action against Marandas. To the extent that  
20 Marandas asserts that Hasche's authority as special counsel  
21 emanates from the settlement agreement, Marandas is mistaken.  
22 Hasche was appointed special counsel by a bankruptcy judge,  
23 and his authority as special counsel arose from that appoint-  
24 ment under 11 U.S.C. § 327. 11 U.S.C. § 327 does not impose  
25 upon Hasche a duty to disclose any other proposed agreement in  
26 connection with that employment.

1 Marandas also argues that Hasche's appointment is invalid  
2 because Hasche has a conflict of interest. 11 U.S.C. § 327(c)  
3 requires:

4 In a case under chapter 7, 12, or 11 of this  
5 title, a person is not disqualified for employment  
6 under this section solely because of such person's  
7 employment by or representation of a creditor,  
8 unless there is objection by another creditor or  
the United States trustee, in which case the court  
shall disapprove such employment if there is an  
actual conflict of interest.

9 The appointment of Hasche as special counsel for the trustee  
10 in bankruptcy does not violate 11 U.S.C. § 327(c) because the  
11 interests of the Tsoumases and the interests of the trustee  
12 were identical at the time of his appointment. Therefore,  
13 the appointment of Hasche was a valid appointment, and Judge  
14 Higdon did not err in failing to remove Hasche as special  
15 counsel retroactive to the date of his appointment.

16 Marandas contends that Hasche should have been removed at  
17 the moment a conflict of interest arose from his representa-  
18 tion of the primary creditors, the Tsoumases. Marandas argues  
19 that the court erred in failing to make the effective date of  
20 the removal retroactive to the date on which notice was given  
21 of Marandas' objection to the settlement.

22 As to the issue of a conflict of interest, Judge Higdon  
23 found that:

24 [A]t the time the settlement was entered into and  
25 Mr. Hasche's name appeared in the settlement docu-  
26 ment to pursue the preference action, I could not  
see that there was any conflict there. It was only  
when an objection to the compromise and settlement  
was filed that then there became at least the

1 appearance of a conflict on his part because his  
2 client was also a part of the settlement agreement.

3 Transcript of February 26, 1993, pp. 97-98. The question of  
4 whether Hasche had a conflict of interest did not arise until  
5 after Marandas objected to the settlement. At the hearing on  
6 February 26, 1993, Judge Higdon stated that Hasche's represen-  
7 tation created only "the appearance of a conflict," but not  
8 an actual conflict after Marandas filed his objection. The  
9 Disciplinary Counsel for the Oregon State Bar Association  
10 also declined to find that Hasche had a conflict of interest  
11 in his limited role as special counsel. Appellant's Excerpt  
12 of Record, p. 262. Although Judge Higdon did not find a con-  
13 flict of interest at the hearing on January 13, 1993, she  
14 removed Hasche as special counsel at the urging of Marandas  
15 and required that the trustee be represented by independent  
16 counsel until the settlement issue was resolved. The ban-  
17 kruptcy court did not err in failing to remove Hasche as  
18 special counsel prior to the hearing on January 13, 1993.

19 5. Denial of Marandas' Motion to Extend Time to File  
20 Adversary Proceeding

21 In its order dated January 15, 1993, the bankruptcy court  
22 denied the motion of Marandas to extend the time to file an  
23 adversary proceeding. Marandas contends that the bankruptcy  
24 court erred in denying his motion to extend time under the  
25 doctrine of excusable neglect. In support of his contention,  
26 Marandas cites Pioneer Inv. Servs. Co. v. Brunswick Assocs.,  
\_\_\_ U.S. \_\_\_, 113 S.Ct. 1489 (1993), and Bankruptcy Rule



1 9006(b)(1). The trustee claims that Pioneer Inv. applies only  
2 to Chapter 11 reorganizations, not Chapter 7 filings, and that  
3 Bankruptcy Rules 9006(b)(2) and (3) apply in addition to Bank-  
4 ruptcy Rule 9006(b)(1).

5 Bankruptcy Rule 9006(b) provides, in relevant part:

6 (1) In General. Except as provided in para-  
7 graphs (2) and (3) of this subdivision, when an  
8 act is required or allowed to be done at or within  
9 a specified period by these rules or by a notice  
10 thereunder or by order of court, the court for cause  
11 shown may at any time in its discretion (1) . . .  
order the period enlarged . . . or (2) on motion  
made after the expiration of the specified period  
permit the act to be done where the failure to act  
was the result of excusable neglect.

12 (2) Enlargement Not Permitted. The court  
13 may not enlarge the time for taking action under  
Rules 1007(d), 1017(b)(3), 2003(a) and (d), 7052,  
9023, and 9024.

14 (3) Enlargement Limited. The court may  
15 enlarge the time for taking action under Rules  
16 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a),  
4007(c), 8002, and 9033, only to the extent and  
under the conditions stated in those rules.

17 At the hearing on January 13, 1993, Judge Higdon stated as  
18 follows when she denied Marandas' motion to extend the time  
19 to file an adversary proceeding:

20 Bankruptcy Rule 9006(c) makes it very clear that in  
21 order for you to have, in order for a creditor to  
22 have the time to file, additional time to file a, to  
23 file such a complaint, either under [Section] 523 or  
[Section] 727, you must file the motion to extend  
time within the original timeframe [sic] given to  
file the original action.

24 Transcript of January 13, 1993, p. 59. The rules for filing  
25 claims under Section 523 and Section 727 of the Bankruptcy  
26 Code are Bankruptcy Rules 4004(a) and 4007(c), respectively.

1 Both of these rules require that a motion to extend the time  
2 for filing an amended complaint must be made before the time  
3 for filing the complaint has expired. Marandas did not file  
4 a motion to extend the time for filing an amended complaint  
5 before the time for filing the complaint had expired. The  
6 bankruptcy court did not err in applying the plain language  
7 of Bankruptcy Rules 9006(c), 4004(a), and 4007(c).

8 Marandas argues, nonetheless, that his motion should  
9 be allowed because his failure to timely file was excusable  
10 neglect under the rule of Pioneer Inv. While Pioneer Inv.  
11 establishes a test for determining excusable neglect, that  
12 case concerns excusable neglect under Bankruptcy Rule 3003(c)  
13 in a proceeding under Chapter 11. Marandas points to nothing  
14 in Pioneer Inv. which would indicate that the test articulated  
15 there for excusable neglect was intended to apply outside the  
16 context of a proceeding under Chapter 11. In fact, the rules  
17 regarding how the time limits for filing are determined are  
18 markedly different in proceedings under Chapter 11. Under  
19 Bankruptcy Rule 3003(c), the time for filing a proof of claim  
20 in a proceeding under Chapter 11 is fixed by the court. As  
21 is a Chapter 7 case, this case is governed by Bankruptcy Rule  
22 3002(c), which fixes the filing limitation at 90 days from the  
23 meeting of the creditors. Therefore, the rule of Pioneer Inv.  
24 does not apply to this case.

25 6. Approval of the Settlement Agreement

26 Marandas contends that the settlement agreement approved

1 by Judge Higdon is inequitable because the court did not pro-  
2 vide facts sufficient to support the approval of the settle-  
3 ment. The trustee argues that Judge Higdon made specific  
4 findings on every factor required, and that the settlement  
5 achieved an equitable result.

6 The standards for approval of a proposed settlement have  
7 been enunciated in the Ninth Circuit, and in order to deter-  
8 mine whether a proposed settlement is fair and equitable, the  
9 bankruptcy court must consider four factors:

- 10 (a) The probability of success in the litigation;  
11 (b) the difficulties, if any, to be encountered  
12 in the matter of collection; (c) the complexity  
13 of the litigation involved, and the expense,  
14 inconvenience and delay necessarily attending it;  
15 (d) the paramount interest of the creditors and a  
16 proper deference to their reasonable views in the  
17 premises.

18 In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988) (quoting  
19 In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986)  
20 (citation omitted).

21 Pursuant to Bankruptcy Rule 9019(a), compromises are  
22 favored in bankruptcy, and the decision of the bankruptcy  
23 judge to approve or disapprove the compromise of the parties  
24 rests in the sound discretion of the bankruptcy judge. Such  
25 a decision is reviewable, but will normally not be set aside  
26 except where there is an abuse of discretion. 9 Collier on  
Bankruptcy ¶ 9019.03 (15th ed.).

27 The four factors set out in Woodson are recited in the  
28 final order of Judge Higdon approving the settlement. The  
29 transcript from the hearing on February 26, 1993 indicates

1 that Judge Higdon took testimony from the trustee, Hasche,  
2 and the attorney for the trustee concerning how the four  
3 factors should be applied in this case. Hasche testified  
4 that to prevail in the fraudulent conveyance action would  
5 have been costly, and even if the action had been successful,  
6 the money held by the children would be very difficult to  
7 obtain. Transcript of February 26, 1993, p. 25. The trustee  
8 testified that he expected that an action for fraudulent con-  
9 veyance would have been extended and expensive and "fought at  
10 every stage of the game." Id. at 58. Not only would it have  
11 been a "very difficult task to get anything from anybody," the  
12 trustee testified that he had no money and no means of funding  
13 litigation. Id. at 59. Moreover, only one proof of claim had  
14 been filed in the case, and even if the trustee was successful  
15 in collections, the overwhelming majority of any recovery  
16 would have been paid to the Tsoumases.

17 At the hearing on February 26, 1993, Marandas argued that  
18 Judge Higdon should not approve the settlement because the  
19 state court judgment on which the Tsoumases based their claim  
20 was invalid as a result of misstatements or non-disclosures;  
21 that the only document which was submitted by the Tsoumases  
22 in support of this claim was an unauthenticated Oregon Liquor  
23 Control Commission application which stated a higher value for  
24 the restaurant than the value listed in the bankruptcy court;  
25 and that the trustee was required to make an accounting of  
26 profits earned after the Tsoumases took over the restaurant.

1           At the hearing on February 26, 1993, the trustee argued  
2           that he had made an assessment of the profit and loss state-  
3           ments and determined that, although the trustee had a tech-  
4           nical claim against the Tsoumases for lost profits, the value  
5           of any such claim was insignificant, especially in light of  
6           the fact that most of the recovery would have been re-paid to  
7           the Tsoumases.

8           Judge Higdon considered the objections of Marandas and  
9           the documents submitted by Marandas on the issues of the  
10          invalidity of the judgment and the accounting of profits and  
11          concluded that these issues had only limited relevance. At  
12          the conclusion of the hearing on February 26, 1993, Judge  
13          Higdon addressed the concerns of Marandas directly:

14               [F]irst of all, I'm going to allow your documents  
15               in. I will allow you to make an offer of proof on  
16               your documents, even though they're not authenti-  
              cated. If you want to appeal this, I'll let the  
              Appeals Court deal with that.

17               However, for my purposes today, I do not  
18               believe that any of that is relevant. I have not  
19               looked at the documents, but you have, in essence,  
20               told me the nature of them, and based on what you  
21               have told me, I don't think any of that is relevant  
22               to the issues that I have to decide today. And  
23               that is because they do not address the probability  
              of success in the litigation. They do not address  
              the difficulties to be encountered in the manner  
              of collection. They do not address the complexity  
              of the litigation involved and the expanse [sic]  
              and convenience and delay necessarily attending it.

24               They may address, to a certain extent, the  
25               paramount interest of the creditors. However, this  
26               is a unique case, and I've already indicated in what  
              way it is unique. The primary and perhaps sole  
              creditor in this estate other than the \$800 claim  
              for something are the Tsoumases who entered into

1 the settlement agreement, and their views as to the  
2 appropriateness of this settlement I need to give --  
I'm required to give deference to.

3 Therefore, I have to rule on behalf of the  
4 trustee on the issue that is before me today for  
the treasons [sic] that I've stated.

5 Transcript of February 26, 1993, pp. 93-94.

6 This court finds that Judge Higdon had good reason to  
7 approve the settlement based on the first three factors from  
8 Woodson. All of the parties, except for Marandas, advocated  
9 approval of the settlement at the hearing on February 26,  
10 1993. Judge Higdon considered Marandas' remarks but found the  
11 relevance of the issues he raised limited to the final factor  
12 of the test outlined in Woodson. The fact that Judge Higdon  
13 gave deference to the views of the primary creditor does not  
14 nullify the fact that she carefully considered the objections  
15 made by Marandas. The test as articulated in Woodson does not  
16 require that the views of all potential creditors be given  
17 equal weight; it simply requires that their views be given  
18 "proper deference" by the judge approving the settlement.  
19 Judge Higdon's decision was more than a mere boilerplate  
20 approval of the trustee's suggestions. The bankruptcy court  
21 made a reasoned decision based on the factors outlined in  
22 Woodson. Judge Higdon did not err when she approved the  
23 settlement.

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PAGE 20 - OPINION

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CONCLUSION

The decision of the bankruptcy court is affirmed.

DATED this 28 day of October, 1993.



HELEN J. FRYE

United States District Judge