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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 01-86600
NATIONWIDE WAREHOUSE & STORAGE, LLC,	)	
Debtor.	)	CHAPTER 7
HERBERT C. BROADFOOT, II, as Trustee for the Estate of NATIONWIDE WAREHOUSE & STORAGE, LLC,	)	ADVERSARY PROCEEDING NO. 03-6531
Plaintiff,	)	
v.	)	
UNITED FURNITURE INDUSTRIES, INC.,	)	JUDGE BIHARY
Defendant.	)	

ORDER

This case could be used in a course on professionalism. It involves an unintended and unnoticed release of a trustee's claims. Procedurally, the case is before the Court on a motion by Herbert C. Broadfoot, II, Chapter 7 Trustee in the above-referenced case (the "Trustee") to vacate an Order approving a compromise and settlement, to vacate his dismissal of an adversary proceeding and to set aside the settlement entered into by the Trustee as Plaintiff with Defendant United Furniture Industries, Inc. ("United Furniture") in this preference action.

The Trustee filed the motion to vacate on February 10, 2005, and United Furniture filed a short response in opposition. United Furniture had been represented by Duane Morris, LLP (the "Duane Morris firm"), but the law firm of Lamberth, Cifelli, Stokes & Stout, P.A., not the Duane Morris firm, filed the response on behalf of United Furniture. The Court held a hearing on the Trustee's motion on March 24, 2005. David Kurzweil and Matthew Gensberg of Greenberg Traurig, LLP (the "Greenberg Traurig firm") appeared on behalf of the Trustee, as did the Trustee, and James Cifelli appeared on behalf of United Furniture. At the hearing, the Court identified several factual issues which required evidence and several legal issues which required deliberate briefing. The hearing was continued to April 7, 2005, and the Court set dates for the filing of briefs.

At the April 7, 2005 hearing, Messrs. Kurzweil and Gensberg appeared on behalf of the Trustee, and the Trustee was present. Mr. Cifelli appeared on behalf of United Furniture. Douglas Hanby, the Chief Financial Officer and a director of United Furniture, was present. Neil Olack and Antony Sanacory of the Duane Morris firm appeared, and Sean Smith appeared on behalf of the Duane Morris firm. Only Mr. Sanacory testified at the hearing. Counsel presented an amended stipulation of facts.[1] At the April 7, 2005 hearing, counsel stipulated to the submission of the transcripts of depositions of Messrs. Sanacory, Hanby, and David Belford taken on April 4 and 5, 2005, in this adversary proceeding. The Trustee's counsel directed the Court to specific portions in the depositions, and United Furniture's counsel requested that the Court review the depositions in their entirety. Counsel also stipulated to the admission of a two-volume deposition of Mr. Hanby taken on October

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1 This stipulation superceded a stipulation of facts presented on March 24, 2005.

29, 2004, and on February 21, 2005, in another adversary proceeding pending against Mr. Belford.

The parties filed briefs on April 21, 2005 and May 11, 2005. United Furniture sent the Court a letter on May 20, 2005, citing a recent case, and on May 31, 2005, the Trustee filed a response. After carefully considering the motion, briefs, oral argument, Mr. Sanacory's testimony on April 7, 2005, the depositions of Antony Sanacory, David Belford, and Douglas Hanby, the parties' stipulation of facts and exhibits, the record in this adversary proceeding and the underlying Chapter 7 case, the Court concludes that the Trustee's motion to vacate should be granted.

Factual Background

Nationwide Warehouse and Storage, LLC and its affiliates (the "Debtors") were one of the largest discount furniture and bedding retailers in the United States. At the time the bankruptcy was filed, the Debtors operated 119 stores in 22 states, Puerto Rico and Canada. Debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code on October 12, 2001 through their counsel, Kilpatrick Stockton, LLP (the "Kilpatrick Stockton firm"). These cases were jointly administered. After selling most of their assets, Debtors filed a motion to appoint a Chapter 11 Trustee. The motion was granted on December 20, 2002, and Herbert C. Broadfoot, II was appointed as the Chapter 11 Trustee. On February 13, 2003, Trustee Broadfoot filed a motion to convert this case to a case under Chapter 7. After a hearing on the motion to convert held on April 2, 2003, the Court entered an Order converting the case, and Mr. Broadfoot remained as the Chapter 7 Trustee.

The Trustee hired four law firms to represent him as special counsel. In April of 2003, he filed an application to employ the Greenberg Traurig firm as special counsel to litigate avoidance actions on his behalf, and the application was approved. On July 7, 2003, the Trustee filed an application to employ the Kilpatrick Stockton firm as special counsel to assist with the review of administrative claims and to provide general information, and that application was approved. On October 3, 2003, the Trustee filed an application to employ Powell, Goldstein, Frazier & Murphy, LLP (the "Powell Goldstein firm") as special counsel to prosecute fraudulent conveyance actions against David and Howard Belford on behalf of the Trustee, with fees to be paid on a contingency basis. After a scheduled hearing on the application, the Court entered an Order approving the Trustee's application to employ the Powell Goldstein firm. In early 2004, Jeffrey Kelley, a partner working on the actions pending against David and Howard Belford, left the Powell Goldstein firm and joined the firm of Troutman Sanders, LLP ("the Troutman Sanders firm"). On February 25, 2004, the Trustee filed an application to employ the Troutman Sanders firm to act as co-counsel with the Powell Goldstein firm in the prosecution of the two fraudulent conveyance actions brought against David and Howard Belford. The Court scheduled a hearing on the Trustee's application and entered an Order approving the application to employ the Troutman Sanders firm.

The Trustee has filed sixty-seven (67) avoidance actions. The Greenberg Traurig firm filed fifty (50) adversary proceedings to recover preferential transfers on behalf of the Trustee. The Kilpatrick Stockton firm filed ten (10) complaints to recover preferential transfers on behalf of the Trustee. The Powell Goldstein firm filed two adversary

proceedings to avoid some $35,000,000.00 in fraudulent conveyances, one against David Belford and one against Howard Belford. Both the Powell Goldstein firm and the Troutman Sanders firm are now representing the Trustee in those matters. Additionally, the Trustee's law firm of Ragsdale, Beals, Hooper & Seigler, LLP filed five (5) other avoidance actions.

Some facts are undisputed. On September 21, 2003, the Trustee, through his special counsel at the Greenberg Traurig firm, filed this adversary proceeding, Adversary Proceeding No. 03-6531, against United Furniture seeking to avoid and recover certain alleged preferential transfers under 11 U.S.C. §§ 547 and 550 (the "United Adversary Proceeding"). The complaint, as amended, sought to recover alleged preferential payments in the amount of $3,392,553.70. On December 1, 2003, United Furniture, represented by the Duane Morris firm, filed an answer.

On October 10, 2003, the Trustee, through his special counsel at the Powell Goldstein firm, filed an adversary proceeding, Adversary Proceeding No. 03-6551, against David A. Belford ("Belford") seeking, under 11 U.S.C. § 544(b) and state law statutes, to avoid in excess of $35,000,000.00 in fraudulent transfers made to Mr. Belford (the "Belford Adversary Proceeding"). The Greenberg Traurig firm was not employed to represent the Trustee in the Belford Adversary Proceeding and has never appeared in the Belford Adversary Proceeding. On November 10, 2003, Alston & Bird, LLP ("Alston & Bird") filed an appearance on behalf of David Belford, and on November 14, 2003, the undersigned entered an Order of recusal. The Belford Adversary Proceeding was transferred to the Honorable Paul W. Bonapfel.

Thus, the Trustee's cause of action in the United Adversary Proceeding is a preference avoidance action against a corporation seeking to recover in excess of $3,000,000.00. The Trustee's cause of action in the Belford Adversary Proceeding is a fraudulent transfer action against an individual seeking recovery of in excess of $35,000,000.00. The Trustee had different law firms representing him in these two avoidance actions, the named defendants in the two actions were different and had different law firms representing them, and the two adversary proceedings were before different judges.

The defendant in the preference action, United Furniture, is an Ohio corporation. It turns out that David Belford is the sole owner of United Furniture. He testified in a deposition taken on April 5, 2005, that he is a director and thinks he is the chief executive officer of United Furniture. Mr. Belford's identity as an owner, officer or director of United Furniture is not anywhere of record in the United Adversary Proceeding. Mr. Belford was not named as a defendant in the United Adversary Proceeding, and the Trustee did not conduct discovery seeking the names of the officers and directors of United Furniture.

After discovery and settlement negotiations in the United Adversary Proceeding, the Trustee and United Furniture agreed to settle the United Adversary Proceeding for $270,000.00. This settlement was reached through negotiations by attorneys at the Greenberg Traurig firm representing the Trustee and attorneys at the Duane Morris firm representing United Furniture. During the negotiations, these attorneys never discussed Mr. Belford, the Belford Adversary Proceeding, any cause of action included in the Belford Adversary Proceeding or Mr. Belford's association with United Furniture. The Duane Morris firm represents that during the negotiations, no one at the firm was aware of the Trustee's

$35,000,000.00 fraudulent conveyance action filed against Mr. Belford. The attorneys for the Trustee in the Belford Adversary Proceeding (attorneys at the Powell Goldstein firm and the Troutman Sanders firm) had no involvement in the United Adversary Proceeding or in the settlement negotiations.

Counsel at the Greenberg Traurig firm drafted a proposed motion to approve the compromise and settlement of the United Adversary Proceeding for $270,000.00 and circulated settlement documents to counsel at the Duane Morris firm. The original proposed settlement agreement contained the following release language:

> Upon receipt of the Settlement Amount from Defendant, the Trustee shall dismiss the Complaint with prejudice and shall also automatically and without further action on his part, or further Order of Court being required, waive, release and forever discharge any and all claims it may have against Defendant with respect to Avoidance Actions under the Bankruptcy Code.

On December 3, 2004, an associate at the Duane Morris firm, Antony Sanacory, submitted proposed changes to the settlement agreement to associate John Elrod at the Greenberg Traurig firm, via e-mail, which consisted of the following release language:

> Pursuant to this settlement, the Trustee release and discharge [sic] United Furniture, together with its past and present officers, directors, employees, subsidiary, affiliates, related companies, agents, trustees, attorneys or other representatives from all actions, causes of action, proceedings, charges, complaints, claims, demands, damages, costs, and liabilities of every kind that may arise under Chapter 5 of the Bankruptcy Code, which he or the Debtors have ever had or now have, whether known or unknown.

In a telephone conversation, counsel for the Trustee asked Mr. Sanacory why United Furniture needed the broader proposed release language, and Mr. Sanacory stated that this was simply his standard release language. During the conversation, Mr. Sanacory stated that he did not know "whether there was anything else out there and would be comfortable

with a broader release." Counsel also discussed that the statute of limitations had expired with respect to avoidance actions in the Nationwide case, and Mr. Sanacory testified that counsel at the Greenberg Traurig firm said they don't normally agree to this kind of release language but since the statute of limitations on avoidance actions had passed, they would agree. Counsel at the Greenberg Traurig firm did not ask United Furniture's counsel to identify the current or former officers or directors of United then or at any other time prior to the execution of the settlement agreement, nor did they take any steps to learn the identity of current or former officers or directors of United Furniture prior to the execution of the settlement agreement.

Without negotiating any additional consideration or payment from United Furniture to the Trustee, counsel for the Trustee agreed to most of the changes in the release language suggested by Mr. Sanacory. The following release language is contained in the unsigned settlement agreement attached to the Motion to Compromise (the "Release Language"):

> Upon approval of the Settlement Amount, the Trustee releases and discharges United Furniture, together with its past and present officers, directors, employees, agents, attorneys, or other representatives from all actions, causes of action, proceedings, charges, complaints, claims, demands, damages, costs, and liabilities of every kind that may arise under Chapter 5 of the Bankruptcy Code, which he or the Debtors have ever had or now have, whether known or unknown.

During the negotiations between counsel at the Greenberg Traurig firm and the Duane Morris firm to settle the United Adversary Proceeding, including the negotiation of release language, there was no mention of Mr. Belford's name or of the pending Belford Adversary Proceeding. Counsel for United Furniture and counsel for the Trustee are all clear

that they did not intend to settle or resolve any pending avoidance action other than the preference action in the United Adversary Proceeding.

On December 7, 2004, the Greenberg Traurig firm filed and served a motion to approve a compromise and settlement of the United Adversary Proceeding (the "Settlement Motion"). The Settlement Motion states that the Trustee and United Furniture have agreed to settle the alleged preference claims against United Furniture in the amount of $3,392,553.70 for $270,000.00 pursuant to a settlement agreement substantially similar to what is attached as Exhibit A (the "Settlement Agreement"), which is an unsigned settlement agreement. The unsigned agreement states that its effectiveness is "expressly conditioned upon the entry of a final and unappealed Order approving the Settlement." The Settlement Motion makes no reference to any release by the Trustee of claims against Mr. Belford, nor does it refer to any effect that settlement of the Trustee's preference claims in the United Adversary Proceeding could have on the $35,000,000.00 fraudulent conveyance claims against Mr. Belford in the Belford Adversary proceeding.

The Greenberg Traurig firm filed a Notice of Hearing in both the underlying Chapter 7 case and in the United Adversary Proceeding stating that a hearing on the motion to compromise and settle the preference action against United Furniture, Adversary Proceeding No. 03-6531, would be held on January 12, 2005. The Notice of Hearing does not disclose that the Belford Adversary Proceeding, Adversary Proceeding No. 03-6551, is being settled, released or affected in any way by this compromise, and the Belford Adversary Proceeding is not referenced in the Notice of Hearing in any fashion. On December 7, 2004, the Greenberg Traurig firm filed a certificate of service indicating that it had served the

Settlement Motion together with the Notice of Hearing on Antony Sanacory at the Duane Morris firm, the Trustee, and the United States Trustee. On December 8, 2004, the Greenberg Traurig firm filed an amended certificate of service indicating that it had served the Settlement Motion on counsel for United Furniture, the Trustee, and fifty-three (53) other interested parties or attorneys. The amended certificate of service does not reflect that the Greenberg Traurig firm served the Notice of Hearing on the expanded list.

In settling the United Adversary Proceeding, one of a great number of preference cases handled and resolved by the Trustee and the Greenberg Traurig firm, the Trustee and his attorneys at the Greenberg Traurig firm did not realize that David Belford was an officer, director or employee of United Furniture, and that Mr. Belford would attempt to use the Release Language in the United Adversary Proceeding as a defense in the Belford Adversary Proceeding pending before another judge.

From this point forward, the relevant facts become less clear. On or about December 10, 2004, Matthew Levin of Alston and Bird, counsel for David Belford in the Belford Adversary Proceeding, received Electronic Case Filing (ECF) notification of a pleading filed in the main Nationwide bankruptcy case which was the motion to compromise and settle the United Adversary Proceeding. After reviewing the unsigned settlement agreement, Mr. Levin realized that the release language in the proposed settlement of the United Adversary Proceeding may result in a release of Mr. Belford from the fraudulent conveyance claims in the Belford Adversary Proceeding. Mr. Levin had this belief prior to the January 12, 2005 hearing on Trustee Broadfoot's motion to compromise and settle the United Adversary Proceeding. Mr. Levin did not contact the Trustee or the Trustee's counsel

regarding this issue. It appears from Mr. Belford's deposition that Mr. Levin called Mr. Belford in December or early January regarding this possibility, and this call took place before the January 12, 2005 hearing. It is not clear from the evidence presented whether and when Mr. Belford discussed this matter with Mr. Hanby. Mr. Hanby as the chief financial officer of United Furniture directed Mr. Sanacory's activities in the United Adversary Proceeding. United Furniture's claims of attorney-client privilege resulted in some unanswered questions at the depositions, and the Court does not have a clear picture of who knew what when.

At the January 12, 2005, scheduled hearing on the Settlement Motion, the Trustee was present, as were John Elrod of the Greenberg Traurig firm on behalf of the Trustee and Mr. Sanacory of the Duane Morris firm on behalf of United Furniture. No objections were filed or raised to the Settlement Motion, and counsel did not ask to make a presentation on the Trustee's unopposed motion to settle the United Adversary Proceeding. Counsel presented a proposed order granting the Settlement Motion, which the Court entered on January 14, 2005.

On January 18, 2005, Mr. Sanacory, the associate at the Duane Morris firm, signed the Settlement Agreement on behalf of United Furniture, instead of any officer of United Furniture. The signature line reads as follows:

United Furniture Industries, Inc.
By: *Antony L. Sanacory*

Antony L. Sanacory
Name

Attorney
Title

United Furniture did not provide any explanation in its briefs or at oral argument as to why the Settlement Agreement wasn't signed by an officer of United Furniture; the signature line calls for the signature of an officer of United Furniture, not an associate with outside counsel. The explanations in the deposition transcripts raise more questions than they answer. In Mr. Sanacory's deposition, he testified that at some point Mr. Hanby was going to China and that was why he signed it. In Mr. Hanby's deposition, he testified that Mr. Sanacory signed the Settlement Agreement on behalf of United Furniture, because Mr. Hanby told him to and that he "just didn't want to fool with it."

On Monday, January 24, 2005, at 4:30 p.m., the Greenberg Traurig firm sent the Settlement Agreement to the Trustee for execution. Later that afternoon, the Trustee signed the Settlement Agreement and faxed a copy of the signed agreement back to the Greenberg Traurig firm. The Greenberg Traurig firm in turn sent the Settlement Agreement to the Duane Morris firm on the evening of January 24, 2005. The Trustee then received the $270,000.00 from United Furniture.

On Wednesday, January 26, 2005, Trustee's counsel at the Greenberg Traurig firm electronically filed a dismissal of the United Adversary Proceeding. The Clerk's Office closed the United Adversary Proceeding on January 28, 2005 at 4:08 p.m. This closure is reflected in the main docket of the Nationwide bankruptcy case, and ECF notification of that closing was sent to lawyers on the ECF notification list including counsel for Mr. Belford. Twelve (12) minutes later, at 4:20 p.m., on January 28, 2005, Mr. Belford filed a motion for leave to amend his answer in the Belford Adversary Proceeding. The motion seeks to add an affirmative defense of release and states that this is based on the recent Settlement Agreement between the Trustee and United Furniture approved in the United Adversary Proceeding on

January 14, 2005. Mr. Belford argues that the Settlement Agreement signed by United Furniture's lawyer and the Trustee resulted in a release by the Trustee of the $35,000,000.00 fraudulent conveyance claims in the Belford Adversary Proceeding.

The Trustee's counsel at the Greenberg Traurig firm first became aware of Mr. Belford's position that the settlement of the United Furniture Adversary Proceeding released the Trustee's claims in the Belford Adversary Proceeding on February 1, 2005. That same day, Mr. Kurzweil at the Greenberg Traurig firm promptly telephoned Mr. Sanacory at the Duane Morris firm.

On February 2, 2005, Mr. Sanacory faxed a short but carefully drafted letter to Mr. Kurzweil stating that he had no contact with the attorneys representing Mr. Belford regarding the Belford Adversary Proceeding and that he had had no involvement in or familiarity with the Belford Adversary Proceeding. But Mr. Sanacory's letter does not say whether he had any contact with other attorneys in his own firm regarding Mr. Belford's position on this release. His letter does not say whether he had any contact with Mr. Hanby on the matter. His letter does not say whether and when he knew that Mr. Belford was an officer of United Furniture. His letter does not say what he knew on January 18, 2005 when he signed the Settlement Agreement on behalf of United Furniture. His letter does not say what Mr. Hanby, Mr. Belford or others associated with United Furniture knew at the time the settlement motion was presented to the Court on January 12, 2005, at the time the Order was presented to the Court on January 14, 2005, or at the time that Mr. Sanacory was directed to sign the Settlement Agreement on January 18, 2005.

Mr. Kurzweil promptly responded to Mr. Sanacory in writing on February 4, 2005, requesting that United Furniture consent to seeking relief in the Bankruptcy Court to correct the mutual mistake of fact, as neither the attorneys at the Greenberg Traurig firm or the Duane Morris firm were aware that there was a pending fraudulent conveyance action against an officer of United Furniture. Mr. Sanacory's supervising partner at the Duane Morris firm, Neil Olack, wrote Mr. Kurzweil a letter dated February 8, 2005, indicating that United Furniture would resist any attempt to vacate the settlement. Mr. Olack did not respond to or acknowledge Mr. Kurzweil's position that the Settlement Agreement was based on a mutual mistake. Instead, he wrote that he "did not consider it productive for us to parse through your letter line by line and provide you with comments." Two days later, on February 10, 2005,the Trustee filed the motion to vacate the January 14, 2005 Order.

Analysis of the Facts and Legal Arguments

The Trustee's motion is brought under Fed. R. Civ. P. 60, made applicable here by Fed. R. Bank. P. 9024.

Fed. R. Civ. P. 60 provides as follows:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

An order may be vacated where such an action is necessary to accomplish justice. A bankruptcy court may modify or vacate its own orders approving settlements in instances where the full nature of the settlement was not disclosed. *See Maxwell Newspapers, Inc. v. The Travelers Indemnity Co. (In re Maxwell Newspapers, Inc.),* 170 B.R. 549 (S.D.N.Y. 1994); *Butler v. Almengual (In re Almengual)*, 301 B.R. 902 (Bankr. M.D. Fla. 2003).

The Trustee promptly filed the motion to vacate within nine (9) days of learning of the mistake and misrepresentation and within twenty-six (26) days of the entry of the Order to be vacated. There has been no reliance by any party on the January 14, 2005 Order, and the Trustee has repeatedly stated that he is willing and able to refund the settlement funds.

The Trustee is entitled to the requested relief under Rule 60(b)(1), because the Order was obtained through a mistaken and inadequate disclosure. *Almengual,* 301 B.R. 902, is instructive. There, the court vacated a previous order granting a motion to compromise. In that Chapter 7 case, the case trustee had filed a turnover motion seeking a turnover of all non-exempt property which included the debtors' interest in a revocable trust. The trustee and the debtors announced that they had settled the turnover motion for $100,000.00 in exchange for a release. The case trustee then filed a motion to compromise the turnover action, using a negative notice procedure and serving all creditors and the U.S. Trustee with the motion to compromise. No objections were filed, and the court entered an order granting the compromise motion. Then, within the one year period for bringing an action to revoke a discharge, the United States Trustee filed an adversary proceeding seeking a revocation of the

debtors' discharge under 11 U.S.C. § 727, alleging that the debtors had intentionally omitted substantial assets from their schedules.

The court considered whether the release language described in the settlement barred a proceeding to revoke the debtor's discharge and found that the order approving the motion to compromise was improvidently entered. The order approving the compromise had the effect of releasing the debtors from matters that were well beyond the scope of the motion. Relying on Rule 60(b)(1), the court in *Almengual* stated that a court may correct its own mistakes and may act *sua sponte* to vacate orders entered under a mistake of fact. The court reviewed the standards used in evaluating a compromise as set out in *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.),* 898 F.2d 1544, 1549 (11th Cir. 1990). While the compromise motion as presented in *Almengual* appeared straightforward, the United States Trustee's allegations of the debtors' misconduct were not referenced in the motion. Thus, the court held that creditors and parties in interest received inadequate notice of the circumstances surrounding the settlement reached between the debtors and the trustee and the consequences of giving this release. Similarly, in the case at bar, the creditors and parties in interest received inadequate notice of the consequences of the Trustee giving a release to United Furniture's officers and directors. The settlement here did not meet the *Justice Oaks* standard with respect to the release of claims in the Belford Adversary Proceeding, and the Court was not informed of the possible impact of the Release Language on the Belford Adversary Proceeding. Adequate notice to parties in interest is a central requirement to the administration of bankruptcy cases. Like the motion to compromise in *Almengual*, the notice

in the case at bar failed to meet the minimal standards for noticing, and the January 14, 2005 Order was improvidently granted.

Alternatively, the Trustee is entitled to the requested relief under Rule 60(b)(3), because the Order was obtained by a motion and notice that did not fully or fairly represent the effects of the settlement on another pending adversary proceeding. *See Maxwell Newspapers, Inc.*, 170 B.R. at 550. In *Maxwell Newspapers,* the district court affirmed the bankruptcy court's decision to vacate a previously approved stipulation. The stipulation provided for a payment by Travelers to the debtor of some $41,000.00 and also contained a provision releasing Travelers from any future liability to the debtor. The stipulation had been served on various parties and no objection had been filed. Four months after the Court had approved the stipulation, the debtor assigned avoidance actions to the committee of unsecured creditors. The committee determined that several causes of action existed against Travelers for preferential transfers totaling some $2.4 million. The committee then moved to vacate the stipulation pursuant to Rule 60(b), realizing that the preference action would be hampered by the release entered into and previously approved by the Court.

The bankruptcy court vacated the stipulation pursuant to Rule 60(b)(3), finding that the motion to approve the stipulation had material omissions that "had the effect of lulling the reader into the mistaken belief that the range of dispute was in the tens of thousands, rather than the millions, of dollars." *Id.* At 550. On appeal, the court recognized that bankruptcy courts, as courts of equity, have the power to reconsider, modify, or vacate a previous order as long as no intervening rights have become vested in reliance on the order. The court also recognized that when a bankruptcy court approves a compromise, it impacts

more than individual litigants; it impacts creditors. In *Maxwell*, the documents attached to the stipulation motion did not contain information regarding the preferential payments and, according to this district court, this led to an "ill-considered Stipulation." In this case, the Settlement Motion and Notice did not contain information regarding the fraudulent conveyance claim against Mr. Belford and this led to an ill-considered order. The Court was not apprised of the alleged impact of the settlement on the Belford Adversary Proceeding. The Court and the creditors received no notification that at least $35,000,000.00 in Trustee claims would be released for only $270,000.00. The Settlement Motion did not contain any information regarding the Belford Adversary Proceeding, because the Trustee never intended to release his claims in or settle the Belford Adversary Proceeding. If United Furniture intended otherwise, this was never disclosed to the Court.

The Trustee is also correct that the January 14, 2005 Order should be set aside, because the Court did not approve a settlement of the Belford Adversary Proceeding, and counsel did not follow the provisions of Bankruptcy Rule 9019 with respect to the Belford Adversary Proceeding. Federal Rule of Bankruptcy Procedure 9019, entitled "Compromise and Arbitration," provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and ... to any other party as the court may direct." Trustees cannot bind bankruptcy estates to compromises absent bankruptcy court approval.

Any settlement of the Belford Adversary Proceeding that United Furniture or its officers hoped to obtain here is not enforceable, because the requirements of Rule 9019 were not met. The Trustee's Settlement Motion referenced only the settlement of the claims

contained in the United Adversary Proceeding, not the claims contained in the Belford Adversary Proceeding. The Trustee did not intend and most importantly did not have the authority to release Mr. Belford from the claims in the Belford Adversary Proceeding. Such a release would have amounted to a compromise of the Belford Adversary Proceeding and would have required a separate motion to compromise and notice to all parties in interest. Furthermore, the certificates of service filed do not reflect proper service of the Notice of hearing on the creditor body.

United Furniture's arguments in opposition to the Trustee's motion to vacate are unpersuasive. United Furniture argues that public policy considerations impose a heavy burden on a trustee seeking to vacate an order approving a settlement. United Furniture ignores the public policy considerations that impose a requirement on lawyers to be candid and forthcoming with courts. United Furniture ignores the fact that the integrity of the bankruptcy system depends on counsel providing full disclosure and proper notice of all proposed settlements. United Furniture is correct that orders approving settlements should not be overturned absent compelling circumstances. The circumstances here are compelling, and there are strong justifications for vacating an Order obtained by counsel with a motion and notice that failed to include any mention that the proposed settlement could release and affect a $35,000,000.00 claim in a different pending action.

United Furniture also argues that granting the motion to vacate would undermine hundreds of settlements that have been entered into and approved by this Court. The Court certainly hopes not. Nothing in this Order would affect the enforceability of settlements entered into and approved by the Court following proper notice and adequate

disclosure. On the other hand, if counsel have obtained other orders from this Court using inadequate notices and disclosures to the Court and the creditor body, then counsel is correct that any such orders need to be reviewed and vacated, if appropriate.

United Furniture argues that Rule 60(b)(1) does not apply here, because the Trustee chose not to investigate the implications of the release provisions to which he agreed and that this is not the kind of mistake contemplated by 60(b)(1). The Trustee does not deny having made a mistake. But the Trustee is not the only one who made a mistake, as the lawyers for United Furniture at the Duane Morris firm represent that they also were not aware at the time counsel filed the Settlement Motion and obtained the January 14, 2005 Order that the settlement in fact could materially affect and release the Trustee's claims in the Belford Adversary Proceeding. There was nothing in the record of the United Adversary Proceeding to alert the Court or the creditors to the effect of this proposed settlement on the Belford Adversary Proceeding. The fact that Mr. Belford, Mr. Belford's lawyers and possibly Mr. Hanby were aware of the failure by the Trustee and United Furniture's counsel to disclose the matter does not cure the mistake and defect in the Notice to creditors or in the Settlement Motion presented to the Court.

United Furniture argues that unless the Court finds misconduct on its part, the Order cannot be set aside under Rule 60(b)(3). United Furniture argues that all of the wrongdoing was on the part of the Trustee and its lawyers.

It is helpful to analyze what each person is alleged to have done or not done.

The Trustee hired a number of different law firms to prosecute numerous avoidance actions. In a perfect world, he would have been aware that Mr. Belford was an

officer of United Furniture. But he apparently was not, and it is undisputed that he had no intent to release his $35,000,000.00 claim in the Belford Adversary Proceeding when he settled the United Adversary Proceeding for $270,000.00.

United Furniture contends that Mr. Belford's position as an officer of United Furniture was disclosed in depositions taken in the Belford Adversary Proceeding and that the Trustee was or should have been aware of this testimony. United Furniture cites to an October 29, 2004 deposition of Douglas Hanby taken in the Belford Adversary Proceeding. However, only Christopher Reeves of the Powell Goldstein firm and Douglas Ernst of the Troutman Sanders firm are listed as appearing on behalf of the Trustee. At the beginning of the deposition, Mr. Belford's attorney makes a statement that the Trustee has sued United Furniture in a preference action, that Mr. Hanby is employed by United Furniture, and that United Furniture's attorneys would need to be present if there are questions about the preference allegations. Mr. Ernst assures Mr. Hanby and Mr. Belford's counsel that he will not be asking any questions about the preference case against United Furniture. Later, Mr. Hanby testifies that he is working for David Belford at United Furniture, a furniture manufacturing company. It is significant that neither Trustee Broadfoot nor any of the lawyers at the Greenberg Traurig firm representing the Trustee in the United Adversary Proceeding were at this deposition taken in the Belford Adversary Proceeding.

In the stipulations submitted, United Furniture also refers to a deposition of David Belford taken on October 27, 2004 in the Belford Adversary Proceeding. In response to questions by the Trustee's special counsel at the Powell Goldstein firm, Mr. Belford states that he is an officer and director of several companies including United Furniture and that he

is the C.E.O. of United Furniture. The parties did not submit a copy of Mr. Belford's October 27, 2004 deposition, but there is no suggestion that the Trustee himself or any of the Trustee's lawyers in the United Adversary Proceeding were present at this deposition or aware of this testimony.

While deposition testimony in the Belford Adversary Proceeding was such that Trustee's special counsel at Powell Goldstein or Troutman Sanders would have known of a relationship between United Furniture and Mr. Belford, these lawyers were not involved in the Trustee's claims against United Furniture. There are no facts to suggest that the Trustee's special counsel at the Greenberg Traurig firm knew that Mr. Belford was an officer of United Furniture. According to counsel, discovery in the Belford Adversary Proceeding had been going on for 18 months and involved 38 depositions with over 4,000 transcript pages and some 509 exhibits. Mr. Belford's position as an officer of United Furniture was not a key fact in the Belford Adversary Proceeding, but was one of a great many facts irrelevant to the outcome of that litigation. Thus, the Court cannot find, based on the October, 2004 depositions of Mr. Hanby and Mr. Belford, that either Trustee Broadfoot or his special counsel at the Greenberg Traurig firm had actual knowledge of Mr. Belford's relationship with United Furniture.

The lawyers at the Greenberg Traurig firm – Should they have known what was in the 38 depositions taken in another adversary proceeding in which they were not representing the Trustee? No. Lawyers cannot be expected to know all the facts in every deposition taken in cases in which they are not appearing as counsel of record. Should they have agreed to language releasing United Furniture's officers and directors without having

opposing counsel identify the names of each officer and director? Had they requested such a listing, they would have identified the name of Mr. Belford, presumably passed that name on to the Trustee, and he would not have signed the Settlement Agreement with the Release Language.

What about the lawyers representing the Trustee in the Belford Adversary Proceeding? United Furniture argues that Jeffrey Kelley, the attorney at the Troutman Sanders firm representing the Trustee in the Belford Adversary Proceeding, was on the ECF notification list for the Nationwide case and that he, like Mr. Belford's counsel, could have read the Settlement Motion filed on December 7, 2004. The argument continues that perhaps Mr. Kelley would have realized that the proposed settlement of the United Adversary Proceeding included a release that could affect the Belford Adversary Proceeding. But the parties have stipulated that, as a matter of ordinary course, Mr. Kelley would not have read pleadings in the Nationwide bankruptcy case that were not directly related to the Belford Adversary Proceeding. Thus, there is nothing in the record to support the argument that Mr. Kelley knew the settlement of the United Adversary Proceeding could affect the case in which he was representing the Trustee.

What about the lawyers at the Duane Morris firm? Should they have done anything differently? It is difficult to say, because we don't know what they each knew and we don't know when they were alerted by United Furniture to the relationship between Mr. Belford and United Furniture. Nor do we know when precisely they learned of the Belford Adversary Proceeding. We do know that an associate at the Duane Morris firm, rather than an officer of United Furniture or a partner of the law firm, signed the settlement agreement on

January 18, 2005. We do know that the letters written on February 2, 2005 and February 8, 2005 by counsel at the Duane Morris firm are non-responsive and evasive. Because of the claims of attorney-client privilege, the Court is unable to know precisely what individual lawyers knew at the time they took or declined to take certain actions that would have prevented the Trustee from having to bring the motion to vacate.

If United Furniture and its lawyers had known before January 14, 2005, the time when the Court signed the Order prepared and presented by counsel, that the settlement would affect another pending adversary proceeding which was not disclosed in the motion or notice, shouldn't they have disclosed this to the Court and creditors?

If the lawyers at the Duane Morris firm had found out this fact after January 14, 2005, but before their associate signed the Settlement Agreement on their client's behalf on January 18, 2005, shouldn't they have declined to sign the agreement for their client without first making proper disclosure to the Court?

If the lawyers at the Duane Morris firm learned the facts after their associate signed the Settlement Agreement on January 18, 2005, but before they sent it to the Trustee for his signature on January 24, 2005, shouldn't they have advised the Trustee and the Court that this could affect another pending adversary proceeding?

If the lawyers at the Duane Morris firm learned the facts after both they and the Trustee signed the Settlement Agreement, shouldn't they have still come forward to the Court and made a full disclosure of the effect of this settlement on another pending adversary proceeding?

They have not answered these questions directly, but the implication of the positions taken by United Furniture are that they do not believe at any point, including the point in time prior to the submission of an order to the Court, that counsel would have been obliged to advise the Court or creditors of the effect of the settlement on another pending adversary proceeding. United Furniture takes the position that it is totally without blame, because its lawyers did not sign the Settlement Motion or the Notice to creditors. However, at some point United Furniture and/or its lawyers became aware that these documents filed by the Trustee did not contain adequate disclosure to the Court and the creditors. There are times when silence and the failure to make a necessary disclosure is tantamount to an affirmative misrepresentation. The game of "hiding the ball" or "catch me if you can" cannot be played with the courts. *See Official Committee of Unsecured Creditors v. H. B. Michelson (In re H. B. Michelson),* 141 B.R. 715, 725 (Bankr. E.D. Cal. 1992) ("[P]ulling the wool over the eyes of the court impairs the judicial machinery in the performance of its duty.")

It is undisputed that Trustee's counsel Mr. Kurzweil promptly requested counsel at the Duane Morris firm to join him in presenting a joint motion to vacate the order approving the settlement. United Furniture's failure to adhere to that request has resulted in the Trustee having to incur thousands of dollars in additional attorneys' fees and costs. It is troublesome if the creditors of this estate are asked to pay these fees and expenses. It is not

clear how this cost should be borne, and that matter will undoubtedly be the subject of further proceedings.[2]

What about Mr. Belford and Mr. Hanby? They are officers of the defendant United Furniture, and it seems likely that one or both of them were aware that (1) the proposed settlement in the United Adversary Proceeding would have a material effect on the Belford Adversary Proceeding and (2) this was not disclosed to the Court or creditors. We do not know whether they told this to United Furniture's lawyers, but whether they did or did not, the matter was not disclosed and they should not be allowed to profit from the resulting mistake or misrepresentation.

To summarize, based on the record before the Court, the Court cannot find that all the mistakes or misrepresentations are attributable to the Trustee or his counsel. The January 14, 2005 Order that approved an unintended and unnoticed release of the Trustee's claims in the Belford Adversary Proceeding cannot stand and should be vacated.

For the sake of completeness, the Court will address United Furniture's remaining legal arguments. United Furniture disagrees with the Trustee over whether unintentional misrepresentations are covered by Rule 60(b)(3), and the law on this point remains unsettled in the Eleventh Circuit. *Hornor, Townsend & Kent, Inc. v. Hamilton*, 2003 WL 23832424, at *9 n.10 (N.D. Ga. 2003) (citing *Harduvel v. General Dynamics Corp.*, 801

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At the hearings, the Court gave United Furniture an opportunity to consider renoticing the settlement with full disclosure of the impact on the Belford Adversary Proceeding. United Furniture declined, contending in its brief that "there could hardly have been a more fulsome disclosure."

F. Supp. 597, 608 n.21 (M. D. Fla. 1992) and *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1374-75 (11th Cir. 1981)). This issue need not be decided in the case at bar for two reasons. As described above, it is not clear from the facts that the continued misrepresentation was unintentional on the part of United Furniture, and finally, if for any reason Rule 60(b)(1) and Rule (60)(b)(3) do not apply here, the improper noticing under Rule 9019 provides an adequate basis for vacating the January 14, 1005 Order.

United Furniture relies on *Boyd v. North End Auto Sales, Inc. (In re Check Reporting Services, Inc.),* 137 B.R. 653 (Bankr. W.D. Mich. 1992) for the proposition that a trustee should not be protected from his mistake. There, the trustee asked the Court to set aside a settlement that contained an inadvertent release, arguing that there was no notice. The Court declined to do so, because in that case the Court had entered a special order under Rule 9019(b), which gave the trustee the authority to settle certain claims without notice or order of the court. No such Rule 9019(b) order was requested or granted to the Trustee in the instant case, and the Trustee never had authority to settle the claims in the Belford Adversary Proceeding.

In a post briefing submission, United Furniture asked the court to consider a recent Fifth Circuit case, *Pettle v. Bickham (In re Pettle),* 410 F.3d 189 (5th Cir. 2005). In *Pettle*, Bickham had sued Pettle in state court for personal injuries resulting from a car accident. Pettle then filed Chapter 7 bankruptcy which stayed the trial in the state court. Bickham filed an adversary proceeding in the bankruptcy court objecting to the dischargeability of his claim under 11 U.S.C. § 523(a)(9), which excepts from discharge debts for death or personal injury caused by the debtor's operating a motor vehicle if the

debtor was intoxicated. The bankruptcy court lifted the automatic stay to permit the state court to determine the amount of the claim and then entered an order discharging all of Mr. Pettle's debts except those owed to Bickham.

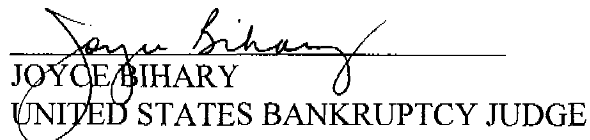
Bickham then filed a motion to dismiss the dischargeability action which motion was granted by the court in an order prepared by Bickham dismissing the claim with prejudice. When Bickham pursued his claim in state court, Pettle moved to reopen the bankruptcy case to enjoin Bickham from proceeding under 11 U.S.C. § 524, the discharge injunction statute. Almost one year after voluntarily dismissing his dischargeability complaint, Bickham filed a motion for relief under Rule 60(b). The bankruptcy court denied the motion, and the district court reversed, finding that relief was warranted under Rule 60(b)(1). The court of appeals, however, agreed with the bankruptcy court and reversed the district court. In doing so, the Court held that Rule 60(b)(1) could not relieve Bickham's negligence and Rule 60(b)(6) could not relieve Bickham from the deliberate choice to dismiss the dischargeability action.

Pettle is distinguishable from the facts in the instant case. Most importantly, *Pettle* did not involve a mistaken disclosure, inadequate notice, or a misrepresentation to the Court. The Bankruptcy Rules do not require any notice to all creditors when a single creditor dismisses his own dischargeability proceeding. This is in contrast to the release of a $35,000,000.00 fraudulent conveyance claim, which unquestionably requires notice to creditors and to the Court. In addition, Bickham waited almost a year to bring his 60(b) motion, whereas here the Trustee acted promptly.

Finally, it is relevant that the undisclosed matter involved the possible release of claims in an avoidance action in which the Court had recused itself. United Furniture argues that the Court has the authority to approve a settlement of a matter when the Court would be disqualified from ruling on the matter if it were contested. This may be so when a settlement has been properly noticed. But a settlement or release of claims in the Belford Adversary Proceeding was not properly noticed. There was nothing in the Settlement Motion that would have put the Court or any creditor on notice that this settlement would affect the Trustee's claims in the Belford Adversary Proceeding. Simply put, the Court could not and would not have approved this settlement if counsel had advised the Court that the notice and motion failed to include any mention of a release of a $35,000,000.00 claim in the avoidance action in which the Court had recused itself.

In accordance with the above reasoning, the Trustee's motion to vacate the January 14, 2005 Order, to vacate the dismissal of the United Adversary Proceeding, and to set aside the Settlement Agreement signed by the Trustee and United Furniture's attorney, is GRANTED in its entirety. The Trustee is instructed to return the $270,000.00 to United Furniture promptly.

IT IS SO ORDERED, this 14th day of July , 2005.



JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order mailed by United States Mail to the following:

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Date: July 14, 2005