WRITTEN DECISION NOT FOR PUBLICATION

ENTERED 9/14/06
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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY 128 DEPUTY

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re RICHARD LEE FLANNERY, Debtor.	Case No. 04-02865-B7 Adv. No. 05-90265-B7 ORDER ON DEBTOR'S MOTION FOR LEAVE TO AMEND ANSWER TO ADD COUNTERCLAIMS
UNUM LIFE INSURANCE COMPANY OF AMERICA, Plaintiff, v. RICHARD LEE FLANNERY, Defendant.	

Debtor Richard Flannery seeks leave of the court to amend his answer to Unum Life Insurance Company's complaint so that he may assert against them certain counterclaims.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 312-D of the United States

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District Court for the Southern District of California. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The essential facts relevant to this motion are not in dispute. Richard Flannery received certain disability and other insurance benefits from policies with Unum prior to filing bankruptcy. On or about March 29, 2004 debtor filed bankruptcy, with the assistance of counsel of record, attorney Haglund. While it appeared at the time that the filing was precipitated by real estate issues, apparently issues between Mr. Flannery and Unum were coming to a boil. On April 15, 2004 Unum filed suit against Mr. Flannery in the United States District Court for the Southern District of California, seeking declaratory relief concerning its obligations under the policies and seeking restitution of the funds it had already paid and recovery of the premiums that had come due during the period benefits were paid.

According to Unum, they had difficulty effecting service, and during a search for a good address for Mr. Flannery first learned of the bankruptcy filing. Unum filed a notice of stay with the district court on or about May 3, 2004.

Having learned of the bankruptcy, Unum filed a motion to extend time to file objections to discharge and claim of exemptions on June 28, 2004.

On June 29, 2004 attorney Haglund filed a motion to withdraw as counsel, which debtor opposed. The motion was granted on August 3.

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On August 16, 2004 the Court entered an order granting Unum's motion to take a Rule 2004 exam. Then on September 21, Unum sought an OSC re: contempt for noncompliance with the Court's order. On October 25, the Court set specific dates by which certain events were to occur.

On October 29, the United States Trustee filed a motion to convert or dismiss. On January 3, 2005 debtor submitted his own voluntary motion to convert, which was granted. Thereafter, debtor submitted a self-styled "Conversion Update Petition for Richard Flannery's conversion from Chapter 11 to Chapter 7 (voluntary)". That was filed on March 14, 2005. In his revised (and typewritten) Schedule B, under item 20 concerning contingent and unliquidated claims, Mr. Flannery listed "2. Claim of asset from UNUM/Provident for failure to pay disability benefits." He estimated the value of his claim at $5,000,000. Just weeks later, the Chapter 7 trustee sent out a proposed notice of abandonment of Mr. Flannery's claim against Unum, among other property interests. Abandonment was effected by operation of 11 U.S.C. § 554(c).

On June 6, 2005, Mr. Martorella, as counsel for Mr. Flannery and others, filed an adversary proceeding against Mr. Gafford and others. That fact is noted to illustrate that Mr. Flannery, although technically pro se after the withdrawal of Mr. Haglund, was not devoid of communications with attorneys in the interim.

Two days later, on June 8, 2005, Unum filed its adversary proceeding against Mr. Flannery in the bankruptcy court. Unum

alleged that Mr. Flannery committed fraud in the claims he submitted for benefits under the policies; Unum sought declaratory relief that Flannery was not disabled within the meaning of the policies such that Unum had no further obligation to pay benefits; Unum sought restitution of any payments that constituted an over payment; Unum sought rescission of the policies because of misstatements in his claims for benefits; and Unum sought to have Flannery's debt to it declared nondischargeable.

On July 22, 2005, Mr. Flannery filed a typed answer to Unum's complaint, denying the substantive allegations. He did not assert any affirmative defenses or any counterclaims.

After no apparent activity in the case, the Court issued a notice of intent to dismiss for lack of prosecution. Counsel for Unum responded by a notice setting a pre-trial status conference, a partially completed certificate of compliance (developed under Local Bankruptcy Rule 7016-2), and Unum's counsel's declaration concerning communications with the debtor and his apparent efforts to find counsel.

At the status conference on January 3, 2006, attorney Pagter was present and represented to the Court that a substitution of attorney was pending. In fact, it was filed just three days later. On January 6, 2006 Mr. Pagter formally substituted in for Mr. Flannery in the Unum adversary proceeding.

On or about March 1, 2006 attorney Martorella filed a state court lawsuit on behalf of Mr. Flannery and others against Unum

and others, alleging: 1) breach of contract; 2) breach of the implied covenant of good faith and fair dealing; 3) tortuous [sic] breach of insurance contract; 4) negligent infliction of emotional distress; 5) intentional infliction of emotional distress; and 6) conspiracy. All of the claims relate to the policies with Unum and Unum's alleged conduct in relation to them. Unum filed a notice of removal of that action to this Court on April 5, 2006.

At a status conference on June 15 in the removed case, Unum indicated it would file a motion to dismiss the case, which it did on August 4. In the meantime, on July 28 Mr. Pagter filed a motion to consolidate the two adversaries. On August 1, in the instant case, he finally filed the pending motion for leave to amend to set out as counterclaims the claims against Unum that had been included in the state court complaint. More than 16 months have elapsed since Mr. Flannery amended his Schedule B to list as an asset his claim against Unum. The trustee filed his proposed abandonment more than 15 months before. Almost 14 months had elapsed from the filing of Unum's complaint, and just over a year since Mr. Flannery filed his answer to Unum's complaint.

So the issue before the Court is whether, given those uncontroverted facts, Mr. Flannery should be allowed at this juncture to amend his answer to assert counterclaims against Unum which he has claimed he has held at least since March, 2005 when he amended his Schedule B to list the claim.

Rule 7013 of the Federal Rules of Bankruptcy Procedure governs counterclaims. It provides in pertinent part:

> Rule 13 FR Civ P applies in adversary proceedings . . .. A trustee or debtor in possession who fails to plead a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, may by leave of court amend the pleading, or commence a new adversary proceeding or separate action.

Then, the whole of Rule 13, Fed. R. Civ. P. is set out. Rule 7013 creates an interesting question because it provides that a "trustee or debtor in possession" can invoke oversight, inadvertence, or excusable neglect. What if the party seeking to amend is neither a trustee nor a debtor in possession? Does Rule 13(f), which is not by its terms limited to a trustee or debtor in possession, come into play to rescue the movant, in which case it has rendered the "trustee or debtor in possession" provision superfluous?

This Court need not try to reconcile those provisions in the context of this proceeding. Mr. Flannery is neither a trustee nor a debtor in possession. For present purposes, the Court will proceed on the premise that Rule 13, including Rule 13(f) is applicable to this motion.

The threshold is established by Rule 13(a). It provides in relevant part:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the

> opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The general proposition of Rule 13(a) is: "A counterclaim that is compulsory but not pleaded in accordance with the rule, is thereafter barred." Sanders v. First Nat'l Bank, 114 B.R. 507, 512 (M.D. TN 1990); Aguilar v. Valley Federal Savings Bank, 95 B.R. 208 (Bankr. D.N.M. 1989).

Rule 13(a) instructs that a compulsory counterclaim is one that the pleader, Flannery, has at the time of his pleading if the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim". The test commonly employed to determine whether a counterclaim is compulsory is the so-called "logical relationship" test. As explained by one court, "the test defines 'transaction' [flexibly] to 'comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.'" Sanders, 114 B.R. at 512. That same court then borrowed from a Third Circuit decision, Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (1961), and repeated:

> The phrase "logical relationship" is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim when separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts.

In the instant case, there is no question about whether Flannery's claims arise from the same transactions as Unum's claims. Flannery expressly so states in his moving papers (Motion, p.5, 11. 7-8; p. 6, 11. 5-13), although he attempts to suggest some facts occurred after he filed his answer on July 22, 2005. The Court finds that argument somewhat disingenuous. Mr. Flannery amended his bankruptcy schedules in March 2005 to assert that he had a claim against Unum for failure to pay disability benefits. The Court is not clear whether Mr. Flannery was receiving legal advice at the time, as Unum argues had been ongoing since 2004. But he certainly believed he had claims against Unum arising out of their not paying benefits he claimed he was owed. All the other claims that Mr. Flannery seeks to now raise are logically related to not paying the benefits.

Mr. Flannery has invited the Court to review In re Zilog, Inc., 450 F.3d 996 (9th Cir. 2006) on the issue of excusable neglect. It is useful for another purpose, as well, because it reviews the law of the Ninth Circuit concerning when a claim arises. The court reminds us that a claim arises "once it is within the claimant's 'fair contemplation'." That does not require that the last relevant fact has occurred, but rather whether the claim was within the claimant's "fair contemplation." 450 F.3d at 1000.

So, at this point in the analysis, the Court has concluded that the claims Mr. Flannery now seeks to assert as counterclaims

against Unum are claims that arise out of the same transaction or occurrence as the transaction and occurrences which underlie Unum's claims against Mr. Flannery. They are compulsory counterclaims within the meaning of Rule 13(a), and were believed by Mr. Flannery to exist at least as early as March, 2005. The issue which remains for the Court is whether Mr. Flannery should be permitted to amend his answer a year after filing it to add the counterclaims he believed he held over 17 months ago.

The answer lies in whether there is some exception to the operation of Rule 13(a). Mr. Flannery makes two arguments. One is that Rule 7015 applies and provides that "leave [to amend a pleading] shall be freely given when justice so requires." Rule 15, via Rule 7015, certainly does say that. But does it trump the provisions of other Rules which may require a stronger showing, such as Rule 13? Rule 13 expressly governs amendments to assert counterclaims. As the more specific rule, it governs, not the more general Rule 15. Otherwise, Rule 13's test becomes surplusage as against Rule 15's more general authorization.

Rule 13(f) provides:

> (f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may on leave of court set up the counterclaim by amendment.

There is scant authority addressing the test of Rule 13(f), and the few courts that have are not consistent. In a 1975 Fifth Circuit decision, Spartan Grain & Mill Co. v. Ayers, 517 F.2d

214, the appellate court was faced with a somewhat similar factual situation:

> Spartan filed suit in November, 1972; producers filed their original answers and counterclaims in December of that year. The counterclaims alleging statutory violations were not filed until 16 months later, two months prior to the trial.

517 F.2d at 220. In holding that the district court should have allowed the amendment, the court noted:

> Courts have interpreted these provisions liberally, in line with the Federal Rules' overall goal of resolving disputes, insofar as possible, on the merits and in a single judicial proceeding. (Citations omitted.) The argument for allowing amendment is especially compelling when, as here, the omitted counterclaim is compulsory (citation omitted). The mere passage of time between an original filing and an attempted amendment is not a sufficient reason for denial of the motion.

The court found no suggestion in the record that Spartan would be prejudiced, or that the trial would be delayed for additional discovery. It is curious, at a minimum, that the court made no effort whatsoever to interpret or apply Rule 13(f). Rather, it cited Foman v. Davis, 371 U.S. 178 (1962) for its general proposition, set out above, although Foman was a Rule 15 case. From the Spartan court's opinion, it appears that the burden is on the non-moving party to show prejudice or delay, and seems to ignore that Rule 13(f) imposes on the movant the burden of showing oversight, inadvertence, or excusable neglect, essentially eviscerating whatever threshold Rule 13(f) sets.

In Ford Washington Resources, Inc. v. Tannen, 153 F.R.D. 565 (E.D. PA 1994), the district court similarly ignored Rule 13(f)'s language in favor of the general Rule 15 amendment policy and stated:

> In determining whether to allow the amendment, courts must consider whether the pleader has acted in good faith and will not cause any undue delay in filing the counterclaim, whether there is any undue prejudice to the non-moving party and whether the claim is meritorious.

153 F.R.D. at 566. In reality, that is the test under Rule 15, as set out in Foman v. Davis, 371 U.S. at 182. It is not assessing "oversight, inadvertence, or excusable neglect". It may, however, be relevant to consider under the last prong of Rule 13(f), "or when justice requires", which is arguably comparable to the Rule 15 standard, that "leave shall be freely given when justice so requires."

To the extent the "when justice requires" prong of Rule 13(f) is the same as Rule 15's "when justice so requires", Foman v. Davis' guidance is relevant. There, the Supreme Court wrote:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

371 U.S. at 181-182. The Court went on to declare:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so

> requires"; this mandate is to be heeded. (Citation omitted.) If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

371 U.S. at 182.

In Ralston-Purina Co. v. Bertie, 541 F.2d 1363 (9th Cir. 1976), the court of appeals upheld a denial of leave to amend under Rule 13(f). In doing so, the court stated:

> Although this provision is generally applied liberally, a trial court's denial of a Rule 13(f) motion is reversible only where it constitutes an abuse of discretion. (Citation omitted.) The instant motion contained no allegation of timely notice of the claimed defects, and was made six months after the filing of the answer to Purina's complaint and two months after a pretrial conference. Furthermore, the record on appeal does not reflect any reasonable explanation of this delay. We find no abuse of discretion here.

541 F.2d at 1367. That decision seems more consistent with finding that a movant has a threshold burden of showing some prong of Rule 13(f)'s test, rather than the Rule 15 test of Foman.

Slightly more recently, in Sil Flo, Inc. v. SFHC, Inc., 917 F.2d 1507 (10th Cir. 1990), that court also upheld a denial of leave to amend to add a compulsory counterclaim. There, the

motion to amend was filed more than three months after a bar date set in a scheduling order by the court. The movants claimed they had not had all the facts they needed to assert the counterclaims, and that a subsequent sale had given rise to a new claim. The trial court found those assertions "unpersuasive". The court concluded enough facts were known to support a timely filing, and that a tactical decision was made by the movants not to do so.

The appellate court, in affirming the denial of leave, stated:

> We agree with the district court's characterization that, based on the inconsistent statements in the defendants' motions, their failure to file the counterclaim was a tactical decision and not simply a mistake by counsel as to the need to file within the scheduling order deadline, as later alleged in the motion for reconsideration. While rigid adherence to the pretrial scheduling order is not advisable (citation omitted), sufficient evidence supports the district court's conclusion that the defendants' failure [to] timely amend was not due to oversight, inadvertence or excusable neglect.

917 F.2d at 1519. Interestingly, the court makes no mention of the fourth prong of Rule 13(f), "or when justice requires".

There is also interesting dictum in a 1992 district court case which, like Sil-Flo, focussed on "oversight, inadvertence, or excusable neglect", without mention of "or when justice requires". In Merritt Logan, Inc. v. Fleming Foods of Pennsylvania, Inc., 138 B.R. 15, 28 (E.D. PA), after concluding Rule 13 was not applicable to the circumstances before it, the

court wrote:

> Moreover, even if the rule did apply, Logan has not met the requirements. Logan claims that the prerequisite of "oversight, inadvertence, or excusable neglect" has been met because the claims must have been omitted by the oversight or inadvertence of prior counsel, as there is no other reason for their omission. Mistake by counsel is a dispute between Logan and its counsel, it is not a sufficient showing of oversight, inadvertence or excusable neglect on the part of Logan. Were this not the case, the exception would swallow the rule, as every debtor who omitted a counterclaim could seek relief by blaming the omission on counsel.

Whether the core proposition about attorney error remains viable in light of the Supreme Court's decision in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd P'ship, 507 U.S. 380 (1993) remains to be determined.

Yet another district court decision considered Rule 13(f) in the face of a defendant's motion to amend his answer to add a counterclaim 29 months after the complaint was filed. In Preferred Meal Systems v. Save More Foods, Inc., et al., 129 F.R.D. 11, 13 (D.D.C. 1990), the court recognized the standard of Rule 15 that leave should be "freely given when justice so requires", but concluded as to this pro se defendant that justice required denial. The court considered that movant did not show there was any newly discovered information to precipitate the motion, the discovery cut-off had just been reached and trial was expected to start within two months. The movant made no showing of the reasons for the lengthy delay, or for his failure to make the motion sooner. The court was persuaded additional discovery

and a change in discovery cut-off and trial dates would be necessary if the motion was granted.

In denying leave to amend, the court stated, in part:

> Rule 13(f) is interpreted liberally, but "it should not be construed as an open-ended mechanism for avoiding the timely filing of counterclaims arising out of a single transaction."

Id. The court concluded:

> In sum, the defendant has not shown the Court that justice requires inclusion of the counterclaim nor has he demonstrated "oversight, inadvertence, or excusable neglect."

Id.

Mr. Flannery's argument, now made through an attorney, is that he did not know that he was supposed to raise any counterclaims he might have against Unum when he filed his answer in July, 2005, notwithstanding that he had listed those claims in his amendment to Schedule B in March, 2005. It is of more than passing curiosity that Mr. Flannery amended Schedule B almost three months before Unum filed its adversary against him, and eleven months after Unum had sued him in federal district court (stayed by the bankruptcy filing). The amendment was made after conversion of his case from Chapter 11 to Chapter 7, and someone recognized the importance of listing the claim against Unum as property of the debtor in order for it to be subsequently abandoned under 11 U.S.C. § 554(c) back to Mr. Flannery. So the only thing he purportedly did not know was the requirement of Rule 13(a). It is also of interest, as Unum points out, that

Mr. Flannery' present attorney, Mr. Pagter, was present before this Court on October 25, 2004, as an advisor to Mr. Flannery, as the Court's minute order reflects. That date was for the hearing on the OSC re contempt for non-compliance with this Court's order granting Unum's Rule 2004 request.

In short, the Court finds and concludes that Mr. Flannery has made no showing whatsoever of oversight or inadvertence, so those grounds do not support his motion.

Excusable neglect is the next issue. The seminal case in that area is Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd P'ship, 507 U.S. 380 (1993). That case involved late-filed proofs of claims by creditors in a Chapter 11 and the issue of excusable neglect arose under Rule 9006(b)(1), Fed. R. Bankr. P. The president of the corporate creditors consulted with a bankruptcy attorney upon receipt of a notice of meeting of creditors. Buried in the notice was a bar date for filing proofs of claims. The attorney and president attended the meeting, which was held six weeks before the bar date. Still, they did not file timely proofs of claims. Three weeks later, however, they did so, along with a motion to permit a late filing. The bankruptcy court denied the motion, finding no excusable neglect. After appeal, a remand, and further appeal, the Supreme Court, in a 5-4 decision found the bankruptcy court's reading of the requirement too restrictive. The Court began by examining the dictionary definition of "neglect", and concluded that under Rule 9006(b)(1):

> Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by interviewing circumstances beyond the party's control.

507 U.S. at 388.

In looking to the other provisions utilizing an "excusable neglect" standard, the Court commented on Rule 13(f) in a footnote:

> In assessing what constitutes "excusable neglect" under Rule 13(f), the lower courts have looked, inter alia, to the good faith of the claimant, the extent of the delay, and the danger of prejudice to the opposing party.

507 U.S. at 392.

Having satisfied itself on a meaning for "neglect", the Court turned to its qualifier:

> This leaves, of course, the Rule's requirement that the party's neglect of the bar date be "excusable". It is this requirement that we believe will deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1). With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay,

> including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

507 U.S. at 395. The Court ultimately centered its finding that the neglect involved was "excusable" on the unusual form of the notice of the claims bar date, which it felt was ambiguous and obscure.

In a recent late-filed claim case, In re Zilog, Inc., 450 F.3d 996 (9th Cir. 2006), the court found the neglect excusable on what it recognized was a much stronger record supporting excuse. The court applied the Pioneer factors in doing so.

Reviewing the Pioneer factors on the record of this case, the result is much less clear. Unum offers no argument that it would somehow be prejudiced if the amendment were allowed. At oral argument, Unum's counsel had to acknowledge that many of the issues raised by the proposed counterclaims would necessarily be litigated in prosecution of Unum's complaint for declaratory relief and restitution. Nor has there been any showing that allowing the amendment will substantially delay or alter the progress of the underlying proceeding. To date, most of what has occurred has been procedural sparring. On the other hand, the delay in bringing the motion is significant, over one year since the answer was filed. The only proffered explanation is "I did not know I was supposed to". Accepting such an explanation would be tantamount to saying no one should be held accountable for knowing the applicable national rules of procedure, and that is contrary to long-standing case law that even true pro se parties

are held to know the rules, except in very limited situations. In fact, accepting such an explanation would largely render surplusage the rest of Rule 13(f), as well as other rules that use "excusable neglect".

Here, as Unum has pointed out, Mr. Flannery has not been a true pro se party since the beginning in 2004 with his filing, then with his legal advisor, who is now his counsel of record. In addition, he must have met with attorney Martorella, as well, before Mr. Flannery had Mr. Martorella file suit for him against Mr. Gafford and others in June, 2005, days before Unum filed against him. It is noteworthy that Mr. Pagter, in his moving papers, advises that Mr. Martorella will be taking the lead in the present litigation going forward. There is also the issue of the advice Mr. Flannery got in or around March 2005, or his own realization, that caused him to amend Schedule B to list his claims against Unum. As already noted, at the January 3, 2006 status conference Mr. Pagter was present and advised that his substitution into this case was pending. Indeed, it was filed three days later, on January 6, 2006. No motion for leave to amend was filed until August 1, seven months later. On March 1, 2006 Mr. Martorella filed the state court lawsuit for Mr. Flannery and others, against Unum and others. Those same claims by Mr. Flannery against Unum are sought to be added by the proposed amendment here (Motion, p.5, 11.7-8). But no effort was made to seek to amend Mr. Flannery's answer to assert his compulsory counterclaims for five more months. It is quite clear

that seeking to amend his answer to add the counterclaims was always within Mr. Flannery's control, as was his knowledge of the existence of the claims.

The last of Pioneer's non-exhaustive enumerated factors is whether the movant has acted in good faith. Unum argues Mr. Flannery has not, in several ways. First, Mr. Flannery had evaded submitting to an independent medical examination for quite some time, even before filing bankruptcy. He failed to respond to the 2004 exam ordered by the Court, or to seek any sort of protective order. He finally submitted only after being ordered back into court on an OSC re: Contempt. Second, a year after amending his Schedule B to list his claim against Unum, and eight months after filing his answer to Unum's complaint, he has his lawyer file suit in state court against Unum, and against the individual physicians who examined him at Unum's behest.

After considering the Pioneer "excusable neglect" factors, and despite the Court's finding that there is no real prejudice to Unum or delay in the case if amendment is allowed, the Court finds and concludes that Mr. Flannery's neglect - if there is any "neglect" as distinct from intentional decision-making - is not "excusable" within the meaning of Pioneer, Zilog, or Rule 13(f).

That leaves the fourth prong of Rule 13(f), "or when justice requires". As already discussed, Foman v. Davis, 371 U.S. 178 (1962), instructed that an amendment should be "freely given":

> In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by

> amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, fertility of amendment, etc. . . . .

371 U.S. 182. There has been no showing of undue prejudice to Unum, nor futility of the proposed amendment. There is unexplained and therefore undue delay, and it is hard to imagine why there was no effort many months earlier to assert the counterclaims for any reason other than tactical, nor has Mr. Flannery offered such a reason.

In the face of the Supreme Court's instruction in Foman v. Davis, this Court concludes it should grant leave to amend the answer to add the proposed counterclaims only because there has been no showing of prejudice to Unum or that allowing the amendment would cause serious delay or upset of already protracted litigation. Further, while the record is equivocal, the Court is unable to find that Mr. Flannery has demonstrated the sort of bad faith in this adversary proceeding that would support denial of leave to amend.

Allowing leave to amend on the fourth prong of Rule 13(f) - "or when justice requires" - is troubling in that under the Foman v. Davis discussion of its elements it really swallows up the other three prongs of "oversight, inadvertence, or excusable neglect", renders them largely, if not entirely surplusage, and even has the practical effect of putting the burden on the non-moving party to show prejudice, undue delay, and bad faith. But that seems to be what "justice requires" under Foman.

Conclusion

As already noted, the Court would deny leave to amend under the first three prongs of Rule 13(f) because Mr. Flannery has failed to establish oversight, inadvertence or excusable neglect. Leave is granted only because the fourth prong, "when justice requires" has such a low threshold under Foman v. Davis that in the absence of undue prejudice, undue delay, or affirmative bad faith, leave must be "freely given" under the Rule 15(a) standard.

Accordingly, Mr. Flannery is granted leave to amend his answer of July, 2005 to add the counterclaims proposed in his moving papers. Said amended answer and counterclaim shall be filed and served on Unum within twenty-one (21) days of the date of entry of this Order. Failure to timely file and serve such an amended pleading shall constitute a waiver of the leave herein granted.

IT IS SO ORDERED.

DATED: SEP 13 2006

PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re Adversary Case No. 05-90265-B7
Bankruptcy Case No. 04-02865-B7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON DEBTOR'S MOTION
FOR LEAVE TO AMEND ANSWER
TO ADD COUNTERCLAIMS

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

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Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on September 13, 2006.

Barbara J. Kelly

Barbara J. Kelly, Judicial Assistant