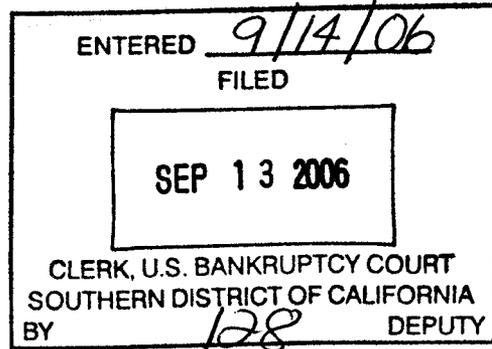


1 **WRITTEN DECISION NOT FOR PUBLICATION**



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 04-02865-B7  
12 ) Adv. No. 05-90265-B7  
13 RICHARD LEE FLANNERY, )  
14 ) Debtor. ) ORDER ON DEBTOR'S MOTION  
15 ) FOR LEAVE TO AMEND ANSWER  
16 UNUM LIFE INSURANCE COMPANY ) TO ADD COUNTERCLAIMS  
17 OF AMERICA, )  
18 ) Plaintiff, )  
19 v. )  
20 RICHARD LEE FLANNERY, )  
21 ) Defendant. )

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

25 This Court has subject matter jurisdiction pursuant to  
26 28 U.S.C. § 1334 and General Order No. 312-D of the United States

///  
///

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

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

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

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

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

26 ///

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

6 On October 29, the United States Trustee filed a motion to  
7 convert or dismiss. On January 3, 2005 debtor submitted his own  
8 voluntary motion to convert, which was granted. Thereafter,  
9 debtor submitted a self-styled "Conversion Update Petition for  
10 Richard Flannery's conversion from Chapter 11 to Chapter 7  
11 (voluntary)". That was filed on March 14, 2005. In his revised  
12 (and typewritten) Schedule B, under item 20 concerning contingent  
13 and unliquidated claims, Mr. Flannery listed "2. Claim of asset  
14 from UNUM/Provident for failure to pay disability benefits."  
15 He estimated the value of his claim at \$5,000,000. Just weeks  
16 later, the Chapter 7 trustee sent out a proposed notice of  
17 abandonment of Mr. Flannery's claim against Unum, among other  
18 property interests. Abandonment was effected by operation of  
19 11 U.S.C. § 554(c).

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

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

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

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

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

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

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

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

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

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

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

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

11 Then, the whole of Rule 13, Fed. R. Civ. P. is set out. Rule  
12 7013 creates an interesting question because it provides that a  
13 "trustee or debtor in possession" can invoke oversight,  
14 inadvertence, or excusable neglect. What if the party seeking to  
15 amend is neither a trustee nor a debtor in possession? Does Rule  
16 13(f), which is not by its terms limited to a trustee or debtor  
17 in possession, come into play to rescue the movant, in which case  
18 it has rendered the "trustee or debtor in possession" provision  
19 superfluous?

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

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

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

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

4   The general proposition of Rule 13(a) is: "A counterclaim that is  
5   compulsory but not pleaded in accordance with the rule, is  
6   thereafter barred." Sanders v. First Nat'l Bank, 114 B.R. 507,  
7   512 (M.D. TN 1990); Aguilar v. Valley Federal Savings Bank, 95  
8   B.R. 208 (Bankr. D.N.M. 1989).

9           Rule 13(a) instructs that a compulsory counterclaim is one  
10   that the pleader, Flannery, has at the time of his pleading if  
11   the claim "arises out of the transaction or occurrence that is  
12   the subject matter of the opposing party's claim". The test  
13   commonly employed to determine whether a counterclaim is  
14   compulsory is the so-called "logical relationship" test. As  
15   explained by one court, "the test defines 'transaction'  
16   [flexibly] to 'comprehend a series of many occurrences, depending  
17   not so much upon the immediateness of their connection as upon  
18   their logical relationship.'" Sanders, 114 B.R. at 512. That  
19   same court then borrowed from a Third Circuit decision, Great  
20   Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634  
21   (1961), and repeated:

22           The phrase "logical relationship" is given  
23           meaning by the purpose of the rule which it  
24           was designed to implement. Thus, a  
25           counterclaim is logically related to the  
26           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.

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

16 Mr. Flannery has invited the Court to review In re Zilog,  
17 Inc., 450 F.3d 996 (9<sup>th</sup> Cir. 2006) on the issue of excusable  
18 neglect. It is useful for another purpose, as well, because it  
19 reviews the law of the Ninth Circuit concerning when a claim  
20 arises. The court reminds us that a claim arises "once it is  
21 within the claimant's 'fair contemplation'." That does not  
22 require that the last relevant fact has occurred, but rather  
23 whether the claim was within the claimant's "fair contemplation."  
24 450 F.3d at 1000.

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

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

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

19 Rule 13(f) provides:

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

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

1 214, the appellate court was faced with a somewhat similar  
2 factual situation:

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

9 517 F.2d at 220. In holding that the district court should have  
10 allowed the amendment, the court noted:

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

23 The court found no suggestion in the record that Spartan would be  
24 prejudiced, or that the trial would be delayed for additional  
25 discovery. It is curious, at a minimum, that the court made no  
26 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.

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

5 In determining whether to allow the  
6 amendment, courts must consider whether the  
7 pleader has acted in good faith and will not  
8 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.

9 153 F.R.D. at 566. In reality, that is the test under Rule 15,  
10 as set out in Foman v. Davis, 371 U.S. at 182. It is not  
11 assessing "oversight, inadvertence, or excusable neglect". It  
12 may, however, be relevant to consider under the last prong of  
13 Rule 13(f), "or when justice requires", which is arguably  
14 comparable to the Rule 15 standard, that "leave shall be freely  
15 given when justice so requires."

16 To the extent the "when justice requires" prong of Rule  
17 13(f) is the same as Rule 15's "when justice so requires", Foman  
18 v. Davis' guidance is relevant. There, the Supreme Court wrote:

19 It is too late in the day and entirely  
20 contrary to the spirit of the Federal Rules  
21 of Civil Procedure for decisions on the  
22 merits to be avoided on the basis of such  
23 mere technicalities." The Federal Rules  
24 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."

25 371 U.S. at 181-182. The Court went on to declare:

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

1 requires"; this mandate is to be heeded.  
2 (Citation omitted.) If the underlying facts  
3 or circumstances relied upon by a plaintiff  
4 may be a proper subject of relief, he ought  
5 to be afforded an opportunity to test his  
6 claim on the merits. In the absence of any  
7 apparent or declared reason - such as undue  
8 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."

9 371 U.S. at 182.

10 In Ralston-Purina Co. v. Bertie, 541 F.2d 1363 (9<sup>th</sup> Cir.  
11 1976), the court of appeals upheld a denial of leave to amend  
12 under Rule 13(f). In doing so, the court stated:

13 Although this provision is generally applied  
14 liberally, a trial court's denial of a Rule  
15 13(f) motion is reversible only where it  
16 constitutes an abuse of discretion.  
17 (Citation omitted.) The instant motion  
18 contained no allegation of timely notice of  
19 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.

20 541 F.2d at 1367. That decision seems more consistent with  
21 finding that a movant has a threshold burden of showing some  
22 prong of Rule 13(f)'s test, rather than the Rule 15 test of  
23 Foman.

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

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

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

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

19 917 F.2d at 1519. Interestingly, the court makes no mention of  
20 the fourth prong of Rule 13(f), "or when justice requires".

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

1 court wrote:

2           Moreover, even if the rule did apply,  
3 Logan has not met the requirements. Logan  
4 claims that the prerequisite of "oversight,  
5 inadvertence, or excusable neglect" has been  
6 met because the claims must have been omitted  
7 by the oversight or inadvertence of prior  
8 counsel, as there is no other reason for  
9 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.

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

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

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

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

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

9 Id. The court concluded:

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

15 Id.

16 Mr. Flannery's argument, now made through an attorney, is  
17 that he did not know that he was supposed to raise any  
18 counterclaims he might have against Unum when he filed his answer  
19 in July, 2005, notwithstanding that he had listed those claims in  
20 his amendment to Schedule B in March, 2005. It is of more than  
21 passing curiosity that Mr. Flannery amended Schedule B almost  
22 three months before Unum filed its adversary against him, and  
23 eleven months after Unum had sued him in federal district court  
24 (stayed by the bankruptcy filing). The amendment was made after  
25 conversion of his case from Chapter 11 to Chapter 7, and someone  
26 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

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

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

9 Excusable neglect is the next issue. The seminal case in  
10 that area is Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd  
11 P'ship, 507 U.S. 380 (1993). That case involved late-filed  
12 proofs of claims by creditors in a Chapter 11 and the issue of  
13 excusable neglect arose under Rule 9006(b)(1), Fed. R. Bankr. P.  
14 The president of the corporate creditors consulted with a  
15 bankruptcy attorney upon receipt of a notice of meeting of  
16 creditors. Buried in the notice was a bar date for filing proofs  
17 of claims. The attorney and president attended the meeting,  
18 which was held six weeks before the bar date. Still, they did  
19 not file timely proofs of claims. Three weeks later, however,  
20 they did so, along with a motion to permit a late filing. The  
21 bankruptcy court denied the motion, finding no excusable neglect.  
22 After appeal, a remand, and further appeal, the Supreme Court, in  
23 a 5-4 decision found the bankruptcy court's reading of the  
24 requirement too restrictive. The Court began by examining the  
25 dictionary definition of "neglect", and concluded that under Rule  
26 9006(b)(1):

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

7 507 U.S. at 388.

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

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

17 507 U.S. at 392.

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

20 This leaves, of course, the Rule's  
21 requirement that the party's neglect of the  
22 bar date be "excusable". It is this  
23 requirement that we believe will deter  
24 creditors or other parties from freely  
25 ignoring court-ordered deadlines in the hopes  
26 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,

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

3 507 U.S. at 395. The Court ultimately centered its finding that  
4 the neglect involved was "excusable" on the unusual form of the  
5 notice of the claims bar date, which it felt was ambiguous and  
6 obscure.

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

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

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

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

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

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

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

22 That leaves the fourth prong of Rule 13(f), "or when justice  
23 requires". As already discussed, Foman v. Davis, 371 U.S. 178  
24 (1962), instructed that an amendment should be "freely given":

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

1 amendments previously allowed, undue  
2 prejudice to the opposing party by virtue of  
3 allowance of the amendment, fertility of  
4 amendment, etc. . . . .

4 371 U.S. 182. There has been no showing of undue prejudice to  
5 Unum, nor futility of the proposed amendment. There is  
6 unexplained and therefore undue delay, and it is hard to imagine  
7 why there was no effort many months earlier to assert the  
8 counterclaims for any reason other than tactical, nor has  
9 Mr. Flannery offered such a reason.

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

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

1 Conclusion

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

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

17 IT IS SO ORDERED.

18 DATED: SEP 13 2006

19  
20   
21 PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court  
22  
23  
24  
25  
26