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claims  
LBR 3001-1.A.1.d  
11 U.S.C. § 501(c)  
11 U.S.C. § 502(b)(9)  
11 U.S.C. § 326  
trustee's fees

In re Rovig, Case No. 397-36652-elp7  
4/20/99 ELP unpublished

When the trustee learned that there were surplus assets in the estate, he trustee sent a letter to all scheduled creditors who had not filed timely claims, notifying them of the surplus assets and that he would hold the case open to allow the late filing of claims. The trustee's action in sending the letter was not improper, because the trustee could have asked the court to send a surplus asset notice pursuant to LBR 3001-1.A.1.d, or could have filed claims on the creditor's behalf pursuant to § 501(c). The claims filed by the creditors after the claims bar date are not disallowed because they are late. § 502(b)(9). The lateness of claims filed after the deadline for filing affects their distribution priority rather than their allowability.

The trustee's fees cannot exceed percentages of funds disbursed by the trustee to parties other than the debtor. § 326. Funds disbursed include payments made to creditors, including creditors who filed late claims.

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UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF OREGON

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In Re:

) Bankruptcy Case No.

11

STACIE LEE ROVIG,

) 397-36652-elp7

)

12

Debtor.

) MEMORANDUM OPINION

)

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Kenneth S. Eiler, trustee of Chapter 7 debtor, Stacie Lee

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Rovig, notified creditors who did not file claims by the claims bar

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date that he had \$45,000 available for distribution and only \$8,830

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in claims had been filed. His letter encouraged the recipient

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creditors to file claims and several did so. Debtor objects to the

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trustee's final account on the basis that the trustee acted

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improperly when he sent the letter and objects to distribution to

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creditors who filed late claims following the allegedly improper

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letter. For the reasons discussed hereafter, debtor's objections

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are overruled.

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FACTS

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When debtor filed her Chapter 7 bankruptcy in 1997, one of

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the assets she listed on her schedules was a personal injury claim

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arising from an assault ("the claim"), which debtor valued at \$1,000

1 and claimed was fully exempt. Shortly after the filing, the  
2 bankruptcy court clerk sent notice of the filing to debtor's  
3 creditors and advised them not to file a claim unless they received  
4 further notice from the court to do so. The notice indicated that  
5 it appeared there were no assets in debtor's estate from which  
6 payment could be made to unsecured creditors.

7           Ultimately, the trustee settled the claim for \$160,000. From  
8 the proceeds, the trustee paid his counsel (\$53,333), the costs of  
9 the litigation (\$8,960), and \$54,000 to debtor which consisted of  
10 \$10,000 for her exemption plus \$44,000 for the amount received in  
11 excess of projected claims. The trustee retained approximately  
12 \$45,000 to pay the costs of administration and the creditors'  
13 claims.

14           On June 25, 1998, the clerk notified interested parties that  
15 the trustee expected to be able to pay a dividend to creditors and  
16 that claims had to be filed within ninety days thereafter in order  
17 to be timely. The notice further stated: "Claims may be filed after  
18 the stated deadline, but they probably will be treated as late and  
19 therefore paid after timely claims . . . ."

20           When the trustee reviewed the filed claims shortly after the  
21 September 23, 1998 claims deadline, he learned that only \$8,830 in  
22 claims had been filed even though debtor had scheduled \$27,713 in  
23 unsecured claims on her Schedule F.<sup>1</sup> On October 6, 1998, the

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24  
25           <sup>1</sup> According to Exhibit C to debtor's petition, debtor had  
26 \$31,298 in unsecured debt. Debtor's schedules do not include any  
(continued...)

1 trustee mailed a letter to each of the scheduled creditors who had  
2 not filed a timely claim that said:

3 I am the bankruptcy trustee in the above entitled  
4 proceeding which was commenced on August 13, 1997. To  
5 date, I have collected over \$45,000 available for  
6 distribution to creditors. Notice has been sent to  
7 creditors to file claims. **However**, as of this date I have  
8 received only \$8,830 in claims. If you do not file a  
9 claim then I will have no alternative but to return a  
10 substantial sum to the debtor.

11 I am prepared to leave this case open for an  
12 additional thirty (30) days to allow you to file a proof  
13 of claim. If you have any questions please contact me  
14 immediately. Your claim form should be filed with the  
15 U. S. Bankruptcy Court. Their address is: **1001 SW Fifth**  
16 **#900, Portland, Oregon 97204**. Be sure to attach  
17 documentation supporting your claim. Thank you.

18 (Emphasis in original).

19 Thereafter, five additional creditors filed claims totaling  
20 \$11,655.57.

#### 21 ISSUES

- 22 1. Whether the trustee acted improperly in mailing the  
23 letter.
- 24 2. Whether claims filed after the trustee mailed the  
25 letter should be disallowed.
- 26 3. How much compensation should be awarded to the trustee.

#### 27 ANALYSIS

##### 28 A. Propriety of the Letter.

29 Before 1996, when the amount of assets held by a trustee

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30 <sup>1</sup>(...continued)  
31 priority unsecured debt. There is no apparent explanation for the  
32 discrepancy between Exhibit C and Schedule F.

1 exceeded filed claims, the court notified interested parties of the  
2 surplus and notified creditors of the opportunity to file claims.<sup>2</sup>  
3 In 1996, the national rule regarding surplus asset notices was  
4 eliminated.

5           Thereafter, in 1998, the Bankruptcy Court for the District of  
6 Oregon amended Local Bankruptcy Rule 3001-1.A.1.d<sup>3</sup> to provide that  
7 the court may send a surplus asset notice if the trustee requests  
8 such a notice and demonstrates "cause." General Order 98-1.2. The  
9 background of the 1996 amendment and the amendment of the related  
10 Local Bankruptcy Rule are set forth in greater detail in my  
11 unpublished opinion in In re Williams, No. 397-36061-elp7 (Bankr. D.  
12 Or., June 11, 1998), a copy of which is attached.<sup>4</sup>

13           Rather than incur the expense and uncertain outcome of a  
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15           <sup>2</sup>       Former Fed. R. Bankr. P. 3002(6) provided:

16                   In a chapter 7 liquidation case, if a surplus remains  
17                   after all claims allowed have been paid in full, the  
18                   court may grant an extension of time for the filing  
19                   of claims against the surplus not filed within the  
20                   time hereinabove prescribed.

21           <sup>3</sup>       Local Bankruptcy Rule 3001-1.A.1.d. provides:

22                   If a trustee concludes a case has surplus  
23                   assets, the trustee may file a motion for  
24                   authorization to send notice of such surplus to  
25                   creditors who have not filed a claim. The court may  
26                   then, for cause shown in an individual case,  
27                   authorize the clerk to send a surplus asset notice in  
28                   that case. If such notice is authorized, and is sent  
29                   after the filing deadline for tardy claims set forth  
30                   in LBR 3001-1.A.1.c., the deadline for filing tardy  
31                   claims shall become that set in the notice.

32           <sup>4</sup>       The Williams opinion incorrectly cites the pertinent Local  
33           Bankruptcy Rule as 3002, rather than 3001.

1 motion to have the court send a surplus asset notice, some trustees,  
2 with the encouragement of the United States Trustee, began pursuing  
3 alternative courses of conduct. For instance, some trustees, using  
4 their statutory authority under 11 U.S.C. § 501(c),<sup>5</sup> file claims on  
5 behalf of creditors. See In re Martin, No. 698-62706-FRA7 (Bankr.  
6 D. Or., February 12, 1999) (Alley, J.) (unpublished) (Fed. R. Bankr.  
7 P. 3004 requires that claims filed by a trustee on behalf of a  
8 creditor be filed no later than 30 days after the claims bar date,  
9 therefore, claims filed by the trustee after that deadline were  
10 disallowed as untimely.).

11 When the trustee realized that several creditors had not  
12 filed claims in this case, he could have simply filed claims on  
13 their behalf under § 501(c). Instead, before his deadline to file  
14 claims on behalf of the creditors, he wrote to them and suggested  
15 that they file claims. Under the distribution provisions of  
16 § 726(a)(3)<sup>6</sup>, such claims, while late, would be paid before the

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18 <sup>5</sup> 11 U.S.C. § 501(c) provides:  
19 If a creditor does not timely file a proof of such  
20 creditor's claim, the debtor or the trustee may file  
a proof of such claim.

21 <sup>6</sup> 11 U.S.C. § 726(a)(3) provides:  
22 (a) Except as provided in section 510 of this title,  
23 property of the estate shall be distributed ---  
24 . . . . .  
25 (3) [t]hird, in payment of any allowed  
26 unsecured claim proof of which is tardily filed under  
section 501(a) of this title, other than a claim of  
(continued...)

1 trustee returned any funds to the debtor. Given that the trustee  
2 could have filed claims on behalf of the creditors at the time he  
3 sent the letter, there was nothing improper about the trustee  
4 advising the creditors of their opportunity to file a late claim.

5 Contrary to debtor's assertion, the trustee had no obligation  
6 to ask the court to send a surplus asset notice. The language of  
7 Local Bankruptcy Rule 3001-1.A.1.d is permissive, not mandatory.  
8 The rule allows a trustee to ask for a surplus asset notice; it does  
9 not require him to do so. The rule could not have the effect urged  
10 by debtor because if it did, it would be contrary to § 501(c) which  
11 gives the trustee the authority to file claims on behalf of  
12 creditors.

13 Debtor complains that she did not receive notice of the  
14 letter. Nothing obligated the trustee to notify debtor of the  
15 letter.<sup>7</sup>

16 B. Debtor's Objection to Late-Filed Claims.

17 Debtor's objection to allowance of the late-filed claims is  
18 based upon the alleged impropriety of the letter. Having found that  
19 the trustee acted properly in sending the letter, overruling the  
20 claims objection follows.

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22 <sup>6</sup>(...continued)

23 the kind specified in paragraph (2)(C) of this  
24 subsection[.]

25 <sup>7</sup> In the notice sent by the court on June 25, 1998 regarding  
26 the filing of claims, all interested parties, including debtor, were  
notified that there could be distribution to creditors who filed  
late claims.

1 Even if I construe debtor's objection to the claims as being  
2 based upon the fact that creditors filed them after the deadline,  
3 debtor's objection is not well taken. Congress amended the  
4 Bankruptcy Code in 1994 to add § 502(b)(9), which deals expressly  
5 with the disallowance of a claim on the basis that the claim is  
6 filed after the claims bar date. The statute provides:

7 (b) Except as provided in subsections  
8 (e)(2), (f), (g), (h) and (i) of this section, if such  
9 objection to a claim is made, the court, after notice and  
10 a hearing, shall determine the amount of such claim in  
11 lawful currency of the United States as of the date of the  
12 filing of the petition, and shall allow such claim in such  
13 amount except to the extent that ---

14 . . . . .

15 (9) proof of such claim is not timely  
16 filed, except to the extent tardily filed as  
17 permitted under paragraph (1), (2), or (3) of  
18 section 726(a) of this title or under the  
19 Federal Rules of Bankruptcy Procedure . . . .

20 Thus, as the United States Trustee pointed out by in his response to  
21 debtor's objection, "[i]n Chapter 7 cases, the lateness of claims  
22 filed after the deadline for filing timely claims affects their  
23 distribution priority rather than their allowability. See 11 U.S.C.  
24 § 502(b)(9); 11 U.S.C. § 726(a)(3)." (Document 42). The debtor's  
25 objection to the late-filed claims is overruled.

26 C. Trustee's Fees.

The trustee has requested \$4,235 in fees and has supported  
his request with time records demonstrating that administration of



1 the case will consume 26.10 hours of the trustee's services.<sup>8</sup>  
2 Debtor does not challenge the necessity of the services provided by  
3 the trustee, the reasonableness of the number of hours worked, or  
4 the trustee's claim that \$175 per hour is a reasonable rate of  
5 compensation. Debtor argues that the trustee's fees should be  
6 limited to the statutory maximum compensation on disbursements of  
7 \$8,830, the amount of the timely-filed claims, not to exceed  
8 \$2,500.<sup>9</sup>

9 Section 330(a) of the Bankruptcy Code provides that the court  
10 may award the trustee reasonable compensation, subject to the  
11 limitations of § 326. The pertinent part of § 326 provides that the  
12 trustee's compensation shall not exceed the percentages specified of  
13 the funds disbursed by the trustee to interested parties other than  
14 debtor. Disbursements include payment of administrative expenses  
15 plus funds distributed to creditors. In this case, trustee paid  
16 \$62,293 in attorney fees and costs related to the claim.<sup>10</sup> Claims  
17 filed by unsecured creditors total approximately \$17,000 and will be  
18 paid in full. Using just those two numbers, the maximum trustee

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20 <sup>8</sup> Mr. Eiler has also been employed as attorney for the  
21 trustee. He has put debtor and the court on notice that as of  
22 February 10, 1999 he had worked 4.5 hours as a lawyer and would  
assert a \$787.50 claim for those services.

23 <sup>9</sup> The maximum trustee's fee on \$8,830 is \$1,633. See  
24 11 U.S.C. § 326(a).

25 <sup>10</sup> The fact that trustee's attorney, Wilbur Smith, withheld  
26 those sums from the settlement check rather than paying them to the  
trustee does not make any difference. The trustee constructively  
received the \$62,293.

1 compensation exceeds \$7,000.<sup>11</sup> The trustee has requested  
2 substantially less than the maximum. The debtor's objection to the  
3 trustee's fees is not well taken.

4 CONCLUSION

5 Debtor's objections to the trustee's final report, to  
6 allowance of late-filed claims, and to the trustee's fee request are  
7 overruled. The trustee shall submit the order.

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ELIZABETH L. PERRIS  
Bankruptcy Judge

11 cc: Stacie Lee Rovig  
12 Kenneth S. Eiler  
U. S. Trustee

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<sup>11</sup> The statutory maximum would also include funds disbursed  
26 to the trustee for his fees, thus further increasing the maximum  
fee.