11 USC § 501
11 USC § 502
11 USC § 1302(b)(4)
Negligent Misrepresentation
Unjust Enrichment

Vinzant v. Knupp, Adv. No. 93-3433; Civil No. 95-564 ST
In re Vinzant, Case No. 388-32747-H13

10/24/95 Redden Unpublished

The District Court adopted, with one amendment, the magistrate's Findings and Recommendation affirming the decision of the Bankruptcy Court. The court held that a Chapter 13 trustee is not required to pay a secured claim that is listed in the confirmed plan but for which no proof of claim was filed. The filing of a proof of claim is a prerequisite to being deemed allowed under section 502; therefore a secured creditor must file a proof of claim and have that claim allowed in order to receive any distribution in a Chapter 13 proceeding.

Summary judgment was properly given on plaintiff debtor's claim against the Chapter 13 trustee for negligent misrepresentation in failing to follow his usual practice of noting in red ink on the Notice of Intent that the secured creditor had failed to file a proof of claim. The trustee has no duty under § 1302(b)(4) to notify debtors that creditors have not filed claims.

Summary judgment was properly given on plaintiff debtor's claim against the secured creditor for negligently failing to

follow its custom of informing the debtor's attorney that it has not filed a timely proof of claim. The debtor and creditor are in an adversarial relationship, and the creditor has no duty to the debtor.

Summary judgment was properly granted on plaintiff's unjust enrichment claim against the unsecured creditor that received a distribution that it would not have received had the secured claim of a secured creditor been paid. Plaintiff debtor could have filed a proof of claim on behalf of the secured creditor, thereby protecting her rights. Her failure to do so resulted in the trustee's failure to pay the secured claim and the payment of the balance of the plan payments to the unsecured creditor.

Affirmed see P97-10.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re JEANNE M. VINZANT, Debtor,	Civil No. 95-564-ST
JEANNE M. VINZANT, Plaintiff, vs. EMILY KNUPP, ROBERT MYERS, MULTNOMAH COUNTY, and EMILY KNUPP, P.C., Defendants.	O R D E R

REDDEN, Judge:

Magistrate Judge Stewart filed her Findings and Recommendation on September 6, 1995. The matter is now before me pursuant to 28 U.S.C. section 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When a party objects to any portion of the Magistrate's

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(Rev 8/82)

Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. section 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

One of the defendants, the Chapter 13 Trustee, has timely filed objections. I have, therefore, given the file of this case a de novo review. The Magistrate's Findings and Recommendation (doc. #87) is AMENDED to incorporate the Trustee's objections that pursuant to 11 U.S.C. § 1302(b)(4), there is no "duty" by the trustee to notify debtors of creditors who have not filed claims. Section 1302(b)(4) states only that the trustee shall "advise, other than on legal matters, and assist the debtor in performance under the plan." Id.

Therefore, the conclusions of law found on page 23, line 16 and page 29, line 4 are amended to state that there is no duty on the part of the trustee in this case to notify plaintiff of the fact that Multnomah County had not filed a proof of claim. Otherwise, the Findings and Recommendation are adopted in their entirety -- the judgment of the Bankruptcy Court is affirmed and plaintiff's Notice of Appeal (doc. #53) is dismissed.

IT IS SO ORDERED.

Dated this 24 day of October, 1995.

James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re JEANNE M. VINZANT, Debtor. JEANNE M. VINZANT, Plaintiff, v. EMILY KNUPP, ROBERT MYERS, MULTNOMAH COUNTY, and EMILY KNUPP, P.C., Defendants.	)	CV. 95-564-ST FINDINGS AND RECOMMENDATION

STEWART, Magistrate Judge:

INTRODUCTION

On June 14, 1988, debtor-plaintiff, Jeannie M. Vinzant (fka Jeanne Miles) ("plaintiff") filed a bankruptcy petition (Bankruptcy Case No. 388-32747-H13) pursuant to Chapter 13 of the Bankruptcy Code, 11 USC §§ 101-1330 ("Code"), in the United States Bankruptcy Court for the

District of Oregon ("Bankruptcy Court"). Plaintiff thereafter filed this adversary proceeding (In Re Vinzant, Adv. No. 93-3433-P) against defendants Emily Knupp and Emily Knupp, P.C. ("Knupp, P.C."), Multnomah County, and the Chapter 13 trustee, Robert Myers ("Trustee").

Multnomah County holds a tax lien against plaintiff's real property. Plaintiff listed this debt in her proposed Chapter 13 plan. However, because Multnomah County did not file a proof of claim with the Bankruptcy Court, the Trustee did not distribute any sums to Multnomah County, and instead distributed to Knupp, P.C. the full amount of its unsecured claim. As a result, Multnomah County's tax lien was not discharged and continues to accrue against plaintiff at an interest rate of 16% per year.

Plaintiff alleges that, under the terms of her confirmed Chapter 13 plan, the Trustee was required to pay Multnomah County's tax lien. Alternatively, plaintiff argues that the Trustee was negligent in failing to notify her that Multnomah County had not filed a proof of claim. Plaintiff also alleges that Multnomah County was negligent in failing to file a timely proof of claim and in failing to follow its usual practice of notifying a debtor that it had not filed a proof of claim so that the debtor and/or the debtor's attorney could file a proof of claim on Multnomah County's behalf. Finally, plaintiff alleges that Knupp, P.C. was unjustly enriched. Plaintiff seeks to have defendants return and/or redistribute the funds paid by the Trustee to Knupp P.C. In the alternative, plaintiff seeks to have her Multnomah County tax account credited with all funds Multnomah County would have received under plaintiff's confirmed Chapter 13 plan had Multnomah County timely filed a proof of claim.

Bankruptcy Judge Elizabeth Perris granted summary judgment in favor of Multnomah County (docket #45), the Trustee (docket #43), and Emily Knupp, as an individual (docket #44).

After a trial on plaintiff's unjust enrichment claim against Knupp, P.C., Judge Perris granted judgment in favor of Knupp, P.C. by letter dated October 25, 1994 (docket #50) ("Letter Opinion"). On November 8, 1994, Judge Perris entered a Judgment of Dismissal (docket #51), and on November 14, 1994, entered an Amended Judgment of Dismissal (docket #52), incorporating the Letter Opinion by reference. Plaintiff appeals those judgments.

In the event of an objection to the Bankruptcy Appellate Panel, the United States District Court has jurisdiction of all bankruptcy appeals. 28 USC § 158. Because plaintiff timely filed an objection to referral of this appeal to the Bankruptcy Appellate Panel of the Ninth Circuit (docket #54), this appeal is now before this court.[1]

FACTS

On September 23, 1994, the parties filed Agreed Facts (docket #48). In addition, the record contains transcripts of the proceedings before the Bankruptcy Court (dockets #61, 62, and #63) and the parties filed excerpts of the record (dockets #71, #76, and #79). The following facts are taken from those documents.

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[1] The Fifth and Seventh Circuits have decided that district courts have no power to refer bankruptcy appeals to magistrate judges, even if the parties consent. In Matter of Elcona Homes Corp. 810 F2d 136, 139-40 (7th Cir 1987); Minerex Erdoel, Inc. v. Sina, Inc., 838 F2d 781, 786 (5th Cir), cert denied, 488 US 817 (1988); In Matter of Evangeline Refining Co., 890 F2d 1312, 1320 (5th Cir 1989); In the Matter of Foreman, 906 F2d 123, 125-26 n. 2 (5th Cir 1990). The rationale is based on the history of the bankruptcy statutes. The Bankruptcy Reform Act of 1978 contained a provision that explicitly prohibited a district court from referring a bankruptcy appeal to a magistrate judge ("Express Prohibition"). 28 USC § 1334(c). After the Supreme Court ruled that the broad grant of jurisdiction to the bankruptcy courts was unconstitutional, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 to strengthen the control of Article III courts over bankruptcy courts. It streamlined bankruptcy appeals and in the process omitted the Express Prohibition. Appeals may now be taken either to the district court or, with the parties' consent, to the bankruptcy appeals panel. The Fifth and Seventh Circuits reason that if Congress intended its appeals scheme to include reference to Magistrate Judges, it would have expressly so provided.

The Tenth Circuit has taken a slightly different position. Hall v. Vance, 887 F2d 1041 (10th Cir 1989) held that referral of a bankruptcy appeal to a magistrate judge for an "advisory hearing" in which the district court explicitly reserved jurisdiction to render the final decision did not violate the bankruptcy laws. Accord, In re Apex Oil Co., 146 BR 821 (ED Mo 1992).

The Ninth Circuit has not yet addressed this issue. Therefore, this matter has been referred to a magistrate judge pursuant to 28 USC § 636(b) and Local Rule 135-1.

In 1982 plaintiff retained the services of Knupp, P.C. to represent her in a divorce from her then husband, Fred Miles. As a result of that representation, plaintiff owed Knupp P.C. attorney fees. Thereafter, Knupp P.C. filed an attorney's lien to secure payment of the unpaid fees.

Plaintiff filed a Voluntary Petition pursuant to Chapter 13 of the Code on June 14, 1988. On June 20, 1988, the Bankruptcy Court notified plaintiff's creditors that a meeting of creditors would be held on July 12, 1988, and enclosed a summary of plaintiff's proposed plan. Excerpts of Record of Appellee Multnomah County ("Multnomah County Excerpts"), pp. 5-6. On January 30, 1989, plaintiff filed a Modified Chapter 13 Plan ("Modified Plan"). Agreed Facts, Exhibit A. The Modified Plan proposed that plaintiff pay $1,050.00 per month for 36 months to satisfy, among other debts, the full amount of Multnomah County's tax lien. It also proposed paying a fixed sum of $11,448.00 to either Knupp, P.C. and/or Robert and Dorothy Miles. Additionally, at the request of the Trustee, plaintiff's Modified Plan indicated that unsecured creditors would be paid "0% approx." instead of "0%," as originally indicated in plaintiff's proposed plan.

On March 15, 1989, the Bankruptcy Court entered an Order ("Confirmation Order") confirming plaintiff's Modified Plan ("Confirmed Plan"). Id, Exhibit B.

Knupp, P.C. timely filed an unsecured proof of claim in the amount of $9,162.57. Id, Exhibit D. This claim is shown on the claims register as Claim No. 3. Id, Exhibit F. A few weeks later, Knupp P.C. filed an amended proof of claim in the same amount which indicated that the claim was secured by a judgment lien. Id, Exhibit E. This claim is shown on the claims register as Claim No. 5. Id, Exhibit F. No entity filed an objection to either proof of claim.

Plaintiff's Confirmed Plan listed her residence in Multnomah County with a value of $62,000.00. Id, Exhibit A. However, after deducting the security interests with priority, the remaining equity in her residence was insufficient to pay in full both the competing lien claims of Knupp, P.C. and of Robert and Dorothy Miles. In a collateral proceeding, Bankruptcy Judge Henry Hess determined that the lien of Robert and Dorothy Miles was superior to and had priority over the lien of Knupp, P.C. with respect to plaintiff's residence. Id, Exhibit C. Accordingly, on March 22, 1990, Judge Hess ordered that Knupp, P.C.'s claim was unsecured. Id. Knupp P.C. did not file a second amended proof of claim.

Although the Confirmed Plan lists Multnomah County as a secured creditor, Multnomah County did not file a proof of claim for its tax lien against plaintiff. Additionally, neither plaintiff nor her attorney filed a proof of claim on behalf of Multnomah County prior to the entry of the Discharge Order.

On or about May 9, 1990, the Trustee's employee sent to plaintiff and her attorney a Notice of Intent to Pay Claims ("Notice of Intent") and a claims register which summarized the claims that had been filed in the bankruptcy case. Excerpt of Record of Robert W. Myers, Trustee ("Trustee's Excerpts"), Exhibit 5. It is the Trustee's general practice to alert the debtor and/or the debtor's attorney by red ink on the Notice of Intent if a secured creditor has not filed a proof of claim. Here, however, the Trustee made no notation on the Notice of Intent or claims register that Multnomah County had not filed a proof of claim.

Plaintiff completed her payments to the Trustee pursuant to the terms of the Confirmed Plan. The Trustee did not make any payments to Multnomah County under the Confirmed Plan. After paying the secured claims, other than Multnomah County's tax lien, the Trustee paid the

remaining balance of $9,162.57 to Knupp P.C. for its unsecured claim (by checks dated November 5 and 15, 1991). Thereafter, on December 2, 1991, the Bankruptcy Court issued a Discharge Order. Agreed Facts, p. 3.

Subsequent to entry of the Discharge Order, plaintiff learned that Multnomah County had not been paid any funds by the Trustee and reopened the case by filing this adversary proceeding.

STANDARDS

Pursuant to Bankruptcy Rule 8013, findings of fact by the Bankruptcy Judge, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. Conclusions of law and mixed questions of law and fact are reviewed *de novo*. In re Hedgecock, 160 BR 380 (D Or 1993). With respect to summary judgment motions, FRCP 56 applies. Bankruptcy Rule 7056.

DISCUSSION

I. Chapter 13 Procedures

Proper analysis of plaintiff's claims first requires an understanding of the procedures followed in a Chapter 13 bankruptcy proceeding in this district.[2]

A Chapter 13 petition is a voluntary filing which enables individuals to adjust their debts out of future income under court supervision. After a debtor files a Chapter 13 petition, the Bankruptcy Court sets a date for a meeting of creditors and sends to all creditors and other interested parties listed in the debtor's petition a form captioned "Order for Meeting of Creditors,

[2] The following explantion is based on information provided by the documents and also by the parties during oral argument.

Combined with Notice Thereof and of Automatic Stay," together with a "Summary of Debtor's Chapter 13 Plan" ("Summary"). Multnomah County Excerpts, pp. 5-6.

The first paragraph of the Summary states what amount the debtor proposes to pay to the trustee each month ($700.00 in this case). The second paragraph states what amount "the trustee shall make" each month from the debtor's payment to "holders of proved and allowed secured claims." In this case, Multnomah County is listed with a proposed monthly payment of $205.00. Underneath that statement is a paragraph that reads as follows:

> THE CLAIM OF EACH CREDITOR LISTED ABOVE SHALL BE ALLOWED AS A SECURED CLAIM IN THE AMOUNT OF THE SECURITY VALUE SHOWN AND WILL BE PAID IN THE MONTHLY PAYMENT SHOWN UNTIL EACH SUCH CLAIM, WITH INTEREST . . . HAS BEEN PAID. SUCH HOLDERS SHALL RETAIN THEIR LIENS UNTIL THEIR ALLOWED SECURED CLAIMS HAVE BEEN PAID. ANY REMAINING AMOUNT OWING SHALL BE ALLOWED AS A GENERAL UNSECURED CLAIM AND BE PAID UNDER THE TERMS OF PARAGRAPH 2D, BELOW.

Although paragraph 2 states the value of the security ($62,000.00 for plaintiff's residence), it does not list the amount of debt owed to each creditor. That information is contained on the debtor's schedules, a copy of which may be obtained by contacting the Bankruptcy Court. The Summary also states what dividend percentage will be paid to general unsecured claimants, what executory contracts and leases are rejected, what creditors will be paid directly by the debtor, and what liens are voided. Chapter 13 plans are designed to pay secured claims in full and generally run for 36 months but may be extended for up to five years. 11 USC § 1322(d).

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The Order for Meeting of Creditors states the date and time set for the meeting at which creditors may file their claims, examine the debtor, and transact other business (July 12, 1988 in this case). It also states the date and time of the hearing on confirmation of the plan (July 28, 1988 in this case) and further advises that:

> In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim whether or not he is included in the list of creditors filed by the debtor. Claims which are not filed within 90 days after the above date set for the meeting of creditors will not be allowed except as otherwise provided by law. . . . ANY CREDITOR WHO HAS ANY OBJECTION TO ANY PROVISION OF THE DEBTOR'S PLAN, INCLUDING THE VALUATION OF ANY SECURITY, MUST ATTEND THE HEARING ON CONFIRMATION AND PRESENT SUCH OBJECTION TO THE COURT. IN THE ABSENCE OF SUCH AN OBJECTION THE COURT MAY ENTER AN ORDER CONFIRMING THE PLAN WHICH WILL MAKE ALL OF THE PLAN'S PROVISIONS BINDING UPON ALL CREDITORS, EXCEPT THE AMOUNT OWED A CREDITOR SHALL BE DETERMINED FROM THE CREDITOR'S PROOF OF CLAIM RATHER THAN THE AMOUNT SHOWN IN THE PLAN. FILING OF A PROOF OF CLAIM REJECTING THE PLAN OR A MOTION FOR RELIEF FROM THE AUTOMATIC STAY WILL NOT BE CONSIDERED AS AN OBJECTION TO CONFIRMATION.

In other words, a secured creditor can object to the plan only by presenting the objection to the court at the confirmation hearing. The creditor may also file a proof of claim to establish the amount of the debt. The claim form is on the reverse side of the Order for Meeting of Creditors and must be filed no later than 90 days after the first meeting of creditors. This date commonly is referred to as the claims bar date.

The confirmation hearing generally is held after the meeting of creditors, but before the claims bar date. However, sometimes confirmation hearings can occur before the meeting of creditors in order to expedite payment to creditors. Under 11 USC § 1326, a debtor must make

payments before the plan is confirmed. The trustee holds these payment and does not distribute them until the plan is confirmed. If necessary, the plan is subsequently modified. Conversely, confirmation hearings sometimes are delayed. In this case, the confirmation hearing was delayed well beyond the claims bar date.

In advance of the confirmation hearing, the debtor submits a proposed Chapter 13 plan. The trustee makes preliminary determination that the plan is feasible and may request the debtor to make modifications. The form used for that purpose is very similar to the Summary form. In this case, the debtor's Modified Plan increased the monthly payments to $1,050.00 (up from $700.00) for 36 months and the monthly payment to Multnomah County to $365.00 (up from $205.00). Trustee's Excerpts, Exhibit 3. It also provided "0% approx." (rather than simply "0%") as the dividend to unsecured creditors from any remaining balance. After the confirmation hearing is held, the Bankruptcy Court enters a confirmation order. In this case on March 15, 1989, the court confirmed the debtor's Modified Plan with one amendment. Trustee's Excerpts, Exhibit 4.

After receiving the Order for Meeting of Creditors, Multnomah County generally files a proof of claim and obtains a copy of the proposed plan. If Multnomah County determines that the proposed plan will not pay off the debtor's tax lien, it generally files an objection and often will settle with the debtor to either increase the amount or number of its allotted monthly payments.

In this case, Multnomah County did not receive the Order for Meeting of Creditors and therefore did not file a proof of claim. Multnomah County Excerpts, pp. 8, 41. This likely occurred because the Multnomah County tax account for plaintiff was held in her former

(married) name of Jeannie Miles. Id, pp. 9, 48. Multnomah County did receive the Modified Plan, but by that time the claims bar date had passed. Id, pp. 10, 46.

Sometime after confirmation of the plan and the claims bar date, it is the general practice of the Trustee to send to debtors and their attorneys a Notice of Intent, attaching a copy of the claims register prepared by the Bankruptcy Court clerk's office. The Notice of Intent advises that:

> . . . unless the debtor(s) object to any claim . . . within thirty (30) days of this Notice's mailing date, the trustee will pay the claims in the amount and status (i.e. secured, or unsecured with or without priority) shown on the register as soon as funds are available.
> YOU ARE FURTHER NOTIFIED that payment will NOT be made and objections will NOT be necessary where the Plan controls . . . Examples where formal objections are normally required would be . . . claims which were not timely filed . . .

Trustee's Excerpts, Exhibit 5.

The claims register in this case did not list Multnomah County because Multnomah County did not file a proof of claim. While the Trustee sent plaintiff a Notice of Intent and a copy of the claims register, he did not otherwise alert her or her attorney of Multnomah County's non-filing.

If a secured creditor fails to timely file a proof of claim, "the debtor or trustee may do so in the name of the creditor" within 30 days after the claims bar date or a later date as extended by the Bankruptcy Court for good cause. Bankruptcy Rule 3004. If a secured creditor does not file a proof of claim, its lien is not discharged, but survives and may be foreclosed after the Chapter 13 bankruptcy is terminated. 11 USC §§ 506(d)(2), 1328(a); Dewsnup v. Timm, 502 US 410, 418-19 (1992); In re Thomas, 883 F2d 991 (11th Cir 1989), cert denied, 497 US 1007 (1990). In

this case the debtor would have benefitted by filing a proof of claim on behalf of Multnomah County because its tax lien accrued interest at the high rate of 16% per year and has not been discharged. As a result, plaintiff now faces a greater debt to repay Multnomah County than existed before the Chapter 13.

II. Negligence of the Trustee

A. Must the Trustee Pay a Secured Creditor Absent a Proof of Claim?

Plaintiff first argues that the Trustee was required to pay Multnomah County in spite of the fact that no one ever filed a proof of claim for Multnomah County's tax lien. This dispute presents a contentious issue of statutory interpretation that has split the bankruptcy courts. That issue is whether a secured creditor must file a proof of claim in order to obtain payment from the trustee under a confirmed plan in a Chapter 13 case. Recognizing this split of authority, Judge Perris held that a secured creditor must file a proof of claim in order to receive a distribution under a Chapter 13 plan:

> Permitting a distribution in chapter 13 in the absence of a filed proof of claim would circumvent the claims allowance process provided by the Code and pertinent rules. While there is a split of authority, the better reasoned authority requires the filing of a proof of claim by or on behalf of a secured creditor as a prerequisite to that creditor's entitlement to a distribution under a Chapter 13 plan. See In re Johnson, 95 B.R. 197 (Bankr. D. Colo. 1989).

Conclusion of Law No. 2, (docket #43).

Her decision is in accord with several other bankruptcy courts. E.g., In re Schaffer, 173 BR 393, 395-96 (Bankr ND Ill 1994); In re King, 165 BR 296, 299 (Bankr MD Fla 1994); In re Alderman, 150 BR 246, 252 (Bankr D Mont 1993); In re Linkous, 141 BR 890, 895 (WD Va 1992), aff'd 990 F2d 160 (4th Cir 1993).

Plaintiff urges this court to instead follow the lead of contrary bankruptcy decisions holding that a Chapter 13 trustee must pay secured claims in accordance with the confirmed plan even if a secured creditor has not filed a proof of claim. In re Rome, 162 BR 872, 875 (Bankr D Colo 1993), following In re Babbin, 156 BR 838, 846-47 (Bankr D Colo), reversed in part 160 BR 848 (D Colo 1993); In re Robert, 171 BR 881, 886 (Bankr ND Cal 1994).

Plaintiff's argument derives from the absence of any provision in the Code or the Rules that requires a secured creditor to file a proof of claim in a Chapter 13 proceeding.[3] The Code defines a claim as a "right to payment." 11 USC § 101(5). A claim is "entitled to priority" under 11 USC § 507 only if it is "allowed." Whether a claim is "allowed" is, in turn, a function of 11 USC §§ 501 and 502, governing the filing of proofs of claim and allowance of claims, as well as Bankruptcy Rule 3002. As explained in the legislative history of section 501:

> This subsection is permissive only, and does not require filing of a proof of claim by any creditor. It permits filing where some purpose would be served, such as where a claim that appears on a list filed under 11 U.S.C. §§ 924 or 1111 was incorrectly stated or listed as disputed, contingent, or unliquidated, where a creditor with a lien is undersecured and asserts a claim for the balance of the debt owed him (his unsecured claim, as determined under proposed 11 U.S.C. § 506(a)), or in a liquidation case where there will be a distribution of assets to the holder of allowed claims. In other instances, such as . . . in situations where a secured creditor does not assert any claim against the estate and a determination of his claim is not requested under proposed 11 U.S.C. § 506(d) . . . filing of a proof of claim may simply not be necessary.

In re Babbin, 156 BR at 846-47, quoting HR Rep No 595, 95th Cong, 1st Sess 351 (1977), and S Rep No 989, 95th Cong, 2d Sess 61 (1978).

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[3] Chapters 1, 3, and 5 of the Code apply to Chapter 13 cases, whereas Chapters 7, 19, and 11 do not apply. 11 USC § 103 (a)-(g), (i).

In some circumstances, the rules require the filing of proofs of claim in order for a claim to be allowed. In particular, Bankruptcy Rule 3002(a) requires that an "unsecured creditor or an equity security holder must file a proof of claim or interest to be allowed" except as provided in the rules governing Chapters 9 and 11 (Rule 3003) and when the claim can be filed by a debtor or trustee (Rule 3004) or by a guarantor, surety, or co-debtor (Rule 3005). Notably, this rule does not mention secured creditors or Chapter 13. This leads to the inference that secured creditors need not file proofs of claims in order to have their claims allowed in a Chapter 13 case.

In addition, the Code sections specifically governing Chapter 13 cases also appear to support plaintiff. Section 1326(c) directs the trustee to "make payments to creditors under the plan" and does not refer to any proofs of claims that must be filed prior to making payments. Section 1327(a), captioned "Effect of confirmation," states as follows:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

The Confirmation Order is a final order binding on the parties and is often referred to a "new contract." In re Babbin, 156 BR at 850. Thus, the trustee is bound by the terms of the plan as confirmed by the Order.

However, if a secured creditor does not file a proof of claim, then the Trustee is faced with the problem of determining whether the claim is "allowed" and entitled to distribution under a Chapter 13 confirmed plan. The answer to this question lies in 11 USC § 502(a) which reads: "A claim or interest, *proof of which is filed* under section 501 . . . is deemed allowed, unless a party in interest . . . objects" (emphasis added). Some cases and commentators interpret this

language to require a secured creditor to file a proof of claim as a prerequisite to having it allowed. E.g., In re Schaffer, 173 BR at 394; In re Linkous, 141 BR at 895; In re Alderman, 150 BR at 252; 3 *Collier on Bankruptcy*, 15th ed., pp. 502-09. However, other cases interpret that same language to reach the opposite conclusion:

> The section merely says that **once a proof of claim is filed** under section 501, a permissive section, it is deemed allowed unless objected to. It does not say that in order to have a claim allowed a proof of claim must be filed.

In re Babbin, 156 BR at 848 (emphasis in original).

Judge Perris followed the first line of authority, citing the decision by Bankruptcy Judge Brooks in In re Johnson. However, after the Chief Bankruptcy Judge in that same court reached the opposite conclusion in In re Babbin, Judge Brooks changed his position four years later:

> By necessity, and for the sake of uniformity among the judges of this Court, I am now abandoning a portion of a prior decision that proofs of claim are necessary, even for secured creditors. In re Johnson, 95 B.R. 197 (Bankr. D. Colo. 1989).

In re Rome, 162 BR at 875 n. 12.

Thus, In re Johnson is no longer good authority. Nevertheless, this court concurs with Judge Perris' decision for several reasons. First, to the extent that the Bankruptcy Rules are inconsistent with the Code, the Code governs. 28 USC § 2075; In re Rogers, 57 BR 170, 172 n. 1 (Bankr ED Tenn 1986). Hence, sections 501 and 502 control over any inconsistency in Bankruptcy Rule 3002. If Bankruptcy Rule 3002(a) allows a secured claim without filing a proof of claim, then it conflicts with sections 501 and 502, as explained below.

Second, unlike Bankruptcy Rule 3002, which addresses only unsecured claims, section 502 governs all claims, whether secured or unsecured. The plain language of section 502 deems a

claim as "allowed" only if proof of it "is filed under section 501." In other words, a condition precedent of allowance is the filing of a proof of claim. If not filed, it will not be allowed. If not filed and allowed, it is not entitled to payment under Chapter 13. Nothing in section 502 addresses allowance of claims for which a proof of claim has not been filed.

Third, Congress is capable of expressly eliminating the requirement for filing a proof of claim. It did so for Chapter 9 and 11 cases by providing that a claim, whether secured or unsecured, is deemed filed and may be allowed based solely on the debtor's listing of the creditor in the statements and schedules unless scheduled as disputed, contingent, or unliquidated. 11 USC § 1111(a); Bankruptcy Rule 3003. The Code contains no similar provision for Chapter 13 cases. If Congress had intended to allow claims in Chapter 13 cases without the necessity of filing a proof of claim, it could have so provided.

Fourth, a secured creditor may choose for some reason not to participate in a Chapter 13 proceeding. Its lien nonetheless survives the bankruptcy and is satisfied or discharged only to the extent that it is receives distributions from the plan. For example, Multnomah County's tax lien, if not paid by the Confirmed Plan, remains against plaintiff's property to be ultimately collected, if necessary, by foreclosure. Plaintiff may prefer to include the tax lien in the Confirmed Plan in order to save her property from foreclosure, but Multnomah County may be indifferent. To permit a debtor to automatically include a secured creditor in a Chapter 13 plan would thwart a creditor's right not to participate in and be paid by the bankruptcy proceeding.

Fifth, without a proof of claim, proper processing of payments by the Chapter 13 trustee may present an administrative nightmare. A Chapter 13 trustee is obligated to perform the same duties as a Chapter 7 trustee to "examine proofs of claim and object to the allowance of any claim

that is improper." 11 USC §§ 704, 1302(b)(1). A creditor asserting a security interest in property must accompany a proof of claim with evidence that the security interest has been properly perfected. Bankruptcy Rule 3001(d). The trustee is at a distinct disadvantage to determine whether a secured creditor is entitled to secured treatment absent a proof of claim. The trustee would either have to assume that every secured creditor listed on the debtor's schedules is a non-avoidable and valid security interest or must conduct detailed, expensive and time-consuming searches for proof of proper perfection. Surely this is not the intent of the Code.

Sixth, even if the confirmed plan is binding, the language of plaintiff's Confirmed Plan, although not a model of clarity, seems to anticipate that payments will only be made to secured creditors whose claims are first allowed. The Confirmed Plan recites in paragraph 2(b) that "the trustee *shall make disbursements* as follows . . . (b) Payments to secured creditors *whose claims are duly proved and allowed* as follows," listing, among others, a monthly payment of $365.00 to Multnomah County. If the Confirmed Plan anticipates that the Trustee will make payments to the listed secured creditors, regardless of whether their claims are filed and allowed, then it need not qualify the definition of secured creditors by the phrase "whose claims are duly proved and allowed." The qualification must be prospective in nature, otherwise it would be meaningless.

The Confirmed Plan (emphasis added) also recites that:

> The claims of each of the creditors listed above *shall be allowed as a secured claim in the amount of the value of the security* and *will be paid* in monthly installments as shown until the *allowed secured claim* . . . has been paid.

This language could mean either that the listed claims are already allowed as secured claims or, alternatively, that they will only be allowed in the amount of the value of the security.

Given that the Confirmed Plan lists the value of the security, but not the amount of the secured claims, the latter interpretation is most logical. In other words, if a secured creditor files a proof of claim and the amount of that claim is allowed, then the claim is secured up to the amount of the security listed in the Confirmed Plan.

Seventh, the procedures of the Bankruptcy Court of the District of Oregon clearly contemplate that a secured creditor must file a proof of claim in a Chapter 13 proceeding. The Order for Meeting of Creditors specifically advises that a creditor must file a proof of claim in order to share in any distribution from the estate and that "the amount owed a creditor shall be determined from the creditor's proof of claim rather than the amount shown in the plan." Neither the proposed nor Confirmed Plan lists the amount of each secured claim, but only the name of the creditor and the value of the security. To determine who and how much to pay under a confirmed plan, the Trustee sends to the debtor a Notice of Intent, listing those claims that have been filed and allowed by the claims bar date and the amount. The debtor has the right to object to any claim within 30 days. If a secured creditor has not filed a claim, then that claim is not listed on the claims register.

This procedure is distinctly different from the practice in the Bankruptcy Court of Colorado, which involves a motion to confirm stating the amount of each secured claim. This procedure was deemed important to that court in concluding that a secured creditor need not file a proof of claim:

> Each motion to confirm clearly specified the Debtors' contention of value and sought a determination of the value of the collateral securing the creditor's claim, and, hence, the amount of the allowed secured and unsecured claim of that creditor. Neither of the secured creditors objected and neither has called into question the propriety of the notice. *Further,*

> *each motion to confirm explicitly advised the creditor that if no objection was filed, the creditor would receive the amount specified in the plan, and there was no stated requirement for the filing or allowance of a proof of claim.* Under these circumstances, there can be no plausible reason to require the secured creditor to file a proof of its secured claim.

In re Babbin, 156 BR at 849 (emphasis added).

At least one bankruptcy court in the Ninth Circuit has followed the lead of the Bankruptcy Court of Colorado to hold that the IRS's secured claim in a Chapter 13 case, although not timely filed, should be allowed:

> The court concludes that the IRS's secured claim should be allowed, even if the IRS did not timely file a proof of claim. In a Chapter 13 case, Rule 3002(a) does not require filing of a proof of claim by a creditor asserting a secured claim. Advisory Committee Note to Rule 3002 ("[a] secured claim need not be filed or allowed under § 502 or § 506(d) unless a party in interest has requested a determination and allowance or disallowance under § 502"); In re Rome, 162 B.R. 872, 875 (Bankr. D. Colo. 1993) ("the Chapter 13 Trustee is bound to distribute funds to secured creditors in accordance with a confirmed plan even absent a proof of claim being timely filed"). Because Debtor's scheduled secured debt owed to the IRS in the amount of $5,700 and Debtor's confirmed plan provides for payment of the IRS's allowed secured claim in the amount of $5,700, the IRS's secured claim shall be allowed in the amount of $5,700.

In re Robert, 171 BR at 886.

However, that case presented a different scenario than this case and did not discuss the interplay of Code sections 501 and 502 with Bankruptcy Rule 3002. There the IRS was attempting to participate in the Chapter 13 plan by filing a claim and seeking allowance, whereas here the debtor is attempting to force the secured creditor to receive distributions under the plan based on the debtor's schedule without any proof of claim being filed or allowed. In addition, in that case the confirmed plan provided for payment of the IRS claim in a specific sum, whereas

here the Confirmed Plan does not list the amount of Multnomah County's tax lien. Therefore, this court finds In re Robert of little precedential value.

Furthermore, another decision by the Ninth Circuit contains language which provides some support for requiring secured creditors to file proofs of claim in order to obtain payment under the plan. In re Tolman, 102 BR 790 (ED Wash 1989), aff'd and adopted in full, 970 F2d 114 (9th Cir 1990) (*per curiam*) addressed the necessity for timely filing unsecured priority and non-priority claims in a Chapter 13 case.[4] In that case, a debtor's Chapter 13 plan provided for full payment of an IRS unsecured debt (a potential priority claim), but the IRS failed to timely file a proof of claim. The plan was then amended to eliminate any provision for payment of that debt. The court held that the unsecured IRS claim was not allowed because it was provided for under the plan but not timely filed, and therefore was discharged upon the debtor's completion of performance under the plan.

In reaching this conclusion, the court made a noteworthy comment in dictum. It disagreed with the bankruptcy court's rationale that a priority claim should have the same status as a secured claim, noting that if a secured claimant "failed to file any proof of claim, its claim would not be allowed. Because it was not allowed there would be no purpose to include it in the plan *since the Trustee would not be authorized to pay any portion of it out of the debtor's assets or earnings.*" Id at 796 (emphasis added). This comments assumes that a secured claim cannot be paid by the Trustee unless first filed and allowed.

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[4] Priority claims are different than secured claims. 11 USC § 507 affords special priority status to a listed category of debts, such as administrative expenses and limited "allowed unsecured claims." A Chapter 13 plan must provide for full payment of all priority claims under section 507. 11 USC § 1322(a)(2).

Based on these reasons, this court concludes that despite the split of authority on this issue, filing of a proof of claim under Code section 501 is a prerequisite to being deemed allowed under Code section 502 and, thus, a secured creditor must first file a proof of claim and have that claim allowed in order to receive any distribution in a Chapter 13 proceeding. Consequently, the Trustee properly did not disburse any funds to Multnomah County because no proof of claim for Multnomah County was ever filed or allowed.

B. Was the Trustee Negligent?

Plaintiff asserts that, when a secured creditor fails to file a proof of claim, the usual practice of the Trustee is to make a notation in red ink on the Notice of Intent.[5] This alerts the debtor that the particular secured creditor has not filed a proof of claim. Thus, plaintiff argues that the Trustee was negligent in failing to follow his usual practice of giving her notice of the non-filing by Multnomah County. The issue is whether or not this failure constitutes actionable negligence. Judge Perris concluded that the Trustee was not negligent because he had no duty to protect plaintiff. This court agrees that the Trustee was not negligent, although for a slightly different reason.

Because a cursory review of the Notice of Intent and accompanying claims register revealed no red ink, presumably plaintiff and/or her attorney was misled into thinking that it was not necessary to further investigate which creditors had filed proofs of claim because either the Trustee had already done so or all the secured claims listed in the Confirmed Plan would be paid.

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[5] Plaintiff's own description indicates that the Trustee's usual practice was an evolving one which may, for some unidentified reason, have been discontinued. Appellant's Brief & Excerpts of Record, pp. 16-17 n. 20. For purposes of this appeal, the Trustee does not dispute, and this court will assume, that the Trustee had such a practice and in fact failed to follow that practice. Thus, to give plaintiff the benefit of every reasonable inference in her favor, this court will assume that the Trustee's usual practice was clearly developed and had not been abandoned.

While plaintiff has not explicitly characterized it as such, this claim is properly analyzed as one for negligent misrepresentation. In other words, plaintiff complains that the Trustee's failure to explain the facts contained in the Notice of Intent and accompanying claims register made those documents inherently misleading.

Oregon recently recognized that a party may be able to recover economic damages based on a theory of negligent misrepresentation. Onita Pacific Corp. v. Trustees of Bronson, 315 Or 149, 152, 843 P2d 890, 892 (1992) ("[W]e agree that damages may be recoverable for some negligent misrepresentations."). However, where the claimed damages are strictly economic, a plaintiff may only recover if some duty is owed to him or her by the allegedly negligent actor above and beyond the standard common law duty to prevent foreseeable harm:

> Our precedents establish that a negligence claim for the recovery of economic losses caused by another must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm. . . .
>
> "[O]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property. It does not suffice that the harm is a foreseeable consequence of negligent conduct that may make one liable to someone else, for instance to a client. Some source of a duty outside the common law of negligence is required." . . .
>
> Hence, where the recovery of economic losses is sought on a theory of negligence, the concept of duty as a limiting principle takes on a greater importance than it does with regard to the recovery of damages for personal injury or property damage.

Id at 159, 843 P2d at 896, quoting Hale v. Groce, 304 Or 281, 284, 744 P2d 1289, 1290 (1987) (citations and footnotes omitted).

In order to determine whether such a duty exists, the court must "examine the nature of the parties' relationship and compare that relationship to other relationships in which the law

imposes a duty on parties to conduct themselves reasonably, so as to protect the other parties to the relationship." Id at 160, 843 P2d at 896. Whether a duty exists "is a question of law for the court to decide." McDonald v. Title Ins. Co. of Or., 49 Or App 1055, 1059, 621 P2d 654, 657 (1980).

Onita recognized that a duty sufficient to support a claim for negligently inflicted economic injuries may arise from a variety of relationships including "a contractual, professional, or employment relationship, or as a result of any fiduciary or similar relationship implied in the law." Onita, 315 Or at 165, 843 P2d at 899. However, these duties were explicitly distinguished from "adversarial" relationships where the parties were attempting to "further their own economic interests." Id at 161, 843 P2d at 897.

The relationship between a bankruptcy trustee and the debtor is governed by the terms of the Code. The Chapter 13 trustee is akin to a "hybrid ombudsman rather than a representative of the creditors." In re Kutner, 3 BR 422 (Bankr ND Tex 1980), appeal dism'd, 656 F2d 1007 (5th Cir 1981), cert denied, 455 US 945 (1982). The Code imposes a number of duties on Chapter 13 trustees, including the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan." 11 USC § 1302(a)(4). This duty has been interpreted to require the Chapter 13 trustee to provide financial counseling for the debtor. In re Marrero, 7 BR 586 (Bankr D PR 1980). Plaintiff contends that the duty of notifying a debtor that a secured creditor failed to file a proof of claim is part of the broad statutory duty of assisting the debtor.

The Trustee responds that whether or not a debtor should file a proof of claim falls in the category of "legal" advice which he is explicitly prohibited from providing to the debtor. Although the case law and legislative history provide little guidance, this court is persuaded that

assistance in filing claims falls in the category of permitted assistance, rather than prohibited legal advice, to the debtor. After all, the trustee, as well as the debtor, has the ability to file a proof of claim in the name of the creditor in a Chapter 13 case. Bankruptcy Rule 3004. Upon noting that a secured claim has not been filed, a trustee may either file the claim for the creditor or advise the debtor that the claim has not been filed in order for the debtor to file the claim. The two alternatives present a distinction without a difference; if the trustee can file the claim, then it surely is not prohibited legal advice to tell the debtor to file the claim instead.

Furthermore, plaintiff argues a debtor would never choose not to file a proof of claim for a secured creditor, given that the trustee will no longer allow any undisbursed funds to be returned to the debtor upon discharge. If plan overpayments were returned to the debtor, then the debtor could use those funds to pay any secured creditors who were not paid through the plan. However, if plan overpayments are not returned to the debtor, but instead are paid to unsecured creditors, the debtor will always prefer to pay secured creditors through the plan. In other words, from the debtor's standpoint, the only intelligent economic choice under current law is to file a proof of claim for all secured creditors. This decision clearly involves no legal judgment.

Although this court concludes that the Trustee had some duty to notify plaintiff of the fact that Multnomah County had not filed a proof of claim, her negligence claim nonetheless fails. As noted earlier, this claim is essentially one for negligent misrepresentation. It appears that Oregon courts would follow the general guidelines contained in RESTATEMENT (SECOND) OF TORTS ("RESTATEMENT"), § 552 (1976) in fashioning the elements of a claim for negligent

misrepresentation.[6] Onita, 315 Or at 159, 843 P2d at 896 (noting that RESTATEMENT § 552 is "close to the mark" except insofar as it adopts a black letter rule regarding scope of duty and scope of recovery). Excising the scope of duty and recovery provisions of section 552 leaves the following basic elements for such a claim:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

RESTATEMENT, § 552.

In this case, several elements are missing. First, it is undisputed that the information supplied by the Trustee was not false. To the contrary, the Notice of Intent stated that the claims register listed "all timely filed claims." Multnomah County's claim was not listed on the claims register, accurately reflecting the fact that Multnomah County had not filed a proof of claim. The debtor was represented by an attorney who could read and understand the claims register without any red markings by the Trustee.

Plaintiff points out that there was a notation of "0%" on the claims register, which she interpreted to mean that the Trustee had determined that unsecured creditors would be paid nothing. However, Judge Perris noted there is no evidence concerning the meaning of that notation (docket #43, p. 5). Absent such evidence, the notation is, at best, ambiguous. It could mean that unsecured creditors will receive 0%. But it could just as easily mean that the

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[6] Plaintiff's claim for failure to notify may seem more appropriately characterized as a claim for "nondisclosure" and therefore better analyzed under RESTATEMENT § 551 ("Liability for Nondisclosure"). However, rather than being a claim for negligence, a claim premised on RESTATEMENT § 551 is a claim for deceit, an intentional tort. United States Nat'l Bank of Oregon v. Fought, 291 Or 201, 219, 630 P2d 337, 347 (1981).

Confirmed Plan would pay nothing to unsecured creditors, unless a proof of claim is filed and noted in the claims register. Had Multnomah County filed a timely proof of claim, the unsecured creditors would have indeed been paid nothing. Thus, the "0%" notation would have proven true.

Second, even assuming the Trustee provided false information (or in this case, a false impression that all secured creditors had filed proofs of claims), plaintiff must show that she justifiably relied on that information. Justifiable reliance requires "reasonable precautions to safeguard one's own interest." Gregory v. Novak, 121 Or App 651, 655, 855 P2d 1142, 1144 (1993) (citations omitted). That element is also missing from plaintiff's claim. As discussed above, the Notice of Intent clearly indicates that the Trustee "will pay the claims *in the amount and status . . . shown on the register*" (emphasis added). The Notice of Intent goes on to state "PLEASE NOTE that information under the 'Remarks' section does not indicate a judicial determination of the claim's status" and invites the debtor to review the actual claims at the Bankruptcy Court and/or obtain copies of the claims. Taken together, these statements clearly advise the debtor that he or she should personally review the claims register and make a determination of whether any claims the debtor wishes to have paid have been perfected. Given such a clear caveat, the debtor may not claim she was lulled into complacency by the Trustee's usual practice of noting any secured claims for which no proof of claim had been filed in red ink.

Following plaintiff's reasoning to its logical conclusion would result in debtors being able to disclaim all responsibility to protect their own interests. It would not matter whether (as here) the debtor had an attorney, failed to indicate a critical former name (i.e. the name in which her property is held) on the bankruptcy petition, and/or was provided a complete and accurate claims register disclosing the identity of all creditors who had filed proofs of claim.

The Code and Bankruptcy Rules contain numerous debtor-protective provisions to prevent this kind of after-the-fact finger-pointing. A debtor may be, and plaintiff in fact was, represented by an attorney. All papers filed in bankruptcy cases are public records and open to examination at reasonable times without charge. 11 USC § 107; see also Bankruptcy Rules 5003, 5005. Voluntary bankruptcy petitions must contain the name, social security or tax identification number, "*and all other names used by the debtor within six years before filing the petition.*" Bankruptcy Rule 1005 (emphasis added). Voluntary petitions, lists, schedules, or statements may be amended by the debtor as a matter of course at any time before the case is closed. Bankruptcy Rule 1009. Debtors are permitted to file proofs of claim on behalf of creditors who fail to do so. 11 USC § 501(c); Bankruptcy Rule 3004. In short, the debtor is provided ample opportunity to fully benefit from the Code's disbursement and discharge provisions.

The Trustee indeed may have adopted a helpful practice of notifying debtors when secured creditors had not filed a proof of claim. However, this court is aware of no authority which, on its face or by analogy, holds that such a gratuitous practice may form the basis for a negligence claim in light of the fact that the Code and Bankruptcy Rules provide debtors the ability to protect their own interests. In this case, plaintiff was provided all information needed to avoid the outcome she now seeks to undo. A brief review of the Notice of Intent and claims register would have fully and accurately informed plaintiff that Multnomah County had not filed a proof of claim and that corrective action was needed. Plaintiff's reliance on the Trustee to highlight what was readily apparent from those documents was, as a matter of law, not justified.

Plaintiff principally relies on Reminga v. United States, 631 F2d 449, 452 (6th Cir 1980). In Reminga, the Federal Aviation Administration ("FAA") published a navigational chart which

incorrectly showed the location of a 1720 foot television tower. Plaintiffs were the widows and executrices of two passengers in a small private airplane who were killed when the plane struck one of the tower's supporting guy wires. The FAA was not required to publish the chart and argued that its gratuitous act could not form the basis of liability against it. However, the court concluded that the FAA engendered reliance by pilots on the chart, and thereby assumed a duty to use due care to see that the charts were accurate.

At least one Oregon case follows a similar analysis. In Peterson v. Multnomah County School Dist. No. 1, 64 Or App 81, 668 P2d 385, rev denied, 295 Or 773, 670 P2d 1036 (1983), the plaintiff was rendered a quadriplegic as the result of a neck injury sustained in a high school football practice. He sued the school district as well as the Oregon School Activities Association ("OSAA"), a private nonprofit corporation which was a member of the National Federation of State High School Associations ("National Federation"). Prior to the injury, a joint committee of the National Federation and the American Medical Association adopted safety recommendations concerning, among other things, contact scrimmages in pre-season football practices. The National Federation's recommendations were transmitted to the OSAA. The OSAA's regular practice was to publish or inform its member schools of the substance of safety recommendations. However, the OSAA did not adopt or publish the National Federation recommendations and did not disseminate them to its member schools. Plaintiff argued that the OSAA's failure to follow its regular practice was negligent. The trial court gave a jury instruction which stated:

> Although a party may have no initial responsibility to act in a given area, once he undertakes to act, he must do so reasonably. Therefore, even if you find from the evidence that the OSAA had no initial duty to make reasonable regulations or recommendations . . . but nevertheless . . . voluntarily undertook to regulate [football practice], then [OSAA has] the

> responsibility to act reasonably in that regard, and would be liable for negligence in failing to act reasonably.

Id at 93, 668 P2d at 393.

In upholding the instruction, the Court of Appeals cited RESTATEMENT § 323 and concluded that there was "ample evidence from which the jury could find that OSAA voluntarily undertook to make safety recommendations or to disseminate the safety recommendations of others to the schools and that its failure to follow that practice with respect to the National Federation recommendations was negligent." Id at 94, 668 P2d at 393.

Reliance on these cases is problematic. First, these cases did not involve negligent misrepresentation claims analyzed under Onita. Second, unlike debtors in bankruptcy proceedings, the pilot in Reminga and the student in Peterson could have justifiably relied on the FAA and OSAA. The means for creating navigational charts are not available to pilots. Similarly, the medical issues involved in promulgating football safety regulations may not be readily apparent to high-school teachers and students. Additionally, the FAA and the OSAA are entities whose roles clearly contemplate the protection of the public's best interests. Here, in contrast, the Trustee and the debtor often have adversarial roles and conflicting interests, as well as equal access to information. Although the Trustee owes some duties to the debtor under 11 USC § 1302(b)(4), the Trustee also owes duties to the creditors which may be adverse to the debtor.

> The trustee's primary role is to distribute to creditors the funds deposited with him by the debtor, but the trustee is not a "mere distributing agent." . . . The trustee under the Act is supposed to inform the debtor of his duties, discourage fraudulent concealment of assets, and make the debtor aware that there is someone other than the bankruptcy court protecting the interests of the creditors. . . . We agree . . . that "inherent" in the Chapter [13] trustee's fiduciary obligations is the duty to oversee the debtor's

> compliance with the plan, including the duty to take appropriate action when the debtor does not make the required payments.

In re Gorski, 766 F2d 723, 726 (2d Cir 1985) (citations and footnote omitted).

Although the Trustee had some duty to notify plaintiff that Multnomah County had not filed a proof of claim, he provided plaintiff with no false information upon which plaintiff justifiably relied. Therefore, summary judgment in favor of the Trustee should be affirmed on plaintiffs' negligence claim.

C. Trustee's Immunity

Because this court finds that the Trustee was not required to disburse funds to Multnomah County absent a proof of claim, and further finds that plaintiff's negligence claim against the Trustee fails, it need not address the issue of whether or not the Trustee is immune from liability.

III. Negligence of Multnomah County

Upon becoming aware that it has not timely filed a proof of claim in a pending bankruptcy proceeding, Multnomah County's undisputed custom and practice is to inform the debtor's attorney of the situation to enable the debtor to file a claim on Multnomah County's behalf. Multnomah County Excerpts, pp. 35-36 (Deposition of Benjamin Hilton). Plaintiff contends that Judge Perris should not have granted summary judgment in favor of Multnomah County due to material issues of fact regarding the foreseeability of the harm caused by Multnomah County's failure to follow its usual custom and practice.

Plaintiff correctly notes that the evidence is disputed as to what advice Multnomah County gave plaintiff. Multnomah County claims that beginning in December 1990 or January 1991, plaintiff called several times asking why the tax lien was not being paid. In response, Multnomah

County asserts that it informed plaintiff that the Trustee does not make payments unless a proof of claim is filed and that her attorney could file a proof of claim for her. Id, pp. 40-42, 45. Plaintiff denies that she had any conversation with anyone at Multnomah County until after entry of the Discharge Order and then was told that Multnomah County had not filed a proof of claim because it was secured whether or not it received any payments from the Trustee. Appellant's Excerpts of Record, A-9-10.

Nevertheless, these disputed factual issues are not material. Assuming, as plaintiff contends, that she had no conversations with Multnomah County prior to entry of the Discharge Order, her claim against Multnomah County fails as a matter of law.

Plaintiff relies on Fazzolari v. Portland School Dist. No. 1J, 303 Or 1, 734 P2d 1326 (1987) to argue that Multnomah County's conduct (i.e. failing to alert her that it had not filed a proof of claim) unreasonably created a foreseeable risk to her (i.e. the non-payment, non-discharge, and continued accrual of substantial interest charges on her tax lien). However, reliance on Fazzolari's general "foreseeability" analysis in a case involving strictly economic harm is improper. As discussed above, Onita holds that "[f]oreseeability alone is not a sufficient basis to permit the recovery of economic losses on a theory of negligence." Onita, 315 Or at 165, 843 P2d at 899. In requiring that a negligence claim for the recovery of economic damages be premised on some duty beyond the common law duty to exercise reasonable care to prevent foreseeable harm, the court noted that Fazzolari "does not dictate a different result" because it "recognized that the common law of negligence traditionally has excluded some types of 'predictable' harms from its reach, including 'solely economic * * * injuries.'" Id at 165 n. 13, 843 P2d at 900 n. 13. Thus, in order to maintain her negligence claim against Multnomah

County, plaintiff must show that she was owed some duty beyond the common law duty to prevent foreseeable harm.

In this case, the relationship between plaintiff and Multnomah County is that of a debtor and a creditor. Specifically, Multnomah County is a governmental body holding a lien for unpaid taxes against plaintiff's property. As discussed earlier, secured creditors have no duty to file a proof of claim unless they wish to share in distributions from the bankruptcy estate. In addition to imposing no requirement to file proofs of claim, the Code imposes no duty on creditors to notify debtors that they have decided not to and/or are unable to (due to passage of the claims bar date) file timely proofs of claim. Thus, creditors and debtors, including Multnomah County and plaintiff, clearly have adversarial relationships in bankruptcy proceedings.

The relationship of debtor and creditor is a classic example of an adversarial relationship, particularly where some effort to collect and/or avoid payment of the debt is involved. Plaintiff argues that she and Multnomah County both want the tax lien paid and therefore, their relationship is not in fact adversarial. However, it is not a matter of whether Multnomah County *wants* the lien paid, it is a matter of *how* the lien will be paid. The lien *will* be paid, either through payments under plaintiff's Confirmed Plan, independent payments by plaintiff, or foreclosure and sale of plaintiff's property. The relationship between plaintiff and Multnomah County would have been *more* adversarial had Multnomah County been an unsecured creditor. However, the fact that Multnomah County is assured of payment and therefore is ambivalent about the method of payment, while plaintiff prefers a particular method of payment, highlights, rather than obviates, the adversarial nature of their relationship. Unlike the Trustee, Multnomah County did not have any statutory duty to give any advice whatsoever to the plaintiff. Furthermore, this court is aware

of no authority imposing any duty on one party in an adversarial relationship to assure that the other party's desires with respect to a particular part of the transaction between them are fulfilled. Thus, plaintiff has failed to show any duty imposed on Multnomah County which provides a basis for holding Multnomah County liable for its alleged negligence in failing to follow its usual practice of notifying a debtor that it had not filed a proof of claim.

Thus, summary judgment in favor of Multnomah County should be affirmed.

IV. Unjust Enrichment of Knupp, P.C.

Plaintiff argues that Knupp, P.C. was unjustly enriched because it received a windfall. If the Trustee had paid the Multnomah County tax lien, then no funds would have remained for payment to unsecured creditors. Knupp, P.C. responds that plaintiff would have no restitution claim absent the Chapter 13 proceeding and that plaintiff cannot rely on Chapter 13 given her failure to file a secured claim on behalf of Multnomah County. Furthermore, Knupp, P.C. argues that it had the "equivalent of a contractual right to payment" and was akin to a bona fide purchaser of value. Finally, it argues that it relied to its detriment by spending the money and changing its position.

In order to be obtain restitution based on a theory of unjust enrichment, plaintiff must show that, in some fashion, Knupp P.C.'s enrichment was "unjust." "The mere fact that a benefit was conferred is insufficient." Tum-A-Lum Lumber v. Patrick, 95 Or App 719, 721, 770 P2d 964, 965 (1989), citing Porter Const. Co. v. Berry, 136 Or 80, 298 P 179 (1931); RESTATEMENT OF RESTITUTION, § 1, comment c at 13 (1927). Thus, where the plaintiff fails to exhaust all remedies against the allegedly unjustly enriched defendant, or suffers damages as a result of his or her own neglect, a claim for unjust enrichment will not lie. Id at 721-22, 770 P2d at 965; Shiel v.

Breuer, 130 Or App 87, 92, 880 P2d 500, 502 (1994), rev denied, 320 Or 508, 888 P2d 569 (1995). Similarly, while Oregon recognizes actions for assumpsit for money had and received, a plaintiff seeking to recover such moneys based on a theory of unjust enrichment must show that the defendant "wrongfully appropriated the plaintiff's property and was thereby unjustly enriched." McCarthy v. Tomlinson, 91 Or App 685, 687, 756 P2d 687, 688 (1988).

As discussed above, the Trustee properly disbursed no funds to Multnomah County because no proof of claim was filed by or on behalf of Multnomah County. Under 11 USC § 501(c) and Bankruptcy Rule 3004, plaintiff had the right to file a proof of claim on behalf of Multnomah County. As correctly noted by Judge Perris, the fact that plaintiff neglected to do so bars her restitution claim:

> [T]he debtor failed to compare the claims register against the schedules to discover that the County had not filed a proof of claim. During the pendency of the plan, the debtor failed to contact the County when [she] received informational tax statements reflecting that the taxes were not being paid on the property. Had the debtor taken either of these actions, she would have learned that the County had not filed a proof of claim and she could have taken steps to ensure that the County's claim was paid. The failure of the debtor or her agent to take the positive steps necessary to protect her rights led to the payment of Knupp, P.C. pursuant to the plan. In light of the debtor's failure, Knupp P.C. has not been unjustly enriched and the debtor is not entitled to the equitable remedy of restitution.

Letter Opinion, p. 4.

Thus, Judge Perris' decision granting judgment to Knupp, P.C. should be affirmed and this court need not address the remaining arguments by Knupp, P.C.

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V. CONCLUSION

Although this court recommends that the Bankruptcy Court judgments should be affirmed, it is deeply troubled by the fact that plaintiff did not accomplish the intent of her Chapter 13 plan. A debtor cannot obtain a fresh start if a creditor can "hide in the wings ready to pounce upon the debtor just at that moment when he believes that he has finally paid his debts and regained financial stability." In re Tolman, 102 BR at 796. Through Chapter 13, plaintiff intended to pay in full Multnomah County and her other secured creditors, prevent foreclosure of her residence, and be discharged from her debts to unsecured creditors. That did not happen because neither the Trustee nor Multnomah County followed their usual and customary procedures. Instead, Multnomah County's tax lien was not paid, but accrued interest at 16% per year, leaving plaintiff with a much larger debt than before the Chapter 13 proceeding. That lien may be foreclosed against her residence. In other words, Chapter 13 appears to have accomplished little for plaintiff.

Had the Chapter 13 operated as intended, Knupp, P.C.'s lien would not have been paid. Although Knupp, P.C. would have suffered, instead of plaintiff, that is the unfortunate result of insufficient equity in plaintiff's residence to pay all secured claims. Nevertheless, this court feels that the correct legal analysis requires that Judge Perris' decision should be affirmed.

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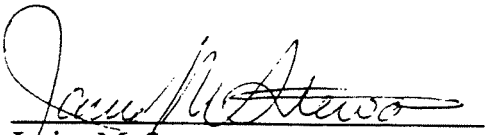
RECOMMENDATION

For the reasons stated above, the judgments of the Bankruptcy Court should be AFFIRMED and plaintiff's Notice of Appeal (docket #53) should be DISMISSED.

DATED this 6th day of September, 1995.



Janice M. Stewart
United States Magistrate Judge

NOTICE

Objections to these Findings and Recommendations are waived unless written objections are filed and served within ten days after service. 28 USC §§ 636(b)(1)(B) and (C); LR 135-3.