The following constitutes the ruling of the court and has the force and effect therein described.

Signed October 28, 2008 **United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
FORT WORTH OSTEOPATHIC	§	CASE NO. 05-41513-DML-7
HOSPITAL, INC., D/B/A OSTEOPATHIC	§	
MEDICAL CENTER OF TEXAS, AND	§	
	§	
HEALTH CARE OF TEXAS, INC., D/B/A	§	CASE NO. 05-41503-DML-7
OSTEOPATHIC HEALTH SYSTEM OF TEXAS,	§	
	§	
DEBTORS.	§	
	§	

SHAWN K. BROWN,	§	
CHAPTER 7 TRUSTEE,	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	ADVERSARY NO. 07-04015-DML
	§	
ROBERT C. ADAMS, D.O., ET.AL.,	§	
	§	
DEFENDANTS.	§	

REPORT AND RECOMMENDATION

TO: HON. TERRY R. MEANS, UNITED STATES DISTRICT JUDGE:

Comes now the undersigned bankruptcy judge and, pursuant to your *Order Adopting Report and Recommendation of Bankruptcy Judge and Denying Motion to Dismiss*, makes this

report and recommendation respecting the *Motion by Third-Party Defendant MBIA Insurance Corporation to Dismiss Third-Party Complaint*[1] (the "Cantey Motion") and the *Motion by Third-Party Defendant MBIA Insurance Corporation to Dismiss Cross-Claim* [2](the "D&O Motion" and, with the Cantey Motion, the "Motions"), both filed by MBIA Insurance Corporation ("MBIA").

I. Introduction

By the Cantey Motion, MBIA, pursuant to Fed. R. Civ. P. 12(c), applicable by reason of Fed. R. Bankr. P. 7012(b), asks dismissal of Cantey & Hanger, L.L.P., and Morton L. Herman's Third-Party Complaint against MBIA Insurance Corporation, (the "Cantey Claim"), filed by Cantey & Hanger, L.L.P., and Morton L. Herman (collectively "Cantey"), defendants in the captioned adversary proceeding. By the D&O Motion, pursuant to Fed. R. Civ. P. 12(b)(6), applicable by reason of Fed. R. Bankr. P. 7012(b), MBIA seeks dismissal of the Cross-Claim of Certain Former Officers, Directors, and Employees (the "D&O Claim" and together with the Cantey Claim, the "MBIA Claims") filed by certain defendants (the "D&Os") in the captioned adversary proceeding.

MBIA, Cantey and the D&O's each field briefs in connection with the Motions. On August 27, 2008, I held a hearing respecting the Motions during which MBIA, Cantey and the D&Os offered oral argument. As required by your *Order Adopting Report and Recommendation of Bankruptcy Judge and Denying Motion to Dismiss*, I now make this report and recommendation respecting disposition of the Motions.

II. Background

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[1] Filed at docket no. 408 amended by no. 472.

[2] Filed at docket no. 390.

The captioned adversary proceeding (the "Adversary") was commenced by Shawn K. Brown (the "Trustee") as chapter 7 trustee for Fort Worth Osteopathic Hospital ("FWOH") and Health Care of Texas, Inc. ("HCT"). In the Adversary, the Trustee asserts claims against, *inter alia*, Cantey and the D&Os based on a number of theories. The gist of the Adversary is that those named as defendants breached various duties to FWOH and acted affirmatively in a fashion that led to financial collapse of FWOH and HCT.

In addition to answering the Trustee in the Adversary and seeking dispositive relief through motion practice, Cantey and the D&Os, through the MBIA Claims, assert that, though they do not expect to be found liable in the Adversary, if they are found liable, they are entitled to contribution from MBIA in satisfying that liability. In support of this assertion they allege in the MBIA Claims that MBIA's conduct was wholly or partially responsible for FWOH's failure.

Cantey urges that MBIA is liable in contribution pursuant to FRCP 14 (applicable by reason of Fed. R. Bankr. P. 7014)[3] and the provisions of Chapter 33 of the Texas Civil Practice and Remedies Code ("Chapter 33"). The Cantey Claim is based on theories of "assist[ing] and encourage[ing] . . . breaches of fiduciary duties" by the director and officer defendants (Cantey Claim ¶ 25), negligence (Cantey Claim ¶ 26), breach of a duty of good faith and fair dealing (Cantey Claim ¶ 27) and breach of fiduciary duty (Cantey Claim ¶ 28). In the D&O Claim, the D&Os seek contribution pursuant to Chapter 33 based on theories that MBIA breached a duty of good faith and fair dealing (D&O Claim ¶ 34), that MBIA tortiously interfered in potential contractual relationships of FWOH (D&O Claim ¶ 33) and that MBIA engaged in fraud and breached its contracts with FWOH (D&O Claim ¶¶ 36-37).

[3] Rule 14 does not provide an independent basis on which a party seeking contribution may be entitled to relief; rather it provides the procedural platform for asserting a claim of contribution made on the basis of another theory (here Chapter 33, as defined below).

In the Motions, MBIA argues that the MBIA Claims must be dismissed because Cantey and the D&Os lack standing to bring them. Alternatively, MBIA maintains it is a "settling party" as that term is used in Chapter 33 and, therefore, is not susceptible to suit. Moreover, MBIA argues that it is not a joint tort-feasor with Cantey or the D&Os and thus, cannot be held liable for contribution under Chapter 33. Finally, MBIA argues that Cantey and the D&Os have failed as a matter of law to state claims against MBIA.

III. Standards for Dismissal

A. Rule 12(b)(6)

Under Rule 12(b)(6), applicable pursuant to Fed. R. Bankr.P. 7012, a party moving for dismissal has the burden of showing that no claim has been stated. 2 Moore's Federal Practice § 12.34[1][a] (3d ed. 2006). A Rule 12(b)(6) motion may be granted either because a legal remedy based on the alleged facts does not exist[4] or because the facts as alleged, even if true, do not satisfy the legal requirements of the pleaded cause of action.[5] While a complaint attacked pursuant to Rule 12(b)(6) does not need to contain detailed factual allegations, (*Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir.1994)), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955-65 (2007) (citing *Papsan v. Allain*, 478 U.S. 265, 286 (1986)) (on a motion to dismiss, courts "are not bound to accept as true a legal

[4] See, e.g., *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir.1999) (holding that a court must not dismiss a complaint unless it appears to certainty that the plaintiff would not be entitled to relief under any legal theory that might plausibly be suggested by the facts alleged); see also *Santana v. Zilog, Inc.*, 95 F.3d 780 (9th Cir.1996).

[5] *See, e.g., Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1157 (5th Cir.1992) (affirming district court's dismissal of claims because the facts pleaded by the plaintiffs did not state a claim under either RICO or federal civil rights law).

conclusion couched as a factual allegation"). Factual allegations must be enough to raise a plaintiff's right to relief beyond the speculative level. See 5 Wright & Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action."). On the other hand, the court must assume that all the allegations in the complaint are true (even if doubtful in fact),[6] and dismissal under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." See, e.g., *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997).

B. Rule 12(c)

Under Rule 12(c) the standard for dismissal is the same as the standard for dismissal for failure to state a claim under Rule 12(b)(6). *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir.2004) (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir.2002)). A court accepts the well-pleaded facts in the complaint as true and views those facts in the light most favorable to the plaintiff. *Id*. The motion "should not be granted unless the plaintiff would not be entitled to relief under any set of facts that he could prove consistent with the complaint." *Id*. *See In re Teraforce Technology Corp*., 379 B.R. 626, 633 (Bankr. N.D. Tex. 2007).

IV. Discussion

Although the Motions are based on different subdivisions of Rule 12, the standards for surviving a motion to dismiss are, for purposes of the Motions, the same. Further, MBIA's

[6] *Twombly*, 127 S.Ct. at 1965; *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

arguments are essentially the same both as to the Cantey Motion as to the D&O Motion. I will therefore deal with MBIA's arguments jointly regarding both of the Motions.

A. Standing

MBIA argues that the claims asserted by Cantey and the D&Os are claims that belong to the Trustee and cannot be asserted by Cantey or the D&Os, who lack the requisite standing. Cantey and the D&Os counter that their claims are for contribution and the Trustee's otherwise exclusive standing is not a bar to their assertion.

In its initial brief, MBIA relied upon *S.I. Acquisition, Inc. v. Eastway Delivery Servs., Inc. (In re S.I. Acquisition)*, 807 F.2d 1142 (5th Cir. 1987), *Schimmelpenninck v. Bryne (In re Schimmelpenninck)*, 183 F.3d 347 (5th Cir. 1999), *Schertz-Cibolo-Universal City Indp. Sch. Dist. v. Wright (In re Educators Group Health Trust)*, 25 F.3d 1281 (5th Cir. 1994), and *Cadle Co. v. Adrews (In re Andrews)*, No. 94-2160, 2007 WL 596706 (Bankr. S.D. Tex. 2007). I do not believe that these cases are apposite. As the Court of Appeals recently pointed out in *In re Seven Seas Petroleum*, 522 F.3d 575 (5th Cir. 2008), a trustee's exclusive standing to pursue claims of the estate of which he is the representative does not bar every cause of action that may arise from conduct on which the trustee may base a complaint. While *In re Seven Seas Petroleum* involves a very different set of facts than those presented by the case at bar, it illustrates well the mistake that is made by reading too much into *S.I. Acquisition, Inc.* and its progeny.

It appears to me counter-intuitive to argue that a victim's – here the FWOH estate, represented by the Trustee – exclusive standing to pursue a tort claim against its tort-feasors precludes one tort-feasor that was not named from being pursued by a defendant tort-feasor proceeding on a contribution claim. To so hold would effectively nullify the remedy of contribution in all cases other than those in which the tort-feasors have claims for damages in

their own right against each other (e.g., *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828 (Tex.App.-Fort Worth 2006, no pet.)). It is far more logical to read Chapter 33 as allowing one tort-feasor to bring litigation against another tort-feasor from whom the plaintiff might have sought (but did not seek) recovery for the damages allegedly caused by the first.[7] Thus, while the Trustee was the only one who could have sought damages from MBIA for the reasons asserted in the MBIA Claims, since the Trustee failed to assert those claims against MBIA, to the extent the claims otherwise satisfy the requirements of Chapter 33, they may form the basis of a contribution claim for the purposes of a motion to dismiss.

MBIA, however, in its reply briefs, points to *Devon Mobile Commc'ns. Liquidating Trust v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 322 B.R.509 (Bankr. S.D.N.Y. 2005) and *N. Ky. Bank & Trust v. Rhein*, Nos. 83-cv-11, 83-cv-159, 1986 WL 885 (E.D. Ky. 1986). *Adelphia* certainly supports MBIA's position. There the court, having noted that the contribution claim at issue was based on a breach of fiduciary duty cause of action which could not be brought by the defendant making the claim for want of standing, stated, "[t]his standing requirement cannot be circumvented by the expedient of filing a third-party complaint and denominating the breach of fiduciary claims as claims for contribution." 322 B.R. at 529. However, the *Adelphia* court supports this bold statement with no logic, and the cases cited by that court are inapposite.[8]

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[7] To read chapter 33 as would MBIA would limit the right of contribution to just those cases in which the party seeking contribution is itself a victim, since only a victim of a tort will have standing to assert independently a claim against the tort-feasor. Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 Tex. Tech. L.Rev. 1125, 1159-60 (2004) ("Generally, a defendant may assert contribution rights against any person who is jointly responsible for the damages sought by the claimant, without regard to whether that person has been sued by the claimant.").

[8] The *Adelphia* case relies on *Goldin v. Primavera Familienstriftung, TAG Associates, Ltd. (In re Granite Partners, L.P.)*, 194 B.R. 318 (Bankr. S.D.N.Y. 1996) and *Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844 (Bankr. S.D.N.Y. 1994). In the *Granite Partners* case, the defendant seeking "contribution"

As for *Rhein*, the Magistrate Judge's opinion provides little explanation of the underlying facts or the relationships among the parties. However, *Rhein* appears to turn on Rule 14. The court in *Rhein*, noting Rule 14 does not by itself provide a right of action, reaches its conclusion on the basis that the third party plaintiffs there assert no grounds for a contribution claim against the third party defendants. In the case at bar, unlike *Rhine*, the D&Os and Cantey rely on a specific state statute, Chapter 33, as the basis for their right to contribution.

Thus, it is my opinion that the D&Os and Cantey have standing under Chapter 33 to bring the MBIA Claims. The Motions, to the extent based on want of standing, do not have merit.

B. Settling Person

MBIA argues it is immune from suit because it is a "settling person" within the meaning of Chapter 33[9]. In support of this contention MBIA points to a series of releases it obtained from FWOH during the period leading up to FWOH's demise. Cantey and the D&Os respond in essence that to be a settling person one must have paid or agreed to pay consideration to resolve an actual claim.[10] While MBIA contends that the forbearance it granted FWOH as well as its agreement to lend to FWOH (and the actual loan of money to FWOH) satisfy the requirement of

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was found to have no standing to assert such a claim because the plaintiff did not itself have standing to sue – could not have sued – the third party. In the matter before the court, the plaintiff (the Trustee) *does* have standing to sue the third party (MBIA); he just hasn't. Thus, under the circumstances of the case before the court, standing may flow derivatively from the plaintiff to the defendant to sue the third party, while that was not so in the *Granite* case. The *Keene* case does not address the issue of contribution claims at all.

9 Under Chapter 33, "No defendant has a right of contribution against any settling person." TEX. CIV. PRAC. & REM. CODE §33.015(d)

10 Section 33.011(5) of the TEXAS CIVIL PRACTICE AND REMEDIES CODE states: "'Settling person' means a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought." See TEX. CIV. PRAC. & REM. CODE § 33.011(5).

consideration, Cantey and the D&O's insist that neither the forbearances nor the loan satisfy the requirements to be a settling person.

I am of the opinion that this issue again depends on whether MBIA's argument is consistent with the purpose for allowing claims for contribution. Thus, if the Trustee could have sued MBIA notwithstanding the releases, the forbearances and the loan, Cantey and the D&Os may seek contribution. If, on the other hand, the releases FWOH gave MBIA would bar a suit by the Trustee, then MBIA cannot be pursued for contribution.

Cantey and the D&Os point to a number of cases which they assert demonstrate that the releases do not qualify MBIA as a settling party. *See In Re Today's Destiny, Inc.*, 388 B.R. 737, 756 (Bankr. S.D. Tex. 2008) and *Securities Investor Protection Corp. v. Chesier & Fuller, L.L.P. (In Re Sunpoint Securities, Inc.)*, 377 B.R. 513, 569 (Bankr. E.D. Tex. 2007). Even assuming, however, that the releases would be definitive in a non-bankruptcy context, the Trustee has powers that FWOH did not possess. Thus, when a trustee stands in the shoes of creditors – e.g., when pursing a fraudulent transfer – a prepetition release by a debtor will not bar the trustee's suit. *See In re Cowden, 337 B.R. 512 (Bankr. W.D. Pa. 1999)*. The Trustee has argued that he stands in the shoes of creditors in the case at bar. [11]

Even if the releases might serve as a bar to a suit by the Trustee, the releases themselves would be subject to avoidance by the Trustee upon a showing that they were preferential or fraudulent under applicable fraudulent transfer law. *See Metzger v. Farris* (*In re e2Communications, Inc.)*, 320 BR. 849, 855 (Bankr. N.D. Tex. 2004) and *Kaye v. Dupree, et al. (In re Avado Brands, Inc.)*, 358 B.R. 868, 885 (Bankr. N.D. Tex. 2006). If the Trustee could

[11] *See In re Fort Worth Osteopathic Hosp., Inc.*, 387 B.R. 706 (Bankr. N.D. Tex. 2008). However, the Trustee there argued he was pursuing the claims in the Adversary on a derivative basis – a different situation than assertion of a voidable transfer.

pursue the MBIA Claims through avoidance of MBIA's releases, then the D&Os and Cantey should be able to utilize Chapter 33 to do so as well.[12] To the extent the D&Os and Cantey would be required to show the voidability of the releases, if the MBIA Claims do not adequately allege facts supporting that voidability, I am of the opinion that the D&Os and Cantey should be permitted to replead.

Accordingly, I conclude that the releases pleaded by MBIA should not bar contribution claims by the defendants in the Adversary. It is my opinion that the Motions should be denied to the extent they depend on MBIA being a settling party for purposes of Chapter 33.

B. Joint Tort-feasors

MBIA next contends that the MBIA Claims must be dismissed because it is not a joint tort-feasor with either Cantey or the D&Os. MBIA argues that under Chapter 33, to be a joint tort-feasor, MBIA would have to have joined with Cantey and/or the D&Os in the commission of a single tort.

Leaving aside whether the allegations made by Cantey and the D&Os are not sufficient, if proven, to show that MBIA was an active participant in the management of FWOH, and so jointly responsible with Cantey and the D&Os for the wrongs alleged by the Trustee, MBIA mistakes the joint tort-feasor requirement of Chapter 33. As argued by Cantey and the D&Os, in order for a contribution claim to be made under Chapter 33, it is not necessary to show that the party called upon for contribution participated in the same tortious conduct as the party seeking contribution. Rather, it must be shown that conduct of the former contributed to the same

[12] Under Texas contract law the releases relied upon by MBIA may not provide the protections that MBIA asserts. The Texas Supreme Court has stated, "[i]n order to effectively release a claim in Texas, the releasing instrument must 'mention' the claim to be released. Even if the claims exist when the release is executed, any claims not clearly within the subject matter of the release are not discharged. Furthermore, general categorical release clauses are narrowly construed." See *Victoria Bank & Trust Company v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (internal sting cites omitted).

damage to the victim as did the conduct of the latter. *See Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448, 457(Tex.App.-El Paso 2006, no pet.) ("Joint tortfeasors are defined as parties whose tortious conduct combines as a legal cause of a single and indivisible harm to the injured party."). Thus, if two distinct torts are committed that both contribute to the same harm to the same victim, in a suit by the victim, the person committing one of the torts is entitled to seek contribution from the one who committed the other tort to the extent that was the cause of the victim's damages.

There is, however, some merit in the D&O Motion under this head. As argued by MBIA, any claim by the D&Os for breach of contract cannot be asserted under Chapter 33, which is limited to claims lying in tort. Also, the claim by the D&Os that MBIA tortiously interfered in potential contractual relationships between FWOH and prospective buyers cannot be asserted, in my view, by the D&Os under Chapter 33. While a successful sale of the hospital might have ameliorated or even avoided the damages sustained by FWOH, tortious interference that resulted in loss of prospective sales did not cause the demise of FWOH. The harm of FWOH resulting from any tortious interference by MBIA is not the harm alleged in the Adversary to have been caused by the D&Os and the damages from any tortious interference are different from the damages the Trustee seeks to recover from the D&Os. Consequently, if MBIA did tortiously interfere in FWOH's relationships with prospective purchasers, it was not, in so acting, a joint tort-feasor with the D&Os for purposes of Chapter 33.

Finally, although it is less clear, I do not believe that the fraud claim asserted by the D&Os is proper under Chapter 33. The claim of fraud made by the D&Os is based on MBIA's failure to keep its promise to lend to FWOH – a promise the D&Os allege MBIA knew it would not keep.

The damages that may have been sustained by FWOH by reason of any such fraud perpetrated by MBIA are distinct from those caused by the conduct of the D&Os. While it might be proven that, had MBIA intended to act and in fact acted as the D&Os were led to believe it would, FWOH would have survived, any damages arising from MBIA misleading the D&Os are distinct from the damages sought from the D&Os by the Trustee. Put another way, the alleged fraud was not a proximate cause of the harm alleged in the Adversary and the damages sought by the Trustee.

For the foregoing reasons, it is my opinion that MBIA was not a joint tort-feasor within the meaning of Chapter 33 to the extent it breached its contract with FWOH, tortiously interfered with sale contracts or acted fraudulently in connection with any promise to advance loans to FWOH. Thus I believe that the D&O Motion should be granted as to the D&Os' breach of contract, fraud and tortious interference claims. Otherwise, MBIA's argument that it was not a joint tort-feasor lacks merit.

D. Adequacy of Allegations

MBIA argues that the remaining claims against it must be dismissed because they do not withstand the test of Rule 12(b)(6). The heart of MBIA's argument that the D&Os and Cantey have not stated claims for which relief may be granted is that MBIA's relationship with FWOH was not one that would give rise to any fiduciary duty or duty of care.

However, the MBIA Claims include allegations that MBIA participated in or even controlled the management of FWOH. The cases cited by MBIA are to the effect that there is generally no duty running from a lender or surety to its borrower or principal. *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667 (Tex. 1998) and *In re Letterman Bros. Energy Sec. Litig*., 799 F.2d 967 (5th Cir. 1986). Where, as here, facts are alleged that, if proven, would

demonstrate that a lender or surety has taken control of the borrower or principal's business, courts have found the lender or Surety to have a duty to its borrower or principal. *See Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App.-Houston [1 Dist.], 1996.) and *Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 442 (Tex. App.-Houston [14 Dist.], 1998).

Consequently, I conclude that the MBIA Claims are not subject to dismissal on the basis that MBIA owed no fiduciary duty or duty of care to FWOH.

V. Recommendation

Based on the above analyses, I recommend that the Cantey Motion be denied. I further recommend that the D&O Motion be granted as to the extent that the D&O Claim is based upon MBIA's breach of contract, fraud or tortious interference and otherwise denied. To the extent Cantey and the D&Os have failed to plead the voidability of the releases given by FWOH to MBIA and such avoidance is a necessary prerequisite to their claims under Chapter 33, I recommend they be permitted to so replead.

Parties are directed to file objections to this Report and Recommendation with the District Court within ten days of the filing of the Report and Recommendation.

Respectfully Submitted,

D. Michael Lynn,
United States Bankruptcy Judge