UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

IN RE: IN BANKRUPTCY NO.:

PIRKLE REFRIGERATED FREIGHT LINES, INC., MM7-91-00043

Debtor. IN ADVERSARY PROCEEDING NO.:

WILLIAM J. RAMEKER, TRUSTEE, 91-0042-7

Plaintiff,

v.

VALLEY BANK, MADISON and CONTINENTAL BANK, N.A., MEMORANDUM DECISION

Defendants.



On February 5-7, 1992 a trial was held to determine whether the defendant's claim should be subordinated pursuant to 11 USC § 510(c), and whether plaintiff is entitled to recovery of $583,000.00 based on theories of promissory estoppel and/or breach of express or implied contract, or recovery of $847,812.66, based on an unjust enrichment theory.[1] Upon the evidence presented, I make the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Pirkle Refrigerated Freight Lines, Inc. ("Pirkle") was,

[1]Count V of plaintiff's third amended complaint seeks recovery of damages, costs, and attorneys fees, as well as voiding of the defendant's security agreements, as a remedy for the defendants' alleged "tortious conduct" in breaching "their duty of good faith and fair dealing" with the plaintiff. Plaintiff's trial brief and proposed findings of fact and conclusions of law include no mention of this "tortious conduct" cause of action, and it was not argued at trial. However, even assuming that plaintiff did not abandon its tortious conduct cause action, that cause of action must be dismissed for failure to state a claim upon which relief may be granted. FRBP 7012(b); FRCP 12(b)(6).

prior to filing its bankruptcy petition, an irregular route interstate carrier of refrigerated products. A Wisconsin corporation with headquarters in Madison, Wisconsin, Pirkle leased tractors and trailers to be driven either by its employees or pursuant to lease agreements with persons or businesses referred to by Pirkle as "owner-operators."

2. At all times material hereto, all of Pirkle's stock was controlled by Niles Jehn, Pirkle's president. Jehn owned all of the stock of Pirkle Lines Acquisition Corp., which owned all of the stock of Shippan Transportation Corp., which owned all of the stock of Pirkle.

3. On May 9, 1988 Pirkle, Shippan Transportation Corporation, Valley Bank, Madison ("Valley"), and Continental Bank, N.A. ("Continental") entered into an Amended and Restated Credit Agreement ("Credit Agreement"), pursuant to which Continental acted individually and as agent for Valley. As part of the Credit Agreement Pirkle executed two security agreements, and four promissory notes totalling $3,700,000.00. The Credit Agreement provided that Illinois law controlled the Agreement and specified Pirkle's insolvency as one of a number of events of default. In the event of Pirkle's insolvency, the Credit Agreement gave the Banks "the right to appropriate and apply to the payment of such Note any and all balances, credits, deposits, accounts or moneys of the Company or Shippan then or thereafter with such Bank or other holder." The Credit Agreement was modified on October 20, 1989, April 27, 1990, and May 29, 1990. Pursuant to the May 29,

1990 amendment, the Banks agreed not to pursue Pirkle's default, principal payments were suspended, and the interest rate was lowered to five percent.

4. The security agreements executed by Pirkle in connection with the Credit Agreement granted Valley and Continental (collectively, "the Banks") a security interest in Pirkle's accounts receivable, operating rights, general intangibles, equipment, the "Shippan note," and other property.

5. The Banks have a perfected security interest in Pirkle's accounts receivable and all proceeds therefrom, operating rights, general intangibles, equipment, the Shippan note, and other property as set forth in the parties' security agreements and financing statements.

6. There are no perfected security interests which prime the Banks' interest.

7. At all material times between December 24, 1990 and the filing of Pirkle's bankruptcy petition, Michael Murphy, Pirkle's vice president of administration and finance, had the authority to deal with the Banks.

8. At all material times, Pirkle maintained an operating account at Valley for use in the payment of all expenses except payroll, and maintained a separate trust account at Valley for payment of its payroll. The payroll checks were prepared by M & I Data Processing based on paperwork provided by Pirkle. The money necessary to issue the payroll checks was transferred from Pirkle's operating account to its payroll trust account, and Pirkle received

a charge memo evidencing the accounting involved therein. Pirkle had one other account, maintained at Continental solely for purposes of making interest payments to Continental.

9. Pirkle drivers and other administrative employees were paid from the payroll account on a weekly basis, one week in arrears. Owner-operators were paid on a daily basis, (generally within 24 hours of delivering their loads), by means of "settlement checks" written on Pirkle's general account. Fleet operators were paid from each load as received.

10. Under an agreement with ComData, Pirkle's fuel financier, drivers could buy gas at any station accepting ComData credit. Although payments to ComData were generally made daily from Pirkle's general account, Pirkle was not current on its payments to ComData in December of 1990.

11. Mr. Jehn was hospitalized from December 18, 1990 through December 30, 1990 for treatment of kidney stones.

12. On the evening of December 23, 1990 Mr. Jehn made his decision to discontinue Pirkle operations after December 31, 1990.

13. According to Mr. Jehn's instructions, the executive vice president in charge of operations, John Day, was to inform, and did inform, Pirkle employees on December 24, 1990 that Pirkle would cease operations after December 31, 1990. The parties' proposed findings of fact agree that Pirkle employees and owner-operators were told that they would be paid for services previously rendered as well as for services rendered by December 31, 1990.

14. As of December 24, 1990 Pirkle was insolvent. Pirkle's

liabilities exceeded its assets, and it was unable to pay its bills as they came due.

15. On December 24, 1990 Mr. Jehn contacted Continental employee Michael Bacevich to advise him that Pirkle would close its business on December 31, 1990.

16. During Mr. Jehn and Mr. Bacevich's December 24, 1990 conversation, Mr. Jehn informed Mr. Bacevich that there were employee drivers and owner operators still on that road who needed to be paid in order to ensure that the freight was delivered. Mr. Bacevich agreed that the parties had to take care of these people and ensured that they would be paid for their future work in delivering the loads. Mr. Bacevich did not make an unlimited promise on behalf of the Banks to pay for the past and future wages of Pirkle drivers, owner-operators, and administrative employees. Mr. Bacevich made no specific dollar commitment on behalf of the Banks other than a promise to reimburse Mr. Jehn for $50,000.00 he had advanced on Pirkle's behalf to Paccar, an entity from which Pirkle leased 98 tractors, in the event Paccar refunded the $50,000.00 to Pirkle rather than directly to Mr. Jehn.

17. On December 26, 1990 numerous telephone calls and one visit by Bank officers to Pirkle's offices took place which involved conversations between Mr. Murphy, Mr. Bacevich, and/or Michael Smith and William Koehne, the Valley Bank vice presidents assigned to the Pirkle account. Mr. Murphy represented that there were approximately 158 loads of cargo still on the road and that these 158 loads of cargo would generate approximately $300,000.00

in accounts receivable. Mr. Murphy furthermore indicated that approximately $50,000.00 would be required to pay employee drivers and owner-operators to deliver the loads still in transit and approximately $25,000.00 would be required to pay Pirkle's administrative staff to generate the invoices and collect the accounts receivable related to these 158 loads. The Banks assured Mr. Murphy that they would pay Pirkle $50,000.00 for the benefit of the employee drivers and owner-operators and $25,000.00 for the benefit of the administrative staff to ensure that the loads were delivered and accounts receivable generated.

18. Also on December 26, 1990 the Banks informed Mr. Murphy that Valley employee Frank Gambino would be assigned to observe the business activity at Pirkle's headquarters, including accompanying Mr. Murphy to pick up Pirkle's mail and witnessing its opening, and witnessing the depositing of funds in the Valley bank account. Mr. Koehne informed Mr. Murphy that he could not write any checks on Pirkle's bank accounts without first obtaining the approval of the Banks.

19. Also on December 26, 1990 Mr. Murphy picked up the payroll checks for both drivers and administrative staff for the pay period ending December 22, 1990. Mr. Murphy called Mr. Koehne and asked for approval to release the drivers' payroll checks, and "settlement checks" to owner-operators; he did not ask to release the administrative payroll at that time. Mr. Koehne asked the amounts of the checks, (but did not ask whether the checks pertained to services performed before, on, or after December 26,

1990), and gave Mr. Murphy his approval to release the checks, which were duly sent out.

20. Also on December 26, 1990 Grady Henderson, manager of YLJ, Inc., spoke with Mr. Koehne. Mr. Henderson had learned of Pirkle's intended closing on December 24, 1990. YLJ, Inc. leased 69 trucks to Pirkle and furnished its own drivers. Mr. Henderson informed Mr. Koehne that his drivers had shut down and refused to move on December 24 and 25, 1990, pending notification that they would be paid. If not paid, the drivers would dump their loads. Mr. Koehne assured Mr. Henderson that YLJ, Inc. would be paid for everything Pirkle owed it. Mr. Koehne did not recall the conversation.

21. Also on December 26, 1990 Mr. Murphy, while in Mr. Gambino's presence, informed various drivers that the Banks had said that the drivers would be paid for all the work they had done.

22. On December 26, 1990 a total of $184,524.11 (including $82,140.74 for payroll, of which $39,061.27 was for accrued vacation pay) in outstanding checks cleared Pirkle's general account.

23. On December 27, 1990 Mr. Murphy picked up payroll checks totalling $39,061.27; these checks represented accrued vacation pay through December 31, 1990. As indicated, the funds for the vacation payroll had been transferred from the general account to the payroll account on December 26, 1990. The evidence was equivocal with respect to whether the Banks were capable of stopping payment of checks issued on funds contained in the payroll

account.

24. Also on December 27, 1990 Mr. Murphy called Mr. Koehne for authorization to release the administrative payroll checks that Mr. Murphy had picked up the previous day. Mr. Koehne approved their release, again without asking whether the checks pertained to services performed before, on, or after December 26, 1990. Later on December 27, 1990 Mr. Murphy spoke with Mr. Smith, as Mr. Koehne was absent, seeking approval to release $9,000.00 in settlement checks to owner-operators, as well as to make payment in the amount of $35,000.00 to ComData. Mr. Smith, like Mr. Koehne, did not ask whether the settlement checks pertained to services performed before, on, or after December 26, 1990. Mr. Smith acknowledged at trial that the $35,000.00 approval was in addition to the $75,000.00 previously approved by the Banks for delivery of the 158 loads and generation of the corresponding accounts receivable. Mr. Smith was not concerned with whether the $9,000.00 was in addition to the $50,000.00 previously approved for delivery of outstanding loads because of the small size of the disbursement.

25. On December 27, 1990 a total of $54,305.39 in outstanding checks cleared Pirkle's general account.

26. His December 26, 1990 request to release vacation payroll having been denied, on December 28, 1990 Mr. Murphy called for authorization to release the vacation payroll. He spoke with Mr. Bacevich and Mr. Koehne separately, and each of them withheld approval of release of the vacation pay pending examination of the

liquidation budget that Mr. Murphy had been asked to prepare.

27. Also on December 28, 1990 Valley authorized Pirkle to pay $20,000.00 to its attorneys, DeWitt, Porter, Huggett, Schumacher & Morgan, S.C. ("DeWitt, Porter"), in order that they remain on as counsel for Pirkle. This was a separate agreement from the Banks' agreements to pay $50,000.00 to drivers and owner-operators, $25,000.00 to administrative employees, and $35,000.00 to ComData.

28. Also on December 28, 1990 the Banks were given copies of Pirkle's check registers for December 26 and 27, 1990. The check register for December 26, 1990 shows total checks written in the amount of $109,814.63. This amount consists of two $25,000.00 reimbursement checks to Mr. Jehn pertaining to the Paccar matter, and $59,814.63 in settlement checks. The check register for December 27, 1990 shows total checks written in the amount of $76,620.98. This amount consists of $8,150.68 in settlement checks and $68,470.30 in checks to ComData. Only two checks written on December 26, 1990 were honored; they totalled $5,086.30. No checks written on December 27, 1990 were honored.

29. Also on December 28, 1990 the beginning balance in Pirkle's general account was $436.30. The Banks saw that the December 26 and 27, 1990 check registers showed total checks written in the amount of $186,435.61, and believed Pirkle had been writing checks both without the Banks' approval, and in excess of the $75,000.00 agreement. The Banks froze the account, and Pirkle was so advised.

30. On December 29, 1990 Mr. Murphy did not make the daily

deposit to Pirkle's Valley bank account, as he had previously done on December 26, 27, and 28, 1990. Mr. Koehne called to inquire why the deposit had not been made, and Mr. Murphy informed him that he was withholding deposits until an agreement could be reached regarding the liquidation budget.

31. Also on December 29, 1990 Pirkle received a charge memo indicating that the vacation payroll amount had been charged against the general operating account. This indicated to Mr. Murphy that money to fund the vacation pay had been transferred from the operating account to the payroll trust account, and that the vacation payroll checks being held by Mr. Murphy were good (i.e., could not be returned for insufficient funds).

32. For the week of December 23 through December 29, 1990 Pirkle administrative employees are owed $23,282.78 for services pertaining to the generation and collection of accounts receivable. The evidence submitted is inadequate to establish the amounts owed Pirkle drivers and owner-operators for services performed during the same time period. Similarly, the evidence submitted is inadequate to establish the amount of accounts receivable generated from deliveries made on and after December 24, 1990.

33. On December 30, 1990 Mr. Murphy completed the liquidation budget.

34. On December 31, 1990 Mr. Murphy presented the liquidation budget to the Bank officers, but no agreement was reached. Once again, the Banks denied Mr. Murphy's request to release vacation payroll. The parties continued to negotiate, but by January 3,

1991 Pirkle had still been unable to present a liquidation budget acceptable to the Banks, and Mr. Jehn authorized the filing of bankruptcy.

35. Also on December 31, 1990 Mr. Murphy deposited checks from accounts receivable totalling $127,372.09 into a trust account maintained by Pirkle's attorneys, DeWitt, Porter.

36. Also on December 31, 1990 Mr. Murphy was given $7,500.00 by the Banks as a fuel contingency fund to protect against the possibility that ComData would cut off Pirkle's fuel credit over the holiday weekend. This $7,500.00 was part of the $35,000.00 previously promised by Mr. Smith. Mr. Murphy gave the $7,500.00 to Mr. Jehn.

37. On or about January 4, 1991 Mr. Jehn disbursed the $7,500.00 to various of Pirkle's creditors, himself included. None of the debts paid were on account of fuel charges.

38. On January 4, 1991 Mr. Murphy released the vacation payroll checks on the advice of Pirkle's attorneys, because the regular payroll checks were not being released.

39. On January 4, 1991, immediately before Pirkle's bankruptcy filing, Mr. Jehn instructed DeWitt, Porter to write $71,465.94 in checks on Pirkle's DeWitt trust account. Of this amount, $25,000.00 was paid to DeWitt as Pirkle's attorneys ($10,034.21 of this fee was subsequently returned to the trustee), $6,145.00 was paid to Pirkle's employees, $32,820.94 was paid to taxing authorities (primarily for "trust fund" taxes for which Jehn may well have faced personal liability), and the remaining

$7,500.00 was reimbursed to the Banks for the $7,500.00 fuel contingency advance.

40. On January 4, 1991 Pirkle filed its petition under chapter 7 of the Bankruptcy Code.

41. On January 7, 1991 the plaintiff, William J. Rameker, was appointed by court order to be the trustee in the debtor's bankruptcy.

42. Mr. Murphy, who had since resigned from employment with the debtor, was employed by the trustee from January 4, 1991 through February 15, 1991. A handful of the debtor's other administrative employees also worked for four weeks to generate accounts receivable, and all were compensated in the total amount of $17,027.78 by this court's post-petition orders authorizing administrative expense payments.

43. On or about January 30, 1991 YLJ, Inc. filed fifty proofs of claim totalling $116,576.19. Mr. Henderson testified that approximately $30,000.00 of this sum is attributable to services rendered in delivering loads after December 24, 1990. The majority of the proofs of claim state that they are for services begun prior to December 24, 1990 and concluded December 31, 1990. Only $886.98 in claims is specifically identified in the YLJ, Inc. proofs of claim as having arisen between December 24 and December 31, 1990.

44. On February 14, 1991 the Banks filed their proof of secured claim in the amount of $3,250,000.00 plus interest.

45. As of the January 4, 1991 petition date, the debtor owed the Banks $3,250,000.00 plus interest pursuant to the terms of the

Credit Agreement and promissory notes executed in conjunction therewith.

46. On April 2, 1991 this court approved a stipulation between the trustee and the Banks authorizing payment from the debtor's estate to the Banks in the amount of $1,800,000.00.

47. The debtor still owes the Banks $1,450,000.00 pursuant to the terms of the Credit Agreement and promissory notes.

**CONCLUSIONS OF LAW**

**Equitable Subordination**

1. 11 USC § 510(c)(1) provides: "Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may--under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest[.]"

2. "The purpose of equitable subordination is to distinguish between the unilateral remedies that a creditor may properly enforce pursuant to its agreements with the debtor and other inequitable conduct such as fraud, misrepresentation, or the exercise of such total control over the debtor as to have essentially replaced its decision-making capacity with that of the lender." Matter of Clark Pipe and Supply Co., Inc., 893 F2d 693, 701 (5th Cir 1990), reh den, 899 F2d 11 (5th Cir 1990).

3. "Section 510(c) lets bankruptcy judges subordinate claims but does not provide criteria for the exercise of this power. Absence of statutory criteria commits the subject to the courts,

to be worked out in the common law fashion." Kham & Nate's Shoes No. 2, Inc. v First Bank of Whiting, 908 F2d 1351, 1356 (7th Cir 1990).

4. In determining whether a claim should be equitably subordinated, "[t]he court should consider whether (1) the claimant creditor has engaged in some sort of inequitable misconduct;[2] (2) the misconduct has resulted in injury to other creditors or in unfair advantage to the miscreant; and (3) subordination of the debt is inconsistent with other provisions of the bankruptcy code." Matter of Vitreous Steel Products Co., 911 F2d 1223, 1237 (7th Cir 1990).

5. "'Inequitable conduct' in a commercial life means breach plus some advantage-taking, such as the star who agrees to act in a motion picture and then, after $20 million has been spent, sulks in his dressing room until the contract has been renegotiated." Kham & Nate's Shoes, 908 F2d at 1357 (emphasis in original).

6. Although the Banks made no unlimited promise to pay for

---

[2]In Matter of Virtual Network Services Corporation, 902 F2d 1246, 1250 (7th Cir 1990), the court stated: "[W]e conclude that § 510(c)(1) authorizes courts to equitably subordinate claims to other claims on a case-by-case basis without requiring in every instance inequitable conduct on the part of the creditor claiming parity among other unsecured general creditors." The Virtual Network Services court approved equitable subordination of the Internal Revenue Service's non-pecuniary loss tax penalty claims, indicating that the it would be unfair for those non-loss penalty claims to share equally with unsecured creditors having actual losses. See also Vitreous Steel, 911 F2d at 1237. The instant case involves no such non-loss claims, penalty or otherwise, nor any other circumstances which would justify relaxation of the "inequitable conduct" requirement. The debtor thus must establish inequitable conduct if it is to succeed in its equitable subordination claim.

the past and future wages of Pirkle employees and owner-operators, the Banks' promise to pay Pirkle $50,000.00 for the benefit of employee drivers and owner-operators, and $25,000.00 for the benefit of the administrative staff in order to ensure that the loads were delivered and approximately $300,000.00 in accounts receivable were generated was an express contract. Valley's approval of a $35,000.00 payment to ComData for payment of the fuel necessary to deliver the outstanding loads brought the total amount promised under contract by the Banks to $110,000.00.

7. The Banks breached their contract with the debtor by failing to pay the promised amount. While the debtor performed by delivering the loads and generating the accounts receivable, the Banks paid only $5,086.30 in owner-operator settlements pertaining to deliveries made on or after December 26, 1990. To that amount must be added the $61,431.73 spent by the debtor from the DeWitt, Porter trust account containing the Banks' accounts receivable, and the $39,061.27 in unauthorized vacation pay, for a total of $105,579.30.[3]

8. According to Kham & Nate's Shoes, inequitable conduct requires a finding of some advantage-taking in addition to a finding that a contract has been breached. "Normally a creditor

---

[3]The checks which cleared Pirkle's general account on December 26 and 27, 1990 cannot be counted toward the $110,000.00 because they did not relate to payments made for services rendered between December 26 and December 31, 1990. Nor do the $17,027.78 in post-petition wages of the debtor's employees, paid pursuant to this court's orders, count toward the $110,000.00 total. It is unknown how these payments related to deliveries made on or after December 26, 1990, and one cannot assume the wages apply only to those shipments.

may take any lawful action it sees fit in order to protect or collect its claim." In re Osborne, 42 BR 988, 999 (WD Wis 1984). In Kham & Nate's Shoes, the court noted that "Bank did not create Debtor's need for funds, and it was not contractually obliged to satisfy its customer's desires. The Bank was entitled to advance its own interests, and it did not need to put the interests of Debtor and Debtor's other creditors first." Kham & Nate's Shoes, 908 F2d at 1358. See also Matter of EDC, Inc., 930 F2d 1275, 1281-82 (7th Cir 1991) ("Kham & Nate's Shoes . . . holds that the doctrine of equitable subordination may not be used to impose obligations on parties above what they have agreed to, in the absence of evidence of overreaching[.]").

9. The Banks cannot be said to have engaged in advantage-taking toward the debtor. The debtor argues that the Banks had "control" of the debtor, citing as examples the Banks' requirement that on and after December 26, 1990 the debtor obtain the Banks' approval to issue checks, Mr. Gambino's presence on the debtor's premises, and the freezing of the general account on December 26, 1990. Assuming some type of "control" flowed from these actions, they are insufficient to establish inequitable conduct on behalf of the Banks. It was Pirkle's decision to close on December 31, 1990, not the Banks.' Pirkle was insolvent, and the Banks had the right to freeze the operating account at any time. See ¶ 3 of Findings of Fact; Ill Rev Stat ch 26, § 9-503; Wis Stat § 409.503.[4]

[4]Uniform Commercial Code § 9-503 provides, in relevant part, that "Unless otherwise agreed a secured party has on default the right to take possession of the collateral."

Requiring approval of all checks written on the account rather than immediate freezing of the account illustrates that the Banks were exercising less than their full right to control the account at that time. Furthermore, Mr. Gambino was only present on Pirkle premises as an observer, not as one who was "calling the shots" on behalf of the Banks. Finally, the Banks' ultimate exercise on December 28, 1990 of their contractual and legal right to freeze the account does not qualify as a form of inequitable control.

10. The Banks cannot be said to have engaged in advantage-taking toward the debtor's employees and owner-operators. The debtor failed in its attempt to establish that the Banks made an unlimited promise to pay for past and future wages, in return for delivery of outstanding shipments and generation of the corresponding accounts receivable. The Banks are thus not responsible for any representation made by the debtor to its employees and owner-operators that the Banks had made such an unlimited promise.

11. The Banks cannot be said to have engaged in advantage-taking toward YLJ, Inc. Mr. Henderson testified that on December 26, 1990 he had told Mr. Koehne that YLJ's drivers had shut down and refused to move on December 24 and 25 until they were sure they would be paid, and that Mr. Koehne assured him that he would be paid for everything Pirkle owed him. There was no evidence that Mr. Koehne knew at the time of his conversation with Mr. Henderson that Pirkle was in arrears on its payments to YLJ. It is therefore reasonable to infer that Mr. Koehne's promise to pay for everything

Pirkle owed it was intended and understood by him to refer only to payment for delivery of the outstanding shipments. As such, his promise was consistent with, and presumably was contemplated to fall within, the Banks' earlier promise to pay $50,000.00 for delivery of the outstanding loads. This consistency well explains Mr. Koehne's failure to recall having had the conversation with Mr. Henderson.

12. Because the Banks have not engaged in any form of advantage-taking, be it fraud, misrepresentation, control of the debtor, or the like, they cannot, under Kham & Nate's Shoes, be said to have engaged in inequitable conduct. In the absence of inequitable conduct, the debtor's claim for equitable subordination must fail.

**Breach of Express Contract**

13. The court has already determined (see ¶7 of Conclusions of Law) that the Banks breached their contract to pay $110,000.00 in return for the delivery of outstanding loads and generation of accounts receivable, and may be credited with having paid only $105,579.30, leaving a shortfall of $4,420.70. The Banks' assertion that they are entitled to setoff against their against their $1,450.000.00 claim any amounts for which they are found liable in this proceeding is incorrect.

14. "A setoff is a demand which the defendant has against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action. Since it is purely statutory in origin, all of the statutory requirements must be strictly complied

with. A recoupment, on the other hand, is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction. Since it is of common-law origin and is distinct from setoff, the statutory requirements regarding setoff do not apply, and recoupment may be pled defensively[.]" Zweck v DP Way Corp., 70 Wis 2d 426, 433-34, 234 NW2d 921 (1975) (emphasis in original).

15. Because the Banks' demand arises out of the same transaction as the debtor's claim (the notes, security agreements, and Credit Agreement), the Banks are entitled to not setoff, but recoupment. Accordingly, the Banks' claim is reduced from $1,450,000.00 to $1,445,579.30.

**Promissory Estoppel**

16. "To enforce a promise under the theory of promissory estoppel, a plaintiff must prove that the promise was one that the promisor should reasonably have expected to induce either action or forbearance of a definite and substantial character by the plaintiff and that the promise did induce either action or forbearance. In addition, the plaintiff must prove that enforcement of the promise is necessary to avoid an injustice. The first two elements are questions for the fact finder. The third is a policy question to be decided by the court in the exercise of its discretion." U.S. Oil Co., Inc. v Midwest Auto Care Services, Inc., 150 Wis 2d 80, 89, 440 NW2d 825 (App 1989).

17. The debtor premises its promissory estoppel claim on the alleged existence of an unlimited promise by the Banks to pay the

past and future wages of Pirkle's employees and owner-operators in return for delivery of outstanding loads and generation of the corresponding accounts receivable. The court has determined that no such promise was made (see ¶ 16 of Findings of Fact). Accordingly, the debtor's promissory estoppel claim must fail.

**Unjust Enrichment/Implied Contract**

18. The elements of a cause of action in equity for unjust enrichment are: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value." Puttkammer v Minth, 83 Wis 2d 686, 689, 266 NW2d 361 (1978) (citations omitted).

19. "[T]he general rule of implied-in-law contracts (quasi contracts)" is "namely that the law will impose an obligation to pay on the person receiving a benefit when to retain the benefit would be unjust." In the Matter of the Guardianship of Kordecki, 95 Wis 2d 275, 280, 290 NW2d 693 (1980).

20. Regardless of whether Pirkle conferred a benefit on the Banks, it is incapable of recovering under an unjust enrichment or implied contract theory. The equitable maxim of "he who seeks equity must do equity" applies, and Pirkle failed to "do equity" when it wrongfully withheld the Banks' collateral by placing $127,372.09 in checks from accounts receivable into the DeWitt, Porter trust account. By placing the accounts receivable proceeds

beyond the Banks' reach, Pirkle acted inequitably, and thus became confined to pursuit only of those remedies it might have at law. Accordingly, the debtor's unjust enrichment and implied contract claims must fail.

**Conclusion**

The debtor's equitable subordination, promissory estoppel, unjust enrichment, and implied contract causes of action are denied. The debtor's damages in the amount of $4,420.70 from breach of the express contract may be recouped from the Banks' $1,450,000.00 claim, leaving a remaining claim of $1,445,579.30.

It may be so ordered.

Dated April 3, 1992.

ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

IN RE: IN BANKRUPTCY NO.:

PIRKLE REFRIGERATED FREIGHT LINES, INC., MM7-91-00043

Debtor. IN ADVERSARY PROCEEDING NO.:

WILLIAM J. RAMEKER, TRUSTEE, 91-0042-7

Plaintiff,

v.

VALLEY BANK, MADISON and CONTINENTAL BANK, N.A., ORDER

Defendants.

---

The court having this day entered its Findings of Fact and Conclusions of Law in the above-entitled matter;

IT IS HEREBY ORDERED that the debtor's equitable subordination, promissory estoppel, unjust enrichment, and implied contract causes of action are denied; and

IT IS FURTHER ORDERED that the debtor's damages in the amount of $4,420.70 from breach of the express contract may be recouped from the Banks' $1,450,000.00 claim, leaving a remaining claim of $1,445,579.30.

Dated April 3, 1992.

ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

IN RE: IN BANKRUPTCY NO.:

PIRKLE REFRIGERATED FREIGHT LINES, INC., MM7-91-00043

Debtor. IN ADVERSARY PROCEEDING NO.:

WILLIAM J. RAMEKER, TRUSTEE, 91-0042-7

Plaintiff,

v.

VALLEY BANK, MADISON and
CONTINENTAL BANK, N.A., MEMORANDUM DECISION AND ORDER

Defendants.

---

Copies of this Memorandum Decision and Order were mailed to the following parties on April 6, 1992:

Attorney for Plaintiff:

Mr. Stephen L. Morgan
Murphy & Desmond, S.C.
P.O. Box 2038
Madison, WI 53701

Attorney for Defendant:

Mr. Daniel L. Stolper
Stafford, Rosenbaum,
Rieser & Hansen
P.O. Box 1784
Madison, WI 53701-1784