COMMENTS

IF YOU CAN'T BEAT THEM, JOIN THEM: INCLUSIVE JOINDER AND THE FILTERING OF ARTICLE III STATUS INTO THE BANKRUPTCY COURTS

INTRODUCTION

Rife with scandal and soaking in publicity, recent mega-bankruptcy filings, such as Enron, WorldCom, and Adelphia, have drowned the bankruptcy courts in floods of hearings involving countless claims and parties. Not only are these filings some of the largest in corporate history,[1] they also share a common denominator of corporate fraud. Enron's decision to keep some of its debt off the books and misstate its earnings catapulted the company into bankruptcy.[2] WorldCom's attempt to hide losses by improperly accounting for $3.9 billion in operating expenses led to its financial demise.[3] Adelphia found its way to the bankruptcy court's door after it discovered the Rigas family[4] had misappropriated corporate funds via self-dealing. These mega-bankruptcy filings involving corporate fraud open an enormous umbrella under which a plethora of other litigation matters, or non-core proceedings, can be heard.[5] Through broad interpretation of the joinder rules, especially intervention, the federal courts have widened the umbrella and enabled multiple parties to bring their non-core claims, especially those associated with executive fraud, into

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[1] *See* John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, a Culture of Operating Outside Public's View—Hidden Deals with Officers and Minimal Disclosure Finally Cost It Its Trust—Chewco and JEDI Warriors*, WALL ST. J., Dec. 5, 2001, at A1 (citing the Enron bankruptcy filing as the largest corporate filing as of December 2001); Jared Sandberg et al., *WorldCom to File Chapter 11, As Cash Reserves Dwindle Fast*, WALL ST. J., July 19, 2002, at A1 (citing the WorldCom bankruptcy filing as the largest in corporate history as of July 2002).

[2] *See* Emshwiller & Smith, *supra* note 1, at A1.

[3] *See* Sandberg et al., *supra* note 1, at A1.

[4] John Rigas and his two sons, Timothy and Michael, were the former senior executives of Adelphia. Andrew Ross Sorkin, *Corporate Conduct: Prosecution; Founder of Adelphia and Two Sons Arrested*, N.Y. TIMES, July 25, 2002, at C1.

[5] Non-core proceedings are those proceedings that are extraneous to bankruptcy law. *See* 28 U.S.C. § 157(b) (2000).

bankruptcy proceedings.[6] The Second Circuit has recognized the resulting dilemma,[7] identifying umbrella bankruptcy litigation as cases triggered by a bankruptcy petition "often covering numerous actions that are related only by the debtor's status as a litigant and that often involve decisions that will be unreviewable if appellate jurisdiction exists only at the conclusion of the bankruptcy proceeding."[8]

Although the primary function of a bankruptcy court is to hear core bankruptcy matters,[9] inclusive intervention allows the court to entertain additional non-core matters simply because a corporation has filed for bankruptcy. The essential problem with additional non-core matters is that it is not often an easy feat to separate the core bankruptcy issues from the non-core issues. The blurred and amorphous line that separates core bankruptcy issues from non-core issues has been criticized by scholars on countless occasions,[10] and rightly so, for the constitutional stakes are high.[11] Unless the district courts are diligent in reviewing their respective bankruptcy courts' recommendations regarding non-core matters, the federal court system treads too close to replicating the same constitutional violation[12] the U.S. Supreme Court identified in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[13] over twenty years ago.

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[6] *See generally* Adelphia Commc'ns Corp. v. Rigas (*In re* Adelphia Commc'ns Corp.), 285 B.R. 848, 850–51 (Bankr. S.D.N.Y. 2002).

[7] The dilemma is two fold. First, the bankruptcy courts already suffer from docket overload and the numerous actions under the umbrella only add to the problem. *See infra* note 186. Second, non-core proceedings must be reviewed by both the bankruptcy judge and the district court judge. *See* 28 U.S.C. § 157(c)(1).

[8] Sonnax Indus., Inc. v. TRI Component Prod. Corp. (*In re* Sonnax Indus., Inc.), 907 F.2d 1280, 1283 (2d Cir. 1990).

[9] *See* 28 U.S.C. § 157.

[10] *See generally* Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207, 208 (1983); Thomas Galligan, Jr. *Article III and the "Related to" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 11 n.40 (1987); Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 681 (1985); Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 277, 284 (1996).

[11] Pursuant to 28 U.S.C. § 157, bankruptcy judges lack the authority to enter final determinations on non-core matters because they are not Article III judges. They must submit their findings and recommendations on non-core matters to the Article III district judge. *See infra* notes 67–68 and accompanying text.

[12] The U.S. Supreme Court found the Bankruptcy Act of 1978 violated Article III of the Constitution because it granted Article III judicial power to non-Article III bankruptcy adjuncts. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52 (1982).

[13] *Id.*

The first two parts of this Comment address the background necessary to understand how inclusive intervention allows bankruptcy courts to assume Article III status.[14] Part I discusses the U.S. Supreme Court's decision in *Marathon* and the legislation passed in response to that decision. Part II examines the requirements necessary to intervene in a bankruptcy case under Rule 24 of the Federal Rules of Civil Procedure ("FRCP")[15] and § 1109(b) of the U.S. Bankruptcy Code ("Code").[16] Furthermore, Part II describes a split among the U.S. Courts of Appeals regarding the interpretation of both provisions. Part III analyzes this circuit split and discusses the potential effects of inclusively interpreting intervention, specifically the increase in non-core proceedings a bankruptcy court hears. It also discusses the dynamic between the district court and the bankruptcy court regarding non-core proceedings and investigates the possibility of rubber-stamping non-core proceeding recommendations. Finally, Part IV addresses possible solutions to the circuit split and the increased need for discipline among the bankruptcy and district court judges sitting within the Second and Third Circuits in avoiding Article III violations.

I. THE STRIPPING OF ARTICLE III DETERMINATIONS FROM THE BANKRUPTCY COURT

A. The Supreme Court's Holding in Marathon and the Emergency Rule

Before the Supreme Court's holding in *Marathon*, bankruptcy courts, by virtue of the Bankruptcy Act of 1978,[17] shared with the district courts some of the authority to determine issues without enjoying the same Article III status as district court judges. The Act gave the bankruptcy courts the power to hear matters relating to the Code.[18] It did not, however, grant the judges the same benefits as those enjoyed by other federal judges, namely life tenure and secure

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[14] Pursuant to Article III, Section 1 of the Constitution, federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

[15] FED. R. CIV. P. 24(a)(2).

[16] 11 U.S.C. § 1109(b) (2000).

[17] 28 U.S.C. § 1471 (1978). (repealed 1984). The Act established a U.S. bankruptcy court in each judicial district as an adjunct to the district court for such district. *Id.* The bankruptcy court judges were appointed for a term of fourteen years, subject to removal by the judicial council of the circuit in which they served on grounds of incompetence, misconduct, neglect of duty, or disability. *Id.* Their salaries were set by statute and were subject to adjustment. *Id.* The Act granted the bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 [of the Code] or arising in or related to cases under title 11." *Id.* § 1471(b).

[18] 28 U.S.C. § 1471(b).

salary.[19] Essentially, bankruptcy courts were not Article III courts but did everything an Article III court does. The Act removed the judicial power from the Article III district court and placed that power in a non-Article III adjunct.[20] Because Congress, in creating the Act, overstepped its limited power to establish adjuncts to Article III courts, the Supreme Court declared this system unconstitutional in *Marathon*.[21]

The facts of this monumental case are simple. After Northern Pipeline filed for chapter 11 reorganization, it filed an ancillary suit against Marathon Pipe Line.[22] Northern Pipeline claimed Marathon Pipe Line breached a contract and a warranty and sought damages for those breaches, as well as for misrepresentation, coercion, and duress.[23] Marathon Pipe Line then sought to have the suit dismissed "on the ground that the Act unconstitutionally conferred [Article] III judicial power upon judges who lacked life tenure and protection against salary diminution."[24] The Supreme Court, therefore, had to determine whether the jurisdiction granted to the bankruptcy court under 28 U.S.C. § 1471 of the Act violated Article III of the U.S. Constitution.[25] Ultimately, the Court held the liberal grant of jurisdiction to the lower bankruptcy courts exceeded Article III[26] and "[t]he judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by [Article] III."[27]

In reaching its conclusion, the Court first discussed the procedural changes Congress made to the Act.[28] The Act eliminated the referee system[29] and

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[19] *Id.* § 1471. Rather than life-tenure, bankruptcy judges were appointed for a term of fourteen years. While federal district and appellate judges' salary could not be lowered, bankruptcy judges' salary were subject to adjustment, up or down. *Id.*

[20] *Id.*

[21] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

[22] *Id.* at 56.

[23] *Id.*

[24] *Id.* at 56–57. The bankruptcy court denied the motion to dismiss, but the district court granted the motion on appeal. *Id.*

[25] *Id.* at 52.

[26] *Id.* at 50.

[27] *Id.* at 50–51. The court found the attributes of life tenure and protection against salary diminution were "incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches," and bankruptcy judges, created by the Bankruptcy Act, were not Article III judges. *Id.*

[28] *Id.* at 52–53.

[29] Under the referee system, federal district courts served as bankruptcy courts and bankruptcy proceedings were generally conducted before referees except on those occasions where the district court elected to withdraw a case from a referee. *Id.* The referee's final order could be appealed to the district court. *Id.* The bankruptcy courts had jurisdiction over controversies involving property in the possession of the

established bankruptcy courts as adjuncts to the district courts.[30] The jurisdiction created under the Act was much broader than under the referee system,[31] and the jurisdictional grant empowered the bankruptcy courts to "entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under Title 11" of the U.S. Code.[32]

The Court next turned to the importance of the separation of powers and the guarantee of judicial impartiality provided by Article III of the Constitution,[33] which clearly states that judges who enjoy life tenure and are safe from a diminution in salary exercise the judicial powers of the United States.[34] After discussing how these benefits maintain the proper checks and balances,[35] the Court firmly announced, "[o]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence."[36] The Court then explained the Act did not confer those fundamentally important benefits on the bankruptcy courts.[37]

Although Article III does not protect bankruptcy courts, the Court identified three situations in which Article III does not bar the creation of legislative courts by Congress.[38] While Congress may have certain "exceptional" powers in these situations, the Court held "the authority of Congress [is] subject to the general prescriptions of [Article] III" when it is not granted an exceptional power.[39] It found no such exceptional grant of power to

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court. *Id.* With consent, the bankruptcy court also had jurisdiction over some "plenary" matters—such as disputes involving property in the possession of a third person. *Id.*

30 *Id.*

31 Janine C. Ciallella, Note, *Should Bankruptcy Judges Be Permitted to Conduct Jury Trials?*, 8 AM. BANKR. INST. L. REV. 175, 181 (2000).

32 *Marathon Pipe Line Co.*, 458 U.S. at 54.

33 *Id.* at 57–59. Article III of the U.S. Constitution provides, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

34 *Marathon Pipe Line Co.*, 458 U.S. at 60.

35 *Id.* at 57–58. The Supreme Court reasoned the salary and tenure provisions of Article III ensured the independence of the judicial branch and the judicial branch needed to be kept distinct from the legislative and executive branches to safeguard the governmental branches against tyranny and the encroachment of one branch over the others. *Id.*

36 *Id.* at 60.

37 *Id.* at 60–61.

38 *Id.* at 63–70.

39 *Id.* at 70.

Congress regarding the creation of the bankruptcy courts[40] and plainly stated, in three sentences, that which would send the procedural framework of bankruptcy law into a whirlwind of change and controversy.

> [Article] III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by [Article] III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of [Article] III.[41]

The Court concluded the broad grant of jurisdiction laid out in section 1471 of the Act was unconstitutional and could not "be sustained as an exercise of Congress' power to create adjuncts to [Article] III courts"[42] because it had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the [Article] III district court, and ha[d] vested those attributes in a non-[Article] III adjunct."[43]

To remedy this unconstitutional predicament, the Supreme Court gave Congress[44] ninety days to amend the rule.[45] Unfortunately, Congress did nothing; and the Court extended the stay again until December 24, 1982.[46] When Congress still did not respond, the federal courts were forced to find a temporary solution in what has been coined the "Emergency Rule," a model rule proposed by the Judicial Conference and adopted as a local rule by all district courts.[47] Because the Emergency Rule permitted bankruptcy jurisdiction to lie in the district courts[48] and allowed untenured judges to hear

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[40] *Id.* at 71.

[41] *Id.* at 76.

[42] *Id.* at 87.

[43] *Id.*

[44] *Id.* at 88. The Court left the correction in the hands of Congress, saying "[w]e think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of [Article] III in the way that will best effectuate the legislative purpose." *Id.* at 87 n.40.

[45] *Id.* at 88. The Court hoped the limited stay of ninety days would "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.*

[46] *Id.*

[47] *See* Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of* Northern Pipeline v. Marathon, 40 WASH. & LEE L. REV. 99, 115 (1983).

[48] In the Act, Congress expressly refused to permit bankruptcy jurisdiction to lie in the district courts. *See id.*

virtually all bankruptcy proceedings,[49] bankruptcy scholars believed the Emergency Rule to be invalid.[50] Although many condemned the Emergency Rule, the circuit courts never invalidated it.[51] Furthermore, the Supreme Court repeatedly refused to grant certiorari to hear challenges to the validity of the Emergency Rule.[52]

For the following two years under the aptly named Emergency Rule, bankruptcy judges functioned as Article I judges.[53] The Emergency Rule sought to remedy the unconstitutionality of the Act by giving the district courts some authority and control over bankruptcy cases and proceedings. It did so by allowing the district judges to retain the following powers:

(1) the district judge could *withdraw* the reference to the bankruptcy judge, and hear and decide all or part of any bankruptcy case or proceeding in the first instance;

(2) in a "related" proceeding (defined as a proceeding that could have been brought in a state or federal court in the absence of bankruptcy), the bankruptcy judge could not enter a final order (unless all parties consented), but was authorized only to submit *proposed* findings of fact and conclusions of law to the district judge, who had the power to review those findings, and conclusions *de novo*, and in doing so "need give no deference to the findings of the bankruptcy judge;"

(3) in all proceedings, even those in which the bankruptcy judge was permitted to enter a final order, a party had the right to object specifically to the bankruptcy judge's findings and conclusions, with *de novo* review then available in the district court;

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[49] In *Marathon*, the Supreme Court held that allowing untenured judges to have jurisdiction over all matters related to bankruptcy proceedings was unconstitutional. *See supra* notes 41–43 and accompanying text.

[50] *See, e.g.*, Vern Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1, 3 (1983); King, *supra* note 47, at 116.

[51] *See* David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 191 (2000).

[52] *See* Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 576 n.600 (1988).

[53] This two-year period extended from the Supreme Court's decision in *Marathon* on June 28, 1982 until Congress instituted a revised court system in the Bankruptcy Judges and Federal Judgeship Act (BAFJA) on July 10, 1984. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

(4) the bankruptcy judge on his or her own motion could certify that a judgment or order had to be approved by the district judge; and

(5) the bankruptcy judge could not enjoin a court, punish a criminal contempt, hear an appeal, or conduct a jury trial.[54]

Bankruptcy proceedings continued under this system until 1984, "with the bankruptcy judges deciding almost everything and with review by the district judges usually being little more than a cursory 'rubber stamp' procedure."[55]

B. The Eventual Response to Marathon: Congress Codifies the Emergency Rule

In 1984, Congress finally responded to the *Marathon* decision not by drafting a new statute, but by merely codifying the Emergency Rule.[56] Rather than granting Article III status to bankruptcy judges[57] who could then constitutionally hear all bankruptcy proceedings, Congress decided to retain the old system in which bankruptcy jurisdiction is split between the district court and the bankruptcy court.[58] Under the new statute, bankruptcy courts serve as "judicial officers" of the district court[59] and are appointed for a term of fourteen years.[60]

Most importantly, the statute grants the district court the power to refer to bankruptcy judges "any or all proceedings arising under title 11 or arising in or related to a case under title 11."[61] Because of the constitutional problem, however, it does not allow non-Article III bankruptcy courts to enter final orders in all types of bankruptcy proceedings.[62] Instead, the statute

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[54] CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 4.2, at 227–28 (1997).

[55] *Id.*

[56] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. No. 98-353, 98 Stat. 333 (1984).

[57] The lobbying efforts of the Article III judges, headed by Chief Justice Burger and the Judicial Conference, played a significant role in Congress' decision to deny Article III status to the bankruptcy judges. *See* TABB, *supra* note 54, at 228.

[58] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

[59] 28 U.S.C. § 152(a)(1) (2000).

[60] *Id.* § 153(a). Bankruptcy judges may be removed only for incompetence, misconduct, neglect of duty, or physical or mental disability. *Id.*

[61] *Id.* § 157(a).

[62] *Id.* § 157(c)(1).

distinguishes core proceedings from non-core proceedings.[63] Section 157(b)(1), which addresses core proceedings, provides:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.[64]

This provision allows the bankruptcy court to hear not only any and all matters related to bankruptcy but also to determine and enter orders and judgments for those matters.[65] Section 157(c)(1), however, does not grant the same authority to the bankruptcy court when non-core matters are at play. Instead, it provides:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.[66]

The rule distinguishes the bankruptcy court's authority when hearing non-core proceedings from that given to it when hearing core proceedings by stripping it of any ability to enter a final determination or judgment.[67] Instead, it instructs the bankruptcy court to submit a recommendation to the district court, which has the option of approving the recommendation by entering the final determinations and orders.[68] The purpose of this section is to ensure the district court has the ultimate authority in matters unrelated to bankruptcy law, which according to *Marathon*[69] must be determined by an Article III court.[70]

One of the inadequacies of § 157 is that it does not cap the number of non-core proceedings a bankruptcy court may hear. The chronic mega-bankruptcy filings of the last few years force the bankruptcy court to hear various matters

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63 *Id.* § 157(b), (c).
64 *Id.* § 157(b)(1).
65 *Id.*
66 *Id.* § 157(c)(1).
67 *Id.*
68 *Id.*
69 *See supra* notes 41–43 and accompanying text.
70 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982).

it otherwise would not be qualified to hear simply because one of the parties involved has filed for bankruptcy relief. A liberal interpretation of the joinder rules only escalates the number of non-core matters the bankruptcy court hears because it allows even more parties and issues to join the bankruptcy case.

II. LIBERAL INTERPRETATION OF THE JOINDER RULES: INCREASING THE AMOUNT OF NON-CORE PROCEEDINGS BROUGHT BEFORE THE BANKRUPTCY COURT

A. Intervention: Federal Rule of Civil Procedure 24 and § 1109(b) of the Bankruptcy Code

According to FRCP 24, a party who wishes to intervene[71] must first make a timely motion, complete with a complaint or answer and any cross-claims it may have.[72] The court will grant the motion in two situations.[73] First, a party has a right to intervene if it meets FRCP 19(a)(2)(i),[74] which that the moving party's interests may be harmed if it is not joined and if its interests are not already represented.[75] Second, via permissive intervention, a party may intervene if its claim or defense has at least one common question with the pending case.[76] The court, in its discretion, then determines whether to allow

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[71] Intervention is permissive. FED. R. CIV. P. 24(a).

[72] FED. R. CIV. P. 24(a)(2).

[73] *Id.*

[74] Rule 24(a)(2) provides an applicant shall be permitted to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id.

[75] Rule 19(a)(2)(i) specifically provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the act if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest.

FED. R. CIV. P. 19(a)(2)(i).

[76] FED. R. CIV. P. 24(b)(2). "Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common." *Id.*

the intervening party into the case by weighing the benefits of allowing participation against delay caused by intervention.[77]

In addition to Rule 24 of the FRCP, the Code addresses a chapter 11 party's right to be heard in § 1109(b).[78] The section provides, "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."[79] This section seemingly allows any party in interest to be heard on any issue in a chapter 11 bankruptcy reorganization case, but it may be restricted when read in connection to FRCP 24.[80]

B. Judicial Interpretation of Rule 24 and § 1109 of the Code

The central issue regarding joinder in a chapter 11 reorganization case is whether § 1109(b) of the Code, in connection with FRCP 24, provides a basis for intervention as of right in an adversary proceeding.[81] Although the courts of appeals have split in interpreting these rules for approximately twenty years, the split has deepened and has become more of an immediate matter of concern in the past years since the Second Circuit adopted the Third Circuit's interpretation.[82]

Before discussing the judiciary's interpretation of the issue, it is necessary to understand adversary proceedings. Adversary proceedings are "full blown federal lawsuits within the larger bankruptcy case,"[83] and "most litigated

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[77] *Id.* "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

[78] 11 U.S.C. § 1109(b) (2000). The Third Circuit provided background information on § 1109(b), explaining "[s]ection §1109(b) derives from Section 206 of the former Bankruptcy Act, 11 U.S.C. § 606, and former Chapter X Rule 10-210(a)." Official Comm. of Unsecured Creditors of Cybergenics, Corp. v. Chinery, 330 F.3d 548, 562 (3d Cir. 2003) (citing *In re* Amatex Corp., 755 F.2d 1034, 1042 (3d Cir. 1985)). "These two provisions were designed to broaden creditor participation in reorganization proceedings in order to remedy the deficiencies of prior procedures, which were deemed to be unduly restrictive." *Id.* (citing Official Unsecured Creditors Comm. v. Michaels (*In re* Marin Motor Oil, Inc.), 689 F.2d 445, 451 (3d Cir. 1982)). "Significantly, however, §1109(b) is broader than either of those provisions—while they authorized creditors 'to be heard on all matters,' neither authorized creditors to 'raise' issues." *Id.*

[79] 11 U.S.C. § 1109(b).

[80] *See infra* notes 107–110 and accompanying text.

[81] *See, e.g.*, Adelphia Commc'ns Corp. v. Rigas (*In re* Adelphia Commc'ns Corp.), 285 B.R. 848, 853–54 (Bankr. S.D.N.Y. 2002).

[82] *See* Term Loan Holder Comm. v. Ozer Group, L.L.C. (*In re* Caldor Corp.), 303 F.3d 161, 175–76 (2d Cir. 2002).

[83] Section of 1120(a)(1) Comm. of Unsecured Creditors v. Interfirst Bank Dallas (*In re* Wood & Locker, Inc.), 868 F.2d 139, 142 (5th Cir. 1989); *see also* 7 COLLIER ON BANKRUPTCY ¶1109.04[1][a][i] (Alan N.

matters in a bankruptcy case are adversary proceedings."[84] In other words, adversary proceedings are separate suits brought within the greater context of the bankruptcy umbrella. The parties who initiate adversary proceedings intervene in them do not always bring core bankruptcy claims into these separate lawsuits.[85]

As early as 1982, the same year the U.S. Supreme Court held in *Marathon* that bankruptcy judges cannot hear Article III matters,[86] the circuit courts started to examine whether § 1109(b) grants a right to intervene in an adversary proceeding.[87] The Third Circuit was the first to address the question, and it did so in the affirmative.[88] In *In re Marin Motor Oil, Inc.*,[89] the bankruptcy court read § 1109(b) as permissive,[90] but the district court reversed, holding § 1109(b) was mandatory.[91] The Third Circuit affirmed the

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Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) ("A bankruptcy case is . . . in colloquial terms, 'the whole ball of wax.'").

[84] Official Unsecured Creditors' Comm. v. Michaels (*In re* Marin Motor Oil, Inc.), 689 F.2d 445, 450 (3d Cir. 1982).

[85] *See* John Silas Hopkins, III, *Adversary Proceedings in Bankruptcy*, 39 NO. 6 PRAC. LAW. 55, 58 (noting the complaint and answer in any given adversary proceeding must state whether the proceeding is "core" or "non-core").

[86] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 51 (1982).

[87] Courts have been split on the right to unconditional intervention for over two decades. *See* Angela K. Layden, *Unconditional or Permissive? Creditor Committee Right to Intervene in an Adversary Proceeding*, AM. BANKR. INST. J., Aug. 1996, at 26.

> Courts have reached different conclusions regarding a parties' right to intervention under § 1109(b) for two primary reasons. First, some courts have interpreted the word "case" in § 1109(b) to simply mean the underlying bankruptcy case, while others conclude that "case" includes adversary proceedings. Second, the courts have differed on § 1109(b)'s interaction with Rule 7024(a)(1). Rule 7024(a)(1) permits a party to intervene in an adversary proceeding of right "when a statute of the United States confers an unconditional right to intervene." Courts are divided on whether § 1109(b) gives a committee an unconditional right to intervene in accordance with Rule 7024(a)(1).

Id.

[88] *In re Marin Motor Oil, Inc.*, 689 F.2d at 457.

[89] In this case, Marin Motor Oil filed for chapter 11. Because the outstanding shares of the company were owned by Nicholas and Ilse Marin, who also owned several related companies, the U.S. Trustee appointed a trustee to the estate. *Id.* at 446. The unsecured creditors' committee also filed a complaint in which it sought the inclusion of the related companies in the proceedings. *Id.* The committee withdrew its complaint when the trustee entered into a stipulation with the Marins and the related companies, calling for the freezing of their assets. *Id.* The trustee then brought two adversary proceedings in which the committee sought to intervene due to the committee's dissatisfaction with the trustee's performance, specifically allowing the freezing of assets to lapse. *Id.* at 446–47. The committee sought to intervene under § 1109(b), asserting it afforded an absolute right to intervene, regardless of the trustee's performance. *Id.* at 447.

[90] *Id.* at 447.

[91] *Id.*

district court's decision,[92] basing its holding on three grounds. First, it found the "language of the statute would seem clearly to favor the position espoused by the [Creditors'] Committee" that the provision granted it an absolute right to intervene in an adversary proceeding brought in connection to the chapter 11 reorganization case.[93] Second, the Third Circuit supported its textual interpretation of the statute by using the legislative history to demonstrate that § 1109(b) evolved from chapter X, section 206 of the former bankruptcy law.[94] Chapter X, section 206 granted creditors "the right to be heard on all matters arising in a proceeding under this chapter"[95] and had been interpreted by courts and commentators to provide an absolute right to appear and be heard in adversary proceedings.[96] Lastly, the Third Circuit found existing bankruptcy case law on § 1109(b) generally supported the position that § 1109 "should be given as broad and absolute a reading as § 206 had received."[97] The Supreme Court later denied certiorari when a party to *In re Marin Motor Oil* appealed the Third Circuit's decision.[98]

Three years later, in *Fuel Oil Supply and Terminaling v. Gulf Oil Corp.*,[99] the Fifth Circuit rejected the Third Circuit's interpretation of § 1109(b) in *In re Marin Motor Oil*. It held § 1109(b) is applicable only to the chapter 11 case and there is no right to intervene in an adversary proceeding.[100] The Fifth Circuit reasoned that, at first blush, prior bankruptcy practice and the legislative history of § 1109(b) appeared to support the view that § 1109(b) requires a bankruptcy court to permit a party in interest to automatically intervene in adversary proceedings.[101] It also conceded to the Third Circuit's finding that the Code does distinguish between "case" and "adversary

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92 *Id.* at 457.

93 *Id.* at 449; *see also* Layden, *supra* note 87, at 26. "The 3rd Circuit concluded that the word 'case' in §1109(b) did not apply only to the underlying bankruptcy case, but extended to adversary proceedings as well." *Id.*

94 *In re Marin Motor Oil*, 689 F.2d at 451.

95 *Id.*

96 *Id.* at 451–52.

97 *Id.* at 453.

98 689 F.2d 445 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

99 762 F.2d 1283 (5th Cir. 1985). While involved in a chapter 11 bankruptcy case, the creditors committee of Fuel Oil Supply & Terminaling, Inc. had initiated a bankruptcy adversary proceeding to avoid an alleged preferential transfer. *Id.* at 1284. After the bankruptcy court dismissed the action for lack of standing, the creditors committee filed a motion under FRCP 24(a) to intervene as of right in another, already existing, adversary proceeding to avoid the alleged preferential transfer. *Id.*

100 *Id.* at 1287. The district court denied the creditors committee's motion to intervene as of right without a hearing and had not filed any findings of fact or conclusion of law regarding its denial of the motion. *Id.* at 1284.

101 *Id.* at 1285.

proceeding" for purposes of intervention.[102] The Fifth Circuit then reasoned that, however strong it appears to be,[103] the broad interpretation of § 1109(b) granting an absolute right to intervene in an adversary proceeding "loses much of its force . . . when § 1109(b) is juxtaposed with the procedural rules governing intervention."[104]

The Fifth Circuit also stated courts are loathe to find unconditional statutory rights of intervention and courts tend to narrowly construe FRCP 24(a)(1).[105] Furthermore, it noted Congress had "drawn distinctions between bankruptcy 'cases' and the proceedings related to them" in several provisions of Title 28 of the U.S. Code and in the bankruptcy rules.[106]

Finally, the Fifth Circuit reasoned that Congress, on the basis of policy,[107] intended federal courts to apply FRCP 24(a)(2) rather than FRCP 24(a)(1) to intervention motions in adversary proceedings.[108] If it applies FRCP 24(a)(2) rather than FRCP 24(a)(1), "the bankruptcy court is permitted to control the proceeding by restricting intervention to those persons whose interests in the outcome of the proceeding are not already adequately represented by existing

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[102] *Id*; *see also* Virginia A. Bell & Paul B. Jones, *Creditors' Committees and Their Roles in Chapter 11 Reorganizations*, 1993 DET. C.L. REV. 1551, 1580 (1993). The *Fuel Oil* Court examined Title 28 of the U.S. Code and the bankruptcy rules to reach its conclusion "that there is a distinction between 'cases' and adversary proceedings. Based on this premise, the Fifth Circuit rejected the idea that an 'adversary proceeding' is a 'case' subject to section 1109(b)." *Id.* (citations omitted); *see also* 5 COLLIER ON BANKRUPTCY ¶ 1109.02 (15th ed. 1993). As far back as 1973, the Bankruptcy Rules drew a distinction between a "case" and a "proceeding." *Id.* According to *Collier*, Congress must have been aware of the specific use of the term "case" when it drafted § 1109(b). *Id.* Therefore, by restricting § 1109(b) intervention to "cases," Congress intended intervention as of right to apply only in those proceedings involving the administration of the bankruptcy case itself and not any disputed matter within the bankruptcy case. *Id.*

[103] *Fuel Oil*, 762 F.2d at 1285–86.

[104] *Id.* at 1286; *see also* 9 COLLIER ON BANKRUPTCY ¶ 7024.03 (15th ed. 1993). *Collier* states the *Marin* court interpreted the legislative history of § 1109(b) incorrectly and the Fifth Circuit's interpretation "appear[ed] to be the better view."

[105] *Fuel Oil*, 762 F.2d at 1286. The Court observed, "[t]he statutes that do confer an absolute right to intervene generally confer that right upon the United States or a federal regulatory commission;" therefore, "[s]ection 1109(b) is not the type of statute generally considered to provide an absolute right to intervene." *Id.*

[106] *Id.* Specifically, the Court pointed out that the advisory committee note to the Federal Rules of Bankruptcy Procedure 7024 provided "[i]ntervention in a case and intervention in an adversary proceeding must be sought separately." *Id.* (citing FED. R. BANKR. P. 7024, advisory comm. note). According to the Court, this note "makes no sense if intervention in the 'case' provided entrance to the adversary proceeding as well." *Id.*

[107] The bankruptcy court sitting in the Southern District of New York, before it was reversed by the Second Circuit in *In re Caldor Corp*, said the Fifth Circuit's ruling had "several policy reasons to commend it." 955 Fifth Ave. Assocs., L.P., v. N.Y. State Dep't of Taxation & Fin. (*In re* 955 Fifth Ave. Assocs., L.P.), 157 B.R. 942, 950 (Bankr. S.D.N.Y. 1993).

[108] *Fuel Oil*, 762 F.2d at 1287.

parties."[109] Furthermore, the court feared an unconditional right to intervene would open the door to allowing "perhaps hundreds" of creditors to become automatic parties to an adversary proceeding.[110]

Until 2002, when the issue came through the Second Circuit in *In re Caldor Corp.*,[111] no other circuit court had decided whether Code § 1109(b) provided a basis for intervention in an adversary proceeding as of right. The bankruptcy court for in the Southern District of New York denied a motion to intervene brought pursuant to § 1109(b) and FRCP 24.[112] In making its determination, the bankruptcy court recognized a split on the issue within the Southern District of New York[113] and held § 1109(b) is applicable only to the chapter 11 case and does not apply to adversary proceedings commenced in such a case as well.[114] The district court, after reviewing *Fuel Oil*, *In re Marin*,

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[109] *Id.*

[110] *Id.*

[111] Term Loan Holder Comm. v. Ozer Group, L.L.C. (*In re* Caldor Corp.), 303 F.3d 161 (2d Cir. 2002). In this case, a large discount retailer filed for chapter 11 and remained in control as debtor-in-possession. *Id.* at 163. The creditors, Term Loan Holders (TLHC) and Real Estate Loan Holders, looked to satisfy their secured claims from the sale of the debtor's leases and inventory. *Id.* After an unsuccessful attempt to reorganize, the debtor decided to liquidate and sold its inventory to joint liquidators. *Id.* After negotiating a purchase and license agreement and gaining the bankruptcy court's approval of the agreement, the joint liquidators transferred more than $223 million to the debtor and sold its remaining inventory. *Id.* The joint liquidators brought an adversary proceeding against the debtor when the debtor allegedly breached the purchase agreement, and TLHC, the committee on behalf of the term loan holders, moved to intervene as a matter of right under § 1109 and FRCP 24(a). *Id.* at 164.

[112] *Id.* at 162. TLHC brought a motion to intervene in adversary proceeding brought by joint liquidators against chapter 11 debtors. *Id.* It argued § 1109(b) conferred on it a right to appear and be heard and that the outcome of the adversary proceeding would impact the amount of property available for its own $20 million administrative claim and the amount of property available to other creditors. *Id.* at 164. For this reason, TLHC argued it was a bona fide party in interest. *Id.* It also sought permissive intervention under FRCP 24(b). *Id.*; *see also* R. Patrick Vance, *Recent Cases and Legislative Developments*, AM. L. INST. ALI-ABA 55, 61 (2003).

[113] *In re Caldor Corp*., 303 F.3d at 164–65. The bankruptcy court cited *Sarah R. Neuman Found., Inc. v. Garrity (In re Neuman)*, 124 B.R. 155 (Bankr. S.D.N.Y. 1991), for the proposition that § 1109(b) grants a right to intervene in adversary proceedings, and *In re 995 Fifth Ave. Assocs., L.P.*, 157 B.R. at 942, for the opposing proposition that § 1109(b) only applies to the chapter 11 case. *In re Caldor Corp*., 303 F.3d at 164–65.

[114] *In re Caldor Corp*., 303 F.3d at 165. In rejecting the motion to intervene under FRCP 24(a)(2), the bankruptcy court reasoned that the debtor, as debtor-in-possession, was obligated to act in its creditors' best interests and that TLHC failed to produce any evidence the debtor would not adequately represent TLHC's interests in the adversary proceeding. *Id.* It also denied TLHC's motion to intervene under FRCP 24(b) because TLHC's interest in recovering in the debtor's administratively insolvent case was not a claim or defense within the meaning of FRCP 24(b)(2). *Id.*

and two other conflicting cases in the Southern District of New York,[115] affirmed the bankruptcy court's determination.[116]

On appeal, the Second Circuit Court of Appeals reversed the bankruptcy court and district court's decision and sided with the Third Circuit.[117] The Second Circuit found that, although only the Third and the Fifth Circuits had directly ruled on the issue of whether § 1109(b) grants an unconditional right to intervene in an adversary proceeding, the First, Fourth, and Tenth Circuits have, in dicta, favored the position of the Fifth Circuit.[118] In analyzing whether § 1109(b) granted an unconditional right to intervene in an adversary proceeding, the Second Circuit followed the Third Circuit by prudently examining the statutory language of the Code.[119] Keeping in mind § 1109(b) grants a right to appear and be heard on any *issue* in a case,[120] the Court found "issues" occur in proceedings, which themselves fall under the umbrella of the bankruptcy "case."[121] While the Code divides various types of litigation matters into contested matters and adversary proceedings,[122] the Court held the

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115 *Id.*

116 *Id.* The district court also pointed out the Third Circuit's reasoning followed the then-current version of *Collier on Bankruptcy*. *Id.* The court noted that between 1983 and 2002, the treatise had held inconsistent positions on whether § 1109(b) covered adversary proceedings, stating "'Collier's flip-flop over the past twenty years undermines its authoritativeness, though it is also an indication of the closeness of the question.'" *Id.* (quoting Term Loan Holder Comm. v. Ozer Group, L.L.C. (*In re* Caldor, Corp.), No. 95-B44080, 2000 WL 546465, at *4 (S.D.N.Y. May 3, 2000)). The district court also observed the Third Circuit itself had subsequently questioned "whether or not [*In re Marin Motor Oil*] is the better view." *Id.* (quoting Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1233 (3d Cir. 1994)). The court stated that in *Phar-Mor*, the Third Circuit suggested it might have rejected the *In re Marin Motor Oil* position were it not for the circuit's internal operating procedures requiring the court to sit *en banc* to depart from a prior panel's decision. *In re Caldor Corp*., 2000 WL 546465, at *4.

117 *In re Caldor Corp*., 303 F.3d 161, 163 (2d Cir. 2002); *see* Jeffrey R. Babbin, *Developments in the Second Circuit: 2001–2002*, 35 CONN. L. REV. 1565, 1667 (2003) ("As a matter of first impression for the court, and widening a circuit split" the Second Circuit sided with the Third Circuit and found in § 1109(b) "a broad and unconditional right of creditors to intervene as of right in adversary proceedings.").

118 *In re Caldor Corp*., 303 F.3d at 167; *see* Richman v. First Woman's Bank (*In re* Richman), 104 F.3d 654, 658 (4th Cir. 1997) (citing the Fifth Circuit's policy argument regarding intervention in a *chapter* 7 proceeding and finding "the logic of *Fuel Oil* persuasive"); Vermejo Park Corp. v. Kaiser Coal Corp. (*In re* Kaiser Steel Corp.), 998 F.2d 783, 790 (10th Cir. 1993); Kowal v. Malkemus (*In re* Thompson), 965 F.2d 1136, 1142 n.8 (1st Cir. 1992) (citing *Fuel Oil* for the argument that § 1109(b) does not grant a right to intervene under FRCP 24(a)(1)); Unsecured Creditors Comm. v. Marepcon Fin. Corp. (*In re* Bumber Sales, Inc.), 907 F.2d 1430, 1433 (4th Cir. 1990).

119 *In re Caldor Corp*., 303 F.3d at 167–68. '"[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."' *Id.* (quoting United States. v. Ron Pair Enters., 489 U.S. 235, 240–41 (1989)).

120 *Id.* at 169 (citing Official Unsecured Creditors Comm. v. Michaels (*In re* Marin Motor Oil), 689 F.2d 445, 453 (3d Cir. 1982)).

121 *Id.*

122 *Id.* (quoting 10 COLLIER ON BANKRUPTCY ¶ 7000.1 (15th ed. rev. 2001)).

plain language of § 1109(b) grants a right to appear and be heard regardless of whether the issues arise in a contested matter or an adversary proceeding.[123]

The Second Circuit next turned to "various materials extrinsic to the text"[124] to determine whether it warranted a more narrow reading of § 1109(b).[125] It noted courts adopting a narrower view of § 1109(b) based their decisions on grounds other than the text of § 1109(b) and relied, instead, on the bankruptcy rules, advisory committee notes, legislative history, or policy concerns.[126] First, the Second Circuit rejected the argument that an inclusive reading of "case," which includes "adversary proceedings," would render § 1109(b) inconsistent with the bankruptcy rules,[127] and refused "to use the rules to create ambiguity in an otherwise clear Code provision."[128] Finally, after noting policy arguments for and against an unconditional right to intervene,[129] the Second Circuit determined intervention under § 1109(b)

> appears to be appropriate to the extent it will: (1) minimize the need for extensive judicial oversight, (2) speed the debtor's successful reorganization, and (3) allow the creditors' committee to exert enough leverage on the debtor-in-possession so that the debtor-in-possession does not use its extensive flexibility and discretion in a Chapter 11 reorganization to compromise the creditors' interests. In short, interests of efficiency and fair play

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123 *Id.* The court further cited Sarah R. Neuman Found., Inc. v. Garrity (*In re* Neuman), 124 B.R. 155, 159–60 (Bankr. S.D.N.Y. 1991), and Hadar Leasing Int'l Co. v. D.H. Overmyer Telecasting Co. (*In re* D.H. Overmyer Telecasting Co.), 53 B.R. 963, 975 (N.D. Ohio 1984), which reached the same conclusion. *In re Caldor Corp*, 303 F.3d at 169.

124 *In re Caldor Corp.* 303 F.3d at 170.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 171.

129 *Id.* at 175–76. The court conducted a review of the competing policy arguments stating, "[c]ertainly, reasonable arguments can be made on both sides of the policy questions connected with an unconditional right to intervene." It first noted that the Fifth Circuit was concerned "such a right would open the door to 'perhaps hundreds' of creditors becoming automatic parties to an [sic] adversary proceedings," and that a bankruptcy court feared liberal intervention "'could produce complete chaos in the administration of the estate.'" *Id.* at 175 (quoting Sarah R. Neuman Found., Inc. v. Garrity (*In re* Neuman), 103 B.R. 491, 499 (Bankr. S.D.N.Y. 1989)). Finally, for the position that § 1109(b) should not grant an automatic right to intervene, it referenced another bankruptcy court's expectation that "'[a]llowing every creditor and other party in interest under § 1109(b) to intervene . . . would impede the court's ability to understand or to manage the proceeding effectively.'" *Id.* (quoting *In re* 995 Fifth Ave. Assocs., L.P., 157 B.R. 942, 951 (Bankr. S.D.N.Y. 1993)). For the position that § 1109(b) should grant an automatic right to intervene, the court noted the Third Circuit considered the above policy concerns to be "'unrealistic,'" and that, in the years following *In re Marin*, policy had continued to favor an unconditional right to intervene. *Id.* (quoting Official Unsecured Creditors Comm. v. Michaels (*In re* Marin Motor Oil), 689 F.2d 445, 453 (3d Cir. 1982)).

> underlie § 1190(b), and the driving force behind the *Marin* decision was the belief that allowing intervention into adversary proceedings would best serve those interests.[130]

Ultimately, the Second Circuit declined to choose between the competing policy arguments regarding § 1109(b) because, in its view, the simple language of the text supports an unconditional right to intervene.[131]

III. ANALYSIS

A. Effects of the Second and Third Circuits' Liberal Interpretation of Rule 24 and § 1109 of the Code

1. Efficiency

Although the Second and Third Circuits carefully reasoned through their decisions to interpret § 1109(b) as granting an unconditional right to intervene,[132] whether they correctly comprehended how the interpretation affects the everyday proceedings in the bankruptcy courts is less certain. Fortunately, the decision to recognize an absolute intervention right has brought some predicted benefits to the lower courts.[133] By ruling § 1109(b) grants an absolute right to intervene in an adversary proceeding, the bankruptcy and district courts within the Second and Third Circuits enjoy some levels of greater efficiency.[134] When addressing the policy reasons supporting intervention as of right, the Second Circuit noted "[a]fter living with the *Marin* decision for over a decade, the Third Circuit continued to find that policy concerns favored an unconditional right to intervene."[135] For example, twelve years after the *Marin* decision, the Third Circuit cited three ways in which a liberal interpretation of § 1109(b) promotes efficiency and fairness:[136] it minimizes judicial oversight, speeds the reorganization process, and prevents the debtor-in-possession from compromising the interests of creditors by

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130 *Id.* at 175–76 (quoting Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1240 (3d Cir. 1994)).

131 *Id.* at 176. The court concluded "'[u]nless it leads to absurd or futile results, we must enforce what Congress has commanded whether or not we agree with its policy choices.'" *Id.* (quoting Bell v. Bell (*In re* Bell), 225 F.3d 203, 219 (2d Cir. 2000)).

132 *See id.*; *In re Marin Motor Oil, Inc.*, 689 F.2d at 446.

133 *In re Caldor Corp.*, 303 F.3d at 176.

134 *See Phar-Mor*, 22 F.3d at 1240.

135 *In re Caldor Corp.*, 303 F.3d at 175.

136 *Phar-Mor*, 22 F.3d at 1240.

giving the creditors' committee enough leverage.[137] Not only does a broad reading of § 1109(b) allow one bankruptcy court to hear all related proceedings under one litigation umbrella,[138] thus expediting the reorganization process, but it also promotes greater organization within the bankruptcy courts and relieves the judiciary of extensive review.[139]

2. Administrative Costs

While organization and efficiency are desirable, the minimization of extensive judicial review may not be as advantageous, especially where a significant portion of non-core issues are at play.[140] Furthermore, efficiency has its trade-offs, as a bankruptcy court in the Third Circuit recognized.[141] While that court recognizes bankruptcy courts should allow intervening parties to raise issues and "have an opportunity to be heard on them,"[142] it also acknowledges those very opportunities "may add some time and expense to the litigation."[143] In contrast to the prediction that a liberal interpretation of § 1109(b) would promote greater efficiency,[144] the court in *Unofficial Committee of Zero Coupon Noteholders v. Grand Union Co.* found an unconditional right to intervene could potentially add both "expense" and "time" to the litigation.[145] While the courts will be more efficient because one court may be able to hear and address all issues under one bankruptcy umbrella, the courts will sacrifice one aspect of efficiency for another.[146] By granting an automatic right to intervene in an adversary proceeding, the bankruptcy courts will need more time to hear the adversary proceedings and additional claims of the intervenors.[147]

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137 *Id.*

138 *See supra* note 8 and accompanying text.

139 *Phar-Mor*, 22 F.3d at 1240.

140 *See infra* notes 186–88 and accompanying text.

141 *See* Unofficial Comm. of Zero Coupon Noteholders v. Grand Union Co., 179 B.R. 56, 59 (Bankr. D. Del. 1995).

142 *Id.*

143 *Id.*

144 *See* Term Loan Holder Comm. v. Ozer Group, L.L.C. (*In re* Caldor Corp.), 303 F.3d 161, 176 (2d Cir. 2002).

145 179 B.R. at 59.

146 *See id.*

147 *Id.*

3. Where Along the Continuum Do the Rights of Intervenors Fall?

Not only do the decisions of the Second and Third Circuits to grant intervention as of right in an adversary proceeding lead to higher administrative costs,[148] the decisions also opened the door to further interpretational issues, revealing additional layers of problems beneath the surface.[149] The Bankruptcy Court for the Southern District of New York,[150] hearing Adelphia's bankruptcy proceedings, came across these subterranean problems immediately after *In re Caldor*,[151] where the Second Circuit ruled in favor of intervention as of right in an adversary proceeding.[152]

In an adversary proceeding within the *In re Adelphia* bankruptcy case, two committees[153] moved to intervene as of right.[154] Because the committees sought to open two additional fronts against the insolvent Adelphia,[155] Adelphia requested the court place limitations on the committees' right to participate as intervenors.[156] In light of the recent *In re Caldor* holding,[157] the bankruptcy court granted the motion to intervene in the adversary proceeding but recognized the committees' rights in intervention may be of a different degree than of the debtor itself.[158] Finding the issue in the case was "probably inevitable after the Second Circuit's recent decision,"[159] the bankruptcy court asked two important questions:

> With the Second Circuit having ruled that parties in interest are entitled to intervene in adversary proceedings upon request, solely as a consequence of their rights under section 1109(b), what are their rights as intervenors? Are the intervenors allowed, as the defendants here fear, to open up "new fronts" against the defendants; to engage in their own discovery; to make their own

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148 *Id.*

149 *See* Adelphia Commc'ns Corp. v. Rigas (*In re* Adelphia Commc'ns Corp.), 285 B.R. 848, 850 (Bankr. S.D.N.Y. 2002).

150 The Southern District of New York sits within the Second Circuit.

151 Term Loan Holder Comm. v. Ozer Group, L.L.C. (*In re* Caldor Corp.), 303 F.3d 161 (2d Cir. 2002).

152 *In re Adelphia*, 285 B.R. at 850.

153 The two committees were the Official Committee of Unsecured Creditors and the Official Committee of Equity Security Holders. *Id.* at 849.

154 *Id.*

155 *Id.* at 852.

156 *Id.*

157 *In re Caldor Corp.*, 303 F.3d at 176.

158 *In re Adelphia*, 285 B.R. at 850.

159 *Id.*

> motions, and to make their own demands with respect to settlement?[160]

Although the Second Circuit ruled parties in interest have the absolute right to intervene under § 1109(b),[161] it did not address whether the parties in interest, after intervention, may assert causes of action initially owned by the debtor.[162]

Thus, the bankruptcy court now faced the problem of reconciling the *In re Caldor* decision with "a trilogy[163] of other decisions of the Second Circuit which discuss the circumstances under which entities other than the debtor—most commonly, creditors' committees—may assert, for the benefit of the estate, causes of action initially owned by the debtor[.]"[164] Although restrictions on intervention could, as the committees argued, trivialize their intervention and the *In re Caldor* holding "as 'idle gestures,'"[165] the bankruptcy court reasoned the rights of intervenors in an adversary proceeding must be regulated in such a way that keeps litigation orderly.[166]

To balance these conflicting issues, the court found those who intervene in the adversary proceeding do not have the same rights as the debtor, who actually owns the causes of action.[167] The District Court for the Southern District of New York also agreed with the bankruptcy court in holding

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160 *Id*; *see also* Vance, *supra* note 112, at 61–62. After making note of the questions posed by the *In re Adelphia* court, the Second Circuit recently held the unconditional right to intervene under § 1109(b) does not extend so far as to permit the intervenors to settle the adversary proceeding over the debtor's objection. Smart World Techs., L.L.C. v. Juno Online Servs., Inc. (*In re* Smart World Techs., L.L.C.), 423 F.3d 166, 181 (2d Cir. 2005).

161 *In re Adelphia*, 285 B.R. at 850.

162 *Id.*

163 *See* Glinka v. Murad (*In re* Housecraft Indus. USA, Inc.), 310 F.3d 64, 70 (2d Cir. 2002) (holding a creditors' committee may bring suit even where the trustee or debtor-in-possession has not unjustifiably refused to do so, if the committee has the consent of the debtor-in-possession or trustee and the court finds that suit by the committee is in the best interest of the bankruptcy estate and is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings); Commodore Int'l Ltd. v. Gould (*In re* Commodore Int'l Ltd.), 262 F.3d 96, 100 (2d Cir. 2001) (holding a creditors' committee may sue on behalf of the debtors, with the approval and supervision of a bankruptcy court, not only where the debtor-in-possession unreasonably fails to bring suit on its claims, but also where the trustee or debtor-in-possession consents); Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (*In re* STN Enters.), 779 F.2d 901, 904 (2d Cir. 1985) (holding creditors' committees have an implied qualified right to initiate, with approval of the bankruptcy court, adversary proceedings in name of debtor-in-possession only when the trustee or debtor-in-possession unjustifiably failed to bring suit or abused its discretion in not suing to avoid a preferential transfer).

164 *In re Adelphia*, 285 B.R. at 850.

165 *Id.* at 853.

166 *Id.* at 851.

167 *Id.* at 851; *see* Kirkland v. N.Y. State Dep't of Corr. Servs., 711 F.2d 1117, 1126 (2d Cir. 1983) (finding unconditional intervention does not give intervening parties equal standing with the original parties).

intervenors do not have the right to take ownership of a case.[168] Instead, the rights of intervening parties in an adversary proceeding "[fall] along a continuum"[169] with rights to be heard and file briefs at one end of the spectrum, and with "control of the underlying causes of action at the other [end of the spectrum]."[170] While it was obvious to the bankruptcy court that intervenors must have the right to raise issues, to appear and be heard, to file papers, and to argue and respond,[171] the intervenors' rights on the other end of the continuum, such as the right to conduct discovery, notice depositions, and settle, were less clear.[172] To keep the litigation orderly, the court held it would determine, on a case by case basis, whether intervenors have those latter mentioned rights.[173] One obvious problem with case-by-case reviews to determine where along the continuum of rights the intervening parties fall is the uncertainty of the outcome. The circuit courts are already divided on the issue of whether to recognize an unconditional right to intervene. Conducting a case by case determination of the rights of intervening parties, once they have intervened, will only further split the bankruptcy courts in the Second and Third Circuits. Rather than making the bankruptcy courts more inconsistent than they already are on the issue of intervention, it is important that federal bankruptcy courts develop a consistent system to determine the rights of intervening parties both before and after intervention.

4. Organizational Problems

In its holding, the *In re Adelphia* court implicitly recognized another drawback of interpreting § 1109(b) to grant an unconditional right to

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168 Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co. (*In re* Sunbeam Corp.), 287 B.R. 861, 862 (S.D.N.Y. 2003). The court found the intervening party in the adversary proceeding was

> seeking not just intervention, but the right, in essence, to take ownership of the Committee's causes of action—claims that, after all, derive from the estate itself. The authority to pursue claims on behalf of the estate must be granted, in the first instance, by the bankruptcy court. The orderly resolution of bankruptcy cases and the adversary proceedings within them would be impossible otherwise.

Id.

169 *In re Adelphia*, 285 B.R. at 856.

170 *Id.*

171 *Id.* These basic rights fall along the first end of the continuum. *Id.* The *In re Adelphia* court also recognized that even a grant to file papers and to argue and respond "means extra work for those, like the defendants, who are not the intervenors' allies." *Id.* It dismissed this problem by calling it a mere "necessary evil." *Id.*

172 *Id.*

173 *Id.* at 856–57.

intervene.[174] Not only has the liberal reading led to additional interpretational issues regarding the extent to which those intervention rights apply,[175] it has also created the potential for disorder within the greater bankruptcy umbrella.[176] Foreseeing that intervenors could disrupt the order of the proceedings,[177] the *In re Adelphia* court found, "it does not necessarily follow that once having intervened, intervenors have the right . . . to act wholly free of any limitations imposed by the Court in the interests of orderly procedure."[178] It reasoned "courts may control the proceedings before them even after intervention, and, if necessary, limit actions by intervenors or require coordination, in the interests of judicial economy, avoiding harassment or excessive burdens, or otherwise in the interests of justice."[179] Additionally, the *In re Adelphia* court noted, "[g]iven the risk that an intervenor in a given adversary proceeding would not be [] responsible … , it is particularly important to note a court's inherent power to maintain control of the proceedings before it."[180] Though the intervening parties in this particular adversary proceeding behaved conscientiously toward the debtor Adelphia Corporation,[181] the court wisely recognized that intervenors, compared to those who actually bring the cause of action, are less likely to behave in a responsible manner during the adversary proceeding.[182]

5. Replicating Marathon

While managing intervening parties could be crippling and deciding the rights of intervenors on an individual basis is uncertain and undoubtedly costly, the potential that intervenors will bring a multiplicity of non-core issues

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174 *Id.* at 851.

175 *See supra* notes 167–73 and accompanying text.

176 *In re Adelphia*, 285 B.R. at 851; *see also* Craig H. Averch, *The Ability to Assert Claims on Behalf of the Debtor: Does a Creditor Have a Leg to Stand On?*, 96 COM. L.J. 115, 134 (1991). "Bankruptcy courts have been instructed to manage cases 'in such a way as to promote their orderly and prompt disposition.'" *Id.* (quoting United Ass'n of Tex. v. Timbers of Inwoods Forest Assocs., Ltd. (*In re* Timbers of Inwood Forest Assocs., Ltd.), 808 F.2d 363, 374 (5th Cir. 1987)).

177 *In re Adelphia*, 285 B.R. at 851.

178 *Id.*

179 *Id.* at 857; *see also* Shore v. Parklane Hosiery Co., 606 F.2d 354, 356 (2d Cir. 1979) (noting "intervention of right . . . might be 'subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings,' and further stating that this was 'not an innovative suggestion but was instead the recognition of a well-established practice'").

180 *In re Adelphia*, 285 B.R. at 858 n.23.

181 *Id.* at 858.

182 *Id.*; *see* Babbin, *supra* note 117, at 1667 (noting other circuits had "predicted chaos and inefficiency in allowing every creditor and other party in interest an automatic right to intervene in every adversary proceeding").

under the authority of the bankruptcy court is even more troublesome because it could replicate *Marathon*. Although bankruptcy courts certainly may hear non-core issues,[183] they cannot enter final determinations on those same issues.[184] Instead, they may only submit recommendations as to their final determinations to the district court.[185] The more often a bankruptcy court hears non-core issues, the more often a district court must also review the non-core issues. The dilemma in these situations is two-fold. First, it imposes a greater burden on the bankruptcy court,[186] which should not suffer the burden of hearing larger numbers of issues it does not have the Article III authority to determine.[187] Second, it presents a greater chance for judicial oversight in the district courts, which already suffer an overbearing docket control problem.[188] Because the district courts are already overly taxed with causes of action,[189] they may succumb to the temptation to conduct a less than thorough review of their respective bankruptcy courts' recommendations on non-core issues.[190]

The bankruptcy court hearing the *In re Adelphia* adversary proceeding[191] encountered this problem and addressed it briefly.[192] During its discussion of intervenors' rights in an adversary proceeding,[193] the court surveyed the issues in this particular adversary proceeding and admitted the uncertainty of whether they were core issues.[194] Adelphia claimed "under RICO, section 10(b) of the Exchange Act . . . , and common law, for alleged fraud, waste of corporate assets, and breaches of fiduciary duty."[195] Although Adelphia, in its complaint

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183 *See* 28 U.S.C. § 157(c) (2000).

184 *Id.* § 157(c)(1).

185 *Id.*

186 The bankruptcy courts already suffer a docket control problem. In 2001, for example, 330 judges presided over 1.4 million bankruptcy filings. *See* Panel Discussion, *The Judge's Role in Insolvency Proceedings: The View from the Bench; The View from the Bar*, 10 AM. BANKR. INST. L. REV 511, 529 (2002).

187 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 50–51 (1982) (holding a liberal grant of jurisdiction to the lower bankruptcy courts violates Article III of the U.S. Constitution).

188 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3505 (2d ed. 1984 & Supp. 2003) (addressing dramatic increase in district court dockets in the last several years).

189 *See id.*

190 *See* King, *supra* note 10, at 681. King believes the "major temptation" in demanding the district court review all non-core issues "is for the district judge to rubber stamp the proposed findings and conclusions of the bankruptcy judge." *Id.*

191 Adelphia Commc'ns Corp. v. Rigas (*In re* Adelphia Commc'ns Corp.), 285 B.R. 848 (Bankr. S.D.N.Y. 2002).

192 *Id.* at 851.

193 *Id.*

194 *Id.*

195 *Id.*

alleged this was a core proceeding under 28 U.S.C. § 157(b),[196] the bankruptcy court expressed doubt and announced, "this is debatable and not yet agreed to by the defendants, if it ever will be."[197] Here, the bankruptcy court admitted it was uncertain as to whether even the central issue, brought by the owner of the cause of action, was a core proceeding under 28 U.S.C. § 157(b).[198]

Because the bankruptcy court found debatable the assertion that Adelphia's claims were core proceedings,[199] it must have encountered problems choosing between entering a final determination and, alternatively, submitting a recommendation to the district court. In all fairness to the *In re Adelphia* court, it is widely acknowledged that distinguishing between core and non-core issues is one of the "'most difficult area[s] of constitutional law'" in which "'the precedents are horribly murky, doctrinal confusion abounds, and the constitutional text is by no means clear.'"[200] While courts use different sources to determine whether an issue is core or non-core,[201] one thing remains clear to all of them: "[t]here is no easy answer; nearly every court that has faced the issue has struggled in an attempt to find one."[202]

If the bankruptcy courts have difficulty determining whether to enter a final determination or a recommendation on the main issue,[203] how much further

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196 *Id.*; *see supra* notes 63–65 and accompanying text.

197 *In re Adelphia*, 285 B.R. at 851.

198 *Id.*

199 *Id.* The *In re Adelphia* court's apparent confusion and inability to distinguish core proceedings from non-core proceedings is certainly not a new predicament for the federal courts. *See* Galligan, *supra* note 10, at 11 n.40. ("There is some real confusion concerning what is and what is not a core proceeding . . . . Arguably, any matter can potentially affect the administration of the estate and thus be a core proceeding under § 157(b)(2)(A).").

200 H.R. REP. NO 595, at 70–72, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6030–32 (letter from Thomas G. Krattenmaker).

201 *See* Jason C. Matson, Comment, *Running Circles Around* Marathon*? The Effect of Accounts Receivable as Core or Noncore Proceedings on the Article III Courts*, 20 BANKR. DEV. J. 451, 452–53 (2004). In defining the terms "core" and "non-core," the federal courts use a plethora of interpretational approaches, but "courts typically rely on the vague statutory language or a generally understood meaning of the terms." *Id.* at 452 (citing Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion Pictures Corp.), 4 F.3d 1095, 1101 (2d Cir. 1993); Woodward v. Sanders (*In re* SPI Commc'ns & Mktg., Inc.), 112 B.R. 507, 510 (Bankr. N.D.N.Y. 1990); Franklin Computer Corp. v. Harry Straus & Sons, Inc. (*In re* Franklin Computer Corp.), 50 B.R. 620, 621–23 (Bankr. E.D. Pa. 1985)). Some courts look to the "language in *Marathon* to guide their decision." Matson, *supra*, at 452–53 (2004) (citing Commercial Fin. Servs., Inc. v. Bartmann (*In re* Commercial Fin. Servs., Inc.), 251 B.R. 414 (Bankr. N.D. Okla. 2000); St. George Islands v. Pelham, Ltd., 104 B.R. 429 (Bankr. N.D. Fla. 1989)). Others choose to define core proceedings for themselves. *Id.* (citing Christinson v. Catapillar, Inc. (*In re* Tobler Transfer Inc.), 74 B.R. 373, 375 (Bankr. C.D. Ill. 1987)).

202 Total Transp., Inc. v. BTS Transp. Serv. (*In re* Total Transp., Inc.), 87 B.R. 568, 572 (Bankr. D. Minn. 1988).

203 *See* Galligan, *supra* note 10, at 11 n.40.

will the intervention of other parties, and their claims complicate the adversary proceeding? This problematic snowballing of core and non-core issues, brought by original and intervening parties, only escalates when the courts allow more issues into the adversary proceeding by interpreting § 1109(b) as granting an unconditional right to intervene. The concern surrounding intervention rights and the snowballing of core and non-core issues in adversary proceedings is simple: constitutionality. Bankruptcy judges do not have the authority to enter final determinations on non-core issues, which the courts already define with tremendous inconsistency.[204] Some have called this "jurisdictional system imposed on bankruptcy judges"[205] since the 1984 Bankruptcy Act "constitutionally suspect,"[206] and others have criticized congressional naiveté in failing to foresee the practical result of requiring the bankruptcy courts to submit proposed findings and recommendations of non-core issues to the district courts.[207] While it is understood the district court judge "must make an independent judgment [and] cannot, merely, rubber-stamp the bankruptcy judge's proposed findings and conclusions,"[208] the district courts are prone to depend on the recommendations of the bankruptcy courts.[209] As one commentator put it, the bankruptcy court is "intimately familiar"[210] with the details of the case, while the district court is not. Thus, it

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[204] *See* Matson, *supra* note 201, at 452–53.

[205] *See* Klee, supra note 10, at 284.

[206] *Id.*; *see also* Panel Discussion, *supra* note 186, at 526. Richard F. Broude, a mediator and attorney on the panel, called the 1984 Bankruptcy Act

> [b]latantly unconstitutional again because [Congress] put jurisdiction in the bankruptcy judges again. . . . Congress created a silly system in which they vest all of the jurisdiction under the Bankruptcy Code in the federal district court, these Article III judges. But then they provide that if the judges want to, they can delegate all of this responsibility to the bankruptcy judges, which they do.

Id.

[207] King, *supra* note 10, at 681–82. "In practical terms . . . the nonarticle III court's proposed findings and conclusions will be *the* findings and conclusions. 'Consider' and 'review' will disintegrate into rubber stamped acceptances of the bankruptcy court's findings and conclusions." *Id.*; *see also* Matthew J. Fischer, Note, *The Equal Access to Justice Act—Are the Bankruptcy Courts Less Equal than Others?*, 92 MICH. L. REV. 2248, 2282 (1994).

[208] 1 WILLIAM J. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 4:116 (2004) (citing Moody v. Amoco Oil Co., 734 F.2d 1200, 1210 (7th Cir. 1984)); *see also* Vekamaf Holland B.V. v. Pipe Benders, Inc., 671 F.2d 1185, 1186 (8th Cir. 1982).

[209] *See* NORTON, *supra* note 208, § 4:116. The command that district courts not rubber-stamp bankruptcy courts' findings and conclusions "is expectation at its best, in light of the district court's usual desire not to be involved in bankruptcy matters combined with the enormously busy schedule of district judges." *Id.*

[210] Fischer, *supra* note 207, at 2282. Fischer is critical of the Amended Bankruptcy Act, in that requiring the district courts to review noncore issues "consumes" and "misuses" judicial resources. *Id.*

is only natural "de novo review performed by a district court may amount to little more than a rubber stamp."[211]

In plain terms, the Code assumes district judges will conduct a thorough review of the bankruptcy judges' non-core recommendations; thus the Code turns a blind eye to the possibility of rubber-stamping.[212] The liberal interpretation of § 1109(b) only intensifies this vulnerable Achilles' heel of § 157 of the Code in that it invites more non-core issues into the adversary proceeding. With bankruptcy courts hearing additional non-core proceedings in the Second and Third Circuits, it is possible the bankruptcy judge, a non-Article III officer, is the real decision-maker on these non-core proceedings.[213] By interpreting intervention broadly and granting intervening parties in an adversary proceeding the unconditional right to intervene, the Second and Third Circuits have replicated the same constitutional dilemma addressed in *Marathon*[214] over twenty years ago by effectively filtering Article III status into the bankruptcy courts.

B. Effects of the Fifth Circuit's Narrow Interpretation of Rule 24 and Code § 1109

1. Preliminary Tests

While the Second and Third Circuits have suffered, and may continue to suffer, negative repercussions from their decision to recognize broad intervention rights to intervening parties, this does not mean the Fifth's Circuit's restrictive reading of § 1109(b)[215] has not also been problematic. First, one natural problem arises when applying a restrictive reading to § 1109(b) that would not otherwise present itself. Because the Fifth Circuit decided not to grant an unconditional right to intervene, it must consider another legal step in the intervention process.[216] That is, before a party

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[211] *Id; see also* Castro v. Perez (*In re* Castro), 919 F.2d 107, 108 (9th Cir. 1990) (reprimanding a district court where judgment was obviously rubber stamped because it was entered before the reporter's transcript had been prepared). This artificial review process between the bankruptcy and district judges mirrors the relationship between magistrate and district judges under the Federal Magistrates Act of 1979. 28 U.S.C. §§ 631–39 (Supp. 1986).

[212] *See supra* notes 208–11 and accompanying text.

[213] *See* King, *supra* note 10, at 681–82.

[214] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

[215] Fuel Oil Supply & Terminaling v. Gulf Oil Corp., 762 F.2d 1283, 1287 (5th Cir. 1985).

[216] *See* Richman v. First Woman's Bank (*In re* Richman), 104 F.3d 654, 658 (4th Cir. 1997). "[W]hile a 'party in interest' may have standing to intervene, the party with the interest must still separately satisfy the requirements for intervention in order to participate in an adversary proceeding." *Id.*

intervenes, the bankruptcy court must first determine whether a party in interest would have its rights impaired if it were not allowed to intervene and also whether its rights are already protected by the parties in the suit.[217]

In *Louisiana World Exposition v. Federal Insurance Co.*, the Fifth Circuit identified this preliminary procedural set back and found it "places intervention under the Code on the same footing as [FRCP] 24(a)(2)."[218] If the bankruptcy court must apply the same test federal courts have been conducting under FRCP 24(a)(2), as the Fifth Circuit asserted,[219] this extra procedural step in the restrictive interpretation of § 1109(b) is not as problematic as it could be. As opposed to the Second and Third Circuits which must, on a case by case analysis, determine where along the continuum of rights the intervening parties fall,[220] the Fifth Circuit avoids the perpetual uncertainty of the extent of intervenors' rights and applies a test with which it is already familiar.

2. Efficiency

While the approach of the Second and Third Circuits does foster some level of efficiency[221] in interpreting § 1109(b) broadly, the Fifth Circuit's narrow interpretation of the same section also promotes aspects of efficiency. Because parties may only intervene if their rights would be impaired by not intervening and if their rights are not already adequately protected by the original parties in the adversary proceeding,[222] the Fifth Circuit eliminates receiving additional filings from and hearing complaints of intervening parties already adequately represented.[223] Whereas the Second and Third Circuits grant an unconditional right to intervene and consequentially must hear more complaints and receive more filings from intervening parties during the adversary proceeding,[224] the Fifth Circuit only brings into the adversary proceeding those filings and

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[217] *See* La. World Exposition v. Fed. Ins., Co., 858 F.2d 233, 249 (5th Cir. 1988). Third parties may intervene "when a party with an interest in the proceeding would have its rights impaired if it were not allowed to intervene and those rights are not protected by the parties in the suit." *Id.* (citing Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1363 (5th Cir. 1986); *Fuel Oil*, 762 F.2d at 1287)).

[218] *Id.*

[219] *See Fuel Oil*, 762 F.2d at 1287.

[220] *See* Adelphia Commc'ns Corp. v. Rigas (*In re* Adelphia Commc'ns Corp.), 285 B.R. 848, 856 (Bankr. S.D.N.Y. 2002).

[221] *See supra* notes 134–39.

[222] *See Fuel Oil*, 762 F.2d at 1287.

[223] *See* Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1363 (5th Cir. 1986). The court noted "the right to intervene was not absolute because the bankruptcy court can stop redundant cases where the claimants' interests are already protected under the existing litigation." *Id.* (citing *Fuel Oil*, 762 F.2d at 1287)).

[224] *See In re Adelphia*, 285 B.R. at 856.

complaints of intervening parties that first pass the FRCP 24(a)(2) test.[225] By first applying the FRCP 24(a)(2) test, the court does not have to twice deal with the issues and motions brought by intervening parties who are already adequately represented in the adversary proceeding.[226]

3. Minimizing Organizational and Constitutional Concerns

Not only has the Fifth Circuit's narrow interpretation of § 1109(b) yielded an efficient result, perhaps even more so than the Second and Third Circuits' liberal interpretation of the same section, it also has minimized the potential case management[227] and constitutional[228] problems. Because the bankruptcy courts in the Fifth Circuit do not grant an unconditional right to intervene, they do not have to hear as many claims and do not have to place the rights of the intervenors along the continuum.[229] Therefore, the bankruptcy courts within the Fifth Circuit are less likely to suffer from disorder in the adversary proceeding and other case management dilemmas.

More importantly, bankruptcy courts in the Fifth Circuit are less likely to trigger the vulnerability of 28 U.S.C. § 157 and the constitutional questions it raises.[230] By restricting the right to intervene in adversary proceedings, the Fifth Circuit has prevented the number of non-core proceedings that could make their way into the bankruptcy courts. This, in turn, checks the potential for judicial oversight and rubber-stamping at the district court level.[231] Therefore, it is less likely that bankruptcy judges, who do not enjoy Article III status, will become the de facto decision-makers on non-core proceedings.[232] The Fifth Circuit, by interpreting intervention narrowly, has better avoided any potential filtering of Article III status into the bankruptcy courts and replicating the constitutional problem addressed in *Marathon*.

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225 *See Fuel Oil*, 762 F.2d at 1287.
226 *Id.*
227 *See supra* notes 176–79 and accompanying text.
228 *See supra* notes 203–07 and accompanying text.
229 *See In re Adelphia*, 285 B.R. at 856.
230 *See supra* notes 212–14 and accompanying text.
231 *See supra* notes 208–11 and accompanying text.
232 *See* King, *supra* note 10, at 681–82.

IV. POSSIBLE SOLUTIONS

A. Adopt the Narrow Reading of Intervention in Adversary Proceedings

After analyzing the circuit split regarding the broad versus narrow interpretation of § 1109(b) of the Code as it relates to the FRCP rule governing intervention[233] and the effects and potential problems of each interpretation, applying the rule of restrictive intervention in adversary proceedings is the sounder of the two. Not only is the Fifth Circuit's interpretation of § 1109(b) more logical and consistent with FRCP 24,[234] it also maximizes efficiency and reduces the potential for organizational and constitutional problems.

While the Second and Third Circuits' textualist reading of § 1109(b) promotes some aspects of efficiency, it increases administrative costs and could be more time consuming than a narrow interpretation of that section. Furthermore, the textualist reading raises more questions regarding the rights of intervening parties once they have been granted the unconditional right to intervene. Determining where along the continuum of rights the intervening parties fall on a case by case basis leads to uncertainty and could lead to further splits within the Second and Third Circuits. Finally, the liberal reading of § 1109(b) adopted by the Second and Third Circuits increases the potential for constitutional problems identified in *Marathon*. Because an increase in interventions could lead to an increase of non-core issues brought into adversary proceedings, the district judges have more opportunities to limit their reviews of the bankruptcy judges' recommendations to a rubber stamp.

In short, the textualist reading of § 1109(b) leads to greater dilemmas than does the narrow interpretation of the same section. Although the Fifth Circuit's interpretation seems to counter the text of § 1109(b) at first blush, it does make more sense when read in light of FRCP 24. Furthermore, this interpretation does not bring as much confusion to the bankruptcy courts once interested parties have intervened. The bankruptcy courts in the Fifth Circuit are not plagued with making individual assessments of each intervening party and they are less likely to hear as many non-core issues from the intervenors. Because a broad grant of intervention allows parties who seek to intervene the opportunity to unnecessarily complicate the adversary proceeding, the Second

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233 *See* FED. R. CIV. P. 24(a)(2).

234 Fuel Oil Supply & Terminaling v. Gulf Oil Corp., 762 F.2d 1283, 1287 (5th Cir. 1985).

and Third Circuits should adopt the narrow reading of intervention in adversary proceedings.

B. Judicial Discipline in the Bankruptcy and District Courts

Until the Second and Third Circuits adopt a narrow reading of § 1109(b), the bankruptcy courts are more likely to hear additional non-core issues from intervening parties. Because the bankruptcy courts do not enjoy Article III status, both the bankruptcy and district courts are forced to participate in a game of recommendations and reviews regarding those issues. This is because Congress chose to withhold Article III jurisdiction from the bankruptcy courts and inserted an artificial provision that leaves final decisions on non-core issues to the district courts.[235] While the interests of fairness and justice favor the promotion of bankruptcy judges to Article III status,[236] it is unlikely Congress will amend the bankruptcy courts' jurisdiction and grant Article III protection to bankruptcy judges.[237] Furthermore, it is just as unlikely Congress will amend 28 U.S.C. § 157 in such a way that will prevent the district courts from effectively filtering Article III status into the bankruptcy courts.[238]

Therefore, unless the appellate courts collectively choose to interpret § 1109(b) narrowly, the district and bankruptcy courts sitting within the Second and Third Circuits must be sensitive to the potential Article III constitutional violations that a liberal interpretation of § 1109(b) triggers. Because the bankruptcy judges in the Second and Third Circuits are more

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[235] *See supra* notes 57–63 and accompanying text.

[236] Although bankruptcy courts only have as much authority as the district courts choose to delegate to them, the district courts have, in practice, "delegated an extraordinarily broad grant of jurisdiction to the bankruptcy courts." Mette H. Kurth, Comment, *An Unstoppable Mandate and an Unmovable Policy: The Arbitration Act and the Bankruptcy Code Collide*, 43 U.C.L.A. L. REV. 999, 1008–09 (1996); *see also* Panel Discussion, *supra* note 186, at 525–526. One judge on the panel pointed out a great dichotomy in the statute in that district courts delegate to the bankruptcy judges most of their jurisdiction but bankruptcy judges are still defined by the statute as a "specialist judges" who are not protected by Article III of the Constitution. *Id.* at 525.

[237] *See* Panel Discussion, *supra* note 186, at 525–26. When Congress was deciding whether to afford bankruptcy judges full jurisdiction by appointing them under Article III for life at a non-reducible salary, the federal judiciary who already enjoyed Article III protection "would not hear of it." *Id.* The federal judiciary lobbied to keep the then bankruptcy referees from "being afforded the same constitutional protection that they had." *Id.* at 526; *see also Commission Considers Venue, Jurisdiction, Appellate Changes at February Meeting*, AM. BANKR. INST. J., Apr.1996, at 1 (noting the history of lesser treatment of bankruptcy judges, especially by district courts, and the likely opposition from the judiciary if Article III status were to be afforded to bankruptcy judges).

[238] Congress did not correct the problem after *Marathon*. Instead, it merely adopted the Emergency Rule as the new rule. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. No. 98353, 98 Stat. 333 (1984).

likely to hear even more non-core issues, they should practice due care when determining whether the issues delegated to them by the district courts are non-core. In turn, the district judges, who are adamantly opposed to a congressional invitation that would grant bankruptcy judges membership among the elite beneficiaries of Article III status,[239] must actively "consider" the proposed findings and conclusions of the bankruptcy judge. While all federal district and bankruptcy judges are under a requisite obligation to cooperate with each other in entering determinations of non-core issues, the district and bankruptcy judges in Second and Third Circuits are uniquely situated. This is because a liberal interpretation of § 1109(b) only magnifies the constitutional vulnerability of 28 U.S.C. § 157; hence, the need for cooperation in entering determinations of non-core issues within the Second and Third Circuits is even more pronounced.

CONCLUSION

Since *In re Caldor* in 2002, the Second Circuit has aggravated an already thorny circuit split. As the U.S. Courts of Appeals presently stand regarding Code § 1109(b), the Second and Third Circuits endorse an unconditional right to intervene in adversary proceedings. Conversely, the Fifth Circuit denies an unconditional right to intervene in adversary proceedings, and the First, Fourth, and Tenth Circuits, in dicta, have favored the position of the Fifth Circuit. Because many of the mega-bankruptcy filings occur in New York and Delaware, which lie in the Second and Third Circuits respectively, a heavy concentration of adversary proceedings have included intervening parties who were given an unconditional right to intervene. Those intervening parties have brought even more issues under the central bankruptcy litigation umbrella.

While the Fifth Circuit has fortified a dam on intervention and blocked the number of non-core issues brought into adversary proceedings, the decisions of the Second and Third Circuits to read § 1109(b) broadly have opened the flood gates to rivers of intervening claims, both core and non-core. For this reason, the bankruptcy courts and district courts in the Second and Third Circuits risk replicating *Marathon* by filtering Article III status into the bankruptcy courts. To avoid any inadvertent filtering of the Article III power to enter final determinations on non-bankruptcy issues into the bankruptcy courts, the bankruptcy courts in these circuits must carefully separate the non-core issues

[239] *See* King, *supra* note 10, at 676 (noting the federal judiciary "adamantly" opposed life tenure for bankruptcy judges).

from the core issues. More importantly, the district courts must take an active part in reviewing the recommendations the bankruptcy courts issue regarding those non-core issues.

The unsettling problem with these admonitions lies in the drafting of 28 U.S.C. § 157. Not only is the determination of non-core issues, as defined by the statute, inherently enigmatic, the statute also too easily enables the district court judges to slip into a lethargic review of non-core issues. Ripe for abuse, it virtually implores the district judges to perform a less than thorough review of the bankruptcy judges' recommendations. Because the district judges are tremendously overwhelmed with their own dockets and are not intimately connected with the intricate details of the entire bankruptcy case, the latent possibility that district judges will restrict their reviews to a single gesture, that of a rubber stamp, is more likely to emerge.

A liberal interpretation of § 1109(b) as to the rights of intervening parties only forces bankruptcy judges to make additional identifications of non-core issues and magnifies the district judges' temptation to rubber stamp the recommendations of the bankruptcy judges. In this way, the district courts filter their authority to the bankruptcy judges, who in turn embody the attributes of an Article III judge. Until the Second and Third Circuits reevaluate their precedent, their inclusive reading of intervention facilitates the full-circle replication of *Marathon*, which, since the 1984 redrafting of bankruptcy judges' jurisdiction, has been a problem twenty years in the making.

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