

# TO KNOCK FIRST OR BARGE RIGHT IN: IS A CHAPTER 11 COMMITTEE'S RIGHT TO INTERVENE IN ADVERSARY PROCEEDINGS ABSOLUTE OR PERMISSIVE?

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## INTRODUCTION

The United States Bankruptcy Code<sup>1</sup> grants broad rights and powers to an official committee of unsecured creditors in a chapter 11 bankruptcy case.<sup>2</sup> Among the statutory entitlements of a creditors' committee is the right, pursuant to 11 U.S.C. § 1109, to "raise and . . . appear and be heard on any issue in a case under . . . chapter [11]."<sup>3</sup> For over two decades, however, courts have grappled with the question of whether the creditors' committee's right to be heard in a chapter 11 case extends to adversary proceedings initiated in chapter 11 cases. On that issue, the circuits presently are split.<sup>4</sup>

In the seminal case of *In re Marin Motor Oil, Inc.* the court held that a creditors' committee has an absolute right to intervene in an adversary proceeding arising out of a chapter 11 bankruptcy case.<sup>5</sup> Initially, most courts followed the *Marin* holding.<sup>6</sup> Over time, however, a number of the courts of

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<sup>1</sup> 11 U.S.C. §§ 101-1130 (2000). For ease of reference, this Article will refer hereafter to the United States Bankruptcy Code as the "Bankruptcy Code."

<sup>2</sup> See, e.g., *id.* § 1103. For ease of reference, this Article will refer hereafter to an official committee of unsecured creditors as a "creditors' committee" or simply as a "committee."

<sup>3</sup> *Id.* § 1109(b).

<sup>4</sup> As described more fully herein, the Second and Third Circuits hold that a committee has an absolute right to intervene in an adversary proceeding in a chapter 11 case. The First, Fourth, Fifth, and Tenth Circuits have suggested—though not necessarily held—that the committee's right to intervene is not absolute. Compare *Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.)*, 303 F.3d 161 (2d Cir. 2002), and *Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982), with *Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654 (4th Cir. 1997), *Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Coal Corp.)*, 998 F.2d 783 (10th Cir. 1993), and *Fuel Oil Supply & Terminaling v. Gulf Oil Corp (In re Fuel Oil Supply & Terminaling)*, 762 F.2d 1283 (5th Cir. 1985).

<sup>5</sup> 689 F.2d 445.

<sup>6</sup> See, e.g., *Sarah R. Neuman Found., Inc. v. Garrity (In re Neuman)*, 124 B.R. 155 (S.D.N.Y. 1991); *Official Comm. of Unsecured Creditors v. Mellon Bank, N.A. (In re Allegheny Int'l, Inc.)*, 107 B.R. 518 (W.D. Pa. 1989); *Hadar Leasing Int'l Co., Inc. v. D.H. Overmyer Telecasting Co., Inc. (In re D.H. Overmyer Telecasting Co., Inc.)*, 53 B.R. 963 (N.D. Ohio 1984); *Gleason v. Commonwealth Cont'l Health Care (In re*

appeal developed a strong trend against the *Marin* holding with a series of opinions granting creditors' committees only a permissive right of intervention in adversary proceedings.<sup>7</sup> Over a period of seventeen years, each circuit court to consider the issue sided against *Marin*. In 2002, however, the Second Circuit determined that a creditors' committee does enjoy an absolute right to intervene in an adversary proceeding in a chapter 11 case.<sup>8</sup>

It remains uncertain whether the Second Circuit's decision will turn the tide of judicial opinions back towards favoring the *Marin* holding. Whether a chapter 11 creditors' committee enjoys an absolute or a permissive right to intervene in an adversary proceeding is a difficult question, with persuasive arguments on both sides. This Article analyzes those arguments and ultimately concludes that the *Marin* holding, allowing an absolute right of intervention to all parties in interest in adversary proceedings arising in chapter 11 cases, is most sensible.

## I. THE LANDMARK CASES

### A. *Marin: Allowing Absolute Intervention*

In *Marin*, the bankruptcy court appointed a chapter 11 trustee soon after the petition date. The trustee initiated two adversary proceedings in the bankruptcy case. The first adversary proceeding sought to recover property purchased by principals of the debtor with money borrowed from the debtor. The second adversary proceeding sought to consolidate the principals and several nondebtor entities into the pending bankruptcy case.<sup>9</sup>

The creditors' committee grew dissatisfied with the trustee's prosecution of the adversary proceedings and of the bankruptcy case generally. It therefore sought to intervene in the adversary proceedings, claiming an absolute right to do so pursuant to § 1109(b) of the Bankruptcy Code.<sup>10</sup> The bankruptcy court

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Golden Glades Reg'l Med. Ctr., Ltd.), 147 B.R. 813 (Bankr. S.D. Fla. 1992); *Deak & Co., Inc. v. R.M.P. Soedjono* (*In re Deak & Co., Inc.*), 63 B.R. 422 (Bankr. S.D.N.Y. 1986).

<sup>7</sup> See *Richman*, 104 F.3d 654; *Kaiser Coal*, 998 F.2d 783; *Kowal v. Malkemus* (*In re Thompson*), 965 F.2d 1136 (1st Cir. 1992); *Unsecured Creditors' Comm. v. Marepcon Fin. Corp.* (*In re Bumper Sales, Inc.*), 907 F.2d 1430 (4th Cir. 1990); *Fuel Oil*, 762 F.2d 1283.

<sup>8</sup> See *Caldor*, 303 F.3d 161.

<sup>9</sup> *Marin*, 689 F.2d at 446.

<sup>10</sup> See 11 U.S.C. § 1109(b) (2000) (providing that "[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.").

denied the committee's request to intervene, but granted it an *amicus curiae* status that allowed it to submit briefs on all factual and legal issues.<sup>11</sup> The district court reversed the bankruptcy court's order, holding that the right of intervention under § 1109(b) was absolute and mandatory.<sup>12</sup>

On appeal, the Third Circuit began by noting that application of § 1109(b) is limited by its own terms to chapter 11 cases. The *Marin* court considered this a salient distinction, given the Congressional intention to give creditors' committees greater rights in reorganization cases than in liquidations:

In contrast to the advisory role of a creditors' committee in chapter 7 cases, the very nature of a chapter 11 case (the attempt to continue the debtor's business, generally the continuation of a debtor in possession, and the need to address both the determination of assets available for secured and unsecured creditors and equity security holders and the determination of the allocation of said assets among creditors' and equity security holders) dictates a much more active role for committees in chapter 11 cases.<sup>13</sup>

The *Marin* court rejected the appellants' argument that the statute's reference to a "case" was not intended to include an adversary proceeding.<sup>14</sup> In part, the court relied on a treatise, *Collier on Bankruptcy* ("*Collier*"), which described the term "case" to have great breadth. Other terms, *Collier* suggested, are employed to "designate steps within the case."<sup>15</sup> Likewise, the court emphasized that the Advisory Committee notes to the Bankruptcy Rules indicated that "a 'proceeding' is generally a litigated matter in a 'case.'"<sup>16</sup>

The *Marin* court next noted that § 1109(b) grants the right to appear not only "in 'a case'" but "'on any issue in a case.'"<sup>17</sup> The court opined that Congress would not have used such broad language if it had not intended "case" to be greatly inclusive.<sup>18</sup>

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<sup>11</sup> *Marin*, 689 F.2d at 447.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 455 (quoting Andrew P. DeNatale, *The Creditors' Committee Under the Bankruptcy Code—A Primer*, 55 AM. BANKR. L.J. 43, 51 (1981)).

<sup>14</sup> *Id.* at 455.

<sup>15</sup> *Id.* at 451 (quoting 2 COLLIER ON BANKRUPTCY ¶ 301.03 (Lawrence P. King, ed., 15th ed. 1982)). *But see infra* note 74 and accompanying text.

<sup>16</sup> *Marin*, 689 F.2d at 451 (quoting Bankr. R. 101 advisory committee's note). As *Marin* explained in footnote 4, at the time of the decision, the Federal Rules of Bankruptcy Procedure had not yet been prescribed. Accordingly, the older set of Bankruptcy Rules remained in effect to the extent not inconsistent with the Bankruptcy Code. *Id.* at 450 n.4.

<sup>17</sup> *Id.* at 451.

<sup>18</sup> *Id.*

The court commented that it “is hardly surprising” that Congress did not specifically refer to adversary proceedings in § 1109(b).<sup>19</sup> First, the court stressed, Congress did not specifically refer to adversary proceedings anywhere in the Bankruptcy Code. Second, when *Marin* was decided, the new Bankruptcy Rules, to accompany the Bankruptcy Code, had not yet been developed.<sup>20</sup> According to the *Marin* court, “For all Congress knew, the Bankruptcy Rules that ultimately would be adopted under the Bankruptcy Reform Act of 1978 might render the expression ‘adversary proceeding’ obsolete by utilizing some new designation or designations for litigated matters in bankruptcy.”<sup>21</sup>

The *Marin* court then turned to the legislative history of § 1109(b), which it opined should dispel any doubt about the meaning of the statutory language. The court quoted the legislative history to state that § 1109(b)

[p]rovides, in unqualified terms, that any creditor, equity security holder, or an indenture trustee shall have the right to be heard as a party in interest under this chapter in person, by an attorney, or by a committee. It is derived from section 206 of chapter X (11 U.S.C. § 606).<sup>22</sup>

The *Marin* court emphasized the use of the term “unqualified” in the statement of legislative intent.<sup>23</sup> If the right to intervene is unqualified, the court concluded, then surely it is not limited to “the general administrative aspects of the case.”<sup>24</sup>

The *Marin* court also pointed to the legislative history’s reference to section 206 of chapter X of the Bankruptcy Act of 1898. That statute, the court recalled, provided a broad and absolute right to appear and be heard: “The debtor, the indenture trustee, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a [proceeding under this chapter].”<sup>25</sup> The derivation of § 1109(b) from section 206 of chapter X, the *Marin* court opined, “suggests that Congress had no intention of upsetting the

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<sup>19</sup> *Id.*

<sup>20</sup> *See supra* note 16.

<sup>21</sup> *Marin*, 689 F.2d at 451.

<sup>22</sup> *Id.* (quoting S. REP. NO. 95-989, 95th Cong., 2nd Sess. 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902) (emphasis omitted).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting 11 U.S.C. § 206 (repealed 1978)).

long line of section 206 cases granting a broad, absolute right to appear and be heard.”<sup>26</sup>

The *Marin* court noted that section 206 of chapter X had replaced another statute, section 77B, that had granted an absolute right of intervention to creditors and stockholders only in a limited set of circumstances. The court surveyed a number of authorities that confirmed the legislative intent to broaden the right of intervention when section 206 of chapter X was enacted.<sup>27</sup>

The standing conferred by Section 206 of the Bankruptcy Act and Chapter X Rule 10-210(a)(1) was absolute and unlimited, and gave the debtor, creditors, stockholders and indenture trustees the same rights as if they were successful intervenors in the case, but without the necessity of a formal order of intervention . . . . Accordingly, it was clear that there was no need to seek intervention in order to be entitled to full participation . . . .<sup>28</sup>

In light of the breadth and mandatory nature of section 206, the court concluded that Congress likely intended to maintain those characteristics in § 1109(b).<sup>29</sup>

Finally, the *Marin* court found the history of section 206 pertinent because it undermined certain policy arguments made by the appellants. The appellants argued that allowing each creditor the right to intervene in an adversary proceeding would lead to “unthinkable” confusion and expenses.<sup>30</sup> The court disagreed: “But the unqualified right of creditors and stockholders to intervene appears to have been the rule under § 206 for approximately forty years, and the legislative history of § 1109(b) shows no dissatisfaction with it.”<sup>31</sup>

### B. Fuel Oil: *Restricting the Right of Intervention*

The leading case for the position that a committee has only a permissive right to intervention is *Fuel Oil Supply and Terminaling v. Gulf Oil Corp. (In re Fuel Oil Supply & Terminaling)*.<sup>32</sup> In *Fuel Oil*, the creditors’ committee

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 451–52 (citing *In re Keystone Realty Holding Co.*, 117 F.2d 1003, 1005 (3d Cir. 1941)); *In re Phila. & Reading Coal & Iron Co.*, 105 F.2d 358, 360 (3d Cir. 1939); 5 COLLIER, *supra* note 15, ¶ 1109.02.

<sup>28</sup> *Marin*, 689 F.2d at 452 (quoting 5 COLLIER, *supra* note 15, ¶ 1109.02).

<sup>29</sup> *Id.* at 453.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 762 F.2d 1283 (5th Cir. 1985).

filed an adversary complaint seeking to avoid allegedly preferential transfers.<sup>33</sup> The trial court dismissed the proceeding based on its conclusion that the creditors' committee lacked standing.<sup>34</sup> The creditors' committee then filed a motion to intervene as of right in a separate adversary proceeding.<sup>35</sup> The district court denied the motion to intervene.<sup>36</sup>

The creditors' committee appealed to the Fifth Circuit the order denying its motion to intervene.<sup>37</sup> On appeal, the committee argued that § 1109(b) provides an unconditional right to intervene as contemplated in Rule 24(a)(1) of the Federal Rules of Civil Procedure.<sup>38</sup> Rule 24(a) provides, in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene."<sup>39</sup> The committee also argued that the use of the term "case" in § 1109(b) was meant "to be an all-encompassing term, allowing a party in interest to intervene in any proceeding related to a case in bankruptcy."<sup>40</sup>

The Fifth Circuit began by acknowledging that "prior bankruptcy practice and the legislative history of § 1109(b) appear to support the view of the Third Circuit that § 1109(b) requires a bankruptcy court automatically to allow a party in interest to intervene in adversary proceedings."<sup>41</sup> The court concluded, however, that an analysis of Rule 24 undermines the argument in favor of an absolute right to intervene under § 1109(b).<sup>42</sup>

Rule 24(a)(1) provides that a person may intervene in a pending matter if "a statute of the United States confers an unconditional right" to do so.<sup>43</sup> The *Fuel Oil* court first noted that courts are reluctant to conclude that a statute confers such an unconditional right.<sup>44</sup> Further, the court commented, "The statutes that do confer an absolute right to intervene generally confer that right upon the United States or a federal regulatory commission; private parties are

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<sup>33</sup> *Id.* at 1284.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1284–85.

<sup>39</sup> FED. R. CIV. P. 24(a)(1).

<sup>40</sup> *Fuel Oil*, 762 F.2d at 1285.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1286; *see also* FED. R. CIV. P. 24.

<sup>43</sup> FED. R. CIV. P. 24(a)(1).

<sup>44</sup> *Fuel Oil*, 762 F.2d at 1286.

rarely given an unconditional statutory right to intervene.”<sup>45</sup> In light of courts’ treatment of Rule 24, the *Fuel Oil* court concluded that § 1109(b) is not the type of statute that has been deemed as conferring an unconditional right to intervene.<sup>46</sup>

The Fifth Circuit also considered the use of the term “case” in the wording of § 1109(b). The court pointed to several provisions in title 28 that distinguish between bankruptcy cases and related proceedings.<sup>47</sup> Similarly, the court quoted the Advisory Committee Notes to Rule 7024 of the Federal Rules of Bankruptcy Procedure, which state:

A person may seek to intervene in the case under the Code or in an adversary proceeding relating to the case under the Code. Intervention in a case under the Code is governed by Rule 2018 and intervention in an adversary proceeding is governed by this rule. Intervention in a case and intervention in an adversary proceeding must be sought separately.<sup>48</sup>

Because of the distinction between cases and proceedings in title 28, as further supported by the Advisory Committee Notes, the court concluded that Congress did not intend for § 1109(b) to create an absolute statutory right to intervene in adversary proceedings.<sup>49</sup>

Finally, the *Fuel Oil* court emphasized that parties in interest enjoy a broad right to intervene under Rule 24(a)(2)<sup>50</sup> or (b).<sup>51</sup> The court opined that Congress intended for courts to interpret § 1109(b) as conferring a right under Rule 24(a)(2) rather than under Rule 24(a)(1).<sup>52</sup> In other words, the court concluded that § 1109(b) constitutes a right for a party in interest to intervene only if it holds an interest related to the property or transaction at issue. Such an approach, the court reasoned, allows for broad intervention as dictated by

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<sup>45</sup> *Id.* (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil, § 1906 (1972 & Supp. 1984)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1286–87 (citing FED. R. BANKR. P. 7024 advisory committee’s note).

<sup>49</sup> *Id.*

<sup>50</sup> Rule 24(a)(2) allows a person to intervene in an action “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 the 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.” FED. R. CIV. P. 24(a)(2).

<sup>51</sup> Rule 24(b) provides: “Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common.” FED. R. CIV. P. 24(b).

<sup>52</sup> *Fuel Oil*, 762 F.2d at 1287.

the legislative history to § 1109(b). “At the same time,” the *Fuel Oil* court stressed, “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 parties.”<sup>53</sup>

### C. Courts of Appeal Favor Fuel Oil

Since *Marin*, district courts and bankruptcy courts have been divided between *Marin*'s broad interpretation of § 1109(b) and the more limited reading propounded by *Fuel Oil*.<sup>54</sup> Among the courts of appeal, a trend favoring *Fuel Oil* developed. The First, Fourth, and Tenth Circuits have issued opinions that, in varying degrees, sided with the more restrictive interpretation of *Fuel Oil*.<sup>55</sup> Moreover, the Third Circuit has issued an opinion that criticized but did not overrule *Marin*.<sup>56</sup> Recently, however, the Second Circuit issued an opinion following the absolute right to intervene articulated in *Marin*.<sup>57</sup>

The First Circuit was the first court of appeals to side with *Fuel Oil*, although it did so only in the dicta of a footnote. *Kowal v. Malkemus (In re Thompson)* addressed the issue of whether a chapter 7 debtor and an unsecured creditor had standing to appeal a bankruptcy court order that authorized the chapter 7 trustee to compromise a pending controversy.<sup>58</sup> In dismissing the

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<sup>53</sup> *Id.*

<sup>54</sup> *Compare* Sarah R. Neuman Found., Inc. v. Garrity (*In re Neuman*), 124 B.R. 155 (S.D.N.Y. 1991) (holding absolute right of intervention exists under § 1109(b)); Official Comm. of Unsecured Creditors of Allegheny Int'l, Inc. v. Mellon Bank, N.A. (*In re Allegheny Int'l, Inc.*), 107 B.R. 518 (W.D. Pa. 1989); Hadar Leasing Int'l Co. v. D.H. Overmyer Telecasting Co. (*In re D.H. Overmeyer Telecasting Co.*), 53 B.R. 963 (N.D. Ohio 1984); United States Fid. & Guar. Co. v. First Am. Nat'l Bank (*In re Blevins Elec., Inc.*), 185 B.R. 250 (Bankr. E.D. Tenn. 1995); and Deak & Co. v. R.M.P. Soedjono (*In re Deak & Co.*), 63 B.R. 422 (Bankr. S.D.N.Y. 1986), with Big Rivers Elec. Corp. v. Thorpe, 195 B.R. 664 (W.D. Ky. 1996) (holding no absolute right of intervention exists under § 1109(b)); 995 Fifth Ave. Assocs., L.P. v. N.Y. State Dep't of Taxation and Fin. (*In re 995 Fifth Ave. Assocs., L.P.*), 157 B.R. 942 (S.D.N.Y. 1993); Megan-Racine Assocs., Inc. v. Niagara Mohawk Power Corp. (*In re Megan-Racine Assocs., Inc.*), 176 B.R. 687 (Bankr. N.D.N.Y. 1994); Pioneer Inv. Servs. Co. v. Valley Fid. Bank & Trust (*In re Pioneer Inv. Servs. Co.*), 106 B.R. 507 (Bankr. E.D. Tenn. 1989); First Wis. Nat'l Bank of Milwaukee v. Terex Corp. (*In re Terex Corp.*), 53 B.R. 616 (Bankr. N.D. Ohio 1985); and Kenan v. Fed. Deposit Ins. Corp. (*In re George Rodman, Inc.*), 33 B.R. 348 (Bankr. W.D. Okla. 1983).

<sup>55</sup> See *Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654 (4th Cir. 1997); *Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, 998 F.2d 783 (10th Cir. 1993); *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136 (1st Cir. 1992); *Unsecured Creditors' Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.)*, 907 F.2d 1430 (4th Cir. 1990).

<sup>56</sup> See *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1232–34 (3d Cir. 1994).

<sup>57</sup> See *Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.)*, 303 F.3d 161 (2d Cir. 2002); *infra* note 85 and accompanying text.

<sup>58</sup> 965 F.2d at 1138.

debtor and creditor's joint appeal, the *Thompson* court noted that simply by being given the opportunity to be heard at the hearing in front of the bankruptcy court did not confer standing to appeal on the appellants.<sup>59</sup> In a footnote, the court commented that “[s]imilar limitations on participation by ‘parties in interest’ are recognized elsewhere under the [Bankruptcy] Code” and pointed to § 1109(b) as illustration.<sup>60</sup> Rather, the *Thompson* court continued, § 1109(b) allows parties in interest to “monitor” bankruptcy cases, without conferring any right to intervene under Rule 24(a)(1) of the Federal Rules of Civil Procedure.<sup>61</sup>

In *Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, the Tenth Circuit addressed the issue of whether a party in interest—though not a committee—could intervene in an adversary proceeding pursuant to § 1109(b).<sup>62</sup> Quoting from *Thompson*, the *Kaiser Steel* court noted that § 1109(b) “does not afford a right to intervene under rule 24(a)(1), even though such parties-in-interest enjoy the general right to monitor the progress of the chapter 11 case.”<sup>63</sup> Noting that intervention in the bankruptcy case and intervention in an adversary proceeding are separate matters, the court concluded that a party must employ Rule 24 of the Federal Rules of Civil Procedure to intervene in an adversary proceeding.<sup>64</sup>

After once declining to decide the applicability of § 1109(b) to adversary proceedings,<sup>65</sup> the Fourth Circuit joined in the support of *Fuel Oil*. In *Richman v. First Woman's Bank (In re Richman)*, the court presided over the issue of whether chapter 7 debtors have the right to intervene in turnover proceedings that they had initiated as chapter 11 debtors, but in which the chapter 7 trustee became the substituted plaintiff after the bankruptcy case was converted to chapter 7.<sup>66</sup> The Fourth Circuit traced the reasoning employed by the Fifth Circuit in *Fuel Oil*, and concurred.<sup>67</sup> “[W]hile a party in interest may have

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<sup>59</sup> *Id.* at 1142.

<sup>60</sup> *Id.* at 1142 n.8 (citing *Fuel Oil Supply & Terminaling v. Gulf Oil Corp. (In re Fuel Oil Supply & Terminaling)*, 762 F.2d 1283, 1286–87 (5th Cir. 1985)).

<sup>61</sup> *Id.* at 1140–41.

<sup>62</sup> 998 F.2d 783, 788 (10th Cir. 1993).

<sup>63</sup> *Id.* at 790 (quoting *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1142 n.8 (1st Cir. 1992)) (internal punctuation omitted).

<sup>64</sup> *Id.*

<sup>65</sup> See *Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.)*, 907 F.2d 1430, 1433 (4th Cir. 1990).

<sup>66</sup> 104 F.3d 654, 655–56 (4th Cir. 1997).

<sup>67</sup> *Id.* at 658 (stating “[w]e find the logic of *Fuel Oil* persuasive”). The *Richman* opinion does not mention *Marin* or any of the other authorities contrary to *Fuel Oil*.

standing to intervene, the party with the interest must still separately satisfy the requirements for intervention in order to participate in an adversary proceeding,” concluded the *Richman* court.<sup>68</sup>

Most interesting of the cases lending some support to *Fuel Oil* was *Phar-Mor, Inc. v. Coopers & Lybrand*.<sup>69</sup> In *Phar-Mor*, the chapter 11 committee appealed the district court’s denial of its intervention to the Third Circuit, which had decided *Marin* twelve years earlier.<sup>70</sup> The debtor-plaintiff and the defendant both attempted to distinguish *Marin* on the grounds that *Phar-Mor* was a case under the “related-to” jurisdiction of § 1334 of title 28.<sup>71</sup>

The *Phar-Mor* court repeated the history of the *Marin* decision and the case law since its issuance in 1982. The Third Circuit noted that, notwithstanding *Marin*, a number of courts have held that § 1109(b) does not provide an unconditional right to intervene in adversary proceedings.<sup>72</sup>

The courts rejecting *Marin* have advanced three reasons why *Marin*’s interpretation of the scope of § 1109(b) is incorrect. First, Congress has consistently drawn a distinction between bankruptcy “cases” and “adversary proceedings” related to them in other parts of the bankruptcy statutory scheme. Second, courts have construed Rule 24(a)(1) narrowly; these courts have been reluctant to interpret statutes to grant an unconditional right to intervene to private parties. Third, Bankruptcy Rule 7024 and its accompanying advisory committee note indicate that Congress was aware of a distinction between cases and adversary proceedings and that Congress intended to differentiate between them in the context of intervention.<sup>73</sup>

The *Phar-Mor* court further noted that *Collier* had taken the position that *Marin* interpreted § 1109(b) improperly.<sup>74</sup> The court traced a number of points

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<sup>68</sup> *Id.* (internal punctuation omitted).

<sup>69</sup> 22 F.3d 1228 (3d Cir. 1994).

<sup>70</sup> *Id.* at 1230.

<sup>71</sup> See 28 U.S.C. § 1334(b) (2000). In *Phar-Mor*, the plaintiff filed a Pennsylvania state-court complaint against the defendant hours before filing a voluntary petition in bankruptcy in Ohio. The defendant later removed the state-court proceeding to federal district court in Pennsylvania, pursuant to § 1452(a), which allows removal only if § 1334 provides jurisdiction. The plaintiff was able to remove the state-court proceeding because the district court had related-to jurisdiction over the matter; in other words, the district court could reside over the matter because it was related to a case under the Bankruptcy Code. See *Phar-Mor*, 22 F.3d at 1228.

<sup>72</sup> *Phar-Mor*, 22 F.3d at 1232.

<sup>73</sup> *Id.* at 1232–33.

<sup>74</sup> *Id.* at 1233 (citing 9 COLLIER ON BANKRUPTCY ¶ 7024.03 (Lawrence P. King ed., 15th ed. 1993)). Note, however, that *Marin* relied on earlier editions of *Collier* in support of an absolute right of intervention. See *Marin*, 689 F.2d at 450, 452; see also *supra* text accompanying notes 15 & 26. By the time *Phar-Mor* was

made in *Collier* that supported the view that “Congress must have been aware of the specialized use of the term ‘case’ when it created § 1109(b), and, by limiting § 1109(b) intervention to ‘cases’, Congress meant to allow intervention as of right only in those proceedings involving the administration of the bankruptcy case and not any disputed matter within the bankruptcy case.”<sup>75</sup>

The tone of the *Phar-Mor* opinion strongly suggested that the Third Circuit no longer supported the holding in *Marin*. The court, however, concluded: “Nevertheless, *Marin* remains binding precedent, and whether or not it is the better view, this Court’s internal operating procedures bar us from overruling it.”<sup>76</sup>

In addition to the circuit courts, a number of lower courts have issued influential opinions that follow *Fuel Oil* in refusing to allow a broad right of intervention. Among these, the most thorough treatment is offered by *995 Fifth Ave. Assocs. v. N.Y. State Department of Taxation & Fin. (In re 995 Fifth Ave. Assocs.)*.<sup>77</sup> The *Fifth Avenue* court provided an extensive discussion of the reasoning behind both *Marin* and *Fuel Oil*.<sup>78</sup> The *Fifth Avenue* court then considered several additional factors. First, it emphasized that the *Marin* court had relied on *Collier*, but that *Collier* now rejected the *Marin* holding.<sup>79</sup> Second, the *Fifth Avenue* court reasoned that a broad right of intervention still is possible under the *Fuel Oil* approach; parties simply must intervene in accordance with Rule 24(a)(2) of the Federal Rules of Civil Procedure.<sup>80</sup> The court noted: “A broad but not absolute right of intervention in adversary proceedings based on Rule 24 does not preclude creditors from appearing in

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decided, the most recent version of *Collier* asserted that “the *Marin* panel probably interpreted the legislative history of § 1109(b) incorrectly, and that the case law holding that § 1109(b) does not grant an automatic right to intervene under Rule 24(a)(1) ‘appears to be the better view.’” *Phar-Mor*, 22 F.3d at 1233 (citing 9 COLLIER, *supra* note 74, ¶ 7024.03).

<sup>75</sup> *Phar-Mor*, 22 F.3d at 1233 (citing 9 COLLIER, *supra* note 74, ¶ 7024.03).

<sup>76</sup> *Id.* (citing the 3d CIR. I. O. P. 9.1).

<sup>77</sup> 157 B.R. 942 (S.D.N.Y. 1993).

<sup>78</sup> *Id.* at 946–51.

<sup>79</sup> *Id.* at 949; see *Phar-Mor*, 22 F.3d at 1232. One explanation for the apparent inconsistency in *Collier* is that *Marin* cited to a commentary in *Collier* that was completely unrelated to § 1109. The *Marin* court cited to the *Collier* commentary on § 301 of the Bankruptcy Code, which defines and describes voluntary cases in bankruptcy. See *Marin*, 689 F.2d at 450, n.3; 2 COLLIER, *supra* note 15, ¶ 301.03. The support that *Marin* drew from the *Collier* text was therefore out of context.

<sup>80</sup> *995 Fifth Ave. Assocs.*, 157 B.R. at 950 (quoting *Fuel Oil*, 762 F.2d at 1287).

bankruptcy adversary proceedings to monitor the progress of the bankruptcy case and make known to the bankruptcy court their views.”<sup>81</sup>

Finally, the *Fifth Avenue* court asserted that “a qualified rather than an absolute right to intervene in adversary proceedings under § 1109(b) makes sense in the context of nonbankruptcy court litigation concerning the bankrupt estate.”<sup>82</sup> The *Fifth Avenue* court quoted *Fuel Oil* to warn that an absolute right to intervene could lead to hundreds of creditors gaining automatic standing to every adversary proceeding.<sup>83</sup> Such a broad grant of access, the *Fifth Avenue* court noted, is inconsistent with the limited right of intervention in other federal courts and “would impede the [bankruptcy] court’s ability to understand or to manage the proceeding effectively.”<sup>84</sup>

#### D. Caldor: *The Second Circuit Resists the Fuel Oil Trend*

During the period of 1985 to 2002, every court of appeals considering the issue concluded that § 1109(b) does not confer an absolute right to intervene upon committees and other parties in interest. In late 2002, however, the Second Circuit issued its opinion in *Term Loan Holder Committee v. Ozer Group, L.L.C. (In re Caldor Corp.)*, which thoroughly analyzed the positions represented by *Marin* and *Fuel Oil* and ultimately endorsed the former.<sup>85</sup>

In *Caldor*, the debtor contracted with a business organization that was formed specifically to liquidate the debtor’s merchandise.<sup>86</sup> The liquidators initiated an adversary proceeding against the debtors when the debtor refused to honor certain terms of the underlying contract.<sup>87</sup> The Term Loan Holders Committee sought to intervene in the adversary proceeding, in part because it held the largest administrative claim in the case.<sup>88</sup> Because the debtor was administratively insolvent, the Term Loan Holders Committee held an unusually large interest in the prosecution of the case.<sup>89</sup>

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<sup>81</sup> *Id.* at 950. *But see Marin*, 689 F.2d at 453; *see also supra* note 29 and accompanying text.

<sup>82</sup> 995 *Fifth Ave. Assocs.*, 157 B.R. at 951.

<sup>83</sup> *Id.* (quoting *Fuel Oil*, 762 F.2d at 1287).

<sup>84</sup> *Id.*

<sup>85</sup> 303 F.3d 161 (2d Cir. 2002).

<sup>86</sup> *Id.* at 163–64.

<sup>87</sup> *Id.* at 164.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 164.

The liquidators objected to the Term Loan Holders Committee's proposed intervention, while the debtors supported the intervention.<sup>90</sup> The bankruptcy court sided with the liquidators and denied the Term Loan Holders Committee's motion to intervene.<sup>91</sup> The district court affirmed the bankruptcy court's decision.<sup>92</sup>

On appeal, the Term Loan Holders Committee argued that the lower courts had misinterpreted § 1109(b), which it asserted provides "an unconditional statutory right for parties in interest to intervene in adversary proceedings that occur in connection with a Chapter 11 bankruptcy case."<sup>93</sup> The Second Circuit extensively discussed the existing case law, including both *Marin* and *Fuel Oil*, although the court did not comment on the analyses in those two opinions.<sup>94</sup>

The *Caldor* court began its analysis by heeding the Supreme Court's mandate that matters of statutory interpretation must begin with the statutory language.<sup>95</sup> In determining whether the language of § 1109(b) is ambiguous, the *Caldor* court distilled the issue to "whether we should read the term 'case' in § 1109(b) to exclude adversary proceedings."<sup>96</sup> The court therefore analyzed the meanings commonly attributed to the terms "case" and "proceeding." A "case," noted the Second Circuit, "is an 'umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant.'"<sup>97</sup> The *Caldor* court then cited to a bankruptcy court case that described "a proceeding" as follows: "A proceeding can be thought of as a step within the bankruptcy case. [The term] encompasses all disputes that rise to the level of a litigated or contested matter."<sup>98</sup>

Based on those definitions, the *Caldor* court concluded that the statutory language of § 1109(b) contained no ambiguity. Rather, it found the statute clearly confers an unconditional authority to intervene:

The "issues" referred to in § 1109(b) occur in proceedings, which themselves occur in and constitute part of the "case." While the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 165.

<sup>93</sup> *Id.* at 163–64.

<sup>94</sup> *Id.* at 166–67.

<sup>95</sup> *Id.* at 167–68 (citing *Robinson v. Shell Oil Co.*, 518 U.S. 337, 340 (1997); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989); *Tyler v. Douglas*, 280 F.3d 116, 122 (2d Cir. 2001)).

<sup>96</sup> *Id.* at 168.

<sup>97</sup> *Id.* (quoting *Sonnax Indus. v. Tri Component Prods. Corp. (In re Sonnax Indus.)*, 907 F.2d 1280, 1283 (2d Cir. 1990)).

<sup>98</sup> *Id.* (quoting *In re G.T.L. Corp.*, 211 B.R. 241, 244–45 (Bankr. N.D. Ohio 1997)).

bankruptcy rules “distinguish . . . between different types of litigated matters [that arise during the pendency of a bankruptcy case] and divide them into contested matters and adversary proceedings,” the plain text of § 1109(b) does not distinguish between *issues* that occur in these different types of proceedings within a Chapter 11 case. We hold, therefore, that the phrase “any issue in a case” plainly grants a right to raise, appear and be heard on *any issue* regardless whether it arises in a contested matter or an adversary proceeding.<sup>99</sup>

## II. ANALYSIS: BALANCING *MARIN* AGAINST *FUEL OIL*

There is no question that § 1109(b) provides committees and other parties-in-interest with a right to be heard in matters in chapter 11 cases that are not adversary proceedings. Essentially, then, it is undisputed that § 1109(b) provides parties in interest with a right to intervene in contested matters.<sup>100</sup> The question is whether that right extends to adversary proceedings arising in such chapter 11 cases. As discussed above, courts have taken divergent positions on that issue. To oversimplify, it appears that an initial trend favoring a committee’s right to intervene in adversary proceedings has reversed, and more courts now hold that § 1109(b) does not extend to adversary proceedings. Secondary authorities are similarly discordant.<sup>101</sup>

In one sense, the question becomes how to conceptualize an adversary proceeding. If an adversary proceeding represents an entirely separate legal proceeding from the main bankruptcy case, then it should not fall within the purview of § 1109(b).<sup>102</sup> If, on the other hand, the adversary proceeding is a sub-matter within the context of the main bankruptcy case, then perhaps § 1109(b) should extend to the adversary proceeding. In other words, does an adversary proceeding represent a folder that stands alone on the shelf, or a folder that exists within the larger file of the bankruptcy case?

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<sup>99</sup> *Id.* at 169 (citing 10 COLLIER ON BANKRUPTCY ¶ 7000-1 (Lawrence P. King ed., 15th ed. Rev. 2001)).

<sup>100</sup> See FED. R. BANKR. P. 9014. It is perhaps worth noting that Rule 9014(c) provides that a number of Bankruptcy Rules that are otherwise reserved for adversary proceedings shall apply to contested matters, but that Rule 7024 is not among those.

<sup>101</sup> Compare Virginia A. Bell & Paul B. Jones, *Creditors’ Committees and Their Roles in Chapter 11 Reorganizations*, 1993 DET. C.L. REV. 1551, 1580 (Winter, 1993) (noting “[t]he majority position appears to be that espoused by the *Marin* court”), with Angela K. Layden, *Unconditional or Permissive? Creditor Committee Right to Intervene in an Adversary Proceeding*, AM. BANKR. INST. J. July–Aug. 1996, at 26 (remarking that *Fuel Oil* “follow[s] the majority view”).

<sup>102</sup> Like a lawsuit in nonbankruptcy court, an adversary proceeding is initiated by filing a complaint. See FED. R. BANKR. P. 7003; FED. R. CIV. P. 3.

Conceptually, the latter has more appeal. Within a bankruptcy case, there may be any number of contested matters and adversary proceedings. Each may represent a folder within the larger “Redweld” of the bankruptcy case.<sup>103</sup> The adversary proceedings are not standalone folders because their federal jurisdiction often relies on the bankruptcy case.<sup>104</sup> In fact, to argue that an adversary proceeding does not fall within the scope of “any issue in a case” is to deny the jurisdiction of the bankruptcy court in the vast majority of adversary proceedings.<sup>105</sup> Further, the outcome of the bankruptcy case and the fate of the debtor rely equally on the outcomes of the contested matters and the adversary proceedings initiated in the bankruptcy case.

Of course, conceptualization has little to do with statutory construction. Rather, interpretation of § 1109(b) should begin with an analysis of the statutory language, as the *Caldor* court did.<sup>106</sup> If a statute’s wording is unambiguous, statutory construction begins and ends with its plain language.<sup>107</sup> The statute allows the committee to “raise and . . . appear and be heard on any issue in a case under . . . chapter [11].”<sup>108</sup> On its face, the provision appears unambiguous; that is, on a first reading, the wording causes no confusion.

When one tries to apply the statute to an adversary proceeding initiated in a chapter 11 case, however, the statutory meaning becomes somewhat less clear. A judicial determination of whether the statute is ambiguous would likely vary from court to court. Assuming that at least some courts could reasonably conclude that § 1109(b) is ambiguous, the following consideration of the legislative history, policy considerations, and prior statutes is proper.<sup>109</sup>

The Third Circuit in *Marin* relied on a number of considerations that deserve credence. First, the court correctly noted that Congress did not refer to

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<sup>103</sup> See, e.g., *Halbert v. Yousif (In re Yousif)*, 201 F.3d 774, 781 (6th Cir. 2000) (describing adversary proceedings as “full blown lawsuits within the larger bankruptcy case”) (Moore, J., concurring); Section 1120(A)(1) Comm. Of Unsecured Creditors v. Interfirst Bank Dallas, N.A. (*In re Wood & Locker, Inc.*), 868 F.2d 139, 142 (5th Cir. 1989); *In re G.T.L. Corp.*, 211 B.R. 241, 244–45 (Bankr. N.D. Ohio 1997) (noting, “A case is the umbrella under which all of the proceedings occur. A proceeding can be thought of as a step within the bankruptcy case. It encompasses all disputes that rise to the level of a litigated or contested matter.”) (alteration in original) (citations omitted).

<sup>104</sup> See 28 U.S.C. §§ 157, 1334 (2000).

<sup>105</sup> 11 U.S.C. § 1109(b) (2000); see also §§ 157, 1334.

<sup>106</sup> See *Term Loan Holder Committee v. Ozer Group, L.L.C. (In re Caldor Corp.)*, 303 F.3d 161, 167–68 (2d Cir. 2002).

<sup>107</sup> See, e.g., *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

<sup>108</sup> § 1109(b).

<sup>109</sup> See generally *Lamie*, 540 U.S. at 1030; *Ron Pair*, 489 U.S. at 241.

adversary proceedings anywhere in the Bankruptcy Code.<sup>110</sup> With no such reference anywhere else in title 11, it is unreasonable to expect § 1109(b) to include a specific reference to adversary proceedings.

The *Marin* court also properly considered the breadth of the statutory language. Section 1109(b) allows the right to appear and be heard “on any issue in a case.”<sup>111</sup> As the *Marin* court noted, “It is unlikely that Congress would have used such sweeping language if it had not meant ‘case’ to be a broadly inclusive term.”<sup>112</sup>

The *Marin* court’s references to legislative history, which indicated a desire to maintain the jurisprudence developed under the Bankruptcy Act of 1898, also is persuasive.<sup>113</sup> The legislative history also emphasizes that the right to intervene is intended to be “unqualified.”<sup>114</sup> As the *Marin* court notes, “It would be a strained construction to read this ‘unqualified’ right as being limited to participation in the general administrative aspects of the case.”<sup>115</sup>

On the other hand, some of *Marin*’s framework is less persuasive. For example, its reliance on *Collier* must be discounted because the treatise later endorsed the *Fuel Oil* approach.<sup>116</sup> In fact, *Collier* never specifically endorsed the approach of the *Marin* court. Rather, the *Collier* text on which *Marin* relied corresponded to § 301 of the Bankruptcy Code, an entirely incongruent statute.<sup>117</sup>

Likewise, the *Marin* court’s reliance on Advisory Committee notes to the Bankruptcy Rules<sup>118</sup> also should be ignored. Those Advisory Committee notes correspond to earlier versions of the Bankruptcy Rules, which are no longer in effect.<sup>119</sup> Accordingly, the notes of the Advisory Committee no longer should be viewed as even persuasive.

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<sup>110</sup> See §§ 101-1130.

<sup>111</sup> *Id.* § 1109(b).

<sup>112</sup> Official Unsecured Creditors’ Comm. v. Michaels (*In re Marin Motor Oil, Inc.*), 689 F.2d 445, 451 (3d Cir. 1982). *But see* § 307 (employing similar language, but broadening to “any case or proceeding under this title”).

<sup>113</sup> *Marin*, 689 F.2d at 451; *see also supra* text accompanying notes 22–23.

<sup>114</sup> *Marin*, 689 F.2d at 450–51.

<sup>115</sup> *Id.* at 451.

<sup>116</sup> *Id.* at 450, *see also supra* notes 15, 74, and accompanying text.

<sup>117</sup> *See supra* note 79.

<sup>118</sup> *Marin*, 689 F.2d at 450, *see also supra* note 79.

<sup>119</sup> *See Marin*, 689 F.2d at 450 n.4.

The analyses employed in *Fuel Oil* and its progeny also deserve both commendation and criticism. It is true that little harm is likely to result from courts' requiring a creditors' committee to meet the criteria for permissive intervention, as articulated in Rule 24(b) of the Federal Rules of Civil Procedure.<sup>120</sup> Under such an approach, the court could allow the intervention after considering whether it would "unduly delay or prejudice the adjudication of the rights of the original parties."<sup>121</sup> This approach would allow the trial court considerable discretion in determining which cases demand the committee's intervention, while allowing the court to employ other alternatives in other cases.

Less persuasive is the *Fuel Oil* court's argument that Congress treats "case" separately from an "adversary proceeding."<sup>122</sup> As noted in *Marin*, the Bankruptcy Code does not employ "adversary proceeding" in any other statute in title 11.<sup>123</sup> There is no reason to expect that § 1109(b) would expressly extend to adversary proceedings its authorization to intervene.

Further, Congress has not treated the terms "case" and "proceeding" in the mutually exclusive manner suggested by *Fuel Oil* and other courts. For example, the grants of jurisdiction to the bankruptcy court in title 28<sup>124</sup> employ the term "proceeding" to mean any hearing occurring in a bankruptcy case. Such a usage is almost exactly the opposite of the assertion by courts that deny an absolute right of intervention; the *Fifth Avenue* court, for instance, contends that a "proceeding" is a more limited term than a "case," which refers to anything that occurs during the life of a bankruptcy.<sup>125</sup> Legislative history rebukes the *Fifth Avenue* assertion and indicates that Congress sometimes gives "proceeding" the wider meaning of title 28:

[A]nything that occurs within a case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and

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<sup>120</sup> FED. R. CIV. P. 24(b). That rule provides that a party "may be permitted to intervene" if either (1) a statute provides a conditional right, or (2) the applicant's claim or defense and the litigated matter have a question of law or fact in common.

<sup>121</sup> *Id.*

<sup>122</sup> *See, e.g., Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1232 (3d Cir. 1994).

<sup>123</sup> *Marin*, 689 F.2d at 450; *see also supra* notes 19–21 and accompanying text.

<sup>124</sup> *See, e.g., 28 U.S.C. §§ 157, 1334* (2000).

<sup>125</sup> 995 Fifth Ave. Assocs. v. N.Y. State Dep't of Taxation & Fin. (*In re* 995 Fifth Ave. Assocs.), 157 B.R. 942, 948–49 (S.D.N.Y. 1993).

plenary actions under the current bankruptcy law. It also includes any disputes related to administrative matters in a bankruptcy case.<sup>126</sup>

The *Fuel Oil* court also suggested that the Advisory Committee notes to the Bankruptcy Rules supported its holding.<sup>127</sup> The notes, the court opined, demonstrate that Congress was aware of the distinction between an adversary proceeding and a bankruptcy case, and would differentiate where appropriate. Courts should be careful, however, not to give undue credence to the Advisory Committee notes to Bankruptcy Rule 7024. First, Advisory Committee notes are to be viewed not as determinative, but merely “of weight.”<sup>128</sup> Second, analyses should not place greater emphasis on procedural rules (or commentary thereon) than substantive law.<sup>129</sup>

*Fuel Oil* also emphasizes that “Congress must have intended courts to apply Rule 24(a)(2) rather than Rule 24(a)(1) to applications to intervene in bankruptcy adversary proceedings under § 1109(b).”<sup>130</sup> Rule 24(a)(2) allows for intervention when the applicant has an interest in the pending matter, and the outcome of the matter will affect that party’s interest.<sup>131</sup> It is difficult to understand what the import of § 1109(b) would be under the reading of the *Fuel Oil* court. Rule 24(a)(2) provides for intervention under the circumstances set forth in its own text. Unlike Rule 24(a)(1), it does not rely on outside statutes to allow intervention. Rule 24(a)(2) provides exactly the same thing with or without § 1109(b). Therefore, the *Fuel Oil* court’s concept of the interplay between § 1109(b) and Rule 24(a)(2) is misguided.

Another of the arguments against a universal right of intervention for the committee is that such an interpretation would lead to a flood of parties participating in litigation, which would unduly delay proceedings. That argument is inapposite. Considerable amounts of litigation occur in bankruptcy courts outside of adversary proceedings. For example, litigation of a debtor’s objection to a creditor’s proof of claim represents the equivalent of a

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<sup>126</sup> H.R. REP. NO. 95-595 at 445 (1977).

<sup>127</sup> *Fuel Oil Supply & Terminaling v. Gulf Oil Corp (In re Fuel Oil Supply & Terminaling)*, 762 F.2d 1283, 1286–87 (5th Cir. 1985).

<sup>128</sup> See, e.g., *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986); *Mississippi Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

<sup>129</sup> See generally § 2075; *Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 181 (2d Cir. 2005); *Branchburg Plaza Assocs. v. Fesq (In re Fesq)*, 153 F.3d 113, 117 (3d Cir. 1998). Arguably, courts holding that a committee must abide by the Rule 24(a)(2) requirements violate § 2075 of title 28.

<sup>130</sup> *Fuel Oil*, 762 F.2d at 1287.

<sup>131</sup> FED. R. CIV. P. 24(a)(2).

full lawsuit,<sup>132</sup> but is regarded as a contested matter.<sup>133</sup> Pursuant to § 1109(b), all parties in interest, including the committee, “may raise and may appear and be heard on any issue” in such a claim objection.<sup>134</sup> Larger chapter 11 bankruptcy cases see thousands of claims objections filed, in each of which all parties in interest retain the right to intervene. Seldom do extraneous parties become involved in such litigation, however, simply because to do so would only remotely affect their financial stake.<sup>135</sup> Section 1109 nevertheless provides the right for parties to intervene in such litigation, and bankruptcy courts have not experienced a flood of additional participants in claims objections. The same would likely hold true of adversary proceedings: only the rare adversary proceeding would involve issues requiring extraneous parties to spend their resources in appearing.<sup>136</sup>

Both *Thompson* and *Kaiser Steel* suggest that § 1109(b) simply confers upon parties in interest the right to “monitor” chapter 11 cases.<sup>137</sup> Such a suggestion is puzzling, to say the least. It is difficult to conceive of a bankruptcy scenario in which a party in interest—or any other entity, for that matter—does not enjoy a right to monitor a case, regardless of whether statutory authorization exists. Surely a party in interest may monitor a case under chapter 7, even if that chapter contains no statute parallel to § 1109(b). Whatever Congress’s intentions for § 1109(b) might have been, the statute certainly authorizes more than case monitoring.

Finally, the *Fuel Oil* court emphasized that § 1109(b) “is not the type of statute generally considered to provide an absolute right to intervene.”<sup>138</sup> This curious statement is better suited as law review commentary than as a basis for a judicial decision. Whether § 1109(b) shares similarities with other statutes

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<sup>132</sup> See, e.g., *Simmons v. Savell (In re Simmons)*, 765 F.2d 547, 552 (5th Cir. 1985) (citing *Nortex Trading Corp. v. Newfield*, 311 F.2d 163, 163 (2d Cir. 1962)); see also *Dellamarggio v. B-Line, LLC.*, (*In re Barker*), 306 B.R. 339, 347 (Bankr. E.D. Cal. 2004).

<sup>133</sup> See FED. R. BANKR. P. 9014.

<sup>134</sup> 11 U.S.C. § 1109(b) (2000).

<sup>135</sup> In other words, an outside party’s interest in such claim objections is limited to the effect the objections will have on the overall distribution to creditors. In the context of most chapter 11 cases, the effect is negligible.

<sup>136</sup> Further, as discussed above, the Bankruptcy Act provided an absolute right to intervene and the legislative history to § 1109(b) indicates an intention to maintain the characteristics of the previous law. See *supra* text accompanying notes 22–26.

<sup>137</sup> *Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Coal 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).

<sup>138</sup> *Fuel Oil Supply & Terminals v. Gulf Oil Corp. (In re Fuel Oil Supply & Terminals)*, 762 F.2d 1283, 1286 (5th Cir. 1985).

that confer an absolute right of intervention is irrelevant to the analysis. Rather, one must only inspect the statutory language of § 1109(b) and determine whether it confers an unconditional right to intervene, as stated in Rule 24(a)(1).<sup>139</sup> If the statute provides an unconditional right, then it provides an absolute right to intervene under Rule 24. Notwithstanding the *Fuel Oil* court's classification of statutes that generally confer such a right, the plain language of § 1109(b) undeniably provides an absolute right of intervention in contested matters—that is, matters other than adversary proceedings—in chapter 11 cases.<sup>140</sup>

### III. AN ABSOLUTE RIGHT OF INTERVENTION IS APPROPRIATE

Whether chapter 11 creditors' committees have a mandatory or a permissive right to intervene in adversary proceedings is a complex question without an incontrovertible answer. Ultimately, however, more compelling arguments exist in favor of allowing an absolute right of intervention to parties in interest in adversary proceedings in chapter 11 cases. The plain language of § 1109(b) strongly suggests such an outcome. Perhaps, therefore, a court should perform no more analysis than to read the statutory language. To the extent that any conflict exists between the plain language of Rule 24 and the plain language of § 1109(b), the language of the statute must trump.

Even if the court analyzed beyond the face of the statute, however, the arguments supporting an absolute right of intervention are more persuasive. Section 1109(b) provides a right for any party in interest to be heard in any matter in a chapter 11 case. The sensible reading is that an adversary proceeding initiated in a chapter 11 case is, for purposes of § 1109(b), in a chapter 11 case. Because § 1109(b) is a federal statute and the right it confers is unconditional, the rights conferred by § 1109(b) constitute an absolute right of intervention under Rule 24(a)(1).

Whether *Caldor* will stem the tide of opinion behind *Fuel Oil* remains to be seen. In the time since the Second Circuit issued its *Caldor* opinion, no court has issued a major opinion on the issue.<sup>141</sup> Those courts of appeal that already

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<sup>139</sup> See generally FED. R. CIV. P. 24(a)(1).

<sup>140</sup> See 11 U.S.C. § 1109(b) (2000).

<sup>141</sup> The Second Circuit has revisited the issue, but only to clarify that a party in interest seeking intervention under § 1109(b) must still make timely application for intervention, as required by Rule 24(a)(1). See *Iridium India Telecom, Ltd. v. Motorola, Inc.*, 165 F. App'x. 878, 879 (2d Cir. 2005). Most other courts to address the issue in the time since *Caldor* have been inside the Second Circuit and simply have cited to *Caldor*

have issued opinions on the issue are unlikely to revisit the issue absent some compelling set of facts. It will be unfortunate, however, if the issue is not addressed again by the courts restricting intervention, because the law of *Caldor* and *Marin* presents the more reasonable interpretation of § 1109(b).

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in permitting the intervention. *See, e.g.,* Calpine Corp. v. Nev. Power Co. (*In re* Calpine Corp.), 354 B.R. 45, 48 (Bankr. S.D.N.Y. 2006).

